

IN THE SUPREME COURT OF GEORGIA

Case No. S16A0323

JACK SCOTT,

APPELLANT,

V.

THE STATE OF GEORGIA,

APPELLEE.

**BRIEF OF NATIONAL CENTER ON SEXUAL EXPLOITATION AND
CIVIL LAWYERS AGAINST WORLD SEX-SLAVERY,
AS *AMICI CURIAE*, SUPPORTING APPELLEE**

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The National Center on Sexual Exploitation, founded in 1962, is a national non-profit organization that uses education, outreach, and advocacy to fight against the normalization of sexual abuse and violence including the sexualization of children, the production and distribution of pornography, and sex trafficking. The Center is a constant resource for the press, the public, and opinion leaders.

Civil Lawyers Against World Sex-Slavery (CLAWS) is a group of citizens and attorneys devoted to educating the public and enforcing civil laws to protect victims tricked and/or kidnapped into sex slavery. CLAWS is a non-profit organization that uses the civil justice system to bring pro bono lawsuits on behalf of survivors of sex slavery. Our goal is to empower victims, take economic resources away from those who are benefiting from trafficking, and raise awareness among the public.

Amici take interest in this case and write in support of the State of Georgia, the Appellee, because we know that O.C.G.A. § 16-12-100.2(e)(1) is necessary to protect children from grooming, sexual exploitation, and abuse by child sex predators online.

INTRODUCTION

The rise of the Internet age and advancements in technology have encouraged and facilitated child molesters in the sexual abuse of children.¹ According to the Department of Justice's threat assessment report to Congress in 2010, the dangers to our children from such predators are far greater than prior to the Internet and far greater numbers of children are exploited and are at risk.²

State and federal laws have begun to address the many facets of Internet child sexual abuse but this work is far from complete. Graphic "cybersex" with children, remote child molestation, and other types of sexualized online

¹ Kenneth Lanning, Nat'l Ctr. for Missing and Exploited Children, *Child Molesters: A Behavioral Analysis* 118 (5th ed. 2010) ("Many individuals with a sexual interest in children appear to be drawn to computers and the Internet because the technology provides them with added convenience and perceived anonymity, another method of access to children, an easier way to obtain and exchange child pornography, and the most effective method ever invented to locate and communicate with others who share and will validate these interests."); U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction* 8 (2010) <http://www.justice.gov/psc/docs/natstrategyreport.pdf> [hereinafter "The National Strategy"].

² *The National Strategy*, *supra* note 1, at 8 ("The results of the Threat Assessment reveal that *there has been a dramatic increase in cases of sexual exploitation of children*, including the possession, distribution, and manufacture of child pornography; the online enticement of children for sexual acts; commercial sexual exploitation of children; child sex tourism; and child sexual molestation, since the 1990s. For example, in 2006 U.S. Attorneys handled 82.8 percent more child pornography cases than they had in 1994. State and local law enforcement agencies involved in Internet Crimes Against Children Task Forces reported a 230 percent increase in the number of documented complaints of online enticement of children from 2004 to 2008. In the same time period ICAC Task Forces noted a more than thousand percent increase in complaints of child prostitution." (emphasis added)).

conversations which “are potentially dangerous and harmful to children” have largely gone unaddressed³ until recently, with statutes such as the one at issue in this case. Georgia’s statute O.C.G.A. § 16-12-100.2(e)(1) (hereafter “obscene internet contact with a child statute” or “contact with minors statute”), prohibits exactly these types of harmful and dangerous interactions with children.⁴ Moreover, the U.S. Department of Justice has recognized that these online behaviors by adults have been effective in manipulating children into engaging in very risky behavior such as agreeing to meet adults in-person as well as exposing themselves to adults via webcam.⁵ Furthermore, the National Society for the Prevention of Cruelty to Children in the United Kingdom defines such conversations as sexual abuse.⁶ Researchers have long acknowledged these

³ Lanning, *supra* note 1, at 121 (“Whether illegal or not, engaging in graphic ‘cybersex’ with children, asking them to masturbate themselves, and other types of sexualized online conversations are potentially dangerous and harmful behaviors.”).

⁴ See *Skelhorn v. State*, 332 Ga. App. 782 (2015), *Abney v. State*, 327 Ga. App. 551 (2014), *State v. Cohron*, 324 Ga. App. 137 (2013), *Castaneira v. State*, 321 Ga. App. 418 (2013), and *Selfe v. State*, 290 Ga. App. 857 (2008) for cases where O.C.G.A. § 16-12-100.2(e)(1) has been applied and all involving some exposure by the adult to the victim either through sharing photos or live stream webcam video.

⁵ See The National Strategy, *supra* note 1, at 2.

⁶ *Sexual Abuse*, Nat’l Ctr. for the Prevention of Cruelty to Children, <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-abuse/what-is-csa/> (last visited Jan. 19, 2016) (“A child is sexually abused when they are forced or persuaded to take part in sexual activities. This doesn’t have to be physical contact, and it can happen online. Sometimes the child won’t

contacts are harmful and a part of the grooming process employed by predators.⁷ This is why statutes addressing all the different types of harmful online contacts with children are necessary to prevent abuse.

SUMMARY OF THE RESEARCH

I. The Risks and Effects of Online Sexual Abuse on Children

Most child victims of Internet sexual abuse are girls between the ages of 13 and 17.⁸ And in this stage of adolescence children are both curious about sexual matters⁹ and ill-equipped to deal with them.¹⁰ This makes them uniquely

understand that what's happening to them is abuse. They may not even understand that it's wrong.”).

⁷ Lanning, *supra* note 1, at 118; The National Strategy, *supra* note 1, at 8; UNICEF, *Child Safety Online: Global Challenges and Strategies 2* (Christine Dinsmore et al. eds., 2011) http://www.unicef-irc.org/publications/pdf/ict_eng.pdf; Janis Wolak et al., *Online “Predators” and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, *Am. Psychologist* Feb.–Mar. 2008, at 111, 115 [hereinafter *Online Predators*]; Janis Wolak et al., *Online Victimization of Youth: Five Years Later*, *Crimes Against Children Research Center*, 16 (2006) <http://www.unh.edu/ccrc/pdf/CV138.pdf> [hereinafter *Online Victimization of Youth*]; Dr. Michael Seto, *Chapter 4: Internet-Facilitated Sexual Offending*, SMART, http://www.smart.gov/SOMAPI/sec1/ch4_internet.html (last visited Jan. 19, 2016). See generally Janis Wolak et al., *Internet-Initiated Sex Crimes Against Minors: Implications for Prevention Based on Findings from a National Study*, 35 *J. Adolescent Health* 424:e11–e20 (2004).

⁸ *Online Predators*, *supra* note 7, at 115.

⁹ *Online Predators*, *supra* note 7, at 115 (“The reality of adolescent sexual development includes growing sexual curiosity, knowledge, and experience as youths make the transition from childhood to adulthood. Even in early adolescence, most youths are quite aware of, interested in, and beginning to experiment with sex.” (internal citations omitted)).

¹⁰ *Online Predators*, *supra* note 8, at 114 (“Compared with adults and even youths in their late teens (ages 17 to 19), younger adolescents have little experience with

vulnerable to sexual exploitation and abuse online, and child sex predators know this.¹¹ Furthermore, there are aspects of the Internet environment which increase these risks, such as the fact that interactions with strangers typically “take place in isolation and secrecy, outside of oversight by peers, family members, and others in the youths’ face-to-face social networks. This isolation may lead to relationships that form more quickly, involve greater self-disclosure, and develop with greater intensity than face-to-face relationships among peers.”¹² Furthermore, the advancement of mobile technology and immersion of children in Internet communities makes it very difficult for parents to monitor or even be fully aware

intimate relationships or romance. They often lack the ability to negotiate effectively with partners about sexual activity. Young adolescents with older partners have high rates of coerced intercourse.” (internal citations omitted)); *Online Predators*, *supra* note 8, at 114–15 (“[A] considerable portion of victims are in early and mid-adolescence. Few youths of those ages have the mature judgment and emotional self-regulation required to engage in healthy relationships that include sexual intimacy. Third, youths in their early and mid-teens often struggle with emotional control. When they are drawn into online relationships that include disclosures about sexual matters, the feelings that are generated may be particularly powerful and difficult to handle for youths just beginning to experience sexual desires.” (internal citations omitted)).

¹¹ *Online Victimization of Youth*, *supra* note 7, at 16 (“A study of Internet-related crimes found sex offenders who met their victims online were targeting young teenagers by using their developmentally driven desire for romance and interest in sex to manipulate them into meetings for sexual purposes. (internal citation omitted)); UNICEF, *supra*, note 8, at 2 (“Another myth is that grooming typically involves older men lying and forcefully entrapping innocent children by using false identities. This is also largely untrue. Rather, it tends to be a process of ‘seducing’ or flattering children into what the child may perceive as a voluntary sexual online friendship.”).

¹² *Online Predators*, *supra* note 7, at 115–16.

of their children's Internet use.¹³ And certain online behaviors by children increase the risk that they are solicited sexually, such as visiting chatrooms¹⁴ and talking with strangers about sex online.¹⁵ Research shows that especially vulnerable children, those who are highly troubled, have strained relationships with parents, and histories of physical and sexual abuse, are more likely to form close relationships online and become victims of online sexual exploitation.¹⁶ Moreover, the lifelong effects of childhood sexual abuse are devastating.

¹³ UNICEF, *supra* note 7, at 3–4.

¹⁴ *Online Predators*, *supra* note 7, at 116 (“Most of the online child molesters described in the N-JOV Study met their victims in chatrooms. In a 2006 study, about one third of youths who received online sexual solicitations had received them in chatrooms.” (internal citation omitted)).

¹⁵ *Id.* at 116 (“However, youths who send personal information (e.g., name, telephone number, pictures) to unknown people or talk online to such people about sex are more likely to receive aggressive sexual solicitations— those that involve actual or attempted offline contact.” (internal citation omitted)).

¹⁶ *Id.* at 117 (“Youth Internet users with histories of offline sexual or physical abuse appear to be considerably more likely to receive online aggressive sexual solicitations. Abused youths are more at risk for sexual victimization and exploitation in a variety of ways. Abuse history could be related to emotional needs or developmental distortions that make some youths less able to assess and more responsive to inappropriate sexual advances. Some such youths may be vulnerable to online sexual advances because they are looking for attention and affection. In addition, childhood trauma is associated with adolescent risk behavior, including risky sexual behavior. So, the youths most at risk may exhibit a wide range of problems. For some, prior abuse may trigger risky sexual behavior that directly invites online sexual advances. But delinquency, depression, and social interaction problems unrelated to abuse also may increase vulnerability” (internal citations omitted)); *Id.* at 115 (“There is some evidence that adolescents who visit chatrooms are more likely to have problems with their parents, to suffer from sadness, loneliness, or depression, to have histories of sexual abuse, and to engage in risky behavior than those who do not go to chatrooms. Youths who are

Children who have been exposed to sexual abuse have very high rates of drug and alcohol dependence, eating disorders, major depression, social anxiety, panic disorder, divorce, rape as an adult and attempted suicide. Such children suffer from many of the symptoms of post-traumatic stress disorder. And recently, there is evidence to show that such abuse has led to serious psychotic disorders such as schizophrenia, delusional disorder, and personality disorders.¹⁷ But even children who have not been physically abused suffer negative effects from being sexually objectified¹⁸ and engaging in sexual behavior at a young age.¹⁹ Not only

lonely, shy, or lacking in social skills may interact with others in chatrooms to compensate for problems they have forming friendships offline. Younger adolescents, in particular, may not be developmentally prepared to avoid or respond to the explicit sexual invitations they are likely to encounter in many chatrooms.” (internal citations omitted)); Janis Wolak et al., *Escaping or Connecting? Characteristics of Youth Who Form Close Online Relationships*, 26 J. Adolescence 105, 110 (2003) (“[A] disproportionate number of adolescents with close online relationships were highly troubled, reported high amounts of conflict with their parent, low communication with parents and engaged in high levels of delinquency.”).

¹⁷ see Judy Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse*, Paper no. 11, CHILD FAMILY COMMUNITY AUSTRALIA (CFCA), 7–9 (2013),

<https://aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143161/cfca11.pdf>.

¹⁸ APA Report, *THE SEXUALIZATION OF GIRLS*, 20 (2010) (“Ample evidence indicates that sexualization has negative effects in a variety of domains, including cognitive functioning, physical and mental health, sexuality, and attitudes and beliefs.”).

¹⁹ *Online Predators*, *supra* note 7, at 116 (“[E]arly sexual activity is related to a variety of risk behaviors, both sexual (e.g., multiple partners, older partners, unprotected sex, early pregnancy) and otherwise (e.g., substance abuse, delinquency). These bode ill for youths in terms of mental health and academic achievement.” (internal citations omitted)).

is early sexual activity linked to subsequent risky behavior, poor academic performance and mental health issues²⁰ but, so is mere intense romantic or sexual involvement at a young age, such as an online sexual relationship with an adult.²¹

II. The Behavioral Profile of Online Child Predators

Most offenders in Internet sex crimes are men aged 26 years or older and 10 or more years older than their victims.²² These predators use the Internet to target and seduce underage adolescents into sexual encounters using instant messaging services, video chat, email, and chat rooms.²³ Many online child molesters use online communications “to establish trust and confidence, introducing talk of sex, and then arranging to meet youths in person for sexual encounters.” Janis Wolak, David Finkelhor, & Kimberly J. Mitchell, *Online “Predators” and Their Victims*, *American Psychologist*, February 2008, at 116. Online, they are able to search for

²⁰ *Id.* (“[E]arly sexual activity is related to a variety of risk behaviors, both sexual (e.g., multiple partners, older partners, unprotected sex, early pregnancy) and otherwise (e.g., substance abuse, delinquency). These bode ill for youths in terms of mental health and academic achievement.” (internal citations omitted))

²¹ *Id.* (“[I]ntense romantic and sexual involvements during early and mid-adolescence are associated with a range of negative outcomes (e.g., externalizing and risk behaviors) and may result in neglect of other important developmental tasks, such as academic performance.” (internal citations omitted)).

²² *Internet-initiated sex crimes*, *supra* note 7, at 424.e15.

²³ *Online Predators*, *supra* note 7, at 112 (“Most Internet-initiated sex crimes involve adult men who use the Internet to meet and seduce underage adolescents into sexual encounters. The offenders use Internet communications such as instant messages, e-mail, and chatrooms to meet and develop intimate relationships with victims.”).

and access children with less risk of being detected²⁴ and have immediate interactions with them outside the view of parents and guardians.²⁵ Furthermore, these adults can more easily and quickly build trust and seduce children online whereas in-person, societal barriers such as significant age differences would make interactions less comfortable and slower to develop.²⁶ Child molesters with exhibitionist tendencies are also drawn to the Internet as a convenient medium to send nude pictures or expose themselves to minors via webcam.²⁷ Although the Internet has provided a new medium, these sex crimes against children are hardly new.²⁸ In fact, evidence shows that while physical child sexual abuse is declining, Internet sex crimes are increasing.²⁹ Because child sexual abuse has moved online, new laws have been developed and Georgia has kept up with predators in a

²⁴ Lanning, *supra* note 1, at 131.

²⁵ *Online Predators*, *supra* note 7, at 121.

²⁶ *Id.*

²⁷ *Online Predators*, *supra* note 7, at 119 (“The Internet also may be particularly attractive to offenders with exhibitionistic tendencies, who can use Web cameras to transmit images of themselves online. In the N-JOV Study, 18% of online child molesters sent photos of themselves in sexual poses to victim. In the YISS-2, 6% of youths who were sexually solicited received such pictures from solicitors.”).

²⁸ *Id.* at 113.

²⁹ Seto, *supra* note 7 (“The increase in Internet sexual offending has been paralleled by a decrease in the number of reported child sexual abuse cases, and a decrease in violent crime more broadly. This indicates that Internet sexual offending is a new phenomenon that may not be influenced by the same contextual factors as other kinds of sexual or violent crime. An important research question is the extent to which Internet sex offenders represent a new type of sex offender, or whether they reflect the transformation of conventional sexual offending through the adoption of new technologies.”)

constitutionally permissible manner.³⁰ Especially since evidence shows that while many online predators will go on to commit contact offenses against children there is a small percentage who are satisfied with exposing themselves to, seducing, remotely molesting and thus traumatizing children, online alone.³¹

According to Kenneth Lanning's, "Child Molesters: A Behavioral Analysis", published by the National Center for Missing and Exploited Children, whether in-person or online, the motivations and strategies of the predator are the same. Child molesters know how to manipulate and seduce children. Part of this process is to reduce inhibitions by introducing the topics of sex. Showing children, of any age, sexually explicit material, encouraging or facilitating the child's use of pornography and even telling "dirty jokes" to children are part of the seduction process of a child predator. Furthermore, child molesters will try to alienate children from their parents, a process all the more easily achieved through the privacy and intimacy of internet communications hidden from the watchful eyes of

³⁰ Lanning, *supra* note 1, at 117–121.

³¹ *Online Predators*, *supra* note 7, at 116 ("For some of these offenders, the danger and excitement of seducing underage youths are themselves a source of sexual arousal."); Seto, *supra* note 7 ("Briggs, Simon, and Simonsen (2011) have suggested that there is a distinction between fantasy-driven and contact-driven solicitation offenders. The former group engages in online activities (such as sexual chat, exchange of pornographic images, or exhibitionism via Webcam) that are gratifying in and of themselves, often resulting in orgasm while online. These activities appear to reflect the sexual fantasies of the offenders and likely fuel those same fantasies by providing experiences and images for future occasions. Briggs, Simon, and Simonsen (2011) suggest that this fantasy-driven group is not interested in or likely to commit contact sexual offenses against children.").

parents. Child molesters will also use these internet conversations and any pictures that have been shared as blackmail in order to prevent a child from reporting what is happening to his or her parents or law enforcement.³²

SUMMARY OF THE ARGUMENT

Defendant asserts that the statute sweeps indecent speech into its reach, and that that speech is protected, citing *Reno v. ACLU*, 521 U.S. 844 (1997). Appellant's Brief, pg. 23. But *Reno* struck down a restriction on indecent speech when the speech was directed to a wide audience that included *adults*. 521 U.S. at 875. This holding does not however, extend to the targeting of a child as the sole audience of the indecent speech. Georgia's obscene internet contact with a child statute does not prohibit an adult's right to engage in indecent speech but rather, it prohibits an adult's online stalking of a child, utilizing sexually explicit and sexually enticing language, designed to groom a child for the purpose of sexual abuse. So we are not talking about speech alone but instead, conduct designed to sexually exploit a child.

Georgia's contact with minor's statute is constitutional for three reasons. First, this speech is not protected under the First Amendment because of the context in which it occurs. Second, this statute prohibits primarily conduct, which is analogous to the conduct prohibited in Georgia's long-standing child molestation

³² Lanning, *supra* note 1, at 28, 58, 74, 91, 180.

statute. Third, this statute is distinguishable from the statute in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) because children are directly victimized by the speech prohibited in this statute.

On page 14 of appellant's brief he says that, "if the speech is protected, then the intent is protected as well." But here, as in a non-Internet context like the playground, the speech, which is designed to use a child for sexual purpose, is not protected. For example, Georgia's child molestation statute prohibits an adult from doing any "immoral or *indecent* act in the presence of a child" which includes exposing himself to a child. Georgia's contact with minor's statute merely prohibits this same conduct accomplished through the medium of Internet communication such as an adult exposing himself to a child via webcam. Moreover, even though a definitive showing of harm is not required to justify State action³³ *Ashcroft* requires that actual children be affected by the speech being prohibited.³⁴ Here, unlike *Ashcroft*, Georgia's contact with minors statute only prohibits speech which targets specific children for sexual exploitation and directly harms them. For these reasons, Georgia's contact with minors statute does not

³³ See *Ginsberg v. State of New York*, 390 U.S. 629 (1968) (holding that a scientific showing of harm is not necessary to restrict certain speech to children but rather a rational belief of such harm by the State is enough to justify a statute restricting speech that may be harmful to minors).

³⁴ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding that virtual child pornography, which did not involve actual children in its production, was protected under the First Amendment).

violate the First Amendment and is a proper use of the State's power to protect children.

ARGUMENT

I. The First Amendment does not protect sexually explicit speech occurring in the context of child exploitation.

In *Ginsberg v. State of N.Y.*, 390 U.S. 629 (1968), the United States Supreme Court established that children need protection from sexually explicit material even without a scientifically definitive showing of harm. Instead, the State need only show a rational belief that such material is harmful. 390 U.S. at 641–43. The U.S. Supreme Court in *New York v. Ferber*, 458 U.S. 747 (1982) reiterated that no harm need be proved by Congress because when the child is the subject of sexual exploitation the harm is implied. *Id.* at 758. To this end, *Ferber* categorically excluded all child pornography from First Amendment protection, *even that which is not obscene*. *Id.* at 761. The Court justified such a massive exception to free speech because “a sexually explicit depiction need not be ‘patently offensive’ in order to have required the sexual exploitation of a child for its production. . . . It is irrelevant to the child [who has been abused] whether or not the material ... has a literary, artistic, political or social value.” *Id.*

Later, the U.S. Supreme Court recognized in *Paroline v. United States*, 134 S. Ct. 1710 (2014) (a case in which a victim of child pornography sued a mere possessor of the images for the entirety of her civil damages), that there is *intrinsic*

harm to children who are the subjects of sexual pleasure for adults, even at a distance, by adults who have not physically harmed them.³⁵ *Id.* at 1726–27.

In *U.S. v. Williams*, 553 U.S. 285 (2008) the Court held that online speech concerning child pornography, while protected in some contexts,³⁶ is not protected in the context of advertisements or solicitations for child pornography. Furthermore, no actual child pornography need actually be traded but merely the speaker’s *belief*, or intention, that he will be giving or receiving child pornography is enough to criminalize the speech. *Id.*

Because the Supreme Court recognized the intrinsic harm to a child who is the subject of sexual gratification for an adult, in the context of child pornography possession in *Ferber* and *Paroline*, so too should this Court recognize the harm to a child who is the subject of sexual gratification for an adult, in the context of a sexually explicit online communication between them. Research has shown that sexually explicit conversations between adults and children cause real harm to children and are often a method of online grooming that can lead to even more

³⁵ *Id.* The Court explained, “[t]he cause of the victim’s general losses is the trade in her images.” *Paroline*, 134 S. Ct. at 1726–27. “It is common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured.”

³⁶ *Williams*, 553 U.S. at 1842. The Supreme Court explained that while some conversations concerning child pornography may be protected, such as statements advocating for its legality, speech that is specifically advertising or soliciting the trade of a particular piece of child pornography, which is illegal activity, is not protected.

disastrous harms to children. Because Georgia's statute only targets sexually explicit speech that is intended to arouse either the child or the adult, it restricts the prohibition of the speech to that which is sexually exploitive like the speech in *Ferber*. This means that the harm to children is assumed, and this point is strengthened by the research which shows that the harm is indeed actual. And *Williams* makes it clear that when the context of speech involves the active exploitation of children it is not protected merely because it is conducted through Internet communications. *Williams* shredded the false illusion that free speech protections exist just because conversations are had in Internet space. Because a conversation is conducted through the medium of the Internet does not imbue it with a political or ideological meaning nor does this conversation present some new benefit to society by virtue only of the venue in which it takes place. Sexually explicit conversations intended to arouse either the adult or the child occurring online, as they would be in-person,³⁷ are not a context in which sexually explicit speech may be protected, they involve the exploitation of a child and are rightfully restricted.

³⁷ see *Ginsberg v. the State of N.Y.*, 390 U.S. 629 (1968). The content of such sexually explicit conversations if written in a book, or depicted in a video or magazine, and given to child would rightfully be prohibited as material that is harmful to minors.

A. *The First Amendment does not protect sexually explicit speech which occurs in a context intentionally meant to target a child in the absence of parental oversight.*

Parents have the constitutional right to “direct the upbringing and education” of their children. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925). The fundamental importance of this right was articulated in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” 321 U.S. at 166. *Prince* protected this right against unjustified government intrusion. *Id.* However, in *Ginsberg*, the Supreme Court further recognized that this parental right requires protection by the State from other *citizens* who would intrude upon it. 390 U.S. at 639 (1968) (“ . . . parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.”) In fact, the Court in *Ginsberg* held that States could restrict material that is harmful to minors for two reasons, the first of which is the right of parents to guide the education of their children. *Id.*

The restriction of otherwise protected expression in order to protect children and to “suppor[t] ‘parents’ claim to authority in their own household” was again upheld in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978). In *Pacifica*

this right even justified restricting public broadcasts that were available to adults as well as to children. *Id.* The Court explained that such a restriction was appropriate because the context in which this speech took place. *Id.* (“The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.”)

Because the online interactions, between an adult and a child, forbidden by the statute in this case occur intentionally hidden from the view and supervision of parents they violate parents’ constitutional rights, which deserve protection from the State. Furthermore, even more than the context in *Pacifica*, where public broadcasting was merely “available to children,” here, the context in which the harmful speech is intentionally directed at children, demands that the speech be restricted. *Ginsberg* and *Pacifica* have also made clear that the State must support the right of parents to have control over their children’s upbringing with laws that aide them in this important duty. Because parents cannot feasibly control when and with whom their child speaks online, without completely sheltering them from the outside world, the State must assist them by prohibiting adults with nefarious intentions from taking invasive and harmful actions against their children online. And as explained earlier in this brief, those nefarious intentions are easily seen when the nature of the conversations are explicitly sexual. Without this statute, if a mother discovers that a strange man across the country has been describing in

graphic detail his sex life to her 12 year old there is no action the mother can take to cut off this contact save removing her child from the Internet completely. Without government intervention this mother is powerless to protect her child from the explicit sexual communications from an unknown adult until he either gives up or attempts to solicit or actually locate and abuse her child.

The context of these conversations as intentionally directed towards children and intentionally hidden from parents justify their restriction by the State as a constitutional measure to both protect children, and parents' constitutional right to protect their children, from online predators.

B. The First Amendment does not protect sexually explicit speech in the context of inherently manipulative conversations between adults and children.

The U.S. Supreme Court in a series of cases has recognized the inherent vulnerability and fragility of children. For example, the Supreme Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982) recognized that a child's susceptibility to influence should be considered as a part of mitigating circumstances in sentencing them for crimes because "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." 455 U.S. at 115 (The Court held that evidence of the child's "turbulent family history" and "beatings by a harsh father" should have been admitted.). The Court later found in *Roper v. Simmons*, 543 U.S. 551, 569 (2005) that children could not be sentenced to the death penalty because they can

never be as culpable as adults due, in part, to this vulnerability to influence and pressure. 543 U.S. at 569 (“The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures.”). *Roper* also acknowledges that children’s “own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for *failing to escape negative influences* in their whole environment.” 543 U.S. at 570 (emphasis added). And *Graham v. Florida*, 560 U.S. 48 (2010) reaffirmed this when it held that children could not be mandatorily sentenced to life imprisonment without parole for non-homicide offenses because they “are more vulnerable or susceptible to negative influences and outside pressures.” 560 U.S. at 68 (The 17-year old participated in a robbery with two 20-year old men).

Just as children are susceptible to influence in the context of crimes they have committed they are susceptible to influence when targeted by adults for sexual exploitation. The Supreme Court has acknowledged this limitation of children and it is supported by the research concerning children’s vulnerability to manipulation by adults in online sexual encounters. As the Supreme Court deemed this weakness of children enough to make them ineligible for the death penalty, even when they have committed very serious crimes, even more should this Court recognize the superior interest in the State to protect children from themselves, in

the context of internet communication, as this same weakness makes them especially vulnerable to online sexual abuse.

II. Application of Georgia’s obscene internet contact with a child statute demonstrates it primarily targets conduct, conduct which is already prohibited in the physical presence of a child under Georgia’s child molestation statute.

Cases in which Georgia’s contact with minors statute has been applied show that it is directed primarily towards conduct that is harmful to children and is not focused on restricting speech due to its content.

“[T]he government may regulate conduct that may have both speech and ‘nonspeech’ elements if the regulation furthers a substantial governmental interest that is unrelated to the suppression of free expression; and the incidental restriction on First Amendment freedom is no greater than necessary to further the governmental interest.” *State v. Miller*, 260 Ga. 669, 671 (1990) (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

The State of Georgia prohibits an adult from showing a child a video of adults engaging in sexual activity, for the purpose of arousing either the adult or the child, as the crime of child molestation and a felony with a minimum sentence of five years. O.C.G.A. § 16–6–4 (2009); *Craft v. State*, 252 Ga. App. 834, 844 (2001), *Chamblee v. State*, 333 Ga. App. 749, 751 (2015). An adult is also guilty of child molestation for exposing themselves to a minor. O.C.G.A. § 16–6–4 (2009); *Hathcock v. State*, 214 Ga. App. 188, 190 (1994), *Rainey v. State*, 261 Ga.App.

888, 889–890 (2003); *Clemens v. State*, 318 Ga. App. 16, 20-21 (2012) *Brown v. State*, 324 Ga. App. 718, 721 (2013). Furthermore, it has been established that the act of exposure itself is enough to infer the intent to arouse either the adult or child. *Hathcock v. State*, 214 Ga. App. at 190 (1994); *Rainey v. State*, 261 Ga.App. at 889–890 (2003); *Brown v. State*, 324 Ga. App. at 721 (2013). And in *Clemens v. State*, 318 Ga. App. 16 (2012) the Georgia Appeals Court found that an adult is guilty of child molestation even if the child was asleep during the exposure. 318 Ga. App. at 20-21 (the defendant was caught masturbating over a sleeping child). Finally, Georgia prohibits an adult from touching a child in an indecent or sexual manner. O.C.G.A. § 16–6–4 (2009); *Eubanks v. State*, 332 Ga.App. 568 (2015).

Similarly, the internet contact with minors statute prohibits this activity in as far as it can be accomplished via online communication. This is evidenced by its real world application. For example, in *Selfe v. State*, 290 Ga.App. 857 (2008) the defendant was guilty of obscene internet contact with a child when he acknowledged that he was speaking to a 15 year old girl multiple times and then “proceeded to discuss[s] foreplay and arousal with her at length and webcamed himself masturbating.” 290 Ga. App. at 859. Later in *Castaneira v. State*, 321 Ga. App. 418 (2013) the defendant convicted under this statute sent a picture of his exposed genitalia to an undercover officer he believed was a 15 year old girl. 321 Ga. App. at 419. This same year in *State v. Cohron*, 324 Ga. App. 137 (2013) the

defendant was convicted for obscene internet contact with a child because he masturbated via webcam with an undercover officer he believed to be a 14 year old girl. In *Abney v. State*, 327 Ga. App. 551 (2014) the defendant convicted for obscene contact with a child believed he was speaking with a 13 year old girl (who was in fact an undercover officer) when he “engaged in a graphic conversation with the officer posing as “dixiechickie13” about sex and masturbation while transmitting images from his webcam of his penis as he masturbated.” 327 Ga. App. at 552. Again, in *Skelhorn v. State*, 332 Ga. App. 782 (2015) the defendant convicted under the obscene contact with a child statute, while speaking with an undercover officer he believed to be a 13 year old girl, sent a link to a live feed of him naked and masturbating and continued this conduct while communicating back and forth with the “girl.” 332 Ga. App. at 783–84. The defendant in this case went on to “ask[] her a series of crude, explicit questions about her physical appearance, sexual preferences, and sexual experience, including whether her genitals were hairless, whether she liked penises, whether she engaged in fellatio, and whether she was a virgin”. *Id.* at 783. This defendant went even further and instructed her to perform sexual acts upon herself and then to describe aspects of these acts to him. *Id.*

These factual scenarios in which the contact with minors statute has been applied are analogous to those of child molestation. Just as an adult is not

permitted to show a child sexually explicit or pornographic images in their physical presence, conduct which contains elements of speech, an adult should not be permitted to send sexually explicit images or describe sexually explicit conduct through online messaging. Furthermore, if an adult is not permitted to expose themselves in the physical presence of a minor then they cannot be permitted to expose themselves to a minor via live webcam. In both instances a child is seeing the defendant engage in sexually explicit conduct in real time and directed to that child specifically. This point is strengthened by the fact that an adult is not permitted to expose themselves in the presence of a minor even if that child is asleep. How much more can the State prohibit exposure directed to a minor that they can actually see occurring?

Finally, as an adult is strictly prohibited from touching a minor sexually so too should they be prohibited from instructing and directing a child to touch themselves sexually. This is tantamount to remote child molestation. The adult is using the child's hand to do his bidding in order to arouse himself or the child.

Real world application of Georgia's contact with minors statute demonstrates that it is targeting those who wish to exploit children and is not punishing harmless and well-intentioned communications. Furthermore, these cases reveal just how harmful and predatory obscene internet contact with a minor truly is and that despite containing elements of speech, it very much resembles the

conduct prohibited as child molestation under Georgia criminal law. Therefore here, as in a non-Internet context like child molestation, the speech, which is designed to use a child for sexual purpose, is not protected.

III. Georgia’s contact with minor’s statute is distinguishable from the statute in *Ashcroft v. Free Speech Coalition* because child victims are created by the prohibited speech.

Georgia’s contact with minors statute is distinguishable from the provision of the Child Pornography Prevention Act of 1996 (CPPA) struck down for overbreadth in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The section, 18 U.S.C. § 2256(8)(B), discussed in *Ashcroft* prohibited “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, “ that “is, *or appears to be*, of a minor engaging in sexually explicit conduct.” The statute was aimed at prohibiting “virtual child pornography:” images that seem to portray minors but do not actually use children in the production of the images. *Id.* (emphasis added). In the Court’s determination in *Ashcroft*, it stated that the CPAA “prohibits speech that records no crime and creates no victims by its production...While the government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect.” *Ashcroft*, 535 U.S. at 236. The same cannot be said for the harm caused by the online sexual exploitation prohibited in O.C.G.A. § 16-12-100.2(e)(1). The Georgia statute aims to prevent the real harm to children from the

online sexual manipulation, not only the potential harms that may occur after the online contact.

It is within Congress's right to pass laws to protect children from abuse. *Ashcroft*, 535 U.S. at 245. And so too is it within the right of States. *Ginsberg*, 390 U.S. at 641. The sexual internet contact with a child which is intended to sexually arouse the person or the child is more than "intrinsically related" to the sexual abuse of children;³⁸ it is a form of abuse. The Youth Internet Safety Surveys looked at the online victimization of children.³⁹ One category of victimization that the survey examined was sexual solicitations, which was defined as "requests to engage in sexual activities or sexual talk or give personal sexual information that were unwanted or, whether wanted or not, made by an adult." *Id.* at 3. The online solicitation itself, which is the conduct O.C.G.A. § 16-12-100.2(e)(1) is aimed at prohibiting, creates a child victim. Numerous studies and reports repeat this notion that this online sexual exploitation is abuse.⁴⁰

³⁸ In *New York v. Ferber*, 458 U.S. 747, 759 (1982) the Court determined that a prohibition on the distribution, sale, and production of child pornography was constitutional because it was "intrinsically related" to the sexual abuse of children in two ways: as a permanent record of the abuse of the child and due to the State's interest in closing the distribution network of the pornographic materials involving children.

³⁹ *see Online Victimization of Youth*, supra note 7.

⁴⁰ *See* Lanning, supra note 7, at 15, which includes the use of information technology (i.e. computers) as a way predators victimize and sexually exploit children. Lanning also states that "interact[ing] with and solicit[ing] sex with children" online is one of the "most criminally significant sexually exploitive uses

In addition to the harm brought on by these sexually explicit online conversations, there is evidence to demonstrate that the perpetrators are often looking for child pornography and eventual in-person abuse as a result of these conversations. The National Juvenile Online Victimization (N-JOV) Study reported that of the Internet-initiated cases examined, seventy-three percent led to other completed crimes, including sexual assault and child pornography.⁴¹ Once a predator establishes an online relationship with a victim, many then involve the use of a webcam in order to procure sexual images of their victims, which amounts to child pornography production. The N-JOV study also found that one in five online predators took sexually explicit pictures of the victim or convinced victims to take such pictures of themselves. *Id.* Eighteen percent of victims took the pictures themselves and sent them to the perpetrators. *Id.* In a study regarding sting operations, of those arrested, forty percent were in possession of child pornography and one in eight had committed sexual crimes against actual underage victims.⁴² In addition to the real risk of online predators producing and possessing child pornography, there is also the risk that predators will go beyond the Internet and commit illegal sexual acts against the minor victims. From 2004 to 2008, the

of the computer and the Internet.” *Id.* at 127. *See also* UNICEF, *supra* note 7, at 12, which demonstrates that the unique quality about predators using the internet to sexually exploit children is that they do not have to have physical contact with the child in order to commit a crime.

⁴¹ *See Internet-initiated sex crimes*, *supra* note 7, at 14.

⁴² *Online “Predators” and Their Victims*, *supra* note 7 at 115.

Internet Crimes Against Children Task Force (ICAC) received 20,562 reports of online sexual solicitation; of those reports, 7,879 of them involved suspected “travelers” – predators who travel to the child’s location in order to meet in person.⁴³

As the section in this brief describing sexual predators online demonstrates, these men know how to use internet communications to build trust with children, desensitize them, and manipulate them into engaging in sexual activity whether online or eventually in-person. Furthermore, as explained earlier, young adolescents are particularly vulnerable to the tactics of online predators and especially those children who are troubled, have strained relationships with parents, and a history of physical or sexual abuse.

Due to their frequency of online communications and sexual interest, many children are susceptible to online predators. Some use the term “compliant” because the victims do not, in fact, see themselves as victims.⁴⁴ However, under the law, children cannot consent to this sexual contact and thus, are victims to a crime. *Id.* Therefore, unlike the speech in *Ashcroft*, here, actual children are at the center of sexual exploitation and at a high risk for physical sexual abuse through the creation of this speech.

⁴³ The National Strategy, *supra* note 1, at 29.

⁴⁴ Lanning, *supra* note 7, at 25.

CONCLUSION

Research shows that adults who engage in sexually explicit conversations with children online with the intent to arouse either the adult or the child are sexually exploiting this child and most likely grooming them for later abuse. This context precludes any First Amendment protection of such speech. Furthermore, application of Georgia's obscene internet contact with a minor statute shows it is primarily aimed at harmful conduct; conduct which amounts to remote child molestation and is a proper application of criminal restrictions on conduct to the Internet space. Moreover, real child victims are created through these harmful communications which makes this statute distinguishable from the statute in *Ashcroft v. Free Speech Coalition* and proper under the First Amendment. For these reasons, Georgia's obscene internet contact with a child statute is a constitutional protection for children from online sexual exploitation.

This 26th day of January, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing **BRIEF OF NATIONAL CENTER ON SEXUAL EXPLOITATION AND CIVIL LAWYERS AGAINST WORLD SEX-SLAVERY, AS AMICI CURIAE, SUPPORTING APPELLEE** upon counsel for all other parties before filing by placing same into the United States Mail with postage prepaid, and addressed as follows:

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