No.

IN THE SUPREME COURT OF THE UNITED STATES

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ILLIANA GRIGORIOU, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA*

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**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI**

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

**ILLIANA GRIGORIOU,**
Appellant,

v.

**STATE OF FLORIDA,**
Appellee.

No. 4D2024-0724

[January 8, 2025]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barbara R. Duffy, Judge; L.T. Case No. 23-001103CF10A.

Carey Haughwout, Public Defender, and Jeffrey L. Anderson, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Rachael Kaiman, Senior Assistant Attorney General, West Palm Beach, for appellee.

GERBER, J.

The state originally charged the defendant by information with one count of writing threats to kill or to do bodily injury, in violation of section 836.10(2), Florida Statutes (2022). Section 836.10(2) pertinently provides:

> It is unlawful for any person to send, post, or transmit, or procure the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to: … [k]ill or to do bodily harm to another person[.]

§ 836.10(2), Fla. Stat. (2022). The charge arose out of several texts which the defendant had sent to the victim over the course of a day.

The defendant filed a motion to dismiss, arguing section 836.10 is unconstitutional both facially and as applied to the defendant's conduct as charged. After the circuit court denied the defendant's motion, the state

and the defendant agreed upon the defendant entering a no contest plea to a reduced charge of misdemeanor assault, while reserving her right to appeal the denial of her dispositive motion to dismiss the section 836.10(2) charge. That reservation led to this appeal.

We affirm the circuit court's denial of the defendant's motion to dismiss. *See B.W.B. v. State*, 374 So. 3d 40, 46 (Fla. 4th DCA 2023) ("We hold section 836.10 is not overbroad. This is because section 836.10 has a limited objective—to punish [written or electronic] 'threats' of violence sent[, e.g.,] through electronic social media. Because section 836.10 deals only with 'threats' to commit a violent act, it does not violate … First Amendment rights.") (internal citation omitted); *Puy v. State*, 294 So. 3d 930, 934 (Fla. 4th DCA 2020) ("Because there was a question of material fact to be decided by the factfinder—whether the posting was a threat under the statute—the trial court correctly denied appellant's motion to dismiss."); *Saidi v. State*, 845 So. 2d 1022, 1026 (Fla. 5th DCA 2003) ("[S]ection 836.10 is not vague.").

The defendant's appeal raises a secondary argument that the circuit court erred in partially denying the defendant's Florida Rule of Criminal Procedure 3.800(b)(2) motion to correct sentencing errors relating to the imposition of costs. On this argument, we agree with the state's response that the circuit court properly denied the defendant's rule 3.800(b)(2) motion with the exception of one cost—the $26 cost charged for certain county court traffic cases. Thus, we reverse the imposition of that cost, and remand for the circuit court to strike that cost. We affirm the remainder of the circuit court's order partially denying the defendant's rule 3.800(b)(2) motion.

*Affirmed in part, reversed in part, and remanded with directions.*

CONNER and FORST, JJ., concur.

* * *

***Not final until disposition of timely filed motion for rehearing.***

# Supreme Court of Florida

TUESDAY, NOVEMBER 25, 2025

Illiana Grigoriou,
Petitioner(s)
v.
State of Florida,
Respondent(s)

**SC2025-0168**
Lower Tribunal No(s).:
4D2024-0724;
062023CF001103A88810

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, LABARGA, COURIEL, FRANCIS, and SASSO, JJ., concur.

A True Copy
Test:

SC2025-0168 11/25/2025
John A. Tomasino
Clerk, Supreme Court
SC2025-0168 11/25/2025

KS

Served:

JEFFREY L. ANDERSON
CRIM APP WPB ATTORNEY GENERAL
BROWARD CLERK
HON. BARBARA DUFFY
RACHAEL KAIMAN

## ARGUMENT

### POINT I

SECTION 836.10 OF THE FLORIDA STATUTES (2022) IS FACIALLY UNCONSTITUTIONAL AS BEING OVERBROAD IN VIOLATION OF THE 1ST AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant moved to dismiss on the ground that § 836.10 was unconstitutional on its face and as applied to her case R53-77. The trial court denied the motion to dismiss R86-87,123. This was error.

As part of her plea, Appellant reserved the right to appeal the denial of her dispositive motion to dismiss which was based on § 836.10 being facially unconstitutional and unconstitutional as applied R123-24,130.

This Court has jurisdiction under Florida Rule of Appellate Procedure 9.140(b)(2)(A)(i) ("A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.")

Section 836.10 of the Florida Statutes (2022) is **facially** unconstitutional as being overbroad in violation of the 1st and 14th Amendments to the United States Constitution.

As will be explained later, while Florida courts have addressed the aspects of the constitutionality of § 836.10 **as applied** they have not addressed the aspects of the **facial** constitutionality of the statute.

§ 836.10(2)(2022) provides:

> (2) It is unlawful for any person to send, post, or transmit, or procure the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to:
>
> (a) Kill or to do bodily harm to another person; or
>
> (b) Conduct a mass shooting or an act of terrorism.

**Examples of protected speech § 836.10 facially prohibits**

The statute prohibits certain words. It does not limit its prohibition by providing context or whether the sending is limited by intent or recklessness. The statute also prohibits those who procure the sending of words, even though they did not make the threat.

Even if § 836.10 only prohibited unprotected speech it still violates the First Amendment by not providing a mens rea to the statute to avoid the chilling effect on protected speech.

§ 836.10 does not limit the purpose of the sending. The sending

could be for the purpose of a joke, to educate another, to blow off steam etc. Section 836.10 prohibits legitimate protected speech and thus is overbroad violating the First Amendment.

For example, § 836.10 prohibits frowned upon, but not unprotected, speech of "trash talk". It is common in sports to threaten with trash talk. It is also common in electronic gaming over the internet. In a very popular game-"Call of Duty" the goal is to kill or capture the opponent. Gamers commonly have audio and chat connection to the opponent they play against. Threats to kill by participants are common—the goal to kill is part of the game. A Florida gamer often plays against another on the other side of the world –hardly a real or true threat. § 836.10(1) gives very broad definitions of records so the exchange of these threats by audio, chat room, etc. is a record.

But in a game and trash talking is not a real or true threat. Yet, all the elements of § 836.10 are met. § 836.10 does not limit the context of the threat or require a certain state of mind. § 836.10 infringes upon protected speech in violation of the First Amendment.

Another example is where a candidate sends his backers an email saying he "will kill" his opponent in the election. On its face

this is a violation of § 836.10 as it has (1) a threat to kill, (2) is electronically transmitted, and (3) and it may be viewed by another. It certainly is hyperbole. But § 836.10 doesn't exclude hyperbole from its reach by limiting context or intent. The statute is facially unconstitutional in violation of the First Amendment.,

A final example involves procuring the sending of the threat even though the procurer did not make the threat. Consider the following writing:

> Well, I'd rather see you dead, little girl
> Than to be with another man
> You better keep your head, little girl
> Or I won't know where I am
>
> You better run for your life if you can, little girl
> Hide your head in the sand, little girl
> Catch you with another man
> That's the end, little girl …
>
> I mean everything I've said
> Baby, I'm determined
> And I'd rather see you dead
>
> You better run for your life if you can, little girl
> Hide your head in the sand, little girl
> Catch you with another man
> That's the end, little girl
>
> I'd rather see you dead, little girl

This writing has a threat to kill; I sent or transmitted the writing by

the filing the brief; and is actually meant to be read by others. In other words, all the elements of §836.10 had been met.

**Do the above examples call for conviction under § 836.10?**

Despite the fact that all the elements of § 836.10 were meet—no conviction is warranted because the sending/transmitting in the above examples is not speech which is unprotected by the First Amendment. In fact, because the way to discuss the last written threat above is to quote it—but for the First Amendment—this appellate issue could not be raised without violating § 836.10.

The last written threats are actually lyrics from a 1965 Beatles song called "Run for your life" from their Rubber Soul album. Millions of people have accessed these lyrics from sites such as YouTube, etc.[1] A seeming innocent email between colleagues about the lyrics of a rock song could violate the statute. See *Counterman v. Colorado*, 600 U.S. 66, 87, 143 S. Ct. 2106,2122, 216 L. Ed. 2d 775 (2023) (So-

[1] § 836.10 is very broad and prohibits procuring or sending a writing or record of the threat. Thus, there have been 6.1 million violations by accessing the song from YouTube at youtube.com/watch?v=yzHXtxclkg4

tomayor,J., concurring in part). "Without sufficient protection for unintentionally threatening speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student **violent music lyrics**, or for unreflectingly using language he read in an online forum." *Id* (emphasis added).

The wording of § 836.10 is particularly troublesome in many respects. For example, if someone received an email with a bomb threat what do they do? Forward it to a parent or friend seeking advice about what to do? Because of the lack of context or mens rea, § 836.10 would be violated by doing so. Do they forward the email to authorities? One would hope so, but maybe because of the wording in the statute the person would hesitate to do so. After all, by procuring the sending of the email containing the bomb threat to another, the person would have violated § 836.10 despite their good intentions. § 836.10 does not exempt one from the statute based on a legitimate purpose of the sending.

**Facial overbreadth in violation of the First Amendment**

States are prohibited from "abridging the freedom of speech." First Amendment, United States Constitution; *Virginia v.*

*Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (noting that the First Amendment is applicable to the states).

"A statute is impermissibly overbroad under the First Amendment-and facially unconstitutional-if it prohibits 'a substantial amount of protected speech.'" *United States v. Fleury*, 20 F.4th 1353, 1362 (llth Cir. 2021).

"When legislation is drafted so that it may be applied to conduct that is protected by the First Amendment, it is said to be unconstitutionally overbroad." *Wyche v. State*, 619 So.2d 231,235 (Fla.1993).

"This overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially 'because it also threatens others not before the court-those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'" *Id.*

Section 836.10 is unconstitutionally overbroad because it is not limited by subjective mens rea and objective "true threat" elements.

**But § 836.10 prohibits "threats"--aren't all threats unprotected speech?**

No. As explained by the United States Supreme Court in *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023) not all threats are unprotected –only "true" threats are unprotected. 600 U.S. 74 (distinguishing "true" threats from threats made from "jests or hyperbole or stating "I am going to kill you for showing up late"); *State v. Haugen*, 392 N.W.2d 799 (N.D. 1986) (Hyperbole and bluster do not constitute a "true" threat.).

From *Counterman* it is clear, it is not the words alone that constitute a "true threat". Rather, it is the words and the context in which they are used that constitutes a true threat.

§ 836.10 prohibits sending all threats not merely "true threats" thus the language is overbroad in that it prohibits protected speech made as jokes, hyperbole, or even discussion of music lyrics. The statute's language prohibits all manner of "threats" -- including outlandish and impossible threats that would not cause a reasonable listener to be afraid.

The prosecutor below argued a potential jury instruction defines true threat R79. In essence the prosecutor conceded § 836.10 was facially overbroad as the statute itself did not contain this type of narrowing to avoid facial overbreadth.

§ 836.10 is not limited to the sending of true threats and allows for prohibition of protected speech and thus is facially unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution.

**Even if § 836.10 was narrowly written so as to prohibit only "true threats" it would still be overbroad in violation of the First Amendment due to the lack of notice of any mens rea needed to avoid the *chilling* effect on protected speech.**

The legislature did not put any mens rea limitation to the statute. As read, the words of the statute provide for strict liability without any particular intent or recklessness. Thus, a citizen reading the statute could be deterred or chilled from sending a message that is legitimate protected speech.

"The deleterious result of overbroad statutes often is described as a 'chilling effect.' " *J.L.S. v. State*, 947 So. 2d 641, 644 (Fla. 3d DCA 2007) (citing *Schmitt v. State*, 590 So. 2d 404, 412 (Fla. 1991)).

In *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023) the Court explained that the First Amendment may be violated even where only "true threats" are involved because of the potential **chilling effect or self-censorship** on other citizens:

> Yet the First Amendment may still demand a subjective mental-state requirement **shielding some true threats from liability**. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms. Gertz, 418 U.S. at 340, 94 S.Ct. 2997.

600 U.S. at 75; 143 S.Ct. at 2114-15 (emphasis added)

The Court in *Counterman* went on to explain the chilling effect First Amendment violation is prevented by the mens rea requirement:

> And an important tool to prevent that outcome—to stop people from steering "wide[ ] of the unlawful zone"—is to condition liability on the State's showing of a culpable mental state. Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)..... Or said a bit differently: "[B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability," a mens rea requirement "provide[s] 'breathing room' for more valuable speech." Alvarez, 567 U.S. at 733, 132 S.Ct. 2537 (BREYER, J., concurring in judgment).

*Id.*

Law abiding citizens refrain from doing what the statute says is prohibited. Again, the problem here is that a citizen reading § 836.10

does not read any mens rea requirement of intent or recklessness. Should she discuss the lyrics of *Run for your life* with a friend or, because § 836.10 does not express it only applies to intentional or reckless transmissions to cause fear, should she steer away from such a transmission? This is the chilling effect and makes § 836.10 facially unconstitutional.

**But can't the facial overbreadth problem with the statute be cured by court's changing the words of the statute or by a jury instruction?**

No, for several reasons.

Courts "are not at liberty to add words to statutes that were not placed there by the Legislature." *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999).

It is inappropriate to judicially rewrite a statute to add a mens rea element in order to resolve a First Amendment overbreadth problem. *Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993); *United States v. Stevens*, 559 U.S. 460, 481 (2010)(We "'will not rewrite a ... law to conform it to constitutional requirements,' "); *R. R. v. New Life Community Churcy of CMA, Inc.*, 303 So. 3d 916, 923 (Fla. 2020)( "[t]o supply omissions transcends the judicial function.").

The text of the statute is supreme – and that text is more authoritative than the case law interpreting the statute. *Nader v. Florida Dept. of Highway Safety & Motor Vehicles*, 87 So.3d 712, 726 (Fla. 2012).

What words would be added or changed by the court?

One could add in a mens rea.

But which mens rea? Intent to cause fear or recklessness in doing so? The legislature did not express which mens rea it wanted. It certainly could have done so if it wanted to.

A court cannot rewrite the statute for the legislature. It is possible the Legislature wanted § 836.10 to be a strict liability crime. In § 836.10(3) the legislature exempted various entities that obviously have no intent/reckless mens rea from liability. If the Legislature intended to have a mens rea in the statute it would not have excluded entities that have no mens rea from liability.

Probably the most important reason a court cannot add or change the words of a statute goes back to the First Amendment problem of the potential chilling effect. The citizen reads the words of the legislature in determining what to do and not the words of a court. Changing the words by limiting threats to "true threats" or by adding

a requirement of intent or recklessness *in an opinion* does not have any impact on the chilling effect as the words *in the statute* is what is read by the citizen.

**Hasn't the *facial* constitutionality of § 836.10 already been decided?**

No. There are decisions on the constitutionality of § 836.10 **as applied –** but none of the decisions cover the overbroad chilling effect of the statute or state the statute is **facially** constitutional.

For example, in *B.W.B. v. State*, 374 So.2d 40 (Fla. 4th DCA 2023) this Court never stated that the decision was § 836.10 was **facially** constitutional. Instead, the statute was analyzed on whether § 836.10 was constitutional as applied. The focus was on the snap-chat sent by the juvenile:

> The juvenile posted an image on Snapchat and sent it to a friend. The image showed a person—later identified as the juvenile—in a black cap, wearing large black headphones, a red and black skull mask, black sunglasses, a black hoodie, and a pair of fingerless gloves. In his right hand, he is holding what appears to be a gun. The background is an American flag pinned to a blank wall. The text at the bottom of the photo reads, "Don't go to school tomorrow."

The Court analyzed whether § 836.10 applied but did not analyze the words of the statute to determine if the statute was facially overbroad.

There was not even a single indication this Court considered

whether § 836.10, without a declared mens rea by the legislature, chilled or deterred protected speech. This is the heart of facial constitutionality.

This Court did go on to say –"'a **defendant's** First Amendment rights are not violated by laws prohibiting such threats.' *N.D. v. State*, 315 So. 3d 102,104 (Fla. 3rd DCA 2020)…section 836.10 deals only with 'threats' to commit a violent act, it does not violate **the juvenile's** First Amendment rights" *Id. at 46* (emphasis added). These words go to a defendant's rights. The facial constitutionality of a statute does not go to a defendant's rights – it goes to the rights of other people. The as applied constitutionality goes to the defendant's rights. Also, the case of *N.D.* cited by this Court involve an as applied issue. This Court did not decide facial constitutionality of § 836.10. However, if it was intended to do so, it was wrong for the reasons cited earlier in the brief—particularly in not considering the chilling effect on protected speech.

In addition, in *B.W.B.* this Court stated it was agreeing with the State the statute was "narrowly tailored". This is a major misstep. There are absolutely no cases where an appellate court has found a statute to be "narrowly tailored" by the legislature omitting the mens

rea and contextual definitions. The lack of such "broadens" rather than "narrows" the statute. This misstep should be corrected by this Court, even *en banc* if necessary.

In *N.D. v. State*, 315 So.3d 102,105 (Fla. 3d DCA 2020) the court dealt with an older version of § 836.10 and held "we conclude that as applied, the statute is not unconstitutionally overbroad and does not violate N.D.'s First Amendment rights". Again, the decision did not hold the present § 836.10 was facially constitutional. Also, there are a few reasons why this Court should not follow that case. First, its overbreadth analysis relies on the incorrect premise that "threats to injure or kill" are not constitutionally protected. As explained above, only "true threats" are not protected. Second, the determination that the court could read in a mens rea element into the statute when it was not expressly included does not work in a review of facial constitutionality.

**The new world**

As explained above, § 836.10 is not narrowly drawn to avoid the First Amendment problem of overbreadth. How could a statute that neglects to express a mens rea—thus broadening the horizons of the statute—be considered to be narrowly tailored ?

The newest version of § 836.10 further broadens its scope. The present version includes any record "created, modified, archived, received, or distributed electronically." § 836.10(1). Many new issues arise when considering electronic distribution in the context of social media.

“Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a larger audience." *Counterman v. Colorado*, 600 U.S. 66, 14, 143 S. Ct. 2106,2122,216 L. Ed. 2d 775 (2023) (Sotomayor,J., concurring in part). "Without sufficient protection for unintentionally threatening speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics, or for unreflectingly using language he read in an online forum." *Id.*

In a 2021 article by Jonathan Borge and Elena Nicolaou of Oprah Daily's website, some of the most popular colloquialisms are given and explained. Jonathan Borge and Elena Nicolaou, *Here's What All of Those Popular Slang Words Really Mean*, Oprah Daily

(June 25, 2021), https://www.oprahdaily.com/entertainment/g23603568/slang-words-meaning/.

For example, the word "slay" dates back to the 12th century meaning "to kill violently," but not when used colloquially today. *Id*. Now it means to do something exceptionally well. *Id*. Today's speech requires close scrutiny and taken into consideration. This is speech often expressed on social media through text, video, and even the use of emoticons.

§ 836.10 prohibits legitimate protected speech and thus is overbroad violating the First Amendment.

Even if § 836.10 only prohibited unprotected speech it still violates the First Amendment by not providing a mens rea to narrowly tailor the statute to avoid the chilling effect on protected speech.

**Standard for review**

An appellate court reviews a trial court's order concerning a statute's constitutionality de novo. See *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012) ("A court's decision regarding the constitutionality of a statute is reviewed de novo as it presents a pure question of law.").

"Statutes enjoy a strong presumption in favor of constitutionality and courts are obligated to construe statutes to avoid declaring them unconstitutional." *Wegner v. State*, 928 So. 2d 436, 438 (Fla. 2d DCA 2006) (citations omitted).

However, this does not mean that the constitution is to give way to a statute.

Additionally, in First Amendment cases "the court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

§ 836.10 does not limit the purpose of the sending. The sending could be for the purpose of a joke, to educate another, to blow off steam etc. Section 836.10 prohibits legitimate protected speech and thus is overbroad violating the First Amendment.

Even if § 836.10 only prohibited unprotected speech it still violates the First Amendment where by not providing a mens rea to narrowly tailor the statute to avoid the chilling effect on protected speech. A non-lawyer, familiar with § 836.10, but not versed on the First Amendment, might have been chilled to not discuss the above

examples.

It was error to deny the motion to dismiss.

## POINT II

FLORIDA STATUTE 836.10 IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Appellant moved to dismiss on the ground that § 836.10 was unconstitutional on it face and as applied to her case R53-77. The trial court denied the motion to dismiss R86-87,123. This was error.

As part of his plea, Appellant reserved the right to appeal the denial of his dispositive motion to dismiss which was based on § 836.10 being facially unconstitutional and unconstitutional as applied R123-24,130.

This Court has jurisdiction under Florida Rule of Appellate Procedure 9.140(b)(2)(A)(i) (“A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.”).

"An as applied First Amendment challenge contends that a given statute or regulation is unconstitutional as it has been applied to a litigant's particular speech activity." *McDonough v. Mata*, 489 F. Supp. 3d 1347,1359 (S.D.Fla. 2020) (*citation omitted*).

"In considering an 'as applied' challenge, the court is to consider the facts of the case at hand to determine 'whether the statute can be fairly used to proscribe the defendant's [or respondent's]conduct, and the result is not binding on other parties.'" *Accelerated Benefits Corp. v. Dep't of Ins.*, 813 So. 2d 117, 120 (Fla. 1st DCA 2002).

"It is axiomatic that a ' statute may be invalid as applied to one state of facts and yet valid as applied to another."' *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320,329, 126 S. Ct. 961,968,163 L. Ed. 2d 812 (2006).

"It is true that language of dissatisfaction is 'often vituperative, abusive, and inexact,' but courts must exercise caution in distinguishing true threats from crude hyperbole-a judgment derived from examining the totality of the circumstances." *Smith v. State*, 532 So.2d 50, 53 (Fla. 2nd DCA 1988).

" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

In this case, when looking at the totality of the circumstances,

there were no true threats being made by Appellant, all the texts exchanged are crude hyperbole, sarcasm, and venting.

The dialogue between Appellant and ZF show sarcasm, hyperbole, venting of frustration but not true threats so as to make a 19 year old girl a convicted felon. The following were the exchanges between Appellant and ZF:

| **Appellant** | **ZF** |
|---|---|
| | IK where u live |
| Ik where you live and your Mom keep playing | |
| | Wats yo addy Stop talkin |
| you know where I stay right you all talk | |
| | Lmaoooo |
| Yup | |
| | U scary hoe I'm not worried |
| no one scared I anit worried bout you I'm trynna get shot done with my life and not be a bum | |
| | Make sure he get the right House  |

trust they going to your
Mom house first

lght say less

ight

Yh
Answer my call

Anit getting no calls don't forget
I'm doing shit with my life I'm
at work
Your gonna have a lot of
People I the hospital Z*** keep
Playing

Yo scary ass blocked me 

No one blocked you

Bra unblock my sister

Trust got people out for you
Now Z***
That got all your info

Lmaooo
Bet

You fucked with the wrong
person


OK

you think it's funny imma
think it's hilarious when you
sitting in the hospital

Unblock my sisters n
talk to them

DO THAT PLZZZZZ IM BEGGIN

U 

i'm not gonna tell you when
it's gonna be a surprise ask
the other nigga that did something
just like that he was in icu
for 5 months

OK bet
I'm ready 

Bc he didn't know it
was coming

I'm scared scared

don't got to be
bc he's gonna catch you
off card

u tryna sound sound hard now
watch this

Difference between me n u is
that I stand on wat I need to
stand on

i told you it's gonna be
a surprise they definitely
not coming today bc your
expecting it you think we
that dum

Lol Yh don't worry we gon spin on
U den
U n them niggas pussy
Tell 'em I said it
U not bout shii u say u on
trust I am

U sound like a kid talkin bout a
surprise

Bitch if u on dat then be Watchu say u on

they already been by your moms house 3 or 4 times already

Cap asf trust

sen

I can't fight for my own 🤣
U don't even believe that shii 🤣 🤣

obviously not

Braaa u still textin me

I hit people with cars too so watch yourself

Juss stand on bidnezz

LOLLL
Z*** I anit scared

Ok come hit me plz matter of fact use me as a speed bump

👀
LOL now you got people following me 😂😂♡

All love

Your gonna have a lot of people i.
the hospital Z*** keep playing

R68-78.

As can be seen the dialogue had no explicit threats to kill or do

bodily harm.

Appellant's discourse was in reaction to dialogue by ZF. It was, at best, rambling hyperbole and not the serious true threat of killing or bodily harm required.

ZF's repeated reactions to Appellant's comments is to laugh (Lol or laughing emoji).

Appellant's words to act tough is met with ZF's reaction showing the words are hyperbole by ZF laughing, or stating "u tryna sound sound hard now" and "u sound like a kid".

Appellee's comment-- she hits people with cars-- is not a true threat and pure hyperbole. What is ZF's response? "Ok come hit me plz matter of fact use me as a speed bump".

Even referencing others was illusory comments without any serious threat.

ZF started out the conversation by "IK where you live" and Appellant responded the same. This shows the context and nature of both participants conversation ---banter and hyperbole but not true threats.

ZF states throughout the entire conversation that he's "not worried" and even jokes about making sure some unknown character

gets the right house.

Looking at the totality of the circumstances in the present case, this statute was unconstitutionally applied to a conversation consisting of language of dissatisfaction and crude hyperbole.

It was error to deny the motion to dismiss.

## POINT III

THE DUE PROCESS CLAUSE PROHIBITS PROSECUTION UNDER SECTION 836.10 BECAUSE THE LAW FAILED TO PLACE ONE ON ADEQUATE NOTICE THAT IS CONDUCT WAS UNLAWFUL, AND IT INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT, SO THE STATUE IS VOID FOR VAGUENESS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Although an as-applied constitutional challenge to a statute must be raised first in the trial court, a facial challenge may be raised for the first time on appeal. See *Trushin v. State*, 425 So. 2d 1126, 1129-30 (Fla. 1982)(challenging vagueness and overbreadth); *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002) ("While the constitutional application of a statute to a particular set of facts must be raised at the trial level, a facial challenge to a statute's constitutional validity may be raised for the first time on appeal.") (plurality opinion; footnote omitted)

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citations omitted). Therefore, "a statute which either

forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates due process. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted).

"The vagueness doctrine…was developed to ensure compliance with the Due Process Clause in the Fifth Amendment of the United States Constitution." *Simmons v. State*, 944 So. 2d 317, 324 (Fla. 2006). The Florida Constitution, too, guarantees that "[n]o person shall be deprived of life, liberty[,] or property without due process of law." Art. I, § 9, Fla. Const.

"A statute or ordinance is void for vagueness when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited. Thus, it invites arbitrary and discriminatory enforcement." *Wyche v. State*, 619 So.2d 231,236 (Fla.1993).

This "constitutional standard[] for definiteness and clarity" in regulation is required by the Due Process Clause of the Fourteenth Amendment. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

Generally, the inclusion of a scienter requirement in a statute mitigates the law's vagueness, "especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."

*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499 (1982).

As the U.S. Supreme Court has recognized, "a guilty mind is a necessary element in the indictment and proof of every crime." *Elonis v. United States*, 575 U.S. 723 (2015) (citing *United States v. Balint*, 258 U.S. 250, 251 (1922)).

To avoid vagueness, a defendant must know the facts that make his conduct fit the definition of the offense. *Id.* (citations omitted).

Section 836.10 does not specify which kinds of "threats to kill or do bodily harm" are proscribed. It is vague what is meant by "threat," as that term is imprecise and not defined in the statute.

It is unclear if the term includes satirical threats or those meant figuratively or in jest or if it is meant to cover only true threats.

It is also unclear if it covers veiled threats or "threats" that are not subjectively meant to be a threat but could be interpreted as a threat by someone else.

It is unclear if the "threats" proscribe involve asserting that someone will be injured directly or by indirect means.

Additionally, the statute does not have a scienter requirement, which would mitigate the law's vagueness. *Village of Hoffman*

*Estates, supra at* 499.

The statute does not define any intent by the person who sent the writing.

It is vague if the statute criminalizes accidentally or recklessly sending a written threat.

It also is unclear what exactly the offender has to intend—does he have to intend that the recipient be afraid that the offender will actually kill or cause bodily harm or is it sufficient that the offender intend that the recipient receive the writing?

In *Hermanson v. State*, 604 So. 2d 775, 781-82 (Fla. 1992)(emphasis added) it was again emphasized that statutes are not merely written to be understood by lawyers and judges, but must be written so the "common world" understands to avoid vagueness:

> The United States Supreme Court, in *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952), stated that **confusion in lower courts is evidence of vagueness which violates due process**. Furthermore, in *Linville v. State*, 359 So. 2d 450, 453-54 (Fla. 1978), we held that due process is lacking where "a man of common intelligence cannot be expected to discern what activity the statute is seeking to proscribe." In *State v. McKown*, 461 N.W.2d 720 (Minn.Ct.App. 1990), *aff'd*, 475 N.W.2d 63 (Minn. 1991), cert. denied, 502 U.S. 1036, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992), a child's parents utilized a Christian Science practitioner and a Christian Science nurse, but did not seek conventional medical treatment. The

> McKowns were indicted for second-degree manslaughter when their child died of untreated diabetes. The issue in that case was whether the child abuse statute, which contained an exception for spiritual treatment similar to the Florida statute, was to be construed in conjunction with a manslaughter statute that was based on culpable negligence resulting in death. In finding a violation of due process, the Minnesota court concluded that there was a "lack of clarity in the relationship between the two statutes." Id. at 723.
>
> ....
>
> The United States Supreme Court has stated that one of the purposes of due process is "to insure that no individual is convicted unless **'a fair warning [has first been] given to the world in language that the common world will understand,** of what the law intends to do if a certain line is passed.'" *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 375, 93 S.Ct. 1652, 1663, 36 L.Ed.2d 318 (1973) (quoting *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931)). In *Linville*, this Court explained that a person of common intelligence must be able to determine what type of activity the statute is seeking to proscribe.

§ 836.10 does not give fair notice of the expression that is forbidden, and it allows for the arbitrary and discriminatory enforcement.

Because section 836.10 is unconstitutionally vague this cause should be reversed.

## ARGUMENT

### POINT I

SECTION 836.10 OF THE FLORIDA STATUTES (2022) IS FACIALLY UNCONSTITUTIONAL AS BEING OVERBROAD IN VIOLATION OF THE 1ST AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee has not disputed that **under the wording** of § 836.10 the statute prohibits the examples of innocent conduct discussed in the Initial brief at pages 25-27 (trash talk, gaming, rock songs, jokes etc.). Appellee also ignores the First Amendment prohibition of statutes that have a **chilling** effect on free speech-even where the statute involves unprotected speech.

Instead, Appellee argues there are multiple potential mens reas that can be considered by the court-- including an intentional threat and a reckless threat. Neither one is included in the statute. The question is which one should be used. The answer is that the legislature, and not the courts, should determine what mens rea, if any, is in the statute.

Where the legislature does not express or indicate a mens rea the court should not construe or add words to the statute.

Here, not only did the legislature chose not to define a mens rea-- it purposely laid out § 836.10 without limits. From the words

of the statute it appears the legislature wanted § 836.10 to be a strict liability crime. In § 836.10(3) the legislature exempted various entities that obviously have no intent/reckless mens rea from liability:

> (3) This section does not impose liability on a provider of an interactive computer service, communications services as defined in s. 202.11, a commercial mobile service, or an information service, including, but not limited to, an Internet service provider or a hosting service provider, if it provides the transmission, storage, or caching of electronic communications or messages of others or provides another related telecommunications service, commercial mobile radio service, or information service for use by another person who violates this section.

If the Legislature intended to have a mens rea in the statute it would not have excluded entities that have no mens rea from liability. The courts should not construe or add words for a mens rea contrary to the intent of the legislature. Finally, it should be noted the language of § 836.10 is clear without any "ifs, ands, or buts" that there are any limits to the prohibition to communication of any alleged threats. As explained in *State v. Globe Communications Corp.*, 622 So.2d 1066 (1993) where the legislature does not express limitations none should be read in:

> By its plain terms, the statute's ban on publication is absolute and unequivocal: "No person *shall* print...." (Emphasis added). Criminal prosecution flows automatically from

> the statute. **There is no indication the legislature intended any "ifs, ands, or buts" to be read into** the statute's unambiguous language. Yet, this is exactly what the state would have this court do, make the prohibition on publication contingent on an endless number of factual situations. That would involve nothing short of pure judicial legislation. After adding all of the state's ingredients to the mix, the statute would be transformed from an "apple" to an "orange" and we still could not be certain it would pass constitutional muster. None of the above-cited cases stands for the proposition that a court may rewrite a statute in this manner, and no reasonable construction of the statute's present language could authorize such tampering.

622 So.2d at 1080 (emphasis added).Other than the express exemptions mentioned above, the legislature did not limit the reach of the statute.

Appellee simply ignores, that because the legislature did not put any mens rea limitation to the statute, a citizen reading the statute could be **deterred or chilled** from sending a message that is legitimate protected speech. See *J.L.S. v. State*, 947 So. 2d 641, 644 (Fla. 3d DCA 2007) (citing *Schmitt v. State*, 590 So. 2d 404, 412 (Fla. 1991)); *Counterman v. Colorado*, 600 U.S. 66,72-73, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023)("Counterman contends that there is one, based mainly on the likelihood that the absence of such a mens

rea requirement will chill protected, non-threatening speech. Counterman's view, we decide today, is the more consistent with our precedent. To combat the kind of chill he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element").

Changing or construing the words by limiting or adding a requirement of intent or recklessness *in an opinion* does not have any impact on the chilling effect as the words *in the statute* is what is read by the citizen.

It is the text of the statute that is supreme – and that text is more authoritative than the case law interpreting the statute. *Nader v. Florida Dept. of Highway Safety & Motor Vehicles*, 87 So.3d 712, 726 (Fla. 2012).

Furthermore, courts "are not at liberty to add words to statutes that were not placed there by the Legislature." *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999). Even if intended to add a mens rea in order to resolve a First Amendment overbreadth problem. *Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993); *United States v. Stevens*, 559 U.S. 460, 481 (2010)(We "'will not rewrite a ... law to conform it to constitutional requirements,' "); *R. R. v. New Life Community Churcy of*

*CMA, Inc.*, 303 So. 3d 916, 923 (Fla. 2020)( "[t]o supply omissions transcends the judicial function.").

Appellee also argues that this court should withdraw prior decisions on mens rea of § 836.10 and to re-write a different mens rea into the statute. As argued above, the words of the statute are a province of the legislature and not the courts.

Further, the State's request to re-write § 836.10 on appeal is not appropriate. See *I.R. v. State*, 49 Fla. L. Weekly D1177 (Fla. 6th DCA May 31, 2024).

In addition, Appellee misunderstands *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023) in claiming this case involves the same statute as in Colorado and that the U.S. Supreme Court has designated what mens rea should be used.

First, in *Counterman* the conviction was **reversed** because the statute/jury instruction did not have a mens rea limiting liability for a true threat. That is the same problem in this case.

Second, the Court discussed the mens rea as sufficient for the minimum floor required for the First Amendment—it was not necessarily the mens rea for that statute. The mens rea is decided by the legislature and, in fact, the United States Supreme Court does not

write a mens rea for a state statute.

It must be remembered § 836.10 does not limit the purpose of the sending. The purpose could be to threaten or the sending could be for the purpose of a joke, to educate another, to blow off steam etc.

Appellee claims this issue has already been decided. As explained in the Initial Brief, Appellant disagrees. Just to make clear, there is no language in § 836.10 describing the mental state of the **sender, poster etc.** of the communication. Where § 836.10 does not prohibit the threat, but only prohibits the sending of the threat, any words or construction of the mental state of the writer of the threat is not germane. No decision analyzes the chilling effect of the lack of words describing the mental state of the sender. As explained above the legislature did not limit the mental state of the sender. Section 836.10 prohibits legitimate protected speech and thus is overbroad violating the First Amendment.

## POINT II

FLORIDA STATUTE 836.10 IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Appellee claims there were threats by Appellant and thus § 836.10 is not overbroad as applied.

To make its claim Appellee has taken a couple sentences out of context. However, in First Amendment cases "the court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

Furthermore, as explained in Appellant's motion below, when placed in context the exchanges are crude hyperbole, sarcasm, and venting:

> In our case, when looking at the totality of the circumstances, there were no true threats being made by Ms. Grigoriou, all the texts exchanged are crude hyperbole. We must first consider the age of both parties in this exchange, Ms. Grigoriou was merely 19 years old and still attending high school. ZF, the alleged victim here, was 20 years old. Both individuals were no more than legal adults and not living outside of their parents' homes. Furthermore, having been friends for 5 years leading up to this incident, ZF was aware that Ms. Grigoriou did not own or

> have access to a car and did not have a driver's license. This shows that he was aware Ms. Grigoriou never hit anyone with a car*** We must also consider the responses made by ZF to these alleged "threats" being made. When the ICU comment is made, ZF responds that he is "ready" with a laughing face. ZF even references the fact that the statements being made by Ms. Grigoriou are hyperbole when he states that she's "[trying to sound hard now." Furthermore, ZF writes that he knows where Ms. Grigoriou lives, which elicits one of the supposed "threats" of her statement that she knows where he lives. ZF states throughout the entire conversation that he's "not worried" and jokes about making sure this elusive "he" character gets the right house. Looking at the totality of the circumstances in the present case, this statute was unconstitutionally applied to a conversation consisting of language of dissatisfaction and crude hyperbole.

R64-65. This is also shown by the context of the exchanges in pages 44-48 of the Initial Brief.

Finally, allowing application of online communication without context is the very thing that was warned against. “Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a larger audience." *Counterman v. Colorado*, 600 U.S. 66, 14, 143 S. Ct. 2106,2122,216 L. Ed. 2d 775 (2023) (Sotomayor,J., concurring in part). "Without sufficient protection for unintentionally threatening

speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics, or for unreflectingly using language he read in an online forum." *Id.*

## POINT III

THE DUE PROCESS CLAUSE PROHIBITS PROSECUTION UNDER SECTION 836.10 BECAUSE THE LAW FAILED TO PLACE ONE ON ADEQUATE NOTICE THAT IS CONDUCT WAS UNLAWFUL, AND IT INVITES ARBITRARY AND DISCRIMINATORY ENFORCEMENT, SO THE STATUE IS VOID FOR VAGUENESS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee claims § 836.10 gives fair notice to its meaning.

However, Appellee also indicates the statute does not notice citizens if the communication must be intentional or reckless.

A restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

Appellee does not dispute Section 836.10 does not notice citizens which kinds of "threats to kill or do bodily harm" are proscribed. It is vague what is meant by "threat," as that term is imprecise and not defined in the statute. It is unclear if the term includes satirical threats or those meant figuratively or in jest or if it is meant to cover

only true threats. It is also unclear if it covers veiled threats or "threats" that are not subjectively meant to be a threat but could be interpreted as a threat by someone else.

Additionally, terms such as "terrorism" and "in any manner" are not defined or given meaning. It is known that "terrorism" is not mere surplus and necessarily and involves something other than harming or killing as those words are used separately.

In *Hermanson v. State*, 604 So. 2d 775, 781-82 (Fla. 1992)(emphasis added) it was again emphasized that statutes are not merely written to be understood by lawyers and judges, but must be written so the "common world" understands to avoid vagueness.

§ 836.10 does not give fair notice of the expression that is forbidden, and it allows for the arbitrary and discriminatory enforcement.