No. 16-523

In The
Supreme Court of the United States

JACK SCOTT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION AND GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Georgia statute criminalizing non-obscene speech with an arguably sexual content is overbroad because it turns on the subjective thoughts of a single recipient and whether such speech can ever be treated as categorically unprotected by the First Amendment.

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae First Amendment Lawyers Association ("FALA") is a non-profit association incorporated in Illinois, with some 180 members throughout the United States, Canada, and Europe. Its membership consists of preeminent attorneys whose practice emphasizes the defense of First Amendment rights and related liberties. FALA members have litigated cases involving a wide spectrum of such rights, including free expression, free association, and privacy issues. FALA's members were directly involved in many of this Court's decisions that form First Amendment jurisprudence in the area of erotic speech and expression. FALA has also frequently appeared as an *amicus* before this Court to provide its unique perspective on the most important First Amendment issues of the day.

FALA is concerned with the State of Georgia's ("State") attempt to criminalize otherwise constitutionally-protected, erotic communication if such communication arouses one of the parties to the communication. The criminal prohibition imposed by Section 16-12-100.2(e) of the Official Code of Georgia Annotated ("statute") will chill a vast amount of expression protected by the First Amendment. More

[1] Both parties received timely notice and have consented in writing to the filing of this *amici curiae* brief. Pursuant to Supreme Court Rule 37.6 no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

chilling is the felony conviction and mandatory sex offender registration which results from a violation of the statute. FALA takes the position that imposing criminal sanctions on individuals for communicating with a person believed to be a minor in a way that sexually arouses one of the parties threatens free speech protections at a fundamental level. FALA therefore urges the Court to grant certiorari review and reverse the conviction of Petitioner Jack Scott.

The Georgia Association of Criminal Defense Lawyers ("GACDL"), a frequent *amicus curiae* in state and federal courts, is a non-profit association composed of many of the members of Georgia's criminal defense bar. Its approximately 1500 members include both public defenders and private counsel. Among other goals, GACDL is dedicated to improving the fair administration of criminal justice and to securing and preserving defendants' constitutional rights in criminal prosecutions. This dedication is particularly important in cases that address issues regarding criminalizing individuals' Constitutional right of free speech.

SUMMARY OF ARGUMENT

The Georgia statute at issue represents a dangerous infringement upon protected First Amendment rights. The speech criminalized by O.C.G.A. §16-12-100.2(e) is not obscene, nor even necessarily objectionable, notwithstanding the fact that it may reference

sexuality or sexual conduct. Moreover, the otherwise protected speech becomes criminal only when the individual recipient is believed to be sexually stimulated by content which is otherwise suitable even for minors.

Other courts have found similar language to be substantially overbroad. Approval of those cases, and rejection of the Georgia Supreme Court's decision, would resolve the split among these jurisdictions and clarify important speech rights. This Court has repeatedly rejected the establishment of new categories of wholly unprotected speech and should do so again in this case.

ARGUMENT

A. The statute is substantially overbroad.

The chief difficulty with the Georgia statute is that it is not limited to obscene or even pornographic narratives, nor does it apply only to circumstances in which a minor is solicited for sex. The plain scope of the statute would reach perfectly "innocent" publications that would not ordinarily be considered sexual in nature, but may be appealing to the particular sender or recipient on a purely subjective basis. The failure to link that speech to acts which are properly criminalized – such as a conspiracy to commit a crime or direct luring of a child to engage in intercourse – practically guarantees that the statute will scoop up lawful behavior along with criminal conduct.

Section 16-12-100.2(e) is overbroad in several respects. The facial scope of the statute is clearly overbroad as it reaches a great deal of protected speech even when the speech concerns sexuality and minors. The statute is also overbroad in its definitions and details: it reaches mere nudity without a sufficient tie to sexual acts and it focuses on verbal communications and written texts with no connection to pictures of sexual conduct. The statute chills a great quantity of speech which is entirely appropriate for both adults and children.

One does not have to be particularly creative to envision many ordinary communications which are criminalized by §16-12-100.2(e). The following are some which come readily to mind:

(1) Teenagers sharing the *Victoria Secret* catalogue, if a minor becomes aroused.

(2) Parents giving their children instructional videos on female breast examination, if a minor becomes aroused.

(3) People sharing links to *Sports Illustrated Swimsuit Issue*, if a minor becomes aroused.

(4) Educators providing sex education materials to minor students, if those students become aroused.

The inquiry need not be limited to pure hypotheticals. One can readily find problematic examples among the published classics which would run afoul of

the Georgia statute. It is easy to envision how a romantic teenager could be tempted to imitate Juliet following a speech where she eagerly anticipates the loss of her virginity to Romeo:

> Come, civil night, Thou sober-suited matron, all in black, And learn me how to lose a winning match, Play'd for a pair of stainless maidenhoods: Hood my unmann'd blood, bating in my cheeks, With thy black mantle; till strange love, grown bold, Think true love acted simple modesty.[2]

An especially literate teen may find his or her blood boiling after reading the Miller's Tale, which offers escapades of an explicitly sexual nature, such as the infamous discussion of a lady's "beard":

> This Absolon gan wype his mouth ful drie. Derk was the nyght as pich, or as a cole, And at the wyndow out she putte hir hole, And Absolon, hym fil no bet ne wers, But with his mouth he kiste hir naked ers Ful savorly, er he were war of this. Abak he stirte, and thoughte it was amys, For wel he wiste a woman hath no berd. He felte a thyng al rough and long yherd, And seyde, "Fy! allas! what have I do?"[3]

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[2] Shakespeare, *Romeo and Juliet*, Act 3, Scene 2, Full text of play available at http://shakespeare.mit.edu/romeo_juliet/full.html (accessed 1/13/17).

[3] Geoffrey Chaucer, *The Canterbury Tales: The Miller's Tale*, lines 615-35; Available online at http://www.librarius.com/canttran/milltale/milltale615-635.htm (accessed 1/13/17).

A less literate minor might by confused by this Court's decision in *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, (1971)[4] and conclude that the vulgar imperative appearing throughout that opinion was actually an invitation to sexual fulfillment.

The statute is also troubling in its details. The law is written in the disjunctive so that both "sexually explicit nudity" and "sexual conduct" are criminalized without the need for sexual conduct with respect to nudity or nudity as a component of the sexual conduct. While entitled "sexually explicit nudity," the actual definition in §16-12-102(7) merely refers to "a state of undress so as to expose" the various anatomical regions of interest; there is no sexual component required beyond mere nudity.[5] Similarly, the definition of "sexual conduct" in §16-12-100.1(a)(7) refers to intercourse and various acts in which parts of the body are touched, but does not require that the participants be nude. Instead, it appears that activity between fully clothed individuals would qualify so long as the result of the contact is "an act of apparent sexual stimulation

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[4] In *Cohen*, this Court held that an activist wearing a jacket saying "Fuck the Draft" could not be convicted for breaching the peace.

[5] Mere nudity is not the equivalent of obscenity. *See*, *Jenkins v. Georgia*, 418 U.S. 153, 161, 94 S. Ct. 2750, 2755 (1974) ("There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards."). This is true even where minors view nude images or receive descriptions concerning nude people. *See*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214, n. 10, 95 S. Ct. 2268, 2275 (1975) ("[U]nder any test of obscenity as to minors not all nudity would be proscribed.").

or gratification". The separation of nudity from sexuality in a criminal statute is rare, if not unheard of, and serves to extend the already broad reach of the Georgia statute.

The definition of "sexual excitement" in O.C.G.A. §16-12-100.1(a)(8) also raises overbreadth concerns because it does not seem closely linked to actual physiological processes. One schooled in ordinary human sexual responses can tell when male or female genitals are in a "state of sexual stimulation". However, that is hardly true for the female breast which is also included in the anatomic areas which might be subject to "excitement". Without being in the least bit facetious, one can ask how a law enforcement officer can tell whether a female breast is sexually stimulated or merely exposed to a cold room? By reaching beyond anatomic reality to include moral judgments concerning the human female breast, the statute invites application to communications which are fully protected and not properly subject to criminal penalties.

The overbreadth doctrine serves as a bulwark against self-censorship; the threat of prosecution should not deter citizens from engaging in fully protected speech which only resembles the limited categories of speech which may be properly outlawed. Section 16-12-100.2(e) not only includes a great deal of protected speech, but its chilling effect on speech cannot be doubted. Violation of that statute is considered a felony punishable by 10 years in prison and a $10,000 fine. *See*, O.C.G.A. §16-12-100.2(e)(2). Moreover, the consequences of a conviction will follow the speaker for

the rest of his or her life, as Georgia requires that a person convicted of violating §16-12-100.2 must register as a sex offender. *See*, O.C.G.A. §42-1-12(B.1)(xvii).[6]

It requires no stretch of the imagination to conclude that adults will go out of their way not to communicate valuable, but arguably sensual materials, to children if there is even a remote possibility that the child will find the material to be sexually stimulating or that law enforcement officials will leap to that conclusion. *Amici* are vitally concerned that protected speech not be curtailed through a ham-fisted effort to advance what are otherwise worthy legislative goals.

B. This Court has repeatedly rejected the creation of new categories of unprotected speech.

It is obvious that the Georgia statute is well-intentioned; child predators are a serious threat to society and must be dealt with appropriately. One can also sympathize with the Legislature's apparent belief that sexually provocative communications may assist predators in luring children into sexual liaisons. However, in addressing these real-world ills, Georgia has invaded the realm of protected speech and attempted

[6] Section 16-12-100.2(e)(2) specifies that violation of the substantive provisions will only be treated as a misdemeanor if the victim is over the age of 14 and the defendant is 18 or younger. However, it appears that even a minor would have to register as a sex offender if convicted in Georgia Superior Court, as opposed to juvenile court. *See*, O.C.G.A. § 15-11-30.2. The thought of a 17 year old being forever labeled a sex-offender because of something he *said* as a youth is truly chilling.

to create a new category of unlawful communications. That effort must be rejected under the First Amendment.

The Georgia statute criminalizes non-obscene speech which, in most contexts, would not be considered even remotely objectionable. Even speech which includes a sexual component and is specifically directed to minors would not be unlawful unless the recipient or sender is "aroused" by the communication. In addition, the law is not limited to video or images, but specifically targets "verbal descriptions or narrative accounts".[7] Georgia has created a new category of unprotected speech which criminalizes non-obscene speech and texts that do not offend community standards nor arouse the prurient interests of the typical minor; so long as the speech has that effect on at least one minor.

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[7] Theoretically, text-only accounts with no images can be deemed obscene if they otherwise meet the *Miller* test. *See, e.g.*, *Kaplan v. California*, 413 U.S. 115, 93 S. Ct. 2680 (1973) (Obscene material in book form is not entitled to First Amendment protection merely because it has no pictorial content). However, the days of prosecutions for distributing *Ulysses* or *Lady Chatterly's Lover* are long gone. The members of the First Amendment Lawyer's Association have represented many of the most high profile obscenity cases of the last several decades. A canvassing of those members concerning obscenity prosecutions for text-only publications disclosed only one such case since the turn of this century: *United States v. Fletcher*, Case 2:06-cr-00329-JFC (W.D. PA 2007) [Indictment DE #2; Guilty plea entered 8/7/08 DE #75).

Historically, this Court has been very reluctant to create new exceptions to the First Amendment.[8] In recent years, this Court has repeatedly rejected governmental attempts to create new categories of unprotected speech.[9] It should likewise reject Georgia's invitation to do so here. The State already has potent weapons against child predators. Section 16-12-100.2 includes a slew of alternatives for prosecuting actual sexual contact with children as well as conspiracies

[8] This Court summarized the major exceptions to the First Amendment in *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011) and reiterated that the list was unlikely to grow any longer:

> "From 1791 to the present," . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. ——, ——, 130 S. Ct. 1577, 1584, 176 L.Ed.2d 435 (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992)). These limited areas – such as obscenity, *Roth v. United States*, 354 U.S. 476, 483, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-49, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)*; and fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L.Ed. 1031 (1942) – represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.*, at 571-72, 62 S. Ct. 766.

[9] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (Striking down a federal statute criminalizing sexually explicit depictions of young-looking adults); *United States v. Stevens*, 559 U.S. 460 (2010) (Invalidating a federal statute prohibiting depictions of animal cruelty); *Brown*, *supra* (Finding a California statute restricting violent video games unconstitutional).

and attempts to lure a child into a sexual relationship. There is no need, either historically or as a matter of practicality, to create a novel exception to the First Amendment by outlawing otherwise fully-protected speech based on the possibility that some listeners (but not others) may find it sexually interesting.

C. Constitutional protection of speech cannot depend on the reaction of a participant.

One of the unique features of the Georgia statute is that the distinction between lawful and unlawful speech depends entirely upon the reaction of the listener to the message.[10] A message with some arguably sexual content will be considered innocuous if the minor recipient is not "turned on" by the content. However, if the same message is sent to a child who is "aroused" by the content, the sender will go to jail. Separating protected speech from criminal conduct based on the arousal response by the recipient is unprecedented and poses a substantial danger to the exercise of First Amendment freedoms.

This Court has in the past considered the possibility that the reaction of a listener to certain "fighting words" is relevant to whether a crime has been committed. *See*, *Chaplinsky v. New Hampshire*, 315 U.S.

[10] The statute also criminalizes the act of communicating a suggestive message via computer if the person sending the message is sexually "aroused" by the thought that a child will read it. Punishing a "thought crime" poses constitutional hazards of its own. However, the focus of this section of the Brief is on the reaction of the listener/reader.

568, 572, 62 S. Ct. 766 (1942). Thus, calling another citizen a motherf***** might lead to a valid arrest if the target of that epithet was incensed by the comment. However, in a different context, the same word may be an obvious joke or may be considered a joke by a more philosophical listener adhering to the old adage pertaining to "sticks and stones".

Courts since *Chaplinsky* have concluded that the reaction of the listener is a very precarious basis upon which to judge speech. *See, generally*, *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) ("The fighting words exception is very limited because it is inconsistent with the general principle of free speech recognized in our First Amendment jurisprudence.").

The Courts have also come to recognize that the "heckler's veto" is a real threat to protected speech. *See*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880, 117 S. Ct. 2329, 2349 (1997) (Overturning a portion of the Communications Decency Act because "[it] would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child – a 'specific person . . . under 18 years of age,' . . . – would be present."); *See, also*, *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134, 112 S. Ct. 2395, 2403 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1258-59 (11th Cir. 2004) ("[T]he Ordinance impermissibly grants the Sheriff the authority to enforce a 'heckler's veto.'" [based on expected opposition to protestors]).

This case presents an opportunity for this Court to reiterate the principle that the audience or the individual listener should rarely, if ever, define the scope of permissible speech under the First Amendment.

D. The current conflict in the lower courts has created a chilling effect on speech that can be cured by this Court.

In the First Amendment realm, uncertainties in the law create their own chilling effect. *See, generally*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324, 130 S. Ct. 876, 889 (2010) ("Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" (citation omitted); *Dombrowski v. Pfister*, 380 U.S. 479, 491, 85 S. Ct. 1116, 1123, 14 L. Ed. 2d 22 (1965) ("We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal[l], with no likelihood of obviating similar uncertainty for others.").

In his Petition, Mr. Scott points out that there are irreconcilable conflicts between the decision of the Georgia Supreme Court and opinions of other jurisdictions. Most important of those conflicting cases is *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010) which reached a diametrically opposite result when analyzing a functionally identical statute. This case provides a useful vehicle through which this Court can

reiterate several important principles of First Amendment law, including the need for narrow tailoring of laws which criminalize speech and the rejection of new categories of speech supposedly unprotected by the First Amendment.

CONCLUSION

The Court should use this case as an opportunity to clarify that laws intended to protect minors against sexual predators cannot define criminal conduct so broadly so as to chill protected speech. Those protections apply both to adults communicating non-obscene messages (even with some arguably sexual content) and to children receiving such communications. In addition, this Court should reiterate that it is improper to establish new categories of unprotected speech absent a compelling need and a well-documented showing that our Founding Fathers supported such a categorical ban.

Respectfully submitted,

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