"Here's my attitude: I think passing a law about people wearing sagging pants is a waste of time…We should be focused on creating jobs, improving our schools, getting health care, dealing with the war in Iraq. Any public official who is worrying about sagging pants probably needs to spend some time focusing on real problems out there. "Having said that, brothers should pull up their pants. You're walking by your mother, your grandmother, and your underwear is showing. ... What's wrong with that? Come on. There are some issues that we face that you don't have to pass a law [against], but that doesn't mean folks can't have some sense and some respect for other people. And, you know, some people might not want to see your underwear — I'm one of them."
- President Elect and former University of Chicago Constitutional Law Professor, Barak Obama.

City ordinance 4043 was passed by voters on March 11, 2008, in Riviera Beach, Palm Beach County, Florida. The ordinance is referred to as the 'saggy pants' ordinance. It reads:

"It shall be unlawful for any person to appear in public or in view of the public, wearing pants below the waist which expose the skin and undergarments."

Any person convicted of the offense either pays a 150 dollar fine or serves community service. A second or subsequent offense is punished by a 300 dollar fine. Any person who is convicted and does not pay the fine nor complete the community service hours may be imprisoned for a term not exceeding sixty days.

Seventeen-year-old Julius Hart was charged with the offense after a police officer said he saw the teenager riding his bicycle with over ten centimeters of blue-and-black boxer shorts revealed. Julius spent a night in jail and was later arraigned.

Julius Hart was convicted of the offense at trial. He appealed the conviction and lost at the District and Circuit levels. The Supreme Court of the United States has agreed to hear the case. Benjamin Straight, counsel for Julius Hart, writes this brief in support of the city ordinance being declared unconstitutional.

Several places have enacted saggy pants bans including Flint, MI, localities in GA, other parishes and cities in LA, Pleasantville, NJ, and IL. Penalties range from fines

or warnings to jail time. Others communities are considering sagging pants bans. Bans have been rejected in Natchitoches, LA; Stratford, CT; and Pine Bluff, AR.

History of 'Sagging Pants'

Sagging pants is a form of expression commonly used by individuals who identify with the hip-hop subculture. Sagging pants is symbolic and speaks as to what culture the individual identifies himself/herself with. Sagging pants is symbolic rebellion. Sagging pants tells the onlooker that the individual wearing the saggy pants rebukes authority and just might open a can of whoop-ass at any random time.

Sagging pants began in prison where oversized uniforms were issued without belts to prevent suicide attempts and attacks of prison guards. My neighbor, who worked for the Florida Department of Corrections as a prison guard for twenty-two years, told me that inmates who sagged their pants were publicly making themselves 'available' that evening.

Pants are often 'handed down' by siblings in poorer communities, so the pants may be bigger before the child grows into them, thus making them saggy. Sagging pants was

adopted in the hip-hop subculture when gangsta rap erupted onto the national scene in 1986-1987. Sagging pants became a visible and national symbol of hip-hop identification by the early 1990's, primarily through the hip-hop star now turned actor, Mark Wahlberg (Marky Mark). Sagging pants is still employed by numerous current hip-hops stars such as Outkast, Lil' Wayne, 50 Cent, 3-6 Mafia, T-Pain, and has been the trademark of hip-hop legends such as Tupac Shakur, House of Pain, Dr. Dre, NWA, and Snoop Doggy Dog.

Opponents of the Saggy Pants movement argue self-expression and proponents argue indecency.

Symbolic, Expressive, and Communicative Intent

Debbie Seagraves, the executive director of the A.C.L.U. of Georgia said, "I don't see any way that something constitutional could be crafted when the intention is to single out and label one style of dress that originated with the black youth culture, as an unacceptable form of expression."

The Supreme Court has found that there are many forms of symbolic communication where the Defendant communicates an expressive message through some type of conduct that is understood by onlookers. The context in which the symbol

is used for expression is important. In Tinker v. Des Moines School District, 393 U.S. 503 (1969), the Court found that the wearing of black armbands by students in school communicated a message about the hostilities in Vietnam. In Texas v. Johnson, 491 U.S. 397 (1989), the Court held that burning an American flag is symbolic, communicative, and expressive speech. In Spence v. Washington, 418 U.S. 505 (1974), the Court found that an upside down peace symbol on an American flag was a form of communication. The Court wrote:

> "A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it." Id. at 410.

> "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Id. at 411.

Mr. Hart intended to convey a particularized message by sagging his pants. Mr. Hart's message was a clear rebuke of authority through identification with the hip-hop subculture. Hip-hip is currently one of most popular genres of music in American culture with radio stations and a television cable channel (Black Entertainment Network)

dedicated to the genre. Onlookers understand the meaning of the expressive conduct because they are participants in our culture.

The only method in which the government can regulate symbolic speech is when the law passes a scrutiny test, somewhere between intermediate and strict scrutiny. In United States v. O'Brien, 391 U.S. 367 (1968), the Court found that a law prohibiting the burning of a draft card, even though expressive conduct communicating protest against the Vietnam War, was justified by a significant government interest that was unrelated to the suppression of speech and was tailored towards that end. The Court wrote,

> "This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment Freedoms." Id. at 376.

In the case at bar, the city has not stated how the ordinance is serving a significant government interest that is tailored towards the unspecified end.

The Ordinance is Substantially Overbroad and Vague

Mr. Hart argues that the ordinance is facially invalid because the language of the ordinance is overbroad. The ordinance chills significant constitutionally protected speech and individuals to whom the law is unconstitutional may refrain from expression rather than bring a challenge to the statute. Mr. Hart has standing to challenge the ordinance and does so on his behalf and on the behalf of others whose speech is effectively chilled.

The Supreme Court announced in Broadrick v Oklahoma, 413 U.S. 601 (1973), that to invalidate a law on its face the Court must find "the overbreadth of the statute must not only be real but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615.

The sagging pants ordinance language "…wearing pants below the waist which expose the skin and undergarments" is vague for a reasonable person to know whether or not their conduct falls within the law. Individuals then refrain from any conduct that could possibly fit the wording of the ordinance in order to avoid legal sanction. This makes the ordinance's effects far broader than intended or than the Constitution permits, therefore the ordinance is substantially overbroad.

Where, specifically, is the waist of a human being? Waistline varies depending on the sex of individual. Women have higher waistlines than men do. Fashion further defines where the waistline is. In the 1980's, men's and women's pants accounted for a waistline above the naval. This changed in the 1990's when the fashion industry produced clothing for men with a low waistline at the hip-bones. In the millennium, the fashion industry began producing clothes for women that placed the waistline slightly below the butt crack so women could wear thong underwear and show it off. Physiologists may have research that scientifically determines the location of a waistline on males and females, yet every person is different and the ever-changing fashion industry produces the wear of clothing that this vague ordinance targets.

In Gooding v. Wilson, 405 U.S. 518 (1972), the majority (Justice Brennan writing) wrote that phrases like opprobrious words and abusive language must be narrowly defined and narrowly applied by trial courts so as not to suppress protected speech.

Regarding the case at bar, the language, "…wearing pants below the waist which expose the skin and undergarments" was not narrowly defined by the city, is vague, and therefore the ordinance could not be narrowly

applied by the Florida trial court. The law enforcement officer said that he observed ten centimeters of Mr. Hart's undergarments while he was riding a bicycle. Ten centimeters is 3.93 inches. It is common for pants to lower themselves from the user when the user is operating a bicycle, and three inches is a plausible amount of lowering given bicycle riding. Does 'wearing the pants' include sitting in the pants? Once again, the ambiguity of the human waistline can be questioned, and does that standard apply when the wearer is sitting? There are many obvious physical positions a wearer could employ that would compromise the integrity of the protection the clothes seek to provide, and none of these common situations are accounted for in the statutory language. Therefore, the ordinance not only suppresses the speech that the hip-hop culture communicates, but also targets innocent bicyclists.

In Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), the Court held that the ordinance in question, as construed by the New Jersey courts to exclude live entertainment, including nude dancing, throughout the borough, prohibits a wide range of expression that has long been held to be within the protection of the First Amendment. The law prohibited much more speech than just nude dancing; it outlawed all live entertainment- all

plays, concerts, athletic events. The nude dancing establishment was allowed to challenge the law, in part, because of how it regulated the speech of others NOT before the Court.

The sagging pants ordinance outlaws numerous activities of others not before the court that do not subscribe to the hip-hop lifestyle. Swimmers, bicyclists, clowns, and people that just simply forgot their belt that day would be subject to criminal prosecution.

The Ordinance Constitutes Impermissible Viewpoint Based Discrimination

The Supreme Court has found that some categories of symbolic speech are unprotected. In Roth v. United States, 354 U.S. 476 (1957), the Court held that obscenity is a category of speech unprotected by the First Amendment. In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Court upheld a law making it illegal to publish or exhibit any writing or picture portraying the "depravity, criminality, unchasity, or lack of virtue of a class of citizens of any race, color, creed or religion" In his opinion, Justice Frankfurter argued that the speech conducted by the

Defendant breached libel, which is reasoned to be outside the protection of the First and Fourteenth Amendments.

In R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992), the Court struck down a city ordinance that banned all forms of cross-burning. The Court noted that content-based regulations are presumptively invalid. However, society has allowed restrictions upon the content of speech in a few areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. at at 382-383, citing Chaplinsky v. New Hampshire 315 U.S. 568 (1942). The Court wrote that while a particular instance of speech can be proscribed on the basis of one feature, the Constitution may prohibit proscribing it on the basis of another feature. Id. at 385. While burning a flag in violation of an ordinance against outdoor fires could be punishable, burning a flag in violation of an ordinance against dishonoring the flag is not. Id. Other reasonable "time, place, or manner" restrictions had been upheld, but only if they were "justified without reference to the content of the regulated speech." Id., Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Sagging pants is not obscene. There are no overt sexual acts taking place in the public view. The underpants (which could be underwear, gym shorts, regular shorts, or a swimsuit) and possibly a bit of skin are all that could be viewed. Sagging pants pictures are not published in the media with the intent of "depravity, criminality, unchasity, or lack of virtue of a class of citizens of any race, color, creed or religion". Sagging pants are not fighting words, nor symbolic fighting words, because sagging pants has not been a medium to communicate hate, oppression, degradation, or violence.

Proponents of the ordinance might cite R.A.V. and state that sagging pants is of such slight social value that any expressive benefit that may be derived from it is clearly outweighed by the social interest in order and morality. Police Chief Don English in Mansfield, Louisiana (a city that has a sagging pants ordinance), said that the law sets a good civic image. http://www.nytimes.com/2007/08/30/fashion/30baggy.html. The Mayor of Riviera Beach, Florida, said, "I am thankful to the people who came out and voted their conscience and defined what is indecent in our city" upon passage of the sagging pants ordinance.

http://www.palmbeachpost.com/politics/content/local_news/epaper/2008/03/11/0311rivcharter.html.

In Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Court rejected a First Amendment challenge to a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multifamily dwelling, church, park, or school. The ordinance was clearly content based in its very terms: It applied only to theaters that showed films with sexually explicit content. The Court treated the law as content-neutral because It said that the law was motivated by a desire to control the secondary effects of adult movie theaters, such as crime, and not to restrict the speech. This case thus makes the test of whether a law is content-based or content-neutral not its terms, but, rather, its justification. A law that is justified in content neutral terms is deemed content neutral even if it is content based on its face.

In the case at bar, city officials aim to obtain the secondary effect of 'a good civic image', which is tenuous because our constantly changing culture defines what 'a good civic image' is. In fact, the mayor of Riviera Beach did not bother to allude to a 'secondary effect' in his public statement upon passage of the ordinance; he was

pleased that ‘indecent’ was defined by law. Therefore, Renton is not applicable because there are no 'secondary effects'.

How is sagging pants, an expressive wear of clothing, outweighed by the social interest in order and morality? Legislators and voters may not personally like the clothing style, might find it indecent, might not understand the culture message, and might want a ‘good civic image' (whatever that may be). However, this clothing style witch-hunt is reminiscent of previous trends in the past, such as long hair when the Beatles became popular in the United States, spandex wear in the 1980’s, or gang colors in the 1990’s. There is simply a generation gap where those legislating have legal and financial power over those that are setting the current trends.

This finally brings us to time, manner, and place regulations on speech. In Kovacs v. Cooper, 336. U.S. 77 (1949), the Court upheld a restriction on the use of sound amplification devices, such as loudspeakers on trucks. The Court emphasized that the law did not prohibit all such devices, but rather was a reasonable time, place, and manner restriction. The ordinance proscribed the noise, not the speech. If the ordinance is regulating only time, place, and manner of the speech, then the ordinance gets

the benefit of intermediate review The following is the Time, Place, and Manner Restriction on Speech Test: 1. Is the law content neutral? 2. Is it narrowly tailored to achieve a significant governmental interest? 3. Does the law provide ample alternative channels?

The city might have had a better chance at the ordinance surviving a Constitutional Challenge if the language proscribed a time, manner, and place regulation, but then the ordinance would have been facially more viewpoint discriminatory than it already is. A time, manner, and place regulation in the language would have meant targeting African-American youths through stereotyping (I can see the city's argument now: "Those that sag their pants are more likely to be criminals, therefore sagging pants will not be allowed past nine p.m.) That language would have opened up a number of other challenges, such as Equal Protection and Due Process. The city had to write the ordinance in vague language as to avoid more significant, and more socially inflammatory, challenges.

The sagging pants ordinance would not survive this intermediate scrutiny test. First, the law is viewpoint based discrimination. Second, there has been no stated government end, except 'a good civic image' and Third,

there is no other ample alternative channel for individuals that subscribe to the hip-hop subculture to express their viewpoint with such open rebellion- sagging pants is a symbol endemic to the hip-hop subculture.

The sagging pants ordinance is Impermissible Viewpoint Discrimination because there is no Constitutional law basis for proscribing the speech, such as fighting words. Sagging pants is not obscene and is not indecent. There are no 'secondary effects' to regulate. Finally, members of society that identify with the hip-hop subculture sag their pants; proscribing a law, broad in language, that prohibits sagging pants could logically only amount to viewpoint based discrimination against those whose personal viewpoint is to subscribe to the hip-hop subculture and symbolicy express their viewpoint through sagging their pants.

WHEREFORE, the Petitioner asks this Honorable Court to declare the Sagging Pants Ordinance Unconstitutional because the language is Substantially Overbroad, Vague, and amounts to Impermissible Viewpoint Discrimination.