

DOCKET NO. S05A0298

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IN THE SUPREME COURT  
OF THE STATE OF GEORGIA

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ANTHONY MCKENZIE,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

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BRIEF *AMICUS CURIAE* OF THE  
AMERICAN CIVIL LIBERTIES UNION OF GEORGIA

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## **INTEREST OF AMICUS**

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with 400,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. Since its founding in 1920, the ACLU has litigated numerous cases involving issues of freedom of expression and privacy rights, both as a party and as an *amicus curiae*. The ACLU of Georgia, with approximately 6,200 members, is a regional affiliate of the national ACLU.

## **STATEMENT OF THE CASE**

Between June 24 and July 23, 2003, Defendant Anthony McKenzie made five collect telephone calls to a girl named Heather Love – all five of which she accepted – in the course of which the two of them engaged in sexual banter. The calls were recorded by personnel at the Forsyth County Jail, where Mr. McKenzie was detained. At the instigation of Ms. Love’s mother, the Forsyth County Solicitor General filed an accusation against Mr. McKenzie, alleging that in each of these telephone conversations he violated O.C.G.A. § 46-5-21 by making a “comment, request, suggestion, or proposal which [was] obscene, lewd, lascivious, filthy, or indecent.” O.C.G.A. § 46-5-21(a)(1); *cf.* R. 32-34 (accusation).

Mr. McKenzie demurred to the accusation, contending that the statutory section under which he was charged was facially unconstitutional under the First

Amendment to the United States Constitution. R. 29 (Defendant’s General and Special Demurrer). The trial court denied Mr. McKenzie’s demurrer, erroneously believing that the case was controlled by *Constantino v. State*, 243 Ga. 595 (1979), which had addressed a Fourteenth Amendment vagueness challenge to other statutes. R. 44. The case was then tried on a stipulated record, and Mr. McKenzie was convicted on two of the five counts. This timely appeal followed.

## **ARGUMENT**

### I. Overview

As this Court already has implicitly recognized by vacating its earlier Transfer Order and retaining jurisdiction of this matter, the trial court’s reliance on *Constantino* was misplaced. That decision involved two statutes creating offenses relating to *intentionally harassing* telephone calls, and analyzed those statutes under the Fourteenth Amendment, not the First Amendment. *See Constantino*, 243 Ga. at 597-98 (considering and rejecting the claim that former Code sections 26-2610(e) and 104-9901 were void for vagueness under the Due Process Clause). The central issue in this appeal, which *Constantino* did not address, is whether O.C.G.A. § 46-5-21(a)(1) can be upheld against a facial First Amendment challenge.

It cannot. Because section 46-5-21(a)(1) is a content-based restriction on speech, the usual presumption of constitutionality is reversed, and the burden falls

upon the Government to prove that the law is narrowly tailored to a compelling State purpose. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816-17 (2000); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”). Yet far from being narrowly tailored, section 46-5-21(a)(1) arrogates to the State breathtaking power over the content of private telephone conversations. By its plain terms, it applies not only to speech that is obscene but also to that which is merely lewd or indecent; not only to speech uttered with harassing intent but to speech intended to please or amuse; not only to forms of expression presented commercially to the public but even to personal speech of the most private and intimate kind; not only to speech involving minors but also to speech between adults; not only to speech inflicted upon an unwilling listener but even to welcomed and reciprocated speech. Such broad and intrusive regulation of intimate conversations is not necessary to any legitimate governmental end. As written, O.C.G.A. section 46-5-21(a)(1) is therefore facially unconstitutional.

Even if the State had offered a narrowing construction, or requested severance of the statute’s unconstitutional provisions – which it does not – neither expedient would cure the constitutional defects challenged here. If this Court were to sever such vague and overbroad terms as “lewd” and “indecent” from the statute’s text, its remaining terms would still reach deep into the zone of personal

privacy shielded by decisions such as *Stanley v. Georgia*, 394 U.S. 557 (1969).

Nor do the statute's text and purpose readily suggest any narrowing construction that would be consistent with the First Amendment. For these reasons, O.C.G.A. § 46-5-21(a)(1) is void in its entirety as an abridgement of freedom of speech.

## II. O.C.G.A. § 46-5-21(a)(1) Is Void on its Face as a Violation of the First Amendment.

A criminal statute that facially violates the First Amendment cannot be permissibly applied to *any* conduct, even to conduct that the State could constitutionally have regulated under a more narrowly drafted act. *See, e.g., R.A.V.*, 505 U.S. at 379-80 (striking down city hate-crime ordinance as facially unconstitutional, “[a]lthough [the defendant’s] conduct [*i.e.*, burning a cross in an African-American family’s yard] could have been punished under any of a number of laws,” including laws prohibiting arson); *Christensen v. State*, 266 Ga. 474, 475 n.3 (1996) (recognizing that where a statute is challenged as an abridgment of First Amendment rights, it is considered “as it pertains to all adult citizens” and not merely as applied to the defendant). Despite the State’s protestations to the contrary, this case is not about whether Mr. McKenzie did something wrong, but rather about whether the statutory provision under which he was charged complies with the First Amendment.

That provision reads, in full:

(a) It shall be a misdemeanor for any person, by means of telephone communication in this state, to:

(1) Make any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent . . . .

O.C.G.A. § 46-5-21(a). It is plain on the face of the statute that it regulates speech – “any comment, request, suggestion, or proposal” – on the basis of its “obscene, lewd, lascivious, filthy, or indecent” content. *Cf. Playboy Entm’t Group*, 529 U.S. at 811 (holding that F.C.C. regulations of “signal bleed” applying only to channels that primarily carried “sexually explicit . . . or . . . indecent” programming were content-based restrictions on speech); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 859 (1997) (holding that the Communications Decency Act’s ban on transmitting to a minor “any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent” was a content-based restriction on speech).

It is likewise beyond dispute that “[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest,” and “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *Playboy Entm’t Group*, 529 U.S. at 813. As argued below, O.C.G.A. § 46-5-21(a)(1) fails this test. Not only is it substantially over-inclusive in relation to every one of the governmental ends the State proffers; it also reaches into the zone of constitutionally protected privacy by

attempting to regulate the content of personal telephone conversations between consenting adults. Because its constitutional defects cannot be cured by severance or by a narrowing construction, O.C.G.A. § 46-5-21(a)(1) is void in its entirety.

A. The Language of O.C.G.A. § 46-5-21(a)(1) Has Already Been Held Unconstitutional, in Part, by the United States Supreme Court.

In 1968, Congress added a section to the federal Communications Act of 1934, formerly codified at 47 U.S.C. § 223, which forbade knowingly “permitting a telephone under [one’s] control” to be used to make “any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent.” Pub. L. No. 90-299, § 1, 82 Stat. 112. In the same year, the Georgia General Assembly adopted what is now O.C.G.A. § 46-5-21(a)(1), using almost identical language (but omitting the element of *scienter*) to define the offense of which Mr. McKenzie now stands convicted. Ga. Laws 1968, p. 9, § 1.

The federal statute has been amended nine times since its adoption. *See* Pub. L. No. 98-214, § 8(a), (b), 97 Stat. 1469, 1470; Pub. L. No. 100-297, Title VI, § 6101, 102 Stat. 424; Pub. L. No. 100-690, Title VII, § 7524, 102 Stat. 4502; Pub. L. No. 101-166, Title V, § 521(1), 103 Stat. 1192; Pub. L. No. 103-414, Title III, § 303(a)(9), 108 Stat. 4294; Pub. L. No. 104-104, Title V, § 502, 110 Stat. 133; Pub. L. No. 105-244, Title I, § 102(a)(14), 112 Stat. 1621; Pub. L. No. 105-277, Div. C, Title XIV, § 1404(b), 112 Stat. 2681-739; Pub. L. No. 108-21, Title VI, § 603, 117 Stat. 687. As to non-commercial speech, the pertinent portion of the federal Act

now restricts only obscene communications or child pornography, transmitted with the intent to harass or with the knowledge that the recipient is a minor. *See* 47 U.S.C. § 223(a)(1). Thus, it distinguishes in general between communications made to adults and those made to minors, as required by *Butler v. Michigan*, 352 U.S. 380 (1957). As to commercial speech, the federal statute incorporates the Supreme Court’s distinction between speech that is “obscene” and that which is merely “indecent,” *see Sable Communications of Cal. v. F.C.C.*, 492 U.S. 115, 126 (1989) (noting that “[s]exual expression which is indecent but not obscene is protected by the First Amendment”), and eschews vague and undefined terms such as “lewd,” “lascivious,” and “filthy.” *See generally* 47 U.S.C. § 223(b).

In comparison, the legislative history of the Georgia statute reveals no amendments at all. As a result, Georgia’s statute retains language that has been expressly held unconstitutional by the United States Supreme Court. In *Reno v. American Civil Liberties Union*, *supra*, the Supreme Court held that the federal act’s ban on “indecent” communications “lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech.” 521 U.S. at 874. The Court so held, notwithstanding that the language in question was enacted for the compelling purpose of protecting minors from harmful material on the Internet, because “that interest does not justify an unnecessarily broad suppression of speech addressed to adults.” *Id.* at 875. The Government may not “burn the

house to roast the pig,” as Justice Frankfurter memorably articulated the point. *Butler*, 352 U.S. at 383. Like the language struck down in *Reno*, Georgia’s general ban on “indecent” telephone communications fails by reason of its breadth and vagueness.

The State’s brief hardly addresses the question of narrow tailoring, but it is easy to see that the statute’s prohibition of “obscene, lewd, lascivious, filthy, or indecent” speech also is not narrowly tailored to any of the purposes the State claims it serves. Like the federal language at issue in *Reno*, it is not narrowly tailored to the goal of protecting minors, because it also applies to conversations between adults. It is not narrowly tailored to the goal of protecting “unsuspecting” recipients of sexual remarks by telephone, because it applies even when (as in this case) the recipient of the communications knows the identity of her caller and accepts five collect calls from him, four of them *after* having heard him make proposals that allegedly violate the statute. Nor can it be narrowly tailored to the goal of deterring verbal assault or harassment by telephone – the quintessential “obscene phone call” – because it does not require a showing of intent (or *mens rea* of any kind). Indeed, it is not even narrowly tailored to the goal of regulating obscenity, because it applies by its terms to speech that is not obscene.<sup>1</sup>

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<sup>1</sup> See *Sable Communications*, 492 U.S. at 126 (distinguishing “indecent” speech, which enjoys constitutional protection against content-based regulation, from “obscene” speech, which does not); see also *Cunningham v. State*, 260 Ga. 827,

The language of O.C.G.A. § 46-5-21(a)(1) is, if anything, even broader than the language held unconstitutional in *Reno*. It is vague, overbroad, and not narrowly tailored to any compelling State interest, and it therefore violates the First Amendment.

B. The First Amendment Violation Requires Reversal of the Defendant's Convictions.

O.C.G.A. § 46-5-21(a)(1) is not susceptible of a narrowing construction. Nor, if the statute's unconstitutional terms were severed, would the remainder be both constitutionally compliant and reliably consistent with legislative intent. Yet even if severance or a saving interpretation were feasible here, Mr. McKenzie's convictions could not stand, because the trial court's general judgment of guilt would still leave it unclear whether he was convicted under the unconstitutional portion of the statute. Reversal on First Amendment grounds is the appropriate relief.

1. The Statute Cannot Be Judicially Narrowed to Bring It Within Constitutional Boundaries.

Although the State has not so contended, it might be thought that the statute could be reduced to a constitutionally permissible regulation through severance of

833 (1991) (holding that “the word lewd is much broader than obscene” and that the definition of “lewd” includes “lascivious”).

its unconstitutional terms and narrow construction of the rest.<sup>2</sup> An example of this approach is at hand in the *Reno* case, where the Supreme Court severed the phrase “or indecent” from the federal Communications Decency Act’s ban on “obscene or indecent” communications, leaving intact the statute’s prohibition of obscene communications. *Reno*, 521 U.S. at 883. This “textual surgery” saved at least part of the federal statute from being declared unconstitutional, although the Supreme Court declined to adopt a saving interpretation in any other respect. *Id.*

That this approach partly salvaged the federal Act, however, does not show that it would suffice here. First, the Act challenged in *Reno* required proof of *scienter*. See 47 U.S.C. § 223(a)(1)(B); see also *Reno*, 521 U.S. at 859. This additional element substantially narrowed the federal Act’s scope and diminished its potential chilling effect on protected speech, because only those who knowingly deal in constitutionally unprotected obscenity could be convicted. See *Hoffman Estates v. Flipside, Inc.*, 455 U.S. 489, 499 (1982) (stating that a *scienter* requirement can reduce a statute’s potential chilling effect by rendering its scope more definite). No such requirement is to be found in O.C.G.A. § 46-5-21(a)(1). Second, the statutory provisions at stake in *Reno* applied only to communications

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<sup>2</sup> O.C.G.A. § 46-5-21(a)(1) lacks a severability clause. However, “[w]here one portion of a statute is unconstitutional, this court has the power to sever that portion of the statute and preserve the remainder if the remaining portion of the Act accomplishes the purpose the legislature intended.” *Dawson v. State*, 274 Ga. 327, 335 (2001).

made to minors. *See Reno*, 521 U.S. at 859-60 (quoting the relevant provisions). By contrast, Georgia’s statute applies equally to conversations between consenting adults. It is well established that the Government may not “limit[] the content of adult telephone conversations to that which is suitable for children to hear.” *Sable Communications*, 492 U.S. at 131.<sup>3</sup>

Georgia’s statute is likewise broader than the federal statute and regulations that were partly upheld in *Sable Communications*, because it is not limited to commercial telephone messages but also encroaches on personal calls of the most private kind. In this respect, it attempts to invade territory that is doubly protected: not only by the First Amendment, but also by substantive due process. *See Stanley*, 394 U.S. at 565; *see also Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”); *cf. R.A.V.*, 505 U.S. at 383 (stating

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<sup>3</sup> The State apparently admits that it has no legitimate interest in regulating obscene language in private consensual conversations among adults. *See* Brief of Appellee at 13-14 (“The use of 1-900 phone services and Internet chat rooms are private conversations and participants pay to actively participate in a voluntary conversation that may include the type of language prohibited by statute. Thus, there is no need for the State to protect those individuals who choose to participate. The state need only protect unsuspecting recipients of this type of telephonic communications.”). Nowhere, however, does the State explain how the statute at issue can be interpreted not to apply to such private, consensual conversations among adults. In view of the conceded absence of any legitimate governmental interest in protecting such persons against their own free choices, the State’s failure to show that they are somehow exempt from the statute is necessarily fatal to its First Amendment argument.

that even obscene speech is not “entirely invisible to the Constitution”). As the Supreme Court stated in *Stanley*: “Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.” 394 U.S. at 565. Interpreting *Stanley*, this Court has explained that “The right to privacy found in the Fourteenth Amendment and the right to freedom from thought control found in the First Amendment combine to form this limitation on the state's power.” *Majmundar v. Veline*, 256 Ga. 8, 9 (1986).<sup>4</sup>

Even a post-severance version of O.C.G.A. § 46-5-21(a)(1) would apply to a substantial amount of speech that enjoys both First Amendment and privacy protection. It would therefore violate both the First Amendment’s overbreadth doctrine, *see generally Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and the rule that any law burdening a fundamental right must be narrowly tailored to a compelling State interest, *see Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). The Constitution simply does not permit a government employee to pry into intimate conversations between adults to judge the moral propriety of the language used. To hold otherwise would imply that the two men implicated in the

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<sup>4</sup> Despite some early uncertainty concerning the constitutional basis of *Stanley* – *see, e.g., United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123, 126 (1973) (stating in *dictum* that “*Stanley* depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home”) – it is now established that the rule in that case was “firmly grounded in the First Amendment.” *Osborne v. Ohio*, 495 U.S. 103, 108 n.3 (1990) (citation omitted).

*Lawrence* case, for example, would be constitutionally protected in engaging in homosexual sodomy, but not in talking with each other about it on the telephone.<sup>5</sup> This result would invert the well-established rule that speech receives more protection than conduct, not less.<sup>6</sup> Such a holding would also imply, for example, that although Mr. Stanley would be constitutionally protected in hearing obscene speech uttered by an actress on his DVD player, his wife or lover would not be protected in saying the same things to him on the telephone. Yet this outcome would place private personal conversations lower on the scale of First Amendment protection than the consumption of commercially produced obscenity. That cannot be the law.

No saving construction of the statute can remove the constitutional defects that would remain even after severance of its vague terms. Neither the statute's text nor its purpose would support limiting its application only to calls involving minors. On that interpretation, the statute would not even protect adults against the typical "obscene phone call," which was surely the legislature's prime target in the first place. Perhaps a more plausible narrowing construction would be to interpret

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<sup>5</sup> In *Christensen, supra*, this Court upheld against a First Amendment challenge Georgia's statute criminalizing the solicitation of sodomy. 266 Ga. at 476. Regardless of whether the *Christensen* decision remains good law, the statute at issue here does not target the solicitation of any sort of criminal activity.

<sup>6</sup> See, e.g., *R.A.V.*, 505 U.S. at 385 ("We have long held . . . that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses . . .").

section 46-5-21(a)(1) as requiring proof of harassing intent: all the other sub-sections of 46-5-21(a) explicitly require such an element, as does section 46-5-21(b); and the statute, so narrowed, would still achieve its basic purpose. Yet so construed, it would no longer support Mr. McKenzie's conviction, as the State has never alleged such intent. More importantly, the presence of an intent requirement in the other sub-sections at least equally – and probably more strongly – suggests that the omission of such a requirement from sub-section (a)(1) was deliberate. It is not the role of the judiciary to “rewrite a . . . law to conform it to constitutional requirements” – at least, not without some reasonably clear indication of legislative will. *Reno*, 521 U.S. at 884-85 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988)) (footnote omitted). This Court should decline to redraw the statute freehand, with only its constitutional frame for guidance. After thirty-seven years of legal development at the federal statutory and constitutional levels, it is time for the General Assembly to revisit this area of Georgia law.

## 2. Reversal Is the Appropriate Remedy.

Even if this Court were to accept the State's view that obscene speech in private telephone conversations can be banned, reversal would still be necessary because the trial court's Order and Judgment leaves it unclear whether Mr. McKenzie was convicted for speech that was merely “indecent” but not obscene. The trial court did not adopt a narrowing construction of the statute, but instead

erroneously rejected Mr. McKenzie’s constitutional arguments on the basis of *Constantino*. Thus, for all anyone knows, Mr. McKenzie was convicted merely for “indecent” but non-obscene speech. As to speech of that kind, it is clear that the statute’s prohibition is unconstitutional on its face. *See Reno*, 521 U.S. at 874 (holding that the Communications Decency Act’s prohibition on “indecent” communications was a facial First Amendment violation); *Sable Communications*, 492 U.S. at 126 (“Sexual expression which is indecent but not obscene is protected by the First Amendment”).

Where a statute defines several offenses disjunctively, one of which is repugnant to the First Amendment, and the record leaves it unclear which definition was the ground of the conviction, the appropriate remedy is reversal. *See Terminiello v. City of Chicago*, 337 U.S. 1, 6 (1949) (reversing conviction for “fighting words” where, “[f]or all anyone knows [petitioner] was convicted under the parts of the ordinance (as construed) which, for example, make it an offense merely to invite dispute or to bring about a condition of unrest”); *Stromberg v. California*, 283 U.S. 359, 367-68 (1931) (reversing on the ground that, “[i]f any one of [three disjunctive] clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause”). Even if one of the several offenses defined by O.C.G.A. § 46-5-21(a)(1) is consistent with the First Amendment, there is no guarantee that Mr. McKenzie was convicted of that

offense rather than of one whose definition violates the Constitution. For this reason, his conviction must be reversed, no matter what construction of the statute this Court adopts.

### III. Conclusion

In the end, this case involves nothing more than the straightforward application of *Reno*, *Sable Communications*, and *Stanley*. “No one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent.” *Playboy Entm’t Group*, 529 U.S. at 814. But “even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.” *Id.* In drafting O.C.G.A. § 46-5-21(a)(1), the General Assembly simply failed to achieve the tight fit between means and ends that current First Amendment precedent requires. Nor can this Court repair the legislature’s work in this instance without stepping outside its proper judicial role. The statute therefore cannot stand.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the accompanying **BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA** upon counsel of record by first class mail, properly addressed as follows:

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This 4th day of February, 2005.

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