No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Georgia Supreme Court upheld, in the face of a First Amendment overbreadth challenge, a statute that forbids otherwise-protected sexually related speech to minors if the speaker intends to arouse or satisfy someone's sexual desire. The Texas Court of Criminal Appeals and the Ninth Circuit Court of Appeals have held such statutes unconstitutional.

The question presented is:

Is the Georgia statute facially invalid under the Free Speech Clause of the First Amendment?

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OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 788 S.E.2d 468 and is set forth in the Appendix at App. 1.

BASIS FOR JURISDICTION

The judgment of the Supreme Court of Georgia, the highest state court in Georgia, was entered on July 5, 2016. App. 1. A timely Motion for Reconsideration was denied on July 25, 2016. App. 26. This Court has jurisdiction over this Petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

Section 16-12-100.2(e) of the Official Code of Georgia Annotated provides, in relevant part, that a person

> commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer wireless service or Internet service, including but not limited to, a local bulletin board service, Internet chat room, e-mail, or instant messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of this subsection on the unsupported testimony of a child.

Section 16-12-100.2(b)(1) of the Official Code of Georgia Annotated defines a "child" as "any person under the age of 16 years."

Section 16-12-102(7) of the Official Code of Georgia Annotated defines "sexually explicit nudity" as

> a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Section 16-12-100.1(a)(7) of the Official Code of Georgia Annotated defines "sexual conduct" as

> human masturbation, sexual intercourse, or any touching of the genitals, pubic areas, or buttocks of the human male or female or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

Section 16-12-100.1(a)(8) of the Official Code of Georgia Annotated defines "sexual excitement" as "the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation."

Section 16-12-100.1(a)(6) of the Official Code of Georgia Annotated defines "sadomasochistic abuse" as

> flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

STATEMENT OF THE CASE

Petitioner was prosecuted in the Camden County Superior Court for violating Section 16-12-100.2(e) of the Official Code of Georgia Annotated. He filed a General Demurrer, raising the federal question of which he now seeks review – whether Section 16-12-100.2(e) is overbroad and therefore unconstitutional as written under the First Amendment. The trial court denied relief. App. 18. Petitioner sought and received a Certificate of Immediate Review, and Interlocutory Appeal to the Supreme Court of Georgia, which affirmed the trial court on July 5, 2016. App. 1. Petitioner filed a Motion for Reconsideration on July 14, 2016; the Supreme Court of Georgia denied this on July 25, 2016. App. 26.

REASONS FOR GRANTING THE WRIT

I. A Conflict Among Courts

The Georgia Legislature has, with Section 16-12-100.2(e), criminalized communications to minors that are not obscene as to minors, and that fall into no other recognized category of historically unprotected speech.

In upholding this statute in the face of a First Amendment overbreadth challenge, the Supreme Court of Georgia, a state court of last resort, has decided an important federal question in a way that conflicts with a decision of the Texas Court of Criminal Appeals, also a state court of last resort; and with a decision of the Ninth Circuit Court of Appeals.

In *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013), the Texas Court of Criminal Appeals addressed an as-written challenge to Section 33.021(b) of the Texas Penal Code, which forbade sexually explicit (but not necessarily obscene or harmful) communications to minors with the intent to arouse or gratify sexual desire. In a unanimous opinion Texas's criminal court of last resort found that statute, which was functionally the same as the Georgia statute at issue here, invalid under the First Amendment.

In *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010), the Court of Appeals for the Ninth Circuit addressed an as-written challenge to Oregon Revised Statutes § 167.057, which forbade providing minors with visual, verbal, or narrative descriptions of sexual conduct for the purpose of sexually arousing the minor or the furnisher, or inducing the minor to engage in sexual conduct. The Court of Appeals found that the statute, which also was functionally the same as the Georgia statute at issue here, invalid under the First Amendment, concluding, "because Sections 054 and 057 on their face reach a significant amount of material that is not obscene as to minors, the statutes are constitutionally overbroad." *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010).

The State of Oregon in *Powell's Books*, like the State of Georgia in the current case, argued that section 057 was directed at the conduct of "luring minors using pornography" and not speech. The Ninth Circuit disposed of this contention summarily in a footnote:

> However, the statute plainly applies to materials covered by the First Amendment. The statute does not proscribe speech that is integral or limited to criminal conduct – that is, speech that is "the vehicle" for a crime. Section 057 curbs speech used to induce prospective victims to engage in sexual activity but also criminalizes providing materials to arouse or satisfy sexual desires. Whereas inducing a minor to engage in sexual activity is independently criminal, arousing oneself or a minor is not.

Powell's Books, 622 F.3d at 1213 n.15.

The same issue is before the Supreme Court of Minnesota in *State v. Muccio*, A15-1951, on the state's appeal from the judgment of the intermediate court holding that state's functionally identical statute unconstitutional in *State v. Muccio*, 881 N.W.2d 149 (Minn. Ct. App. 2016), review granted (Aug. 23, 2016). The Virgin Islands have a statute substantially similar to Georgia's. V.I. Code Ann. tit. 14, § 490.

II. A Conflict with this Court's Decisions

The Supreme Court of Georgia has also decided this important question of federal law – whether the First Amendment allows the State to forbid speech to minors that falls into no recognized category of historically unprotected speech – in a way that conflicts with relevant decisions of this Court. "Speech that is neither

obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975).

"The key" to the Supreme Court of Georgia's conclusion that the statute "does not prohibit a real and substantial amount of constitutionally protected expression" is "the statute's mens rea element, which requires the accused, with the knowledge or belief that the victim is in fact a child younger than 16, to make contact with that victim with the specific intent to arouse or satisfy his own or the victim's sexual desire." App. 16.

This Court has noted that such distinctions, "defining regulated speech by its function or purpose" are "based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). And as the Ninth Circuit Court of Appeals noted in *Powell's Books*: "Whereas inducing a minor to engage in sexual activity is independently criminal, arousing oneself or a minor is not." *Powell's Books*, 622 F.3d at 1213 n.15.

The Georgia court held that "[t]he specific intent requirement also eliminates the possibility that innocuous communications . . . might fall within the statute's proscriptions." App. 16. This Court has warned that a distinction based, like this one, on speech's intent "blankets with uncertainty whatever may be said.

It compels the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945). Contrary to the Georgia court's assertion, the statute at issue here will likely compel speakers to hedge and trim, avoiding sex-related communication to children (as broadly defined by the Georgia Legislature) for fear of innocuous communications being misconstrued as intended to arouse or satisfy.

Georgia, like Texas, Oregon, and Minnesota, is attempting to define a new category of unprotected speech based on the intent of the speaker. This attempt is contrary to this Court's ruling that " . . . new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011).

The Georgia court claimed that "it is difficult to envision a scenario in which an adult's sexually explicit online communications with a child younger than 16, made with the intent to arouse or satisfy either party's sexual desire, would ever be found to have redeeming social value." App. 16. This is reminiscent of the Government's proposal in Stevens, which this Court described as "startling and dangerous," that First Amendment protection should depend "upon a categorical balancing of the value of the speech against its societal costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

III. Squarely Presented Through a Clean Vehicle

States are understandably concerned about sexual predators' ability to use the cover of the internet to lure children to become victims of sex abuse. This case deals with the distance to which the states can go to protect children online without offending the First Amendment. Authority on whether the states can do what Georgia, Texas, Oregon, and the Virgin Islands have sought to do – to protect children from sexual assault by forbidding sexually explicit (but nonobscene) speech toward them – is mixed. The sooner this Court weighs in on this question, the sooner the states can go about finding a constitutionally acceptable way to protect children.

This case presents an ideal vehicle for resolving the question presented. The relevant facts are not in dispute. And the Court can resolve the question presented based simply on the face of the Georgia statute. The critical issue of First Amendment law raised by this petition is squarely presented.

Further, all aspects of Petitioner's free-speech claim were thoroughly briefed and argued below, and the Georgia Supreme Court definitively resolved that claim against Petitioner. There is nothing left for any lower court to do.

CONCLUSION

Georgia's high court has expanded, beyond the bounds defined by this Court, the state's power to restrict speech between adults and children.

This Court should grant certiorari to correct Georgia's error.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: July 5, 2016

S16A0323. SCOTT v. THE STATE.

HUNSTEIN, Justice.

This interlocutory appeal presents a facial constitutional challenge to subsection (e) of the Computer or Electronic Pornography and Child Exploitation Prevention Act, OCGA § 16-12-100.2, which criminalizes the offense of "obscene Internet contact with a child." Appellant Jack Scott was indicted in January 2015 on two counts of that offense, arising from alleged sexually explicit online communications in which he took part in late 2013 with a minor under the age of 16. Scott thereafter filed a general demurrer, contending that OCGA § 16-12-100.2(e) is unconstitutionally overbroad in violation of the right to free speech guaranteed under the First Amendment to the United States Constitution.[1] The trial court denied the demurrer but granted Scott a certificate of immediate review. Scott filed an application for interlocutory appeal, and we granted the application only to review the merits of his First Amendment overbreadth challenge. We now hold that, when properly construed, subsection (e) does not effect a real and substantial constraint upon constitutionally protected expression. Subsection (e) therefore does not on its face violate the First Amendment, and

[1] Scott's general demurrer also cited the Georgia Constitution's free speech clause, see Ga. Const. of 1983, Art. 1, Sec. 1, Par. 5, and raised an additional challenge under the so-called "Dormant Commerce Clause."

the trial court properly denied Scott's demurrer. Accordingly, we affirm.

1. In general, "[t]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (122 SCt 1700, 152 LE2d 771) (2002); accord *Final Exit Network, Inc. v. State of Georgia*, 290 Ga. 508 (1) (722 SE2d 722) (2012). Though American jurisprudence has recognized a few narrowly defined forms of expression that are categorically excluded from First Amendment protection, see *United States v. Alvarez*, 132 ~~S.Ct.~~ SCt 2537, 2544 (183 LE2d 574) (2012) (enumerating categories of historically unprotected speech, such as defamation, obscenity, and fraud), laws purporting to prohibit or regulate speech falling outside those narrow bounds on the basis of its content are subject to "exacting scrutiny." Id. at 2548. To be valid, such laws "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (93 SCt 2908, 37 LE2d 830) (1973). Accord *State v. Fielden*, 280 Ga. 444, 445 (629 SE2d 252) (2006) ("'(b)ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'").

To maintain the requisite "breathing space" and avoid deterring expression that may tend towards the outer boundaries of what is protected, the First

Amendment overbreadth doctrine permits courts to invalidate laws burdening protected expression on their face, without regard to whether their application might be constitutional in a particular case. See *United States v. Williams*, 553 U.S. 285, 292 (128 SCt 1830, 170 LE2d 650) (2008); *New York v. Ferber*, 458 U.S. 747, 768-769 (102 SCt 3348, 73 LE2d 1113) (1982). This doctrine

> seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that it has been made criminal – has obvious harmful effects.

(Citations omitted.) *Williams*, 553 U.S. at 292; see also *Ferber*, 458 U.S. 747, 768-769. Thus, the overbreadth doctrine, while allowing facial overbreadth challenges without regard to whether the law in question might be constitutional if applied to the litigant at hand, also erects a high bar for establishing facial overbreadth, requiring a finding that the law's overbreadth is "substantial, not only in an absolute sense, but also relative to [its] plainly legitimate sweep." *Williams*, 553 U.S. at 292. Accord *Ashcroft v. Free Speech Coalition*, 535 U.S. 257 (122 SCt 1389, 152 LE2d 403) (2002) (overbreadth doctrine "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); *Final*

Exit Network, 290 Ga. at 511 (deterrent effect on protected expression must be "real and substantial" before statute is invalidated as overbroad); *State v. Miller*, 260 Ga. 669, 673 (2) (398 SE2d 547) (1990) (same).

To assess the extent of a statute's effect on protected expression, a court must determine what the statute actually covers. Accordingly, the first step in any overbreadth analysis is to construe the statute in question. *Williams*, 553 U.S. at 293; accord *United States v. Stevens*, 559 U.S. 460, 474 (130 SCt 1577, 176 LE2d 435) (2010). We now undertake that step, reviewing the trial court's order de novo. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2) (691 SE2d 218) (2010).

2. OCGA § 16-12-100.2(e)(1) provides that an individual

> commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer wireless service or Internet service, including but not limited to, a local bulletin board service, Internet chat room, e-mail, or instant messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of

> this subsection on the unsupported testimony of a child.

OCGA § 16-12-100.2(e)(1). The crime so defined is a felony, except where the victim is at least 14 years old and the accused was 18 or younger at the time of the crime, in which case it is a misdemeanor. Id. at (e)(2).

Under our well-established rules of statutory construction, we

> presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.

(Citations and punctuation omitted.) *Deal v. Coleman*, 294 Ga. 170, 172-173 (751 SE2d 337) (2013). In our interpretation of statutes, we thus look to the text of the provision in question, and its context within the larger legal framework, to discern the intent of the legislature in enacting it. See id.; OCGA § 1-3-1(a), (b).

Deconstructing the multifaceted substantive provisions of subsection (e)(1), it is apparent that the actus reus of the offense at issue is the establishing of "contact."[2] The text of the statute is clear that, to

[2] "Contact" is not defined in the statute, so we look to its ordinary meaning: "an occurrence in which people communicate with each other." Merriam-Webster's Online Dictionary,

constitute a crime, such contact must be made with a person known or believed to be a "child," a term defined in the statute as "any person under the age of 16 years." OCGA § 16-12-100.2(b)(1). In addition, the contact must be accomplished by way of a computer wireless service or Internet service, and it must involve "explicit verbal descriptions or narrative accounts" of subjects falling within any of four categories of offending content: "sexually explicit nudity," "sexual conduct," "sexual excitement," or "sadomasochistic abuse." These terms are defined elsewhere in the Georgia Code, see id. at (b)(4)-(7), as follows:

- "Sexually explicit nudity" is defined as "a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state." OCGA § 16-12-102(7).
- "Sexual conduct" is defined as "human masturbation, sexual intercourse, or any touching of the genitals, pubic areas, or buttocks of the human male or female or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification." OCGA § 16-12100.1(a)(7).

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http://www.merriam-webster.com/dictionary/contact (website last viewed June 23, 2016).

- "Sexual excitement" is defined as "the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation." OCGA § 16-12-100.1(a)(8).
- "Sadomasochistic abuse" is defined as "flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed." OCGA § 16-12-100.1(a)(6).

Following this list of offending content categories is the phrase, "that is intended to arouse or satisfy the sexual desire of either the child or the person." The pivotal question is what term or phrase within subsection (e) this qualifying phrase is intended to modify. Does the phrase modify only the term "sadomasochistic abuse" that immediately precedes it? Or the entire series of offending "verbal descriptions or narrative accounts" previously set forth? Or the "contact" itself? The answer to this question is critical not only to determining the scope of conduct within the statute's reach but also to assessing whether the scope of proscribed conduct is too broad to pass constitutional muster.

Under the canon of statutory construction known as the "rule of the last antecedent," a qualifying phrase "'should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Lockhart v. United States*, 136 ~~S.Ct.~~ SCt 958, 962 (194 LE2d 48) (2016); accord *Coleman*, 294 Ga. at 174. However, this rule is not absolute, and the inference it raises may be

rebutted where "the structure and internal logic of the statutory scheme" so militate. *Lockhart*, 136 SCt at 962-963, 965; see also *Paroline v. United States*, 134 ~~S.Ct.~~ SCt 1710, 1721 (188 LE2d 714) (2014) (recognizing that this inference can be overcome by "'other indicia of meaning'"); *Coleman*, 294 Ga. at 174 (recognizing that this canon applies only "'where no contrary intention appears.'"). Under the alternative "series-qualifier principle," a qualifying phrase appearing at the end of a series should be read to apply to all items in the series "when such an application would represent a natural construction." *Lockhart*, 136 ~~S.Ct.~~ SCt at 965. While these maxims can be helpful in discerning the meaning of a qualifying phrase, they should not be applied mechanically, and, in the end, we must glean the import of such a phrase by examining its situation within and relationship to the entire statutory text, as well as the intended purpose of the statutory provision. See id. at 964 (selecting construction of qualifying phrase that would yield the least redundancy among terms within the statute and would most closely follow the structure of a related statute upon which the provision was patterned); *Paroline*, 134 ~~S.Ct.~~ SCt at 1721; *Coleman*, 294 Ga. at 173-174.

Here, aspects of the structure of subsection (e)(1) and the particular verbiage of the qualifying phrase lead us to reject both the rule of the last antecedent and the series-modifier principle, in favor of a construction under which the qualifying phrase modifies the prohibited "contact" itself: in other words, it is the *contact* "that is intended to arouse or satisfy the sexual

desire of either the child or the person." In reaching this conclusion, we note that the qualifying phrase appears after the list of four enumerated offending content categories. Were we to apply the rule of the last antecedent, we would read the qualifying phrase as modifying only "sadomasochistic abuse." Compared to the other categories in this list – "sexually explicit nudity," "sexual conduct," and "sexual excitement" – this last category is arguably the most egregious – involving "torture" or "flagellation" – and certainly the most narrowly defined. It thus seems unlikely that the legislature intended to enumerate, on par with three relatively broad categories of offending content, the very narrow content category of "sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person." See, e.g., *Paroline*, 134 ~~S.Ct.~~ SCt at 1721 (construing qualifying clause in a manner best according with "common sense"); *United States v. Bass*, 404 U.S. 336, 341 (92 SCt 515, 30 LE2d 488) (1971) (declining to apply rule of last antecedent where its application would be inconsistent "with any discernible purpose of the statute"). For this reason, we find the rule of the last antecedent to be inapposite.

In considering whether the qualifying phrase might, under the series-modifier principle, be intended to modify all four categories of offending content, we note that the phrase makes reference to the sexual desire "of either *the* child or *the* person." In making specific reference back to either the child victim or the accused, this provision requires a specific intent to

"arouse or satisfy" one of the two parties to the allegedly criminal contact. It is thus the "contact" to which the specific intent is linked, rather than any or all of the categories of offending content described in the statute. By specifying that *the* victim or *the* person making the contact be the object of the intent to arouse, the statutory text precludes a construction that links the intent to arouse to the creator of the offending content, rather than to the initiator of the online contact.

Though this construction does not necessarily flow naturally from the grammatical structure of subsection (e)(1), we believe it is the only tenable reading that gives meaning to the article "the" that precedes "child" and "person" in the qualifying phrase. See *Kennedy v. Carlton*, 294 Ga. 576 (2) (757 SE2d 46) (2014) (statutes must be construed to give meaning to all terms therein). Such a construction, moreover, significantly narrows the scope of the statute and thus effectuates our obligation, in the interpretation of statutes, to adopt a readily available limiting construction where necessary to avoid constitutional infirmity. See *Miller*, 260 Ga. at 673-674 (reading a specific intent requirement into Anti-Mask Act to avoid overbreadth problems); accord *Watson v. State*, 293 Ga. 817, 820 (1) (750 SE2d 143) (2013) ("even statutes that impose content-based restrictions on free speech will not be deemed facially invalid if they are readily subject to a limiting construction").

In summary, we read OCGA § 16-12-100.2(e)(1) to prohibit only that online contact involving verbal descriptions or narrative accounts of any of the four

defined categories of offending content and made with the specific intent to arouse or satisfy the sexual desires of the accused or the child victim. The crime of obscene Internet contact with a child is thus comprised of (1) the actus reus – the contact, performed under particular circumstances (with one known or believed to be age 15 or younger; via specified online means; involving verbal descriptions or narrative accounts of content falling into any of the four defined categories) and (2) the mens rea – the specific intent on the part of the accused that his contact will arouse or satisfy the sexual desire of the child or the accused. Having thus construed the statute, we now turn to the question of whether the statute, so construed, can on its face survive First Amendment overbreadth scrutiny.

3. OCGA § 16-12-100.2(e) is one among several substantive provisions of a larger statutory enactment whose very title makes clear that its purpose is preventing the exploitation of children via electronic means. It is "evident beyond the need for elaboration" that government has a compelling interest in protecting the physical and psychological well-being of children. *Osborne v. Ohio*, 495 U.S. 103, 109 (110 SCt 1691, 109 LE2d 98) (1990). We nonetheless have the obligation to ensure that, in its zeal to promote this worthy aim, our legislature has not unwittingly curtailed legitimate modes of expression in a real and substantial way. See *Final Exit Network*, 290 Ga. at 511; *Miller*, 260 Ga. at 673.

In undertaking this assessment, we must determine whether " 'a substantial number of [the statute's]

applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473. Within the "plainly legitimate sweep" of statutory prohibitions are two unprotected categories of speech relevant to this case, obscenity and child pornography. See *Williams*, 553 U.S. at 288-289. Obscenity is material "which, taken as a whole, appeal[s] to the prurient interest in sex, . . . portray[s] sexual conduct in a patently offensive way, and . . . taken as a whole, do[es] not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (93 SCt 2607, 37 LE2d 419) (1973); see also *Ginsberg v. New York*, 390 U.S. 629, 633 (88 SCt 1274, 20 LE2d 195 (1968) (sanctioning categorical prohibition on material that, while not obscene in relation to adult sensibilities, is found to be obscene as to minors). Child pornography encompasses visual depictions of sexual conduct involving children younger than a specified age. See *New York v. Ferber*, 458 U.S. 747 (102 SCt 3348, 73 LE2d 1113) (1982). Though the statute here certainly reaches some speech the content of which falls into one of these two categorically unprotected forms of expression, the four enumerated categories of offending content indisputably span expression that falls outside this narrow swath of unprotected speech and thus into the realm of protected expression. The question is whether the mismatch is too great to pass constitutional muster.

In examining the permissible breadth of a statute seeking to curtail various avenues of child exploitation in the digital age, we are, fortunately, not writing on a

blank slate. See, e.g., *United States v. Williams*, supra (overbreadth challenge to federal law criminalizing pandering and solicitation of child pornography); *Ashcroft v. Free Speech Coalition*, supra (overbreadth challenge to federal law criminalizing various forms of actual and "virtual" child pornography); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (117 SCt 2329, 138 LE2d 874) (1997) (overbreadth challenge to federal statute prohibiting online transmission of "obscene or indecent" messages to recipients under the age of 18). In *Reno*, the Court invalidated two provisions of the federal Communications Decency Act, which sought to protect minors from "indecent" and "patently offensive" communications on the Internet by prohibiting the "knowing transmission of . . . indecent messages to any recipient under 18 years of age" and the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." 521 U.S. at 849, 859. The Court found the scope of these provisions too broad in that they "effectively suppress[] a large amount of speech that adults have a constitutional right to receive and address to one another." Id. at 874. While recognizing the government's compelling interest in protecting children from harmful content, the Court concluded that the provisions at issue were broader than was necessary to achieve this goal. Id. at 875-879. The Court noted that the terms "indecent" and "patently offensive" were undefined in the statute and had the potential to encompass "large amounts of nonpornographic material with serious educational or other value." Id. at 877. In addition, the Court observed that these provisions could cover a

range of adult-to-adult online communications in fora such as chat rooms, where the presence of a single minor could render criminal what would otherwise be protected speech among adults. Id. at 880. These considerations led the Court to conclude that the statute's reach was too broad to withstand First Amendment scrutiny.

In *Free Speech Coalition*, the Court considered the constitutionality of the federal Child Pornography Prevention Act, which expanded the federal prohibition on child pornography to reach "virtual child pornography," in which technology or youthful-looking adults are used to depict what appears to be, but is not actually, children engaged in sexually explicit conduct. 535 U.S. at 239-240. The statute also prohibited the production and distribution of material "pandered" as child pornography, regardless of whether it actually was. Id. at 241. As in *Reno*, the Court invalidated the statute as overbroad, finding that its reach was too far beyond the unprotected categories of obscenity and child pornography and that it thus improperly "abridge[d] the freedom to engage in a substantial amount of lawful speech." Id. at 256. With regard to virtual child pornography, the Court found no justification for a ban on such speech, because its definition did not necessarily exclude works containing serious literary, artistic, educational, or other value, and because, unlike with real child_pornography, actual children are not used as subjects in – and thereby victims of – the production process. Id. at 246-250. With regard to the pandering

provision, the Court held that it was overbroad because it applied to materials without regard to their actual content and applied to those in possession of such materials regardless of how far removed in the distribution chain they were from the actual panderer. Id. at 257-258.

By contrast, in *Williams*, the Court upheld a child pornography pandering and solicitation provision that was enacted following the invalidation of its predecessor in *Free Speech Coalition*. 553 U.S. at 289. As the Court described it, "Rather than targeting the underlying material, the statute bans the collateral speech that introduces such material into the child-pornography distribution network." Id. at 293. In addition, the Court noted that the statute's definition of child pornography "precisely tracks the material held proscribable in *Ferber* and *Miller.*" Id. Other features of the statute were also significant in maintaining its validity, including its scienter elements, which require both "knowing" pandering and either the defendant's belief that the material is child pornography or the intent to make another believe this is so. Id. at 294-296. See also *Osborne*, 495 U.S. at 115 (scienter requirement one factor in conclusion that statute banning possession of child pornography was valid); *Miller*, 260 Ga. at 674 (specific intent requirement cited as significant in limiting scope of statute in question and, thus, saving it from overbreadth). Cf. *State v. Fielden*, 280 Ga. 444, 447 (629 SE2d 252) (2006) (absence of specific intent requirement cited as factor in invalidating statute in question).

Assessing the statute here against this backdrop, we conclude that, under the narrow construction we have adopted above, OCGA § 16-12-100.2(e)(1) does not prohibit a real and substantial amount of constitutionally protected expression. The key to this conclusion is the statute's mens rea element, which requires the accused, with the knowledge or belief that the victim is in fact a child younger than 16, to make contact with that victim with the specific intent to arouse or satisfy his own or the victim's sexual desire. This specific intent requirement dramatically reduces the range of expression that is subject to the statutory prohibition. It is also, to some degree, a proxy for elements of the *Miller v. California* obscenity standard, namely, that the material appeals to a "prurient interest in sex" and that it "lacks any literary, artistic, political, or scientific value," see 413 U.S. at 24: it is difficult to envision a scenario in which an adult's sexually explicit online communication with a child younger than 16, made with the intent to arouse or satisfy either party's sexual desire, would ever be found to have redeeming social value. The specific intent requirement also eliminates the possibility that innocuous communications – for example, a mother's email to her 15-year-old son admonishing him not to read *Penthouse* or a teacher's online lecture describing Michelangelo's *David* – might fall within the statute's proscriptions. See *Osborne*, 495 U.S. at 113-114 (upholding statute where narrow construction avoids punishing innocuous conduct). In addition, this requirement avoids the problem identified in *Reno* of potential overreach into the realm of adult-to-adult communications to which children

might incidentally be exposed, again foreclosing unintentional encroachment into protected speech.

"Invalidation for overbreadth is strong medicine that is not to be casually employed." (Internal quotation marks omitted.) *Williams*, 553 U.S. at 293. Though creative attorneys may dream up "fanciful hypotheticals" under which the statute here reaches protected expression, id. at 301, we are not convinced that these scenarios are sufficiently numerous or likely to warrant the statute's wholesale invalidation. See id. at 303 ("[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.' "). We therefore agree with the trial court that OCGA § 16-12-100.2(e)(1) is not unconstitutionally overbroad under the First Amendment. Accordingly, we affirm.

Judgment affirmed. All the Justices concur.

IN THE SUPERIOR COURT
OF CAMDEN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
vs.	)	**CASE NO.**
JACK SCOTT,	)	**2015-SU-CR-000054**
Defendant.	)	

ORDER

(Filed Aug. 21, 2015)

Defendant has filed a general demurrer to Counts One and Two of the indictment on the ground the statute on which they are based, O.C.G.A. § 16-12100.2(e), is unconstitutional. He contends that rights protected by the First Amendment and the Dormant Commerce Clause are violated by a statute which criminalizes Internet contact with a child involving "explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person."

To invalidate a statute under the Dormant Commerce Clause, it must be shown that the statute "substantially" burdens the right of the party challenging the statute to engage in interstate commerce. *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144 (9th Circuit 2012). In *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160 (S.D. N.Y. 1997), the twelve plaintiffs all engaged in either commercial activities or

information dissemination activities in interstate commerce, which gave them standing to challenge a statute that might expose them to criminal liability in the course of conducting those activities. Defendant lacks standing to challenge the statute in question on the ground it interferes with his right to engage in interstate commerce, because he has not shown he is engaged in any activity implicating interstate commerce.

> Two respected courts recently have held that individual garbage generators lacked standing to challenge schemes similar to Houlton's under the Commerce Clause. See *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1381-82 (8th Cir.), cert. denied, 522 U.S. 1029, 118 S.Ct. 629, 139 L.Ed.2d 609 (1997); *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703-04 (9th Cir.), cert. denied, 522 U.S. 966, 118 S.Ct. 411, 139 L.Ed.2d 315 (1997). These courts emphasized that the purpose of the dormant Commerce Clause is to curtail states' abilities to hinder interstate trade, and that the injury claimed by the individual garbage generators – being compelled to pay higher prices for services they neither required nor desired – was not even marginally related to this purpose. See *Ben Oehrleins*, 115 F.3d at 1382; *Washoe County*, 110 F.3d at 703.

Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999).

Even if Defendant were found to have standing to challenge the statute on Dormant Commerce Clause

grounds, he has not made any showing whatsoever that would support a conclusion the statute's burden on interstate commerce is substantial. He apparently takes the position that his alleged use of the internet while in Florida to communicate with a minor in Georgia means that the Commerce Clause is automatically implicated, and that he is not required to make such a showing. This Court, like the Court in *Hatch v. Superior Court*, 80 Cal. App.4th 170, 94 Cal.Rptr.2d 453 (Cal. App. 2000), disagrees with the holding of *Pataki*, *supra,* on that issue.

> While it may be true that Internet communications routinely pass along interstate lines, we do not believe this general proposition can be employed, as suggested by Hatch, to insulate pedophiles from prosecution simply by reason of their usage of modern technology. Such a view of what our Constitution requires is, in our opinion, completely inappropriate. That is to say, the validity of the *Pataki* analysis *vel non* is not controlling here because the intent to seduce element in section 288.2 is a distinction of the utmost significance. While a ban on the simple communication of certain materials may interfere with an adult's legitimate rights, a ban on communication of specified matter to a minor for purposes of seduction can only affect the rights of the very narrow class of adults who intend to engage in sex with minors. We have found no case which gives such intentions or the communications employed in realizing them protection under the dormant Commerce Clause.

Id. at 80 Cal. App. 4th 195. The Georgia statute, like the California statute, does not criminalize all conversations between adults and minors which include discussions of nudity or sex. It only bans conversations intended by the adult to arouse or satisfy the sexual desires of one or both parties to the conversation, which, like efforts to seduce minors, is appropriately classified as criminal conduct. The Court concludes that O.C.G.A. § 16-12-100.2(e) does not violate the Dormant Commerce Clause.

Defendant cites many cases which implement the First Amendment's protection of free speech. They relate to statutes regulating panhandling, disorderly conduct, obscene language, use of union dues for political purposes, and similar activities. Statutes which restrict speech that has the potential for sexually harming minors are not immune from attack on First Amendment grounds, but their subject matter means great care must be taken in evaluating their constitutionality.

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). Accordingly, we have sustained legislation aimed at protecting the

> physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York*, 390 U.S. 629, 637-643, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), we sustained a New York law protecting children from exposure to non-obscene literature. Most recently, we held that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

U.S. v. Ferber, 458 U.S. 747, 756-757 (1982). Defendant cites *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) in support of his position. That case invalidated, on First Amendment grounds, the Child Pornography Prevention Act of 1996 (CPPA). The basis of the Court decision was that "the CPPA prohibits speech that records no crime and creates no victims by its production." *Id.* at 250. When an adult discusses sex with a minor with the intent of arousing the adult or minor sexually, the discussion creates a victim. The minor is exploited to arouse the adult sexually, or the minor is aroused sexually, or both. The Court further held that

> The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct,

> conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

Id. at 252-253. The constitutional infirmity in the CPPA, the prohibition of speech on the ground it **may** reach children, is not present in O.C.G.A. § 16-12-100.2(e) because the sexually stimulating communication, being one on one in nature, is placed by the perpetrators directly "into the hands of children" when one of the participants in the discussion is a minor.[1] The statute does not use vague terms such as "indecent" or "patently offensive" or "obscene" which require application of subjective standards to determine what conduct violates it. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Protecting children from being used by adults as a means of obtaining sexual gratification is clearly a compelling state interest. By requiring the State to prove not only that an adult-minor discussion of nudity, sexual conduct, sexual excitement or sadomasochistic abuse occurred, but also that it was intended to produce sexual arousal, the statute is narrowly drawn. There is no danger that appropriate online discussion of Michelangelo's David between adults

[1] The indictment alleges the conduct in question was directed at a minor rather than at an adult posing as a minor. Therefore the constitutionality of the statute's criminalizing of speech between two adults, when one of them poses as a minor, is not before the Court in this case.

and minors will be chilled by the statute. Indicating that the statue is sexually explicit is not a crime because that is a factual statement rather than an effort to induce sexual arousal. However, an adult who compares his endowment with that of David in a discussion which includes suggestions of how much pleasure would be derived by its use on a minor, or suggests what uses a minor could make of David's endowment, is put on fair notice by the statute that such conduct is criminal. This satisfies the strict scrutiny standard applicable to laws which restrict content based speech. *See Reed v. Town of Gilbert, Arizona*, ___ U.S. ___, 135 S.Ct. 2218 (2015).

In *Ex Parte Lo*, 424 S.W.3rd 10 (Tx. Crim. App. 2013), the Court held that the First Amendment was violated by a statute which exposed to criminal prosecution any person who communicates in a sexually explicit manner with a minor with the "intent to arouse or gratify the sexual desire of any person." The Court believed that a more narrowly drawn provision, such as "with intent to induce the child to engage in conduct with the actor or another individual that would constitute a violation of [other Texas statutes protecting minors from sexual misconduct]," should have been enacted by the legislature. This Court rejects the notion that the State of Georgia cannot criminalize communications with minors which are intended to produce sexual stimulation unless that conduct includes an intent to induce minors to engage in sexual relations with another person. It is within the police power of the State to prohibit adults from doing anything with minors for

the express purpose of inducing sexual stimulation. That is not what children are for.

Defendant's general demurrer to Counts One and Two of the Indictment is DENIED.

SO ORDERED this 19th day of August 2015.

/s/ Stephen G. Scarlett, Sr.
STEPHEN G. SCARLETT, SR.
Judge, Superior Court
Brunswick Judicial Circuit

[SEAL] SUPREME COURT OF GEORGIA
Case No. S16A0323

Atlanta, July 25, 2016

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

JACK SCOTT v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur.