IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC04-390**

LOWER COURT CASE NO. 3D01-2332

STATE OF FLORIDA,

Petitioner,

-vs-

ALBERTO RODRIGUEZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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ISSUE PRESENTED

Whether Section 843.085(1) is unconstitutional on its face where it is content-based and suffers from overbreadth as it proscribes speech protected by the First Amendment.

STATEMENT OF THE CASE AND FACTS

The sole issue in this appeal is the facial validity of Section 843.085(1), Florida Statutes (2001). The only "fact" needed to decide this issue is the language of the statute itself. The State's statement of the case and facts, then, while essentially accurate, is largely irrelevant.

In the court of appeal, Mr. Rodriguez only challenged the facial validity of the statute. There was no challenge to the statute as applied to his conduct. Indeed, Mr. Rodriguez conceded below, as he does here, that his conduct fit within the actions prohibited by the statute. The actual facts of the case, then, have no relevance to the issue to be decided by this Court.

Section 843.085(1) reads as follows:

> **It is unlawful for any person**:
> (1) Unless appointed by the Governor pursuant to chapter 354, authorized by the appropriate agency, or displayed in a closed or mounted case as a collection or exhibit, **to wear or display any authorized indicia of authority**, including any badge, insignia, emblem, identification card, **or uniform, or any colorable imitation thereof, of any federal, state, county, or municipal law enforcement agency**, or other criminal justice agency as now or hereafter defined in s. 943.045, which could deceive a

> reasonable person into believing that such item is authorized by any of the agencies described above for use by the person displaying or wearing it, or **which displays in any manner or combination the word or words "police," "patrolman," "agent," "sheriff," "deputy," "trooper," "highway patrol," "Wildlife Officer," "Marine Patrol Officer," "state attorney," "public defender," "marshal," "constable," or "bailiff," which could deceive a reasonable person into believing that such item is authorized by any of the agencies** described above for use by the person displaying or wearing it. (emphasis supplied)

In determining whether Section 843.085(1) is unconstitutional, this Court needs to answer two questions:

1. Is the statute content-based or content-neutral? (This determines the applicable standard of review).

2. Is the statute unconstitutionally overbroad?

SUMMARY OF ARGUMENT

Section 843.085(1) is unconstitutional as it is content-based and overbroad.

1. The statute is clearly content-based. On its face, it prohibits the display of certain words or combination of words on clothing when those words could deceive an onlooker into thinking the clothing was authorized by a law enforcement agency. Other words such as "public service aide" or "corporal" are not prohibited.

The statute is not content-neutral. A statute is content neutral if it is "justified

without reference to the content of the regulated speech." Here, though, the justification for the statute is based upon the content of the regulated speech and the message the legislature believes may be communicated by that speech to a reasonable onlooker.

The statute most assuredly impacts upon speech protected by the First Amendment. The State, in its brief, and the Second District, in its decision in *Sult v. State*, 839 So. 2d 798 (Fla. 2d DCA), *review granted*, 852 So. 2d 862 (Fla. 2003) (Case No. SC03-542), make the mistake of equating viewpoint-discrimination with content-discrimination to argue that protected speech is not involved. The two are not the same, and the United States Supreme Court has specifically held that a statute may be found to be content-based even with "no evidence of an improper censorial motive."

2. The statute is overbroad as the majority of conduct it reaches is protected by the First Amendment. The statute does not except a person who wears clothing containing the enumerated words or combination of words with an innocent intent, but reaches **all** clothing containing those words that a reasonable person could believe is authorized by **any** law enforcement agency, in-state or out-of-state. Especially since the September 11 tragedy, though, the vast majority of people wearing "police" shirts or caps have done so as a sign of respect for law

enforcement officers. Such clothing is readily available to the public. Other persons may wear, for example, a "public defender" shirt (available for purchase in my office) as a sign of support for the Public Defender who is up for re-election this fall, or may wear law enforcement apparel while on the way to a Halloween party. This innocent conduct is criminalized by Section 843.085(1).

When a content-based statute reaches **any** speech protected by the First Amendment, it is overbroad and thus unconstitutional. That is clearly the case here.

Even if the statute were considered content-neutral, it would still be unconstitutional as the incidental restrictions on First Amendment freedoms are far greater than necessary to further the asserted governmental interest.

STANDARD OF REVIEW

When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded legislative enactments is reversed. Content-based regulations are presumptively invalid, and the Government bears the burden of rebutting that presumption. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-17 (2000). Under "strict scrutiny," which applies to content-based regulations, the legislation is

presumptively unconstitutional and the State must prove the legislation furthers a compelling state interest through the least intrusive means. *North Florida Women's Health & Counseling Svcs., Inc. v. State*, 866 So. 2d 612, 625 n.16 (Fla. 2003). Even under "mid-level" or intermediate scrutiny, which applies to content-neutral regulations that impact free speech, the legislation is still presumptively unconstitutional and the State must prove that the legislation is substantially related to an important governmental interest and the incidental restrictions on First Amendment speech are no greater than essential to the furtherance of that interest. *Id*. at 625 n.15; *United States v. O'Brien*, 391 U.S. 367, 377 (1968). "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816.

The standard of review set out by the State (which is copied almost *verbatim* from the brief submitted by the State in *Sult*, Case No. SC03-542) fails to recognize that this case involves a statute that implicates First Amendment rights as it restricts speech on the basis of its content.

ARGUMENT

SECTION 843.085(1) IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS CONTENT-BASED AND SUFFERS FROM OVERBREADTH AS IT PROSCRIBES SPEECH PROTECTED BY THE

FIRST AMENDMENT

Before addressing the legal argument, some salient points about the operation and reach of Section 843.085(1) should be recognized:

(1) The statute reaches "authorized indicia of authority" and "any colorable imitation thereof" of all law enforcement agencies in the country. It is not limited either to Florida law enforcement agencies or to actually authorized apparel.

(2) There is no intent requirement on the part of the wearer of clothing bearing one of or a combination of the words listed in the statute. Thus, a person who wears an "NYPD" cap out of respect for those officers who died in the September 11 tragedy can be prosecuted under the statute.[1] A person who wears a

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[1] Such caps are regularly seen on the street, as Justice Wells noted during oral argument in *Sult*. News reports confirm Justice Wells' observation. For example, one article reported "The merchandise for sale near ground zero has to be seen to be believed: . . . seemingly endless piles of New York police and fire department T-shirts, caps, polo shirt, sweat shirts and the like." *Attack on America*, San Diego Union-Tribune, November 12, 2001, *available at* 2001 WL 27299991. Another article reported that items carrying the NYPD logo "are being snapped up at street stands and retail locations" and that people such as Mayor Rudolph Giuliani and Bruce Willis had popularized wearing FDNY and NYPD caps or jackets "in solidarity with the fallen police officers. Now the trend has become a spontaneous outpouring by consumers." The same article quoted 28-year-old Louis Marrero of the Bronx as saying "By this NYPD cap I am representing America. I don't call this a fashion statement. All I am doing is showing the world that these people gave their lives for us and this is a token of support." *Cop, Firefighter Fashions a Craze in New York*, The Toronto Star, October 18, 2001, *available at* 2001 WL 29256818.

"public defender" t-shirt to show support for the incumbent Public Defender in the upcoming election can likewise be prosecuted under the statute.[2] A person wearing a "Wildlife Officer" jacket while driving to a Halloween party with another person dressed as a tiger could be prosecuted so long as a "reasonable person" could think the jacket was authorized by a law enforcement agency. The statute is triggered by the effect on the viewer of the words displayed on the wearer's apparel.

(3) The statute only criminalizes select words. A shirt or jacket with the words "public service aide" or "corporal" or "brigade leader" would not violate the statute no matter how official-looking they appeared to be.

(4) The "reasonable person" viewing the shirt or jacket or cap being worn does not have to believe either that the person wearing the item of clothing is actually a law enforcement officer or that the apparel is actually authorized by a law enforcement agency for there to be a crime. The person viewing the shirt or jacket

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Official NYPD shirts and caps are sold to the public by the New York Police Department via the internet at http://www.shop4nypd.com/, while LAPD hats can be purchased online at http://www.incrediblegifts.com/lapdhat.html. (both sites last visited on July 18, 2004).

[2] "Public defender" t-shirts with the official emblem of the Public Defender are available for purchase at the Miami-Dade County Office of the Public Defender. If undersigned counsel purchased such a t-shirt and gave it to his wife, she could be prosecuted under the statute if she then wore the shirt in public.

or cap need only potentially believe that "such item" of clothing is authorized by a law enforcement agency. An 87-year-old great grandmother wearing a colorable imitation of an official "police" jacket could thus be charged under this statute.

Understanding how the statute may be applied, it is clearly unconstitutional.

I. SECTION 843.085(1) IS CONTENT-BASED

"Content-based restrictions are presumptively invalid." *State v. T.B.D.*, 656 So. 2d 479, 480 (Fla. 1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358, 360 n.2 (2003).[3] "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 723 (2000).

Thus, the First Amendment guarantee of freedom of speech "forbid[s] the States to punish the use **of words or language** not within 'narrowly limited classes of speech.'" *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)) (emphasis added);

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[3] *See* Franklyn S. Haiman, *Speech & Law in a Free Society* 6 (1981) ("Symbolic behavior is one of the most fundamental ways in which human beings express and fulfill themselves. Its exercise thus lies at the core of a free society.").

Cohen v. California, 403 U.S. 15, 26 (1971) (forbidding "particular words" runs "a substantial risk of suppressing ideas in the process"). Consequently, a statute must be narrowly drawn or authoritatively construed so as "to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding*, 405 U.S. at 522.

Numerous cases have held that speech on clothing is entitled to First Amendment protection **as speech**, not merely conduct. For example, in *Cohen*, the Court held that a jacket with the words "Fuck the draft" on its back was protected speech. "The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech.'" *Id*. at18. In *Ayres v. City of Chicago*, 125 F. 3d 1010 (7th Cir. 1997), the issue was the sale of t-shirts advocating the legalization of marijuana. The court held that "there is no question . . . the T-shirts are a medium of expression prima facie protected by the free-speech clause of the First Amendment." *Id*. at 1014. *See also, e.g.*, *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (recognizing that t-shirt with political message "is still protected speech"); *Commonwealth v. Zullinger*, 676 A. 2d 687, 689 (Pa. Super. 1996) (shirt with "fuck you" written on it was protected speech even though State argued it did not express a social or political belief).

A statute is content-based when "its application depends upon the communicative impact of the speech affected." Leslie G. Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L. Rev. 595, 622 (2003). For example, in *O'Brien*, where the defendant burned his draft card on the courthouse steps, the Court noted that he was punished for the "noncommunicative impact of his conduct, and for nothing else." 391 U.S. at 382. The case was thus "unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id*. In contrast, the Court in *Stromberg v. California*, 283 U.S. 359 (1931), struck down a statute which prohibited expressing "opposition to organized government" by displaying "any flag, badge, banner, or device." "Since the statute [in *Stromberg*] was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." *O'Brien*, 391 U.S. at 382; *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (explaining that problem with statute at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976), which limited amount of political contributions, was "that it was concerned with the communicative impact of the regulated speech.")

Section 843.085(1) is clearly content-based as it is directly concerned with

the "communicative impact" of the words enumerated in the statute. Indeed, the very purpose of the statute, according to the State, is to prevent the danger of someone "communicating" to another that he or she is a member of law enforcement when, in fact, that is not so. (Brief of Appellant at 14-15, 18, 22-23). The statute does not regulate noncommunicative conduct; it regulates specific words or combinations of those words which, when worn on clothing, could communicate to a reasonable onlooker that the clothing was authorized by a law enforcement agency. The statute is thus content-based, as the Third District properly recognized when holding that "it focuses only on the content of the speech or expression and the direct impact that it has on a viewer." (App. to Brief of Appellant at 12). *See Playboy*, 529 U.S. at 811-12 (2000) (regulation that "focused **only** on the content of the speech and the direct impact that speech has on its listeners" "is the essence of content-based regulation").

The availability of other means of communicating support or disdain for law enforcement does not change the content-based nature of Section 843.085(1). In *United States v. Eichman*, 496 U.S. 310 (1990), the Court found a flag desecration statute was unconstitutional as it was content-based. *Id*. at 318-19. It did so over the dissent of Justice Stevens, who argued that the ideas expressed by flag burners are various and often ambiguous, and that a prohibition on flag burning "does not

entail any interference with the speaker's freedom to express his or her ideas by other means." *Id*. at 321-22 (Stevens, J., dissenting).

Section 843.085(1) cannot be considered content neutral. "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill*, 530 U.S. at 719 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "[G]overnment regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech." *Id*. at 720. According to the State (Brief of Appellant at 22-23), the legislature adopted Section 843.085(1) because of its concern with the message that the words enumerated in the statute could convey to a reasonable onlooker. By the State's own argument, then, the statute is not content neutral.

The State argues that Section 843.085(1) does not implicate **any** speech protected by the First Amendment, reasoning that a shirt bearing the word "police" "neither expresses support nor disdain for the police" and therefore censorship of such a shirt is permissible. (Brief of Appellant at 14, 31). In support of its claim, the State cites to *Sult* for the proposition that "the instant statute does not involve protected speech since it does not involve the communication of any identifiable

message." (Brief of Appellant at 23-24). In *Sult*, the court held that shirts depicting the word "sheriff" "neither expressly convey support of nor protest against the sheriff's office. . . . Thus, we conclude that to wear an official uniform shirt of a law enforcement agency, or a replica of one, implicates only an incidental amount of expressive conduct." 839 So. 2d at 803.

The State and the Second District have mistakenly equated viewpoint-based censorship with content-based censorship, believing that a statute which does not expressly discriminate against a particular view cannot be content-based. This belief is incorrect as the two types of discrimination are not coextensive. The former is but a subset of the latter: "Viewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995).

In fact, the United States Supreme Court has expressly rejected the State's argument that the First Amendment is implicated only when the government attempts to suppress certain ideas:

> The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). Simon & Schuster need adduce "no evidence of an improper

> censorial motive." *Arkansas Writers' Project*[, *Inc. v. Ragland*], 481 U.S. [221, 228 (1987)]. As we concluded in *Minneapolis Star*: "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." 460 U.S. at 592.

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991). *See also Boos v. Barry*, 485 U.S. 312, 320-21 (1988) (finding statute at issue "is not viewpoint based" but "is content-based"); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) ("a narrow, succinctly articulable message is not a condition of constitutional protection.").

The State relies heavily on a snippet of language it takes out of context from *R.A.V.* to argue that the content discrimination found in Section 843.085(1) is permissible. According to the State, *R.A.V.* "permit[s] content discrimination 'so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.'" (Brief of Appellant at 20 n.2) (citing to *R.A.V.*, 505 U.S. at 390). To understand the proper context of this quotation, it is necessary to discuss in detail the actual holding in *R.A.V.*

* * * * *

R.A.V. considered an ordinance from St. Paul, Minnesota which prohibited burning a cross when the person knew or should have known that the act would

"arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380. The petitioner was convicted under the ordinance and appealed, arguing the ordinance was overbroad and impermissibly content based and thus facially invalid under the First Amendment. *Id*. The Minnesota Supreme Court construed the phrase "arouses anger, alarm or resentment in others" to limit the reach of the ordinance to conduct that amounts to "fighting words" and therefore upheld the conviction. *Id*.

The Unites States Supreme Court reversed, but found it unnecessary to consider the overbreadth argument. 505 U.S. at 381. Instead, the Court held: "Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id*. The Court explained that, even as narrowly construed by the Minnesota Supreme Court, the ordinance applied only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." *Id*. at 391. The use of "fighting words" in other contexts was not prohibited by the ordinance. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id*.

The Court also rejected St. Paul's argument, based on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), that the ordinance aimed only at the "secondary effects" of the speech. "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. The emotive impact of speech on its audience is not a 'secondary effect.'" 505 U.S. at 394 (quotation marks and citations omitted). Finally, the Court rejected St. Paul's argument that the ordinance was narrowly tailored to serve compelling state interests.

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.

505 U.S. at 395-96 (footnote omitted).

R.A.V. involved the novel consideration of "content discrimination through regulation of 'unprotected' speech." 505 U.S. at 386 n.5. The majority's view was that "the First Amendment imposes . . . a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id*. at 387. To buttress its view, the Court engaged in a lengthy discussion of areas of speech that have traditionally been considered proscribable, e.g., obscenity, defamation, and "fighting words."

Id. at 382-86. The Court noted that its newly announced rule prohibiting content discrimination in areas of proscribable speech was not absolute, *id*. at 387, and proceeded to discuss some exceptions. One exception was "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id*. at 388. Thus, while all obscenity is proscribable, a State could choose to prohibit only that obscenity which involves the most lascivious displays of sexual activity. *Id*. "Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech so that the regulation is **justified** without reference to the content of the speech." *Id*. at 389 (citation and some quotation marks omitted; emphasis in original). Thus, for example, a State could permit all obscene live performances except those involving minors. *Id*.[4]

* * * * *

Back, now, to the State's brief and the snippet it quotes from *R.A.V*. Having just discussed two bases for selectively discriminating within areas of proscribable

[4] The Court has never applied the "secondary effects" rationale beyond the context of sexual speech. Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L. Rev. at 605 & n.71.

speech, the Court in *R.A.V.* next said:

> There may be other such bases as well. Indeed, to validate such selectivity (**where totally proscribable speech is at issue**) it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that **there is no realistic possibility that official suppression of ideas is afoot**. (We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of "fighting words," like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

505 U.S. at 390 (emphasis added). Contrary to the State's argument, then, *R.A.V.* does not provide blanket authority for a State to engage in content discrimination so long as official suppression of ideas is not afoot. Rather, *R.A.V.* holds that such content discrimination **may** be possible in those limited areas **where speech is totally proscribable**. The short answer to the State's argument, then, is that words such as "police," "sheriff," "Wildlife Officer," "state attorney," and "public defender" do not fall into any category of speech that is totally proscribable and so content discrimination on the basis of those words is not permissible under the First Amendment.

The State also claims that *R.A.V.* "permits content-discrimination when the content discrimination 'does not threaten censorship of ideas.'" (Brief of Appellant at 20, 22, 24-25) (emphasis omitted) (citing to *R.A.V.*, 505 U.S. at 393). Once

again, the State fails to put this quote into proper context. What the Court said was the following:

> The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable.

505 U.S. at 393. It is thus obvious that the phrase the State hangs its hat on – "content discrimination that does not threaten censorship of ideas" – must be read in context with the extensive earlier discussion of areas of speech that are totally proscribable by the State. Indeed, *City of Bellevue v. Lorang*, 963 P. 2d 198 (Wash. App. 1998), *rev'd* 992 P. 2d 496 (Wash. 2000), which the State cites to and relies on (Brief of Appellant at 20), explains just this:

> In *R.A.V.*, the Court posits that the standard for evaluating content-discriminatory regulations differs depending on whether the speech at issue is fully protected or within a proscribable category.
>
> Although **content discrimination** is presumptively invalid, such discrimination **is permissible with respect to proscribable classes of speech in the following instances:** (i) "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable," *id.* at 388 (*e.g.*, prohibiting only that obscenity that is most patently offensive in its prurience, or criminalizing only those threats of violence directed against the President); (ii) when the proscribable category of speech is "associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the ...

> speech,'" *id.* at 389 (*e.g.*, permitting all obscene live performances except those involving minors; also, laws against treason or sexual discrimination in employment practices); and (iii) **when the content discrimination "does not threaten censorship of ideas**," *id.* at 393.

963 P. 2d at 202 n.7 (emphasis added). A commentator has provided exactly the same explanation, saying that the passage from *R.A.V.* the State relies upon

> **should be considered in conjunction with the majority's earlier statement** that 'to validate such selectivity (**where totally proscribable speech is at issue**) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.

Fernando I. Ruiz, *Survey: Developments in Maryland Law, 1992-93*: III. Constitutional Law, 53 Md. L. Rev. 718, 729 n.101 (1994) (emphasis added).

The State thus errs when it reads the phrase "does not threaten censorship of ideas" as being a generalized "exception[] to the prohibition against content-based discrimination." (Brief of Appellant at 19-20). The accurate meaning of that phrase, as used in *R.A.V.*, is that there is an exception to the prohibition against content-based discrimination **in areas of speech that are otherwise totally proscribable**. This Court has recognized that that is the holding of *R.A.V.* In *State v. Stalder*, 630 So. 2d 1072 (Fla. 1994), the reasoning of *R.A.V.* was summarized as follows: "The First Amendment prevents government from banning

expressive activity **because of disapproval of content** or ideas **except** in certain narrowly defined instances where the category of expression involved is of little social value, such as where the speech constitutes 'fighting words.'" *Id*. at 1074 (emphasis added).

Besides taking it out of context, there are other problems with the State's heavy reliance upon the phrase "does not threaten censorship of ideas." First, and most obviously, the statute at issue here, Section 843.085(1) **does** threaten the censorship of ideas. Bruce Willis, Louis Marrero from the Bronx, and Mayor Giuliani, *see* n.1, *supra*, along with thousands of others, are unable to express their support for the fallen heroes of the September 11 tragedy by wearing an official-looking NYPD cap or jacket in Florida without risking being prosecuted and thrown in jail.

Second, the phrase the State relies upon is not an essential part of the holding in *R.A.V.* and so is dicta. Moreover, a Key Cite search done on Westlaw (on July 18, 2004) shows that *R.A.V.* has been cited in 586 cases. Of those cases, exactly one has quoted the phrase "threaten censorship of ideas".[5] That case was *City of Bellevue*, discussed earlier. A phrase that is dicta and has never been relied

[5] As shown by a July 18, 2004 search in the ALLCASES directory of Westlaw for the phrase "threaten censorship of ideas".

upon by any court in the country as the basis for its decision is hardly very persuasive.

Third, other United States Supreme Court cases demonstrate that "content discrimination that does not threaten censorship of ideas" means a law or regulation that does not **directly censor <u>any</u> speech**. For example, at issue in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), was a statute requiring the Chairperson of the NEA to take into account "general standards of decency and respect for the diverse beliefs and values of the American public" when awarding grants. *Id*. at 572. The statute, then, did not directly forbid any speech or expression, but only dealt with funding which, as the Court noted, is inevitably limited and thus always involves selectivity. *Id*. at 585-86. In upholding the statute against a facial constitutional challenge, the Court noted that the "decency and respect" criteria did not silence speakers by expressly threatening censorship of ideas. *Id*. at 582-83 (citing *R.A.V.*).

Similarly, in *Leathers v. Medlock*, 499 U.S. 439 (1991), the Court upheld the constitutionality of a law extending a general sales tax to cable television, while exempting the print media. Once again, the statute at issue did not directly forbid any speech or expression. The Court noted that the tax at issue was not content-based as nothing in the language of the statute referred to the content of mass

media communications. *Id*. at 449. Nor did the differential burden imposed on cable television operators compared to the print media raise First Amendment concerns absent any interest in censoring "expressive activities." *Id*. at 453.

Section 843.085(1), then, is content-based as it regulates specific words or combinations of words appearing on clothing, and its proscriptions are triggered by the communicative impact those words or combinations of words could have on onlookers.

II. SECTION 843.085(1) IS UNCONSTITUTIONALLY OVERBROAD

Statutes "cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct." *Wyche v. State*, 619 So. 2d 231, 234 (Fla. 1993) (plurality opinion). "A statute is overbroad 'if in its reach it prohibits constitutionally protected conduct.'" *State v. T.B.D.*, 656 So. 2d 479, 481 (Fla. 1995) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)); *accord Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974) (statute that "is susceptible of application to protected speech . . . is constitutionally overbroad and therefore is facially invalid").

A person whose conduct is not innocent may challenge a law where the asserted overbreadth may have a chilling effect on the exercise of First Amendment freedoms. *State v. Brake*, 796 So. 2d 522, 527 (Fla. 2001). This is because "the

danger of an overbroad statute lies in its possible chilling effect upon the exercise of a precious first amendment right by those who read its provisions." *State v. Keaton*, 371 So. 2d 86, 91 (Fla. 1979); *accord Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("expansive remedy" of invalidating overbroad statute is provided "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech – especially when the overbroad statute imposes criminal sanctions"). "Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising his right of free speech." *Keaton*, 371 So. 2d at 91. The "mere existence" of a statute "purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of." *Id*. at 91-92. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs. *Hicks*, 539 U.S. at 119.

"Only a statute that is substantially overbroad may be invalidated on its face." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987). "The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate **all** enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to

remove the seeming threat or deterrence to constitutionally protected expression.'" *Hicks*, 539 U.S. at 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 613 (1973)) (emphasis in original). "Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Hill*, 482 U.S. at 459 (citations omitted).

Section 843.085(1) is clearly overbroad as it reaches the constitutionally protected conduct of, *inter alia*, those wishing to show respect to deceased police officers by wearing an NYPD hat or jacket, those wishing to support an incumbent Public Defender by wearing a "public defender" shirt, and those who wish to dress up as a police officer for Halloween. Further, it is readily apparent that the constitutionally protected conduct this statute infringes upon is much more substantial than those relatively few acts that the statute legitimately reaches.

There are just two reported decisions involving Section 843.085 in the thirteen years it has been in existence, the instant case and *Sult*.[6] In contrast, it is

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[6] A search of FLW Supplement going back to October, 1992, done at the website www.floridalawweekly.com on July 19, 2004, reveals no cases citing to Section 843.085. At oral argument in *Sult*, defense counsel referred to a case he had handled in which a person was charged for wearing an LAPD hat. A newspaper article shows that "Sult was charged using the same law that a different Pinellas deputy applied in 1998 in charging a man for wearing a cap with the initials

safe to assume that literally tens of thousands of official or official-looking police hats and jackets have been sold in just the past three years, mostly out of respect for the people who died on September 11, but in other instances as well. An officer involved in the instant case testified that he had seen other people wearing T-shirts with the Miami-Dade insignia or the word "police" printed on the front or back of a T-shirt. (T. 275). A defense proffer was made in *Sult* that a large amount of law enforcement paraphernalia, including patches, hats, pins and T-shirts, is available for purchase by the general public. (Petitioner's Initial Brief, at 6, Case No. SC03-542).

A content-based speech restriction can stand only if it satisfies strict scrutiny. *Playboy*, 529 U.S. at 813.[7] The statute must be narrowly tailored to promote a compelling Government interest. *Id*.; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *T.M. v. State*, 784 So. 2d 442, 444 n.1

LAPD. Prosecutors dropped the charge against that man the same day it hit the newspaper. Sheriff Everett Rice even offered an apology, saying the deputy should have used better judgment." William R. Levesque, *Sheriff T-shirt Lands Woman in Trouble*, St. Petersburg Times, June 20, 2001 (available at http://www.sptimes.com/News/062001/TampaBay/Sheriff_T_shirt_lands.shtml) (last accessed July 19, 2004).

[7] At oral argument in *Sult*, in response to a question from Justice Pariente, the State agreed that the statute was subject to strict scrutiny if the First Amendment was implicated.

(Fla. 2001). "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816.

There is a plausible, less restrictive alternative here, namely adding an intent requirement to Section 843.085(1). The Third District concluded that the statute was unconstitutionally overbroad "because it bans the wearing of any indicia of law enforcement authority regardless of the intent of the non-official." (App. to Brief of Appellant at 14, 16 n.3). If the statute reached only those people who **intended** to deceive others into believing they were actual law enforcement officers, it would greatly reduce the number of persons who are potentially subject to prosecution under the statute, and would perhaps be acceptable as narrowly tailored to promote the interest the State identifies in preventing people from impersonating a law enforcement officer. *See* App. to Brief of Appellant at 17 (Third District finding "statute must be narrowly tailored with an intent requirement so as not to run afoul of the rights guaranteed by the First Amendment"). But a statute that sweeps up people intending to **honor** law enforcement is hardly the least restrictive means for achieving the goal of catching people trying to impersonate an officer.[8] The statute

[8] The State confusingly writes "Even if a claim of unconstitutionality could be properly entertained on a hypothetical set of facts, the statute itself may not be

is therefore unconstitutional.

The State appears, through its citation to *United States v. O'Brien*, 391 U.S. 367 (1968), to argue in the alternative that Section 843.085(1) should be evaluated as a content-neutral statute. (State Br. at 27-28). In *O'Brien*, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id*. at 376. The four-prong test set out in *O'Brien* (and not discussed by the State) is that

> a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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invalidated in actual situations in which the constitutionality of its application is not at all involved." (Brief of Appellant at 26-27). It is not at all apparent what the State is arguing here. A facial overbreadth challenge necessarily considers how the statute applies to a set of facts not present in the immediate case, so the State is wrong insofar as First Amendment overbreadth doctrine is concerned. In support of what it wrote, the State cites to *Hicks*, but without a specific page citation it is not clear what part of *Hicks* the State is referring to, nor does anything in *Hicks* appear to support what the State wrote. The State also cites to "10 Fla. Jur. 2d Constitutional Law § 91, cases collected at n.47 (1997)," and to *State v. Ashcraft*, 378 So. 2d 284 (Fla. 1979). None of the eleven cases found at n.47 involve the First Amendment, and *Ashcraft* was also not a First Amendment case, so neither citation appears to have any relevance to the issue in this case.

Id. at 377.

O'Brien is inapplicable here because the restrictions of Section 843.085(1) are not "unrelated to the suppression of free expression."

> The proper interpretation of the phrase 'unrelated to the suppression of free expression' requires that the reasons advanced by the government to justify the law be grounded solely in the **non**communicative aspects of the conduct being regulated. . . . When the dangers the government seeks to prevent are dangers that it fears will arise because of what is communicated, then the regulation **is** related to free expression, and should be subjected to the applicable version of heightened scrutiny, and not to *O'Brien*. Prong three of *O'Brien* is, thus, nothing more nor less than an application of the general test for content-neutrality: the law must be '**justified** without reference to the content of the regulated speech.'

Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 9:13 (2004) (citation omitted, emphasis in original). Section 843.085(1) is grounded in the **communicative** aspects of wearing clothing bearing specified words that may deceive a reasonable person into believing the clothing is authorized by a law enforcement agency. The danger the State is seeking to prevent arises from what is communicated to a reasonable onlooker when he or she sees clothing with words that make it appear to have been authorized by a law enforcement agency. As Professor Smolla explains, then, strict scrutiny, and not the *O'Brien* standard, should be used to analyze Section 843.085(1).

Even if the statute were somehow considered content-neutral, it would still be

unconstitutional. When restrictions on expressive speech are "incidental" to the primary legislative purpose, the appropriate inquiry is "whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial governmental interest." *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 537 (1987). As discussed earlier, the incidental restrictions Section 843.085(1) imposes on First Amendment freedoms are far greater than necessary due to the lack of an intent requirement in the statute. Under either standard of review, then, the statute is unconstitutional.

The State argues, citing to *State v. Oxx*, 417 So. 2d 287 (Fla. 5th DCA 1982), that the legislature has the power to dispense with the element of intent in defining crimes that are *malum prohibita*. (Brief of Appellant at 31). The court in *Oxx*, though, recognized that the requirement of mens rea could not be dispensed with when to do so could chill a person's exercise of his or her First Amendment rights. 417 So. 2d at 290. *See Smith v. California*, 361 U.S. 147 (1959) (ordinance dispensing with requirement of scienter and imposing strict criminal liability for possessing obscene material was unconstitutional as it had a tendency to inhibit constitutionally protected expression). The lack of an intent requirement in Section 843.085(1) is chilling the exercise of First Amendment rights as it criminalizes the act of wearing a hat or shirt or jacket with specified words on it that

is or appears to a reasonable onlooker to have been authorized by a law enforcement agency regardless of the wearer's purpose. *Oxx*, then, is of no help to the State.

The State attacks the decision below because of its reliance on *Black*, 538 U.S. 343. (Brief of Appellant at 29-30, 32-33). The Third District, though, only relied on *Black* to "buttress[]" its conclusion that the statute was "constitutionally infirm." (App. to Brief of Appellant at 15). Its discussion of *Black*, then, is *dicta*. The actual holding of the Third District as to why Section 843.085(1) is unconstitutional was that it is "overbroad because it bans the wearing of any indicia of law enforcement authority regardless of the intent of the non-official." (App. to Brief of Appellant at 14). The court went on to explain that "in the absence of an intent or scienter requirement, section 843.085(1) is constitutionally infirm because it makes no distinction between the innocent wearing or display of law enforcement indicia from that designed to deceive the reasonable public into believing that such display is official.[3]" (App. to Brief of Appellant at 16). In footnote 3, the Third District explained

> In the absence of a requirement that the offender . . . intends to deceive . . . there is the potential of penalizing purely innocent, protected conduct. For example, . . . in the aftermath of the "September 11th" tragedy, it has now become commonplace for many Americans to wear authentic-looking law enforcement t-shirts, caps

> and other paraphernalia merely out of reverence for the tragedy's heroes. All such persons would nevertheless be in violation of section 843.085(1). We believe that Floridians do enjoy the right to innocently wear or display such paraphernalia under both the Florida and U.S. Constitutions as long as they are not intentionally attempting to pass themselves off as law enforcement officials.

(App. to Brief of Appellant at 16 n.3). The State has no answer to this contention, the actual holding below.[9]

The State again delves into the facts of this case (Brief of Appellant at 32-33). Respondent, again, points out that this is not an "as applied" challenge, so the facts of this case are still not relevant to the issues to be decided by this Court.

The State points out that Section 843.085(1) is a misdemeanor, and argues that an officer thus does not automatically have power to arrest someone seen wearing what appears to be a piece of clothing authorized by a law enforcement agency. According to the State, the officer would only have the power "to investigate the situation." (Brief of Appellant at 33).

Under the plain language of the statute, the State is simply wrong in this contention. A law enforcement officer can arrest a person without a warrant when

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[9] Surely, if Bruce Willis, Mr. Marrero from the Bronx, or Mayor Giuliani came to Florida on vacation, *see* note 1, *supra*, they would be very surprised to find that their expression of reverence for the heroes of the September 11 tragedy was a basis for criminal charges in Florida.

the person has committed a misdemeanor in the presence of the officer. § 901.15(1), Fla. Stat. (2003). The misdemeanor in Section 843.085(1) is complete when a person wears some article of clothing with specified words or combination of words on it that could make it appear to a reasonable onlooker as if the clothing was authorized by a law enforcement agency. No further investigation is needed.

Finally, the State argues that Section 843.085(1) can be saved by reading into it an intent requirement. (Brief of Appellant at 34-35). This contention, too, is incorrect.

"Fundamental principles of statutory construction dictate that an enactment should be interpreted to render it constitutional if possible. However, the **courts may not vary the intent of the legislature with respect to the meaning of the statute** in order to effect this result." *Keaton*, 371 So. 2d at 89 (emphasis added); *Wyche*, 619 So. 2d at 236 (plurality opinion) ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments."). A court's "discretion to adopt a narrowing statute should be exercised with restraint." *Halifax Hosp. Medical Ctr. v. News-Journal Corp.*, 724 So. 2d 567, 570 (Fla. 1999). "When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment. The Florida Constitution requires a certain precision defined by the legislature, not legislation

articulated by the judiciary." *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978).

The legislative intent behind Section 843.085(1) is plainly to criminalize all wearing of clothing with specified words or combinations of words that **could deceive a reasonable person into believing that such item is authorized** by a law enforcement agency. The intent of the wearer of the clothing is utterly irrelevant in the legislature's view. It is the effect on the observer that matters, and nothing more. If this Court were to read into the statute an intent requirement on the part of the wearer of the clothing, it would be rewriting the statute by engrafting onto it a provision not articulated by the legislature. The Court should not do this. If the statute is to be rewritten, it should be by the legislature.

"If some constitutionally unprotected speech must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *City of Houston v. Hill*, 482 U.S. at 462 n.11. While a goal of preventing individuals from committing crimes while posing as police officers is undoubtedly laudable, "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Carey v. Brown*, 447 U.S. 455, 464-65 (1980). Section 843.085(1) is unconstitutional as written because it is content-based and susceptible of substantial overbreadth in its application. It should be found to be unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below and find that Section 843.085(1) is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Respondent on the Merits was mailed to Richard L. Polin, Assistant Attorney General and to Barbara A. Zappi, Assistant Attorney General, Office of the Attorney General, Criminal Appellate Division, 110 SE 6th Street, 9th Floor, Fort Lauderdale, FL 33301 on July 19, 2004.

_____
Robert Godfrey
Assistant Public Defender

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, and so is in compliance with Rule 9.210(a)(2).

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Robert Godfrey