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## **Michael John Simmons v. State of Florida**

THE MARSHAL: ALL RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

A CHANGE OF PACE. THE NEXT CASE HERE, SIMMONS VERSUS STATE OF FLORIDA.

MADAM CHIEF JUSTICE AND MAY IT PLEASE THE COURT, MY NAME IS WILLIAM SHEPPARD ON BEHALF OF THE PETITIONER, SIMMONS, WHO IS SEEKING REVIEW OF A SPLIT DECISION FROM THE FIRST DISTRICT COURT OF APPEALS WHICH UPHELD FLORIDA STATUTE 847.0138 AND 847.0135.

ARE WE HERE ON BOTH OF THOSE STATUTES?

YES, YOUR HONOR. WE CONTEND THAT 847.0138 VIOLATES THE 1ST AMENDMENT AS WELL AS THE DORMANT COMMERCE CLAUSE. WE CONTEND THAT 847.035 LIKEWISE VIOLATES THE DORMANT COMMERCE CLAUSE.

BUT NOT THE 1ST AMENDMENT?

WE DO NOT BRING A 1ST AMENDMENT CLAIM AS TO 847.0138.

5.

35, I'M SORRY. WE WOULD CHARACTERIZE 0138 IF I MAY SHORTEN THAT AS A DISSEMINATION STATUTE AS OPPOSED TO 0138 WHICH I THINK HAS BEEN CHARACTER BY THE DIFFERENT CASES AS A LURING STATUTE.

SO WE DON'T CONFUSE OURSELVES WHY DON'T WE CALL THEM LURING AND DISSEMINATION?

THANK YOU, YOUR HONOR. THE DISSEMINATION STATUTE VIOLATES THE FIRST AMENDMENT. IT IS OVERBROAD, IT IS VAGUE, AND IT CANNOT PASS STRICT SCRUTINY. WE WOULD DRAW YOUR ATTENTION TO

ARE WE TALKING ABOUT NOW, THERE ARE TWO SECTIONS REALLY OF THIS STATUTE. ONE IS ABOUT DISSEMINATION INTRASTATE AND THE OTHER SECTION SEEMS TO BE DISSEMINATION INTERSTATE. ARE YOU CLAIMING THAT BOTH OF THOSE SUBSECTIONS THERE ARE PROBLEMS WITH THEM?

WELL, AS IT RELATES TO THE FIRST AMENDMENT, YES. AS IT RELATES TO THE COMMERCE CLAUSE ONLY THE INTERSTATE ASPECT OF IT WOULD BE OUR POSITION. I WOULD CALL YOUR ATTENTION TO JUDGE BROWNING'S DISSENT IN THE FIRST DISTRICT COURT OF APPEALS. HE WOULD HAVE UPHELD THE DISSEMINATION STATUTE ON BOTH FIRST AMENDMENT ARTICLE 1, SECTION 4 AND 9 OF THE FLORIDA CONSTITUTION.

I DON'T THINK YOU MEAN UPHELD.

HE WOULD HAVE STRICKEN THEM. I APOLOGIZE. THE FIRST DISTRICT MAJORITY OPINION, AS WELL AS THE APPELLEE, THE STATE, IN AGREEING ON THIS STATUTE, MEANING IT DOESN'T EXIST. THE STATUTE PROVIDES THAT TRANSMIT MEANS TO SEND A SPECIFIC INDIVIDUAL KNOWN BY THE

DEFENDANT TO BE A MINOR VIA ELECTRONIC MAIL. PART OF THE VAGUENESS IS WHAT DOES ELECTRONIC MAIL MEAN? IT IS NOT DEFINED IN THE STATUTE.

IS THERE ANY QUESTION NOTWITHSTANDING FOR YOUR CLIENT TO CHALLENGE THESE CIRCUMSTANCES BUT GIVEN THE SPECIFIC CONDUCT IN THIS CASE, IS THERE ANY QUESTION ABOUT STANDING AS TO MAKING A CHALLENGE FOR VAGUENESS PURPOSES?

NO, YOUR HONOR, I DON'T BELIEF IT DOES. I DON'T BELIEVE THE CONDUCT MATTERS IF WE ARE MAKING FACIAL ATTACKS.

CAN YOU START WITH THE OVERBROAD ARGUMENT?

IT IS OVERBROAD AND IT SWEEPS WITHIN ITS AMBIT PROTECTED CONDUCT, SPECIFICALLY THE SPEECH OF ADULTS. WE ARE HELD

HOW CAN IT DO THAT? IT SAYS IT IS ONLY TARGETED TO IF THE PERSON KNOWS THAT THE RECIPIENT OR BELIEVES THE RECIPIENT TO BE A MINOR. SO HOW DOES IT CHILL ADULT SPEECH?

WELL, AS JUDGE BROWNING SPOKE IF IT IS ONLY HARMFUL TO A MINOR, NUMBER ONE THAT'S VAGUE. WHAT DOES THAT MEAN?

I GUESS I WANT TO STAY WITH THE OVERBROAD PART.

BECAUSE OF ITS VAGUENESS IT SWEEPS WITHIN IT PROTECTED SPEECH. FOR EXAMPLE, HE TALKED ABOUT THE DIFFERENCE BETWEEN THE VARIOUS AGES IN TERMS OF THE OVERBROAD, IF IT IS OVERBROAD IT MUST MEET STRICT SCRUTINY AND WE CONTEND IT CAN'T MEET THE STRICT SCRUTINY.

IT SEEMS TO ME ONE OF THE REAL PROBLEMS THAT JUDGE BROWNING HAD WAS THIS STATUTE WOULD BE APPLICABLE TO A CHAT ROOM; WHEREAS I READ THE STATUTE IT SAYS THAT THIS HAS TO BE SENT TO A SPECIFIC INDIVIDUAL. IF YOU SEND THE MESSAGE, AND MAYBE I'M NOT ELECTRONICALLY UP WITH EVERYTHING, BUT IF YOU SEND A MESSAGE TO SAY A CHAT ROOM, YOU ARE NOT REALLY SENDING IT TO A SPECIFIC INDIVIDUAL, ARE YOU? I MEAN, SO WOULD THAT EVEN BE COVERED UNDER THIS KIND OF STATUTE?

I THINK THAT YOU MAKE THE POINT, WHERE IS THE WORD CHAT ROOM? IT DOESN'T SHOW UP IN THE STATUTE.

IT DOESN'T SHOW UP IN THE STATUTE BUT THAT WAS ONE OF WHAT JUDGE BROWNING USED TO SAY THAT IT MIGHT REACH CONDUCT THAT IS PERFECTLY LEGITIMATE AND ADULTS MIGHT BE A PART OF IT, BUT WHEN YOU LOOK AT THE TERMS OF THE STATUTE WHERE IT SAYS TO A SPECIFIC INDIVIDUAL, WOULDN'T THAT EXCLUDE THAT KIND OF

I'M GOING TO SEND IT TO JUSTICE QUINCE WHO IS A MINOR IN THE CHAT ROOM WITH ALL OF THE OTHER JUSTICES IN IT.

BUT YOU KNOW WHEN YOU ARE SENDING IT YOU ARE SENDING IT TO A CHAT ROOM AS OPPOSED TO A SPECIFIC INDIVIDUAL?

I DON'T KNOW. I KNOW THAT I AM UNDER THE STATUTE I HAVE TO SEND IT BY ELECTRONIC MAIL AND THEN I THINK WHAT THIS ALL TURNS ON, THE WHOLE ARGUMENT OF THE STATE AND THE BASIS OF THE FIRST DISTRICT'S OPINION IS THAT THE WORD ELECTRONIC MAIL DERIVES TO A ONE-WITHIN-ONE INDIVIDUAL COMMUNICATION.

THE FACTS SAY THAT HE ENTERED AN INTERNET CHAT ROOM TITLED I LIKE OLDER MEN AND

THEN THERE WAS APPELLANT REPEATEDLY COMMUNICATED ABOUT SEXUAL ACTIVITIES. SO WAS THAT DONE THROUGH THE CHAT ROOM?

I DON'T KNOW. THIS IS A FACIAL ATTACK ON THE STATUTE AND I SUBMIT THAT THE CONDUCT REALLY DOESN'T MATTER. IF THE STATUTE ON ITS FACE INHIBITS THE SPEECH OF ADULTS AND DRIVES IT DOWN TO THE LEVEL OF A MINOR, SOMEONE UNDER 18, THEN IT CHILLS OUR ABILITY TO COMMUNICATE.

WELL, ADDRESS

GO AHEAD.

I AGREE WITH WHAT YOU JUST SAID. MY PROBLEM IS GOING FROM THAT PREMISES TO THE CONCLUSION THAT THAT'S WHAT THIS STATUTE DOES, BECAUSE THE STATUTE SEEMS SPECIFIC TO SAY IT HAS GOT TO BE TO SOMEONE KNOWN TO BE A MINOR. SO HOW DOES THAT CHILL ADULT TO ADULT SPEECH IF THE E-MAIL IS DIRECTED TO A MINOR?

BECAUSE IT DOESN'T SAY THAT THAT ADULT IT DOESN'T PROHIBIT OR ELIMINATE THE POSSIBILITY OF ADULTS BEING PRESENT. SO THAT THE ADULTS IT CHILLS THEIR COMMUNICATION.

WELL, IF WE ARE TALKING ABOUT EMAILS WHICH IS WHAT I ASSUME FROM THE WORD ELECTRONIC MAIL THAT WE ARE TALKING ABOUT EMAILS, IF THERE ARE SEVERAL ADULTS HAVING AND A CHILD IN THERE HAVING DISCUSSIONS AND EMAIL SOMEBODY CAN JUST PRESS THE REPLY BUTTON AND REPLY TO EVERYBODY EXCEPT THE MINOR AND THERE IS NO CHILLING OF ADULT TO ADULT SPEECH THERE.

YOU ARE SHOWING YOUR KNOWLEDGE OF COMPUTERS. I DON'T HAVE THAT SAME KNOWLEDGE, SO I'M A COMMON MAN. I'VE GOT TO LOOK AT THE LANGUAGE OF THIS STATUTE TO UNDERSTAND WHAT CONDUCT I'M PROHIBITED FROM ENGAGING IN. ELECTRONIC MAIL IS THE ONLY WORDS THERE. IF YOU LOOK UP ELECTRONIC MAIL IN THE DICTIONARY, IT SAYS EMAIL. WELL, WHAT DOES THAT MEAN? WHEN I LOOK UNDER EMAIL IN THE DICTIONARY.

DOES IT SAY ELECTRONIC MAIL?

SIR?

IT SAYS ELECTRONIC MAIL?

IF I LOOK UP EMAIL IN THE DICTIONARY, BLACK'S LAW DICTIONARY DEFINES IT AS THE COMMUNICATION EXCHANGED BETWEEN PEOPLE BY COMPUTER EITHER THROUGH A LOCAL AREA NETWORK OR THE INTERNET, AND THERE IS NOTHING IN THE DEFINITIONS OF EITHER ELECTRONIC MAIL OR EMAIL WHICH SUGGESTS THAT THOSE COMMUNICATIONS ARE SOLELY TO INDIVIDUALLY-ADDRESSED COMPUTER TRANSMISSIONS.

BY CUSTOM ISN'T THAT TRUE HOW IT IS DONE DAY IN AND DAY OUT?

PARDON ME?

ISN'T IT TRUE BY CUSTOM THAT'S THE LANGUAGE? I MEAN, THERE ARE MILLIONS OF PARENTS FOR EXAMPLE AROUND THE COUNTRY THAT WILL ALLOW THEIR CHILDREN TO EMAIL BUT NOT TO ENTER CHAT ROOMS. THAT'S A COMMON CUSTOM BECAUSE OF THE CONCERN ABOUT EXPOSURE TO INAPPROPRIATE BEHAVIOR AND SO THEY SAY EMAIL AND THE EMAIL IS A SPECIFIC INTERNET ADDRESS TO A SPECIFIC INDIVIDUAL.

AND YOU ARE DOING THE FUNCTION OF THE LEGISLATURE WHEN YOU PUT THOSE DEFINITIONS IN HERE. THE AVERAGE PERSON PROBABLY DOESN'T HAVE THE SOPHISTICATION AND LEVEL OF KNOWLEDGE THAT YOU AND JUSTICE CANTERO DO. YOU ALL ARE COMPUTER LITERATE. I'M NOT, SO I HAVE TO LOOK AT THE DICTIONARY BECAUSE I DON'T KNOW WHAT YOU MEAN BY THESE TERMS. AND WE GOT TO TAKE A LOOK AT FLORIDA STATUTE 775.021 WHICH PROVIDES THAT THESE KINDS OF STATUTES SHALL BE STRICTLY CONSTRUED, AND SHALL BE CONSTRUED MOST FAVORABLY TO THE ACCUSED, AND IT IS KIND OF AKIN TO STRICT SCRUTINY. YOU CAN'T ENGRAPH THIS KIND OF REWRITE OF THIS STATUTE, AND I THINK IT IS SIGNIFICANT THAT THE FIRST DISTRICT COURT OF APPEALS AND I THINK I CAN SAY THIS.

WE WOULD HAVE TO FIND THAT EMAIL IS A VAGUE TERM IN ORDER TO SUPPORT YOUR POSITION IF WE FIND THAT EMAIL, THERE IS A PLAIN MEANING TO IT.

I DON'T THINK IT IS A VAGUE TERM. I LOOKED IT UP IN THE DICTIONARY AND IT SAYS JUST WHAT I SAID IT SAYS, BUT IT DOESN'T SAY ONE ON ONE. IT DOESN'T SAY I AM TALKING TO THIS PARTICULAR MINOR.

I GUESS MY POINT IS IF YOU SET UP AN EMAIL ACCOUNT ON GOOGLE, YAHOO OR AOL THAT'S DIFFERENT THAN SIGNING UP TO PARTICIPATE IN A CHAT ROOM.

YOUR HONOR, AS A COMMON MAN WHOSE CONDUCT IS GOVERNED BY AN ACT OF THE LEGISLATURE, I DON'T KNOW YAHOO FROM ANYTHING. IS IT DEFINED IN THE STATUTE?

BUT THE STATUTE DOES TALK ABOUT SPECIFIC INDIVIDUAL, RIGHT? THAT'S HOW THE COMMON MAN IS GOING TO UNDERSTAND WHAT THE STATUTE MEANS IF IT TALKS ABOUT A SPECIFIC INDIVIDUAL, NOT A GROUP.

IT MAY BE, BUT IT IS CHILLING.

CAN YOU I KNOW YOU HAVE LIMITED TIME AND I'M NOT SURE IF OTHER JUSTICES ARE INTERESTED IN THE FIRST AMENDMENT ISSUE, BUT AT SOME POINT I WOULD LIKE YOU TO ADDRESS THE DORMANT COMMERCE CLAUSE CLAIM AS WELL.

AFTER WE GET OUT OF THAT, CAN YOU ADDRESS THE BREAKDOWN THAT YOU SEEM TO BE ARGUING THAT YOU HAVE TO HAVE DIFFERENT CATEGORIES FOR MINORS OR DIFFERENT CLASSIFICATIONS OR DIFFERENT DESCRIPTIONS FOR DIFFERENT AGE GROUPS? COULD YOU HELP ME WITH THAT? IS IT I AM PERMISSIBLE TO HAVE THE STATUTE THAT RELATES TO JUST MINORS? ARE YOU SUGGESTING WE HAVE TO HAVE ONE FOR 15 AND OVER AND 12 AND OVER AND FOR 6 AND OVER?

THE LEGISLATURE HAS DONE THAT IN TERMS OF LEWD ACTS.

AGAIN THEY MAY HAVE BUT THE QUESTION IS: IS IT CONSTITUTIONALLY MANDATORY THAT IT BE DONE?

I THINK SO IN THIS CONTEXT THAT I HAPPEN TO LIVE WITH FOUR CHILDREN UNDER 18. I HAVE A 7-YEAR-OLD AND I SURELY DON'T COMMUNICATE TO HER ABOUT THESE TYPES OF MANNERS THE WAY I DO MY 17-YEAR-OLD SON, AND I DON'T SPEAK TO MY 14-YEAR-OLD DAUGHTER THE SAME WAY I SPEAK TO MY 17-YEAR-OLD SON.

IT IS A MATTER OF COMMON SENSE BUT THE QUESTION IS: IS IT NECESSARY FOR CONSTITUTIONAL VALIDITY. I AGREE WITH EVERYTHING YOU JUST SAID.

YES, SIR. I THINK YOU HAVE TO, BECAUSE IT IS CHILLING.

ARE THERE CASES THAT SAY THAT WE HAVE TO DO THAT?

I THINK THERE THERE IS ONE CASE THAT DISCUSSES THAT, AND WHAT I WOULD LIKE TO SUGGEST IS THIS AND CONCLUDE ON THE FIRST AMENDMENT FOR THE TIME BEING. FIRST DISTRICT'S OPINION STANDS ALONE IN AMERICAN JURISPRUDENCE. THERE ARE A LEGION OF FEDERAL COURTS, INCLUDING.

THIS IS ACTIVE AND YOU KNOW THAT THE PERSON YOU ARE EMAILING TO IS A MINOR SO WHETHER OR NOT IT IS CONSTITUTIONAL IT IS CERTAINLY A MUCH DIFFERENT ANIMAL THAN THE BACK IN RENO THAT THE SUPREME COURT SAW IN RENO.

YOUR HONOR, I WOULD LIKE TO ALMOST, IF IT WERE APPROPRIATE TO ASK YOU THE QUESTION THAT YOU ASKED OF OUR COUNCIL, SHOW ME THE RECORD WHERE WE CAN TALK ABOUT ALL OF THESE TERMS YOU ARE USING. THEY DON'T EXIST IN THIS STATUTORY SCHEME.

THE SUPREME COURT TALKED IN THOSE TERMS. THEY SPOKE IN TERMS OF THE FACT THAT IT WAS A WEBSITE AND PEOPLE WOULD GET ACCESS TO IT.

BUT THEY HAD A RECORD TO DO THAT WITH. THOSE WERE ALL CIVIL RIGHTS CASES WHERE THERE HAD BEEN A RECORD DEVELOPED.

LET ME SEE SINCE I KNOW YOU DO HAVE LIMITED TIME. ON YOUR FIRST AMENDMENT ARGUMENT IT IS TWO FOLD. IT IS VAGUE AND IT DOESN'T JUST LIMIT IT TO WHAT WE THINK OF THE TRADITIONAL I'M SENDING AN EMAIL TO YOU AND NO ONE ELSE IS INVOLVED IN THAT EMAIL. THAT'S NUMBER ONE AND THEN THE SECOND ONE IS THAT IT DOESN'T DISCRIMINATE BETWEEN CATEGORIES OF MINORS. THAT'S THE OTHER.

IT IS VAGUE. THE TERM HARMFUL TO MINORS IS VAGUE.

NOW YOU ARE IN YOUR REBUTTAL BUT WHY DON'T YOU JUST TAKE A MOMENT ON THIS DORMANT COMMERCE CLAUSE WHICH SEEMS TO BE WHAT MOST OF THE COURTS WHEN THEY DECLARE THE STATUTES UNCONSTITUTIONAL THEY SEEM TO BE LOOKING AT THE DORMANT COMMERCE CLAUSE.

THEY DO BOTH. AND THERE HAVE BEEN FOUR CIRCUIT COURTS OF APPEAL WHO HAVE STRICKEN DISSEMINATION STATUTES FOR VIOLATING THE DORMANT COMMERCE CLAUSE. SIMPLY PUT, WHAT WE WOULD HAVE IS A HODGEPODGE OF REGULATION FROM ALL OF THE STATES, AND ALL OF THOSE STATES COULD HAVE DIFFERENT AGE LEVELS FOR PROHIBITING CONTACT WITH MINORS. THE SECOND REASON IS THAT WE ARE REGULATING BY FLORIDA STATUTE CONDUCT ALL OVER THE COUNTRY. AS THE 4TH CIRCUIT SAID, THE CONTENT OF THE INTERNET IS ANALOGOUS TO THE CONTENT OF THE NIGHT SKY. ONE STATE SIMPLY CANNOT BLOCK A CONSTELLATION FROM THE VIEW OF ITS OWN CITIZENS WITHOUT BLOCKING OR AFFECTING THE VIEWS OF CITIZENS OF THE OTHER STATES. THE THIRD REASON IS THAT IT IS AN INVALID, INDIRECT REGULATION OF INTERSTATE COMMERCE BECAUSE IT BURDENS

WHAT ABOUT THE SECTION THAT JUST PERTAINS TO INTRASTATE EMAILS?

WE WEREN'T CHARGED WITH THAT.

THAT SECTION OF THE STATUTE IT SAYS THAT A PERSON IN THE STATE SENDING TO A CHILD IN THE STATE.

RIGHT.

EVERYTHING IS INTERSTATE. EVERYTHING IS INTERSTATE WITH THESE COMPUTERS. THE SERVERS

ARE OUT OF STATE. I JUST DID A CASE THREATENING EMAILS, FEDERAL PROSECUTION FROM ONE PART OF GAINESVILLE TO THE OTHER PART OF GAINESVILLE. WE MOVED TO DISMISS. NO FEDERAL JURISDICTION. WRONG. THE SERVER IS IN VIRGINIA. SO YOU CAN'T SEND AN EMAIL.

LET ME ASK YOU A QUESTION. IF ALL OF THIS MATERIAL BY MR. ^SIMMONS WAS INSTEAD OF TRANSMITTED DIGITALLY OVER THE INTERNET WAS PUT IN AN ENVELOPE AND SENT TO A MINOR HERE IN THE STATE OF FLORIDA, WOULD YOUR ARGUMENT BE THE SAME? WOULD YOU HAVE THE SAME DORMANT

NO.

WHY NOT?

SO WHAT IS THE DIGITAL DELIVERY VERSUS THE HARD COPY DELIVERY MAKE?

PRESUMABLY THE ENVELOPE IS ADDRESSED TO AN INDIVIDUAL ADDRESS AND DIGIT ALY IT IS NOT.

ISN'T AN EMAIL DIRECTED TO AN INDIVIDUAL ADDRESS?

NOT ACCORDING TO THE DEFINITION IN BLACK'S LAW DICTIONARY.

FOLLOWING UP ON THE DORMANT COMMERCE CLAUSE I WOULD HAVE TO DECIDE ON THE CONTENT I AM GOING TO SEND TO A MINOR IN FLORIDA BASED ON FLORIDA LAW AND ONE IN MINNESOTA VERSUS A MINNESOTA LAW. WHAT'S WRONG WITH THAT?

I THINK THAT WHERE WE ARE IS HAVING TO MAKE POLICY DECISIONS FOR EXAMPLE ATTORNEY GENERAL BLOODWORTH, MAKE IT TEN YEARS AGO WHEN HE WROTE AN OPINION THAT STATED. THE INTERNET IS THE FIRST TRULY GLOBAL COMMUNICATIONS NETWORK UTILIZING BOTH INTERSTATE AND INTERNATIONAL WIRE COMMUNICATIONS TO LINK USERS AROUND THE WORLD. THEREFORE, ANY EFFORT TO REGULATE THE USE OF THE INTERNET IS BETTER SUITED TO FEDERAL REGULATION THAN TO A PATCHWORK INTENTION BY THE STATE.

THEY ARE EVEN PUBLISHING NEWSPAPERS BY SATELLITE NOW. IS THAT TO SAY THAT FLORIDA STATUTES CANNOT APPLY SUCH AS THE PUBLICATION OF THE NAMES OF CERTAIN VICTIMS OF CRIME, THOSE KINDS EVER THINGS, THAT'S GOING TO INTERFERE WITH THE DORMANT COMMERCE CLAUSE BECAUSE IT COMES FROM A SATELLITE, THE U.S. NEWS TODAY OR WHATEVER THAT IS, THE NEWSPAPER. THIS JUST SEEMS TO GO AGAINST COMMON SENSE IS WHAT IT SEEMS TO BE.

I THINK IT DOES GO AGAINST COMMON SENSE BECAUSE I THINK THE INTERNET AND THE WORLDWIDE WEB IS SO NEW THAT YOU DON'T KNOW THE LOCATION WHERE YOU ARE SENDING THE MESSAGE. YOU DON'T HAVE A CLUE.

SO THEN THAT SHOULD THEREFORE RENDER IT NOT SUBJECT TO ANY REGULATION AT ALL OR SUBJECT TO ANY RULES AT ALL?

WELL, BUT WE HAVE TO WE HAVE PROHIBITIONS AGAINST THE TYPE OF CONDUCT THAT WE ARE SEEKING TO PROHIBIT HERE. THERE WAS LAWS ON THE BOOKS ALREADY THAT PROHIBITS THIS KIND OF CONDUCT. SO WHAT WE ARE DOING IS INFRINGING ON THE FIRST AMENDMENT RIGHTS OF ADULTS, AND I THINK INTRUDING INTO INTERSTATE COMMERCE. THE WEB AND THE INTERNET IS AN INSTRUMENTALITY OF COMMERCE JUST LIKE I-10 IS. WE CAN'T PASS CERTAIN LAWS AFFECTING I-10 ANY MORE THAN WE CAN THE INTERNET.

WE ARE TALKING ABOUT THE COMMERCE CLAUSE NOW AND REALLY YOUR OBJECTION ON THAT IS IN PRACTICAL TERMS IS A LOT OF COMPANIES SEND GLOBAL SPAM, JUNK MAIL TO ALL KINDS

OF INDIVIDUALS AND WE CAN'T BE REGULATED IN FLORIDA DIFFERENTLY THAN MINNESOTA, BECAUSE WE JUST SEND IT TO EVERYBODY. WE HAVE NO IDEA WHERE THESE PEOPLE ARE ACTUALLY LOCATED, BUT IT SEEMS TO ME THAT IN THAT CASE YOU WOULDN'T VIOLATE THE STATUTE BECAUSE YOU DON'T KNOW THAT ANY SPECIFIC PERSON IS A MINOR. YOU ARE JUST SENDING IT OUT TO A MUCH BUNCH OF EMAIL ADDRESSES THAT YOU GUESS AT AND WRITE IN AND SOME OF THEM DON'T PERTAIN TO ANYBODY, SOME OF THEM DO BUT IN THAT CASE YOU CAN'T HAVE VIOLATED THE STATUTE BECAUSE YOU DON'T KNOW THAT THAT SPECIFIC INDIVIDUAL IS A MINOR.

YOU DON'T KNOW.

THAT'S WHY YOU HAVEN'T VIOLATED THE STATUTE. YOU DON'T KNOW.

EXACTLY.

ALL RIGHT. I THINK WITH OUR HELP YOU HAVE USED UP YOUR TIME. THANK YOU, MR.^SHEPPARD. MR.^McCOY?

GOOD MORNING, YOUR HONORS, PLEASE THE COURT, I'M CHARLEY McCOY HERE ON BEHALF OF THE STATE.

CAN YOU AS A BEGINNING FACTUAL MATTER TELL US, BECAUSE IT SEEMS THAT THE ARGUMENT WE ARE LOOKING AT IS MAYBE THIS WASN'T INTENDED TO APPLY TO INTERNET CHAT ROOMS, AND I HAVE TO CONFESS NOT THAT I HAVE HEARD OF THEM BUT I DON'T KNOW WHAT THEY LOOK LIKE, SO AN INTERNET CHAT ROOM BUT IT SAYS THAT THIS DEPOSIT PI DEPUTY SHERIFF ENTERED THE CHAT ROOM AND THEN HE WAS IN AN ONLINE CONVERSATION BETWEEN SANDI AND THE APPELLANT PRESUMABLY BASED ON THAT THAT CHAT ROOM TAKES PLACE WHERE EVEN THOUGH THEY ARE COMMUNICATING BACK AND FORTH, OTHER PEOPLE ARE PART OF THAT CHAT ROOM. IS THIS A CHAT ROOM CASE?

NO, YOUR HONOR, AND

SO THEY ARE INCORRECT?

THE DIFFICULTY ARISES THROUGH THE RATHER THIN, IF YOU WILL, FACTS, NOT THIN IS NOT THE RIGHT WORD. WHAT HAPPENED HERE IS YOU HAVE SOMEONE WHO PLED NOLO TO ONE VIOLATION OF EACH STATUTE AND THEY ESSENTIALLY STIPULATED TO THE POLICE REPORT.

THE POLICE REPORTS SAY AN INTERNET CHAT ROOM?

THEY STARTED OUT IN THE CHAT ROOM BUT OVER THE COURSE OF ABOUT TWO WEEKS MR.^SIMMONS HIMSELF INITIATED CONTACT WITH SANDI, WHICH OBVIOUSLY WAS A MALE DETECTIVE POSING AS A 13-YEAR-OLD GIRL IN LAKE CITY AND HE REPEATEDLY TOLD HIM WHO SHE WAS AND HOW OLD SHE WAS.

AS I UNDERSTAND THIS PERSON IS PARTICIPATING WHEN THEY ARE TALKING ABOUT A CHAT ROOM AND VARIOUS PEOPLE ARE COMMUNICATING ON AN INTERNET HOOK UP, AND THEN THAT'S HOW THE DEFENDANT AND THIS 13-YEAR-OLD GOT TO KNOW ABOUT EACH OTHER AND THEN THEY COMMUNICATED DIRECTLY WITH EACH OTHER.

THAT'S THE CORRECT READING OF THE RECORD, YOUR HONOR.

AND THE FACT THAT THEY, IF YOU WILL, MET EACH OTHER INITIALLY IN THE CHAT ROOM IS NOT WHAT GAVE RISE TO THE CRIMINAL CULPABILITY ON THE STATUTE. IT IS WHEN MR.^SIMMONS INITIATED CONTACT WITH SANDI BY SENDING A MESSAGE TO HER AND SURE THE POLICE REPORT

COULD HAVE BEEN A LITTLE MORE SPECIFIC, BUT REMEMBER THIS DOES SHOW THIS THING WENT ON REPEATEDLY OVER ABOUT TWO WEEKS AND HE TALKS ABOUT HOW AFTER THE INITIAL FEW HOURS, MR. SIMMONS WOULD COME BACK AND MAKE CONTACT BY BUZZING AND THEN LATER ON DURING THE COURSE OF THESE CONVERSATIONS HE SENT NUDE PICTURES OF HIMSELF AND SO FORTH.

WAS IT BROAD ENOUGH, THOUGH, TO COVER THE SCENARIO THAT THE CHAT ROOM SCENARIO?

THE CHAT ROOM DOES NOT APPLY JUST TO THE CHAT ROOM CONDUCT, YOUR HONOR. LET ME JUST BACK UP AND SAY THAT THE DISSEMINATION STATUTE IS THE LEAST RESTRICTIVE ALTERNATIVE AVAILABLE BECAUSE WHAT IT DOES BY VIRTUE OF THE DEFINITION OF TRANSMIT AND THE EXCLUSION OF A BROAD RANGE OF INTERNET TYPE COMMUNICATION IN THE FLUSH LANGUAGE AT THE END OF THE STATUTE MAKES IT CLEAR THAT THE ONLY THING THAT IS CULPABLE IS WHEN THE SENDER CONTROLS WHO THE RECIPIENT IS INITIALLY. HOW DOES THAT HAPPEN BECAUSE IT HAS TO BE TO A SPECIFIC INDIVIDUAL VIA EMAIL. NOW, THE ONLY TYPE OF INTERNET COMMUNICATION MENTIONED IN THE DEFINITION OF TRANSMIT IS ELECTRONIC MAIL. ANYTHING THAT IS NOT ELECTRONIC MAIL IS OUT BY, YOU KNOW

WHAT ABOUT MR. SHEPPARD'S ARGUMENT THAT ELECTRONIC MAIL IS NOT PART OF THE COMMON KNOWLEDGE?

MAIL IS, YOUR HONOR, AND THE AVERAGE PERSON KNOWS THE DIFFERENCE BETWEEN A TRADITIONAL MAIL, SENDING AN ENVELOPE AND PUTTING A POSTER ON A FENCE ANNOUNCING A PUBLIC MEETING WHERE THE AVERAGE PERSON HAS NO CONTROL OVER WHO SEES THAT POSTER AS OPPOSED TO SENDING A PARCEL, A LETTER IN THE MAIL WHERE YOU NAME, USUALLY, THE INDIVIDUAL OR SMALL GROUP OF PEOPLE THAT ARE GOING TO RECEIVE THAT AT A SPECIFIC LOCATION. THAT IS WHY, AND JUSTICE BELL, I WOULD LIKE TO GO BACK TO YOUR OBSERVATION OR QUESTION. IN ALL OF THE CASES THEY SAY SUPPORT THEIR POSITIONS WHETHER IT IS THE MOSTLY FEDERAL CASES INVOLVING STATES THAT HAVE ABSOLUTELY NONE OF THOSE STATUTES ARE ANYWHERE NEAR SIMILAR TO FLORIDA'S. I WOULD USE AS AN EXAMPLE, BECAUSE THEY RELY ON THEM HEAVILY FIRST OFF LET'S JUST LOOK AT ACLU VERSUS JOHNSON, AND I THINK THE REASON THEY USE THAT CASE NOT ONLY ON THE MERITS BUT ALSO TO ARGUE AGAINST ANY NARROWING CONSTRUCTION OF THE STATUTE THIS COURT MIGHT USE. THIS IS A NEW MEXICO STATUTE, YOUR HONOR, AND I AM JUST GOING TO GO STRAIGHT TO THE STATUTE BECAUSE YOU HEAR THAT AND YOU JUST REALIZE THERE IS NO PERSUASIVENESS IN THAT CASE. THE NEW MEXICO STATUTE MADE IT A MISDEMEANOR TO DISSEMINATE MATERIAL THAT IS HARMFUL TO A MINOR AND THAT WAS DEFINED DIFFERENTLY IN THE FLORIDA STATUTE THROUGH THE USE OF A COMPUTER COMMUNICATION SYSTEM TO KNOWINGLY INITIATE OR ENGAGE COMMUNICATION WITH A PERSON UNDER 18 YEARS OLD. THAT IS EVERY FORM OF COMMUNICATION POSSIBLE ON THE INTERNET. THE FLORIDA STATUTE COMES NO WHERE NEAR THAT. THE DEFINITION OF TRANSMIT IS VERY NARROW AND I SPECIFICALLY DISAGREE WITH THEIR INTERPRETATION OF LEGISLATIVE HISTORY. THE SENATE STARTED OUT WITH A BROADER DEFINITION OF TRANSMIT AND I WILL QUOTE IT TO YOU, BECAUSE IT ORIGINALLY APPEARED IN SENATE BILL 144 JUST AS A GENERAL DEFINITION WITHIN THE OBSCENITY STATUTE. TRANSMIT MEANS TO SEND ELECTRONIC MAIL TO A SPECIFIED MAIL ADDRESS OR ADDRESSES. AND THEN THE SENATE ON ITS OWN BY THE WAY IN ITS FOURTH VERSION OF THAT LAW ADOPTED ON ITS OWN THE DEFINITION THAT LATER BECAME LAW HERE, AND I WILL CALL IT THE HARMFUL MATERIAL STATUTE, YOUR HONOR, AND THEN IN THE WANING DAYS OF THE SESSION THEY ADOPTED THE HOUSE VERSION TO GET SOMETHING DONE, BUT THE CURRENT DEFINITION ONLY SAYS TO A SPECIFIC INDIVIDUAL. WELL, THAT'S GOING TO REQUIRE A SPECIFIC ADDRESS BY ITSELF, AND IT IS NOT ALREADY KNOWN BY THE DEFENDANT TO BE A MINOR. SO IN OTHER WORDS YOU HAVE TO BE THINKING IN TERMS OF WHO IS RECEIVING IT, RATHER THAN JUST IS IT AT A PARTICULAR INTERNET ADDRESS. I SUGGEST TO THE COURT THAT THE LEGISLATURE MOVE TO A NARROWER DEFINITION OUT OF CONCERN FOR THE FIRST AMENDMENT.

COULD YOU ADDRESS THE ISSUE, THE HARMFUL TO MINORS, LET'S TAKE THE SCENARIO THAT IS IN THERE WITH SEX EDUCATION, I WANT TO MAKE SURE THAT, YOU KNOW, 15 TO 18-YEAR-OLDS GET SEX EDUCATION INFORMATION, MINORS, AND IS IT APPROPRIATE FOR SOMEONE TO SEND, YOU KNOW, FROM WASHINGTON, D.C., SEX EDUCATION MATERIALS INTO A MINOR IN FLORIDA?

YOUR HONOR, THAT WOULD NOT BE CULPABLE UNDER THE STATUTE FOR THIS REASON AND I WOULD ASK THE COURT TO LOOK TO TWO CASES FOR THAT. THE FIRST WOULD BE THE U.S. SUPREME COURT DECISIONS WHICH INVALIDATED THE COMPUTER DECENCY STATUTE AND THE REASON THEY SAID THAT STATUTE VIOLATED THE FIRST AMENDMENT WAS THAT THE DEFINITION OF HARMFUL MATERIAL THAT WAS USED DIDN'T INCORPORATE ALL OF THE PRONGS FOR THE TEST OF OBSCENITY IN THE MILLER CASE IN THE U.S. SUPREME COURT PUT IN THE CONTEXT OF FOUR MINORS. THEN YOU LOOK AT THE ASHCROFT DECISION THEY SAID IT WAS OKAY TO USE A COMMUNITY-BASED STANDARD AS PART OF THAT DEFINITION OF THE FIRST AMENDMENT. FLORIDA USES ALL THREE PRONGS, AND TO MEET TO BE CULPABLE UNDER THE FLORIDA STATUTE THE MATERIAL THAT IS SENT IN ORDER TO BE HARMFUL TO MINORS IT HAS TO APPEAL PREDOMINANTLY TO THE PRURIENT INTERESTS OF MINORS. PATENTLY OFFENSIVE TO ADULTS IN THE COMMUNITY, WITH WHAT IS SUITABLE FOR MINORS, THAT'S YOUR SECOND MILLER PRONG WITH YOUR COMMUNITY-BASED STANDARD AND THEN THE LAST TAKEN AS A WHOLE IT HAS TO BE WITHOUT SERIOUS LITERARY, ARTISTIC OR OTHER VALUE FOR MINORS.

DO YOU SEE

SO, YOUR HONOR, NO, WHAT YOU MENTIONED WOULD NOT BE CULPABLE.

IF I WAS SENDING IT TO A FIVE-YEAR-OLD WOULD MY MOTIVATION, WOULDN'T THAT BE DIFFERENT BECAUSE I'M GOING TO USE SEX EDUCATION BUT I AM REALLY GOING TO GET THE LIST OF ALL OF THE KINDERGARTENS.

THE LEGISLATURE IS CONSTITUTIONALLY PERMITTED TO TREAT ALL MINORS THE SAME IF IT DOES SO IN A PERMISSIBLE MANNER.

SO WE HAVE TO ASSUME 17-YEAR-OLD MINOR, NOT A FIVE-YEAR-OLD MINOR FOR THIS STATUTE?

THIS STATUTE EXTENDS THE MINIMUM PROTECTION THE LEGISLATURE THOUGHT WAS NECESSARY TO THE OLDEST OF MINORS, THAT IS SAY A 17 TO 18-YEAR-OLD. IT FOLLOWS TO EXTEND AT LEAST THAT MUCH PROTECTION TO THE CHILDREN EVEN YOUNGER.

SO IF HE WAS SENDING SEX EDUCATION MATERIALS TO A FIVE-YEAR-OLD, THAT WOULD NOT PROSECUTE ON THAT?

IF IT MEETS THE DEFINITION OF HARMFUL TO MINORS.

THE ISSUE ABOUT THE PATENTLY OFFENSIVE TO PREVAILING STANDARDS IN THE ADULT COMMUNITY AND THIS ISSUE OF THE DORMANT COMMERCE CLAUSE, YES, THE INTERNET IS A VERY DIFFERENT ANIMAL BUT I WOULD ASSUME THAT THERE HAVE BEEN FOR YEARS REGULATIONS ABOUT THOSE THAT ARE SENDING OUT PORNO MOVIES ABOUT WHO THEY CAN SEND THEM TO, WHO THEY CAN'T, AND THAT THAT VARIES FROM STATE TO STATE. ARE THERE ANY CASES THAT DEAL WITH THAT ISSUE ABOUT WHETHER THAT BECAUSE IT WOULD SEEM THAT SOMEBODY WHO WAS AN ADULT SENDING PORN O GRAPHIC MOVIES WOULD HAVE TO DETERMINE WHAT THE LAW IS IN THE STATE WHERE THEY ARE SENDING THEM TO, BEFORE THEY KNOW WHETHER THEY CAN LEGALLY SEND THEM OR NOT.

I WANT TO ASSUME, YOUR HONOR, THAT YOU ARE TALKING ABOUT MATERIAL THAT IS NOT LEGALLY ON SCENE AND IT HAS OBSCENE AND IT HAS NO FIRST AMENDMENT PROTECTION.

IS THAT WHAT WE ARE

NO, YOUR HONOR, THE HARMFUL MATERIALS STATUTE IS MATERIAL THAT WOULD BE PROTECTED.

NO, I AM TALKING THEN ABOUT IT IS OKAY TO SEND IT TO ADULTS BUT NOT MINORS.

YES, YOUR HONOR, WHAT YOU HAVE HIT ON IS PROBABLY THE MOST SUPERFICIAL POINT IN THE COMMERCE CLAUSE, BECAUSE IT IS EXPOSING SOMEONE TO INCONSISTENT CRIMINAL LAWS. THREE CASES I WOULD ASK THIS COURT TO LOOK AT, RULINGS FROM THE SUPREME COURT WHICH I THINK COLLECTIVELY STANDS THE PROPOSITION THAT THE STATE WHEN THEY ARE ENACTING CRIMINAL LEGISLATION, PARTICULARLY WHEN THAT INTEREST IS SO IMPORTANT AND IT IS CONSIDERED COMPELLING FOR FIRST AMENDMENT ANALYSIS THEY HAVE MUCH MORE LATITUDE UNDER THE COMMERCE CLAUSE THAN THEY WOULD IF THEY WERE ENACTING ECONOMIC REGULATION AND, YOUR HONOR, IT IS A PROCESS TO GET THERE. FIRST OFF, LOOK TO

THIS KIND OF BLENDS ECONOMIC AND CRIMINAL, ISN'T IT, BECAUSE A LOT OF THESE WHERE YOU WOULD GET THE EMAILS ARE ADVERTISEMENTS FOR PEOPLE TO GO VISIT WEBSITES AND PAY MONEY TO SEE PEOPLE NAKED ON THAT WEBSITE, AND SO THAT THERE IS A COMMERCIAL ASPECT TO IT.

YOUR HONOR, IF YOU ARE TALKING IN TERMS OF COMMERCE CLAUSES THERE ARE ABSOLUTELY NOTHING IN THIS RECORD TO INDICATE THIS IS ANYTHING BUT PERSONAL USE.

I UNDERSTAND.

YOU WOULD HAVE STANDING TO RAISE THAT ASPECT OF THE DORMANT COMMERCE CLAUSE CHALLENGE.

LET ME ASK YOU THE SAME QUESTION I ASKED MR. SHEPPARD WHICH IS WOULD IT BE A VIOLATION OF THE STATUTE IF AN INTERNET PORN SITE SENT OUT ADVERTISEMENTS TO A GLOBAL EMAIL THAT PEOPLE GET AS JUNK MAIL AND HAPPENS TO GET TO A MINOR.

NO, YOUR HONOR, YOU HAVE TO KNOW AHEAD OF TIME THAT THE PERSON YOU ARE DEALING WITH ACTUALLY IS A MINOR OR YOU BELIEVE THEY ARE A MINOR AND THEY ACTUALLY HAVE TO BE IN FLORIDA. THERE IS NOT A REASONABLE BELIEF, IN ORDER TO PUT THE CONDUCT PARTLY IN FLORIDA. SO, AGAIN, FLORIDA IS NOT ENFORCING ITS LAW TO CONDUCT WHOLLY OUTSIDE THE STATE. THE MESSAGE HAS TO BE RECEIVED IN FLORIDA.

IT IS NOT A SHOULD HAVE KNOWN STANDARD?

NOT AS TO THE LOCATION OF THE RECIPIENT.

NO, THEY BELIEVE THAT THE RECIPIENT OF THE COMMUNICATION WAS A MINOR BECAUSE IF YOU SEND OUT A GLOBAL EMAIL OF A PORN SITE YOU ARE LIKELY TO LET ME JUST FINISH.

I'M SORRY.

YOU ARE LIKELY TO RECEIVE OR INCLUDE IN THERE MINORS, I MEAN IT IS JUST STATISTICALLY PROBABLE THAT THAT WILL HAPPEN. SO WOULD THAT BE BELIEVED TO BE A MINOR? IS THERE A SHOULD HAVE KNOWN OR DOES THERE HAVE TO BE ACTUAL KNOWLEDGE UNDER A?

AS TO YOU HAVE TO KNOW THAT THE PERSON IS A MINOR OR AT LEAST BELIEVE THAT SPECIFIC PERSON IS A MINOR.

SO IT IS NOT A SHOULD HAVE KNOWN STANDARD?

NO, YOUR HONOR, AND THAT IS ONE OF THE REASONS THE FEDERAL COURT IN ACO VERSUS JOHNSON SAID THEY WERE NOT GOING TO RECONSTRUCT THAT STATUTE OR NARROWLY CONSTRUE IT BECAUSE THE KNOWING AND INTENTIONALLY LANGUAGE OUT OF THE NEW MEXICO STATUTE JUST MAKES YOU ACT DELIBERATELY AND THEY WERE SAYING THAT IS FAR TOO BROAD. I WANT TO GO BACK TO HOW YOU HANDLE THE DORMANT COMMERCE CLAUSE CHALLENGE THE STATE'S LATITUDE TO ENACT CRIMINAL LAWS AND IT IS VERY INTERESTING. FIRST LOOK AT THE ASHCROFT I DECISION. IT HELPS THE STATE IN ITS COMMERCE CLAUSE ARGUMENT. IT SAID THAT A COMMUNITY-BASED STANDARDS AS PART OF YOUR DEFINITION OF HARMFUL MATERIAL IS ACCEPTABLE FACIALLY UNDER THE FIRST AMENDMENT. WHAT COULD BE MORE INCONSISTENT THEN A COMMUNITY-BASED STANDARD? COMMUNITIES VARY WITHIN A COUNTY MUCH LESS STATE TO STATE. IF THE FIRST AMENDMENT TOLERATES THAT DEGREE OF INCONSISTENCY HOW CAN THE COMMERCE CLAUSE TAKE IT AWAY? YOU ARE ELEVATING THE COMMERCE CLAUSE ABOVE THE AMENDMENT THAT IS SPECIFICALLY DESIGNED TO PROTECT SPEECH. THE SECOND CASE I WOULD ASK YOU ALL TO LOOK AT WOULD BE LOPEZ WHICH IS THE REASON THAT U.S. SUPREME COURT CASE THAT INVALIDATED AND HELD THAT THE ACT WAS BEYOND THE CONGRESS'S COMMERCE CLAUSE AUTHORITY. IN GETTING TO THAT CONCLUSION THE U.S. SUPREME COURT SAID THE STATES OF THE PRIMARY AUTHORITY FOR DEFINING AND ENFORCING CRIMINAL LAW. HOW CAN EACH STATE BE A PRIMARY AUTHORITY FOR DEFINING AND ENFORCING CRIMINAL LAW IF THERE IS A CONSISTENCY REQUIREMENT IMPOSED BY THE WHEN THAT CRIMINAL ACTIVITY INVOLVES THE POSSIBILITY OF INTERSTATE CONDUCT IMPOSED BY THE COMMERCE CLAUSE? THE U.S. SUPREME COURT COULDN'T SAY THAT. OR CONVERSELY THE FIRST STATE TO PASS A CRIMINAL STATUTE THAT ADDRESSED THE POSSIBILITY OF INTERSTATE CRIMINAL CONDUCT WOULD CONTROL ALL OF THE STATES THAT FOLLOWED BECAUSE THEY HAVE TO BE CONSISTENT WITH IT. AND THE LAST CASE THAT

LET ME ASK YOU THIS: IS THE DORMANT COMMERCE CLAUSE ANALYSIS AND THE COMMERCE CLAUSE ANALYSIS AS TO WHAT THE FEDERAL GOVERNMENT CAN DO IN REGULATING INTERSTATE COMMERCE, ARE THOSE MUTUALLY EXCLUSIVELY WHERE ONE ENDS IS WHERE THE OTHER BEGINS?

THE DORMANT COMMERCE CLAUSE IS WHEN THE FEDERAL GOVERNMENT HASN'T ACTED, YOUR HONOR.

BUT LET'S SAY IN THE COMMERCE CLAUSE ANALYSIS, THE SUPREME COURT HAD SAID EVEN DESPITE LOPEZ AND MORRISON AND A COUPLE OF OTHER EXCEPTIONS THEY HAVE GENERALLY SAID CONGRESS HAS PRETTY BROAD POWERS OVER INTERSTATE COMMERCE AND THE RECENT MARIJUANA CASE THEY SAID EVEN THAT, EVEN SOMEBODY WHO IS USING MARIJUANA FOR MEDICINAL PURPOSES IS STILL AFFECTING INTERSTATE COMMERCE SOMEHOW SO THE POWER IS VERY BROAD. DOES THAT MEAN TO THE EXTENT THAT CONGRESS' POWER IS BROAD THEN THE STATE'S POWER IS NARROW?

NO, YOUR HONOR. FOR THIS REASON.

THERE IS AN INTERSECTION THERE?

I UNDERSTAND WHAT YOU ARE SAYING. FIRST OFF WHAT THEY HELD IN THE MEDICAL MARIJUANA CASE WAS THAT THE CONTROLLED SUBSTANCE ACT WAS SO EXTENSIVE AND SO THOROUGH THAT IT LEFT NO ROOM FOR PURELY INTRASTATE LAWS THAT WOULD FROM US STRAIGHT THE FEDERAL ENFORCEMENT SCHEME. THEY CALLED IT A CLOSED SYSTEM. WE DO NOT HAVE THIS HERE BECAUSE THE FEDERAL STATUTE, THE CLOSEST FEDERAL STATUTE DOESN'T EVEN ADDRESS PERSONAL USE OF THE INTERNET AT ALL. IT IS CONFINED TO BUSINESS PURPOSES. THAT'S WHY YOU ARE TALKING DORMANT COMMERCE CLAUSE HERE RATHER THAN IF THERE

WAS AN AFFIRMATIVE ACT BY CONGRESS WE WOULD BE HERE UNDER FEDERAL PREEMPTION SOVEREIGN KIND OF ARGUMENT. THE VERY SAME CASE THAT IN VALUE ITED LOPEZ, THE COUNTRY SCHOOL ZONES ACT, TALKS ABOUT THERE IS LIMITS ON COMMERCE AUTHORITY WAS A CASE, YOUR HONOR, THAT SAID THE STATES WITH THE PRIMARY AUTHORITY FOR DEFINING THE LAW IN THE FIRST PLACE. PART OF THAT RATIONALE WAS THEY SAID THERE IS NO GENERAL CONGRESSIONAL AUTHORITY TO ENACT NATIONWIDE CRIMINAL LAWS. IT HAS TO DERIVE FROM A POWER SPECIFICALLY GRANTED TO CONGRESS, TO THE FEDERAL GOVERNMENT BY THE STATES TO CONGRESS AND IT IS GOING TO COME USUALLY FROM THE COMMERCE CLAUSE. THERE MIGHT BE THE OCCASIONAL ARTICLE 1 POWER AND YOU MIGHT FIND ALTHOUGH IT IS NOT HELPFUL HERE FREE STANDING AUTHORITY UNDER THE CIVIL RIGHTS AMENDMENTS TO THE CONSTITUTION TO MAKE CRIMINAL STATUTES, BUT GENERALLY CONGRESS HAS TO RELY ON COMMERCE CLAUSE. THEY DIDN'T HAVE IT. SO THE STATES HAVE HISTORICALLY MORE LATITUDE TO ENACT CRIMINAL LAWS WITHOUT RUNNING AFOUL THE COMMERCE CLAUSE. THAT'S THE NECESSARY INFERENCE AND IT WAS ECONOMIC REGULATION.

CONGRESS AT LEAST HAS ATTEMPTED TO ACT IN THIS AREA AND THEIR ATTEMPTINGS HAVE BEEN STRICKEN ON FIRST AMENDMENT GROUNDS BUT NOT ON COMMERCE CLAUSE GROUNDS.

WELL, YOUR HONOR, FIRST OFF I WOULD SUGGEST CONGRESS HAS ACTED IN THE AREA OF PERSONAL USE AS OPPOSED TO COMMERCIAL USE OF THE INTERNET, OKAY? BUT TO THE EXTENT THAT YOU CAN FIND SOME COMMERCIAL USE IN THIS STATUTE, CONGRESS' AUTHORITY IS UNDER THE COMMERCE CLAUSE, IF IT FALLS WITHIN THE COMMERCE CLAUSE AUTHORITIES I KNOW THAT IS SORT OF CIRCULAR, NOBODY HAS CHALLENGED, AS FAR AS I KNOW, THE CHILD ONLINE PROTECTION ACT AS BEING IN EXCESS OF CONGRESS' COMMERCE CLAUSE AUTHORITY. IT WOULD BE BIZARRE BECAUSE AFTER ALL THE INTERNET IS A MEDIUM OF COMMUNICATION IN INTERSTATE COMMERCE. WE AGREE WITH THAT. BUT THAT DOESN'T MEAN THAT THE STATES HAVE NO AUTHORITY TO SAY IN A NARROWLY CRAFTED CRIMINAL STATUTE TO PROMOTE A COMPELLING STATE INTEREST THAT YOU CAN'T THAT YOU ARE WITHOUT AUTHORITY TO PREVENT SOMEONE FROM EXPOSING MINORS TO HARMFUL MATERIAL OR IN THE CASE OF A LURING ENTICING STATUTE TO ACTUALLY TRY TO LURE THESE MINORS INTO SEXUAL CONDUCT. THE STATES CAN'T PROTECT MINORS FROM THAT IN THE FACE OF THE DORMANT COMMERCE CLAUSE. YOUR HONORS, AND THERE ARE SEVERAL CASES IN WHICH THE CLOSEST CASE THAT THE STATE COULD FIND INVOLVING STATUTES SIMILAR TO FLORIDA'S WOULD BE THE PEOPLE VERSUS FOLEY FROM NEW YORK AND THE THREE H'S, THE HAYNES, HSU AND HATCH CASES OUT OF CALIFORNIA. IN WHICH THEY UPHELD THE COMMERCE CLAUSE CHALLENGE. IT WASN'T FIRST AMENDMENT CASES. STATE LAWS THAT WERE A HYBRID OF THE TWO STATUTES HERE IN FLORIDA WHERE IT WAS A CRIME IN THOSE STATES TO SEND HARMFUL MATERIALS DEFINED OFTENTIMES SIMILAR TO HERE, WITH THE INTENT SAY TO SEDUCE A MINOR. SO WHAT THEY DID WAS THEY MERGED THE TWO STATUTES.

YOU DON'T SEE ANY DIFFERENCE BETWEEN THE TWO SECTIONS OF THE STATUTES THAT ONE DEALING WITH THE INTRASTATE DISSEMINATION OR HARMFUL MATERIAL AND THE INTERSTATE DISSEMINATION OF THESE KINDS OF MATERIALS? THE INTERSTATE ONE?

YES, I DO, YOUR HONOR. I'M NOT SURE WHAT YOUR QUESTION IS.

THE QUESTION IS WHETHER OR NOT, BECAUSE WE ARE DEALING WITH INTERSTATE IN ONE SECTION OF IT, WHETHER OR NOT WE HAVE A DIFFERENT ANALYSIS OF WHAT OF THE EFFECT ON A DOMINATE DORMANT COMMERCE CLAUSE.

I THINK THE BETTER WAY TO APPROACH THAT AND I KNOW WHAT YOU ARE ASKING, YOUR HONOR, AND TO THE EXTENT HE IS CHALLENGING ON COMMERCE CLAUSE GROUNDS THE DISSEMINATION STATUTE, HE WOULD ONLY HAVE STANDING TO SUE OVER THAT SUBSECTION THAT DEALS WITH COMMUNICATIONS THAT ORIGINATE OUTSIDE FLORIDA.

THEN WASN'T THIS DEFENDANT OUTSIDE OF THE STATE OF FLORIDA? WASN'T HE FROM VIRGINIA?

VIRGINIA, YES, YOUR HONOR. CONSEQUENTLY HE DOESN'T HAVE STANDING TO RAISE A COMMERCE CLAUSE CHALLENGE OF THE STATUTE AS IT APPLIES TO SOMEONE WHO SENDS A MESSAGE FROM FLORIDA TO A FLORIDA SENDER TO A FLORIDA RECIPIENT.

I WAS ASKING YOU ABOUT THE ONE THAT WOULD INVOLVE HIM, BECAUSE HIS WOULD HAVE BEEN INTERSTATE.

RIGHT. SUBSECTION 3, YOUR HONOR, THAT'S THE PORTION OF THE STATUTE.

MR.^McCOY, THANK YOU. WITH OUR HELP YOU HAVE USED UP YOUR TIME AND MR.^SHEPPARD, YOU HAVE USED UP YOUR TIME. SO WE THANK BOTH OF YOU FOR AN INFORMATIVE ORAL ARGUMENT BEING RESPONSIVE TO OUR QUESTIONS AND BEING KNOWLEDGEABLE ABOUT THE ISSUES.