

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-390

THE STATE OF FLORIDA,

Petitioner,

vs.

ALBERTO RODRIGUEZ,

Respondent.

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

REPLY BRIEF OF PETITIONER

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Bureau Chief, Criminal Appeals
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

TABLE OF CONTENTS

TABLE OF CITATIONS	ii
ARGUMENT	1-7
SECTION 843.085(1), FLORIDA STATUTES (2001) IS NOT IMPERMISSIBLY CONTENT-BASED OR OVERBROAD AND IS THEREFORE CON- STITUTIONAL.	
CONCLUSION	8
CERTIFICATE OF SERVICE	8
CERTIFICATE REGARDING FONT SIZE AND TYPE	9

TABLE OF CITATIONS

<u>Case</u>	<u>Page</u>
Church on the Rock v. City of Albuquerque, 84 F. 3d 1273, 1279 (10th Cir. 1996)	1
Cimarron Alliance Foundation v. City of Oklahoma City, 290 F. Supp. 2d 1252, 1261 (W.D. Okla. 2002)	3
Giebel v. Sylvester, 244 F. 3d 1182, 1188 (9th Cir. 2001)	1
Houston v. Hill, 482 U.S. 451, 458, 107 S.Ct. 2502 (1987)	4
Perry Educational Association v. Perry Local Educators Association, 460 U.S. 37, 46, 103 S.Ct. 948 (1983)	2
Sons v. Confederate Veterans, Inc. V. Commissioner of the Virginia Department of Motor Vehicles, 288 F. 3d 610, 624 (4th Cir. 2002)	2

ARGUMENT

SECTION 843.085(1), FLORIDA STATUTES (2001) IS
NOT IMPERMISSIBLY CONTENT-BASED OR
OVERBROAD AND IS THEREFORE CON-
STITUTIONAL.

The Respondent's primary argument in the Answer Brief is that § 843.085(1), Florida Statutes, is content-based even if it is not viewpoint based. While the State maintains, for the reasons set forth in its Initial Brief of Petitioner, that the statute is not content-based, even if it is content-based, the statute would still be constitutional.

The difference between content-based prohibitions and viewpoint-based prohibitions relates essentially to the level of judicial scrutiny to which the prohibitions are subjected. Governmental prohibitions involving viewpoint discrimination are virtually impermissible and are subjected to the highest level of judicial scrutiny. Church on the Rock v. City of Albuquerque, 84 F. 3d 1273, 1279 (10th Cir. 1996).

Content-based restrictions are subject to strict scrutiny. Id.¹

¹ While the distinction between content-based discrimination and viewpoint-based discrimination has been deemed tenuous, it has also been described as the difference between subject matter of speech (content-based) and specific positions taken on the subject matter (viewpoint-based). Giebel v. Sylvester, 244 F. 3d 1182, 1188 (9th Cir. 2001). The instant statute, if it is content-based at all, would be related to the "subject" of unauthorized displays of legitimate governmental authority and would not entail the dissemination of any message or viewpoint.

Explaining the concept of viewpoint discrimination in a case involving a prohibition of a Confederate flag logo on special license plates for the Sons of

Strict scrutiny, for purposes of content-based restrictions, “must be narrowly drawn to effectuate a compelling state interest.” Perry Educational Association v. Perry Local Educators Association, 460 U.S. 37, 46, 103 S.Ct. 948 (1983). The statute at issue herein does involve a compelling state interest and, contrary to the lower court’s conclusion, it is narrowly tailored.

The State has multiple compelling interests at the heart of the statute at issue herein. First, the statute promotes public safety, especially in the context of home invasion robberies, by deterring and punishing those who impersonate law enforcement officers. Second, it promotes public safety in a more general manner. When individuals are in need of assistance from law enforcement officers in an urgent manner, the observation of an individual who appears to be such an officer, on a public street, creates a false sense of security for the individual in need. The individual will approach that person, in pursuit of assistance, only to find that the individual is not a law enforcement officer. This, in turn, prolongs the individual’s pursuit of assistance from law enforcement officers; this similarly prolongs the period in which the person

Confederate Veterans, the Fourth Circuit Court of Appeals stated that “where an evaluation of a given restriction and the surrounding circumstances indicates that one or more speakers are favored over others, and further that the basis for the restriction is in fact the message the disfavored speaker seeks to convey, the restriction violates the First Amendment.” Sons v. Confederate Veterans, Inc. V. Commissioner of the Virginia Department of Motor Vehicles, 288 F. 3d 610, 624 (4th Cir. 2002).

in need may remain in danger; this similarly facilitates the flight of perpetrators, since their pursuit by legitimate law enforcement officers has been delayed.

The Third District Court of Appeal concluded that the statute was not narrowly tailored because it could have and should have included an element of intent to deceive. That, however, would defeat the legitimate compelling state interests. When the person displaying unauthorized insignia denoting legitimate authority is observed by a victim, an impostor's lack of intent is insignificant. The victim's pursuit of assistance will be misguided and delayed regardless of the intent of the impostor. The impostor en route to a Halloween party will enhance the dangers to the victim every bit as much as the impostor who truly did intend to deceive. The presence of the impostor who lacks an intent to deceive will still delay the victim's efforts to obtain assistance. The presence of the impostor who lacks an intent to deceive will still delay law enforcement's efforts to locate and apprehend perpetrators of offenses. Under such circumstances, requiring an element of intent for a "narrowly tailored" statute would utterly defeat the compelling interests that the statute is designed to promote.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Cimarron Alliance Foundation v. City of Oklahoma City, 290 F. Supp. 2d 1252, 1261 (W.D. Okla. 2002). For the reasons set

forth above, that is all that the instant statute does and to require more would be to subvert the legitimate purposes of the statute.

Lastly, with respect to the overbreadth argument, the Supreme Court of the United States has held that “[o]nly a statute that is substantially overbroad may be invalidated on its face.” Houston v. Hill, 482 U.S. 451, 458, 107 S.Ct. 2502 (1987). The possible existence of a single impermissible application of the statute will not invalidate the statute. Id. The Respondent’s arguments in this case do not reflect substantial overbreadth.

In all other respects, the Petitioner relies on the arguments set forth in its Initial Brief of Petitioner.

CONCLUSION

Based on the foregoing, the decision of the lower court should be reversed.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Bureau Chief, Criminal Appeals
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner on the Merits was mailed this ____ day of September, 2004, to ROBERT GODFREY, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing brief has been typed in Times New Roman 14-point type.

RICHARD L. POLIN