IN THE SUPREME COURT OF GEORGIA

GILBERTO RODRIGUEZ, et al.	)	
	)	
Appellants,	)	
	)	
-vs-	)	**CASE NO. S08A1928**
	)	
STATE OF GEORGIA,	)	
	)	
Appellee.	)	

BRIEF OF GEORGIA ASSOCIATION OF CHIEFS OF POLICE, INC. AS AMICUS CURIAE

Michael A. Caldwell
Georgia Bar No. 102775
General Counsel,
Georgia Association of Chiefs of Police, Inc.

DeLong, Caldwell & Bridgers, LLC
101 Marietta St. NW
Suite 3100
Atlanta, GA. 30303
(404)979-3150
(404)979-3170 (Fax)
michaelcaldwell@dcnblaw.com

TABLE OF CONTENTS

The Georgia Association of Chiefs of Police, Inc. (hereinafter "GACP"), hereby files this brief as Amicus Curiae in support of the position of Appellee, State of Georgia, in Georgia Supreme Court Case Number S08A1928. The Amicus respectfully submits that the Court should affirm the Decision and Order of the Superior Court of DeKalb County, Georgia, rejecting Appellants' arguments that the Georgia Street Gang and Terrorism Prevention Act, O.C.G.A. § 16-15-1 *et seq*. ("The Gang Act"), is unconstitutionally vague and over broad, and that it impermissibly infringes upon Defendant's First Amendment rights to free expression.

The GACP urges the Court to affirm the judgment of DeKalb Superior Court Judge, Hon. Michael Hancock, finding that "a person of ordinary intelligence is put on notice as to prohibited conduct under the statute" and that the Act does not impermissibly limit freedom of expression because coverage by the Act's provisions requires that "the symbolic speech must be coupled with conduct which promotes or furthers gang related criminal activity."

STATEMENT OF INTEREST OF AMICUS CURIAE

The Georgia Association of Chiefs of Police, Inc. is the largest professional association for law enforcement agency heads in the State of Georgia, and one of the largest such organizations in the United States. Its principle Active Members

include more than 778 Chief Executive Officers of municipal, county, state, and federal law enforcement agencies, railroad law enforcement agencies, public school police, and private and public college and university police departments. The GACP's Professional (non-voting) membership encompasses an additional 622 police chaplains, mid level managers of state and federal law enforcement agencies, chief executives of private and corporate security firms and citizens who support the efforts of professional law enforcement executives and administrators throughout Georgia. The Preamble to the GACP's Constitution and Bylaws describes its Mission as one which is:

> . . . dedicated to providing police services in the State of Georgia that are aimed at achieving more effective and efficient crime control, reduced fear of crime, improved quality of life, and improved police legitimacy through a proactive reliance on community resources that seeks to minimize crime causing conditions.
> The Georgia Association of Chiefs of Police strives to ensure that all our citizens are served in a professional, ethical and equitable manner that respects individuals, protects our democratic ideals and system of government, pursues greater accountability of police, greater public share in decision making, and greater concern for civil rights and liberties.

One of the most important functions of the GACP is to provide and approve all training and education required for Police Chiefs and non-elected chief executives of state, county and municipal law enforcement agencies and campus

police agencies throughout Georgia under O.C.G.A. §35-8-20 and under the Peace Officer Standards and Training Council ("POST") Regulations.

Accordingly, the GACP possesses a uniquely broad and comprehensive perspective on O.C.G.A. § 16-15-1 et seq. ("The Gang Act"), a statute that its members enforce on a daily basis. Its members also confront the violence and destruction wrought by criminal gangs in Georgia. It is their mission to protect Georgia's citizens from the wanton criminal activities of such groups. The GACP and its members participated in advising Georgia's legislators as they re-drafted the statute. Its members informed the Legislature of their frustrating experiences and the increasingly serious challenges faced under previous versions of the Gang Act in combating the criminal activities of the increasingly numerous and violent gangs infiltrating Georgia's large and small cities and counties, from Atlanta to Albany, from Augusta to Savannah and in urban, suburban and even rural communities. Georgia's legislators drew upon these experiences in crafting the current version of the Gang Act.

ARGUMENT

A. Introduction

Appellants and the *Amici Curiae* supporting their position urge the Court to reverse the decision of DeKalb Superior Court Judge Michael Hancock which

rejected their claims that the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A.§16-15-1 et seq. ("Georgia Street Gang Act" or "Act") was vague, indefinite, or over broad.

The Superior Court was correct in its finding to the contrary, that the Act passes constitutional muster because it places an individual of ordinary intelligence on notice as to the specific conduct that the Act prohibits and punishes, because it clearly defines "criminal street gang" and "criminal gang activity" and because it clearly excludes individuals who are not engaged in such criminal gang activity.

The parades of improbable scenarios which Appellants and their *Amici* serve up as examples of the Act's potentially over-broad applications to support their claims of a fatally-flawed Act ignore well-settled rules of statutory construction and constitutional law. They also disregard the Georgia Legislature's explicit findings and expressions of its intentions behind the Act's provisions, most especially the policy statements of O.C.G.A. 16-15-2. They are blind to the statutory context and the clear concrete meanings of the Act's terms which they challenge.

The Act provides both offenders and law enforcement agents adequate notice of what it forbids, and what factual elements must be present to justify arrests and prosecutions under the Act's sentence-enhancing punitive provisions.

The Act no more impermissibly infringes upon individual's constitutionally-protected associational and expressive rights than does the Georgia Anti-Mask statute, which this Court upheld in *State v. Miller,* 260 Ga. 669, 398 S.E.2d 547 (1990)[1] or than Georgia's RICO Act, the constitutionality of which this Court upheld against similar challenges in *Chancey v. State,* 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied at 481 U.S. 1029.

The Act punishes not expression or association, but rather specific criminal acts of individuals acting in concert with groups which engage in specific criminal acts. It is an appropriate and necessary measure vital to the security of Georgia's citizens.

B. The Gang Act's Statutory Scheme

The criminal proscriptions of the Gang Act, O.C.G.A. § 16-15-1 *et seq*. apply to individuals who commit particularized, enumerated offenses committed while associated with or employed by a "criminal street gang." O.C.G.A. § 16-15-4. The Gang Act defines "criminal street gang" as a group of three or more individuals, associated in fact, who commit criminal gang activity. "Criminal gang activity" is defined as involvement in certain particularized offenses. The Gang Act specifically excludes from the classification of "criminal street gang" groups of

[1] *Id.* 673, 676; *See also, Daniels v. State*, 264 Ga. 460, 448 S.E.2d 185 (1994).

three or more who are not involved in criminal gang activity. O.C.G.A. § 16-15-3. To be prosecuted under the Gang Act, an individual must first commit a specific, criminal offense. Only if an individual who is associated with a "criminal street gang" commits one of those specified offenses is prosecution under the Gang Act viable. The Gang Act, then, is a vehicle to prosecute when criminal activities are perpetrated by an individual associated with a criminal street gang. Thus, association with, membership in, even employment by a criminal street gang, will not, in-and-of itself, be prosecutable under the Gang Act. No "group" can be classified as a "criminal street gang" unless it is involved in specific and identified modes of criminality.

The punishments under the Gang Act are set forth in O.C.G.A. § 16-15-4. In terms of the sentences, all or part of any can be the subject of probation. In numerous instances, punishment under the Gang Act is exceeded by the underlying offense in question.

I. Rules of Statutory Construction and Constitutional Interpretation Require Finding that the Gang Act is Not Too Vague to Be Found Constitutional.

A. Appellants bear the burden of proof in challenging the constitutionality of the Act.

Well-settled principles of statutory construction and constitutional law support the finding that the Gang Act is a constitutionally-permissible exercise of

the Legislature's powers to protect Georgia's citizens from the crisis of violence caused by criminal gang activity. As this Court stated in *Union County v. CGP, Inc.,*[2]"[A]ll reasonable presumptions favor the constitutionality of a legislative act, and the burden of showing to the contrary is on the attacking party." Georgia's appellate courts have consistently applied this rule.[3] This Court has imposed a rule of construction which places the burden upon the challenger of a statute to demonstrate that it is indeed unconstitutional.[4] In fact, under this Court has held, that under Georgia law. " The constitutionality of a statute is presumed until it is *validly* attacked." *Dupre v. Scappaticco*.[5]

Appellants fail to meet this burden. Their attack upon the Gang Act's constitutionality is premised chiefly on out-of-context readings of its provisions.

B. <u>In determining the Gang Act's constitutionality, the Act's provisions must be read as a whole, and in the context of the Legislature's stated findings and intent.</u>

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[2] 277 Ga. 349, 352, 589 S.E.2d 240 (2003)

[3] *See, e.g. Gaines v. State,* 260 Ga. 267, 268, 392 S.E.2d 524 (1990) ("If any reasonable state of facts can be conceived that would sustain the classification, existence of that state of facts at the time the law was enacted must be assumed…"); *Gravely v. Bacon,* 263 Ga. 203, 206, 429 S.E.2d 663 (1993) ("The rules of statutory construction require this court to construe a statute as valid when possible. [CIT] A 'statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction.")

[4] *Gaines v. State*, supra, 260 Ga. at, 268, ("…. [O]ne who assails such law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.").

[5] 244 Ga. 179, 259 S.E.2d 440 (1979) (emphasis added)

O.C.G.A. § 1-3-1 requires that statutes must be read as a whole and in consideration of the General Assembly's stated intent. It provides:

> Construction of statutes generally
>
> (a) In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy. Grammatical errors shall not vitiate a law. A transposition of words and clauses may be resorted to when a sentence or clause is without meaning as it stands.
> (b) In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter.

Time and again this Court has reiterated this statutory directive, including in *State v. Miller*,[6] ("The statute was passed in response to a demonstrated need to safeguard the people of Georgia from terrorization by masked vigilantes."). In *Gaines v. State,*[7] the Court stated: "The General Assembly may have reasonably concluded that habitual violators are more dangerous than those who have had their licenses suspended or revoked." In *Land v. State*[8] it noted: "Thus, the statute is the product of a legislative intent to cover intentional inciteful acts or conduct aimed at one's opponents as well as one's supporters.").

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[6] *Supra*, 260 Ga. at 672.

[7] *Supra,* 260 Ga. 267, 268, 392 S.E.2d 524 (1990)

[8] 262 Ga. 898, 899, 426 S.E.2d 370 (1993), *cert. denied* , 509 U.S. 909 .

Georgia appellate decisions also consistently apply the principle that statutes are to be read "as a whole," when challenged. In *Briggs v. State*,[9] the Court said: "Reading the statute as a whole, as we are bound to do [CIT]…' in testing constitutionality, statute is examined in its entire context'"). *See also, Land v. State*,[10] "[the challenged statute] meets appellant's vagueness challenge since, when read as a whole, it 'provide[s] fair warning to persons of ordinary intelligence as to what it prohibits so that they may act accordingly.'").

The Gang Act's purposes, in light of which the Court must interpret the Act's provisions, are set forth in the Legislative findings:

> Legislative findings and intent
>
> (a) The General Assembly finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The General Assembly recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.
>
> (b) The General Assembly, however, further finds that the State of Georgia is in a **state of crisis which has been caused by violent**

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[9] 281 Ga. 329,330, 638 S.E.2d 292 (2006)

[10] *Supra,* 262 Ga. 898, 899, 426 S.E.2d 370 (1993), cert. denied at 509 U.S. 909

> **street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.** These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.
>
> (c) The General Assembly finds that **there are criminal street gangs operating in Georgia and that the number of gang related murders is increasing.** It is **the intent of the General Assembly in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs which together are the chief source of terror created by street gangs.**
>
> (d) The General Assembly further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs.[11]

Judged in light of these findings and specific intentions of the Georgia Legislature, the Gang Act's provisions are neither unconstitutionally vague, nor over-broad. Rather they are a measured approach attempting to meet the crisis that the General Assembly found was facing Georgia's citizens as a consequence of criminal activities fostered by and engaged in by street gangs and their members.

C. The common meanings and practical applications of the Gang Act's terms reveal that they are not vague or over-broad, and provide adequate notice to potential defendants.

In cases involving constitutional challenges to Georgia statutes, Courts must view them in light of their practical applications. This Court noted in *State v.*

[11] O.C.G.A. § 16-15-2. (Emphasis supplied)

Miller:[12] "It is often necessary and appropriate to consider the context of certain behavior before applying a criminal statute.…" [13] Where a definition is not provided for a particular term in a statute, the Courts direct that its common meaning is adopted and used. Thus, even where the Act has not specifically defined a term, it is not unduly vague because the legislative context of the language provides a clear understanding of its meaning. In *Land v. State*,[14] for example, this Court said: "The General Assembly need not define every word it uses in a statute, as a cardinal rule of statutory construction is 'the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter. . . .' Often, the dictionary definition of terms at issue is utilized to provide an indication as to what the "ordinary signification" is.[15] Similarly, federal courts have interpreted undefined terms of federal statutes such as the term "associate" as found in RICO. In *Lockheed Martin Corp. v. Boeing Co.*[16], for example, the court noted:

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[12] *Supra,* 260 Ga. at 674.

[13] *See also, Schenck v. U.S.,* 249 U.S. 47, 51, 39 S. Ct. 247, 63 L. Ed. 470 (1919) ("But the character of every act depends upon the circumstances in which it is done.").

[14] *Supra,* 262 Ga. at 899.

[15] *See generally*, *In re Estate of Miraglia*, 2008 Ga. App. LEXIS 229 (2008).

[16] 357 F. Supp. 2d 1350, 1362 (M.D. Fla. 2005) (emphasis added). The Court looked to Webster's dictionary for the meaning of "associate."

> To decide whether Boeing and its competitors associated together, it is critical to determine, first, what it means to "associate" or to be "associated." *RICO does not define these terms*, and a search has failed to yield any cases which directly endeavor to define them insofar as they relate to an association-in-fact. *As such, the only resort is to accord the terms their "ordinary meaning" consistent with a reasonable interpretation of RICO*….

Appellants and their *Amici* challenge the Gang Act, in large part, on the basis of its supposed unconstitutional vagueness. In particular, they point to the Gang Act's use of the terms "associated," "gang activity" and "criminal street gang" to support this contention. "Vagueness" challenges fall within the category of due process claims and analyses.[17] Essentially, the test is whether the Gang Act, "give[s] a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." [18] As they failed at trial before Judge Hancock, Appellants and their *Amici* once again have failed to meet the requirement of demonstrating that the Gang Act does not provide this "fair notice." In fact, when applying the foregoing principles of statutory construction and the pertinent case law, it is clear that the Gang Act provides more than adequate notice to potential defendants of what contemplated conduct is proscribed. Appellants argue that the Gang Act is unconstitutionally vague, in part, because it conceivably could encompass *any*

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[17] *Baker v. State*, 280 Ga. 822, 823-4, 633 S.E.2d 541 (2006).

[18] *Id* at 823.

criminal offense, regardless of proof, that a defendant had any connection with a gang. They posit this, based upon their contention that certain terms in the Gang Act are purportedly either not defined or are inadequately so.

The Gang Act, however, applies *only* where a defendant has committed certain independent offenses. It specifically enumerates these independent offenses and applies them to the definition of "criminal gang activity." [19] In addition, the term "criminal street gang" is also particularized, both in terms of what *is* and what *is not* such prohibited activity in O.C.G.A.§ 16-15-3 (2):

> "Criminal street gang" means any organization,

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[19] In its entirety, that definition, found in O.C.G.A. § 16-15-3 is as follows:
As used in this chapter, the term:

> (1) "Criminal gang activity" means the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit any of the following offenses on or after July 1, 2006:
> (A) Any offense defined as racketeering activity by Code Section 16-14-3;
> (B) Any offense defined in Article 7 of Chapter 5 of this title, relating to stalking;
> (C) Any offense defined in Code Section 16-6-1 as rape, 16-6-2 as aggravated sodomy, 16-6-3 as statutory rape, or 16-6-22.2 as aggravated sexual battery;
> (D) Any offense defined in Article 3 of Chapter 10 of this title, relating to escape and other offenses related to confinement;
> (E) Any offense defined in Article 4 of Chapter 11 of this title, relating to dangerous instrumentalities and practices;
> (F) Any offense defined in Code Section 42-5-15, 42-5-16, 42-5-17, 42-5-18, or 42-5-19, relating to the security of state or county correctional facilities;
> (G) Any offense defined in Code Section 49-4A-11, relating to aiding or encouraging a child to escape from custody;
> (H) Any offense of criminal trespass or criminal damage to property resulting from any act of gang related painting on, tagging, marking on, writing on, or creating any form of graffiti on the property of another;
> (I) Any criminal offense committed in violation of the laws of the United States or its territories, dominions, or possessions, any of the several states, or any foreign nation which, if committed in this state, would be considered criminal gang activity under this Code section; and
> (J) Any criminal offense in the State of Georgia, any other state, or the United States that involves violence, possession of a weapon, or use of a weapon, whether designated as a felony or not, and regardless of the maximum sentence that could be imposed or actually was imposed.

> association, or group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity as defined in paragraph (1) of this Code section. The existence of such organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics. Such term shall not include three or more persons, associated in fact, whether formal or informal, who are not engaged in criminal gang activity.

Individuals of ordinary intelligence reading these provisions could not help but *recognize* what activity is, and what activity is not covered. Thus, the argument that these terms are unconstitutionally vague has no merit. In evaluating Appellants' vagueness challenge to the Gang Act, this Court need look no farther than its own decision rejecting similar challenges to Georgia's anti-mask act. In upholding Georgia's "anti-mask" statue, this Court applied a similar analysis.[20] Like the Gang Act, that statute differentiated between criminal and non-criminal conduct appearing in similar circumstances. The Supreme Court's explanation of its decision is particularly important:

> In our view, the statute distinguishes appropriately between mask-wearing that is intimidating, threatening or violent and mask-wearing for benign purposes. *It would be absurd to interpret the statute* to prevent non-threatening political mask-wearing, or to condone threatening mask-wearing conduct on a holiday. We

[20] *See, State v. Miller,* 260 Ga. 669, 398 S.E.2d 547 (1990).

> eschew such a construction of the statute.[21]

The Georgia Supreme Court utilized a similar mode of analysis to uphold Georgia's RICO laws:

> By this standard, quoting from §1962 (c), we hold that *'any person' of average intelligence*, on a clear reading of that statute, together with relevant definitional provisions, could not held [sic] (help) but realize that they would be criminally liable for participating in 'any enterprise,' including their own, 'through a pattern of racketeering activity.'[22]

Similarly, in affirming convictions on charges of destruction of religious property on account of their religious character, the United States Court of Appeals for the Eleventh Circuit applied an analogous approach when considering terms where specific definition was not provided:

> In addition, reading the linguistically rich term "in commerce" out of the statute violates the principle that statutory language must be read in the context of the purpose it was intended to serve. Congress does not write statutes for the words -- it writes them for the meaning. Accordingly, words must be read to have a purpose, and from their purpose they cannot be delinked . . ..Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion. The Appellant, by rendering "in commerce" nothing more than empty words, has

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[21] *Id*. 260 Ga. at 676 (emphasis added).

[22] *Chancey v. State,* 256 Ga. 415, 428, 349 S.E.2d 717 (1986), *cert. denied at* 481 U.S. 1029 (emphasis added).

> severed that phrase from its purpose, in contravention of the basic principle that the words of a statute are written to fill a purpose, not to fill a page.[23]

The Arizona Court of Appeals applied this same methodology in an opinion upholding that state's "gang act":

> Finally, we find no merit in defendant's assertion that the statute is unconstitutionally vague because "in theory, a criminal street gang member could be almost anyone. For example, 'self-proclamation' and 'clothing or colors' could encompass a girl or boy scout troop." This contention overlooks the statutory requirement that the self-proclamation or clothing worn must indicate street gang membership, thus requiring a nexus to an "association . .. whose members . . . engage in the commission, attempted commission, facilitation or solicitation of any felony act.[24]

Appellants and their *Amici* essentially urge this Court to sever the words of the Gang Act from their plain meaning and to divorce them from the context of the legislative statement of the Gang Act's purposes. This would be antipodal to the direction that Georgia's appellate courts and those of other jurisdictions have taken in construing such statutes. They cannot explain away how, as required under the direction of *Chancey,* any person of average intelligence, on a clear reading of that

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[23] *United States v. Ballinger,* 395 F.3d 1218, 1237 (11th Cir. 2005), *cert. denied at* 546 U.S. 1056. (emphasis added) (internal citation and quotations omitted.).

[24] *State v. Ochoa,* 189 Ariz. 454, 461, 943 P.2d 814 (Ariz. Ct. App. 1997), *cert denied at* 522 U.S. 1083.

statute, together with relevant definition provisions, could *not* realize what he or she would be criminally liable for under the Gang Act. As such, they cannot satisfy their burden of showing that the Gang Act is unconstitutionally vague, and the Act should be upheld.

The Gang Act's use of the term "associated," without a specific definition, likewise does not render the Act unduly vague nor over-broad. Use of that same term previously was approved by the Georgia Supreme Court in the context of a criminal statute. With regard to RICO violations, for instance, where the term "associate" similarly is not defined[25], this Court unequivocally stated:

> The appellants contend that this statutory provision is vague and over broad in that it makes it unlawful to "associate" or "participate" even "indirectly" in an enterprise. However, appellants fail to state that such participation in the enterprise be "through a pattern of racketeering activity." In any event, appellants contend that this statutory language does not put a person of ordinary intelligence on notice that he or she is committing a crime. [CIT] As stated earlier, this provision of the Georgia RICO statute is substantially the same as the comparable provision of the federal RICO statute, and similar vagueness challenges to the federal statute have repeatedly failed.[26]

Chancey's analysis would require the Court to consider the term "associated" in view of the Gang Act's entirety. This, in particular, would include

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[25] Under "prohibited activities" Georgia's Racketeering and Corrupt Organizations Act states: "It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." O.C.G.A. § 16-14-4 (b).

[26] *Chancey v. State,* 256 Ga. 415, 427-8, 349 S.E.2d 717 (1986), *cert. denied at* 481 U.S. 1029 (emphasis added) (internal citations omitted).

the fact that the Act's terms and design apply only to "criminal street gangs" and "criminal gang activity" just as in *Chancey*, the terms at issue were considered in connection with the Act's application to "a pattern of racketeering activity," Appellants, like the defendants in *Chancey*, refuse to recognize this critical factor. Accordingly, the fact that "associated" was not specifically defined in the Gang Act does not render the Act unconstitutional.

D. The Gang Act provides adequate notice to law enforcement.

Appellants' corollary vagueness argument, that the Gang Act fails to provide adequate notice to law enforcement of what actions are to be charged under its provisions, should fare no better than their previous argument. In *Banta v. State*,[27] this Court upheld Georgia's false statement statute against a constitutional challenge that, in part, asserted that the terms of the offense did not provide objective standards to law enforcement. The Court rejected this argument, noting that the statute in question did not depend upon the results of a criminalized act in order to apply:

> The statute also provides sufficient objective standards to those who are charged with enforcing it. This is not a case in which the prosecutor's decision to consider Banta's act to be criminal and to be a proper subject of prosecution is made only because of the act's consequence. Rather, Banta's act was criminal when he

[27] 281 Ga. 615, 642 S.E.2d 51 (2007).

> made his false statement, without regard to the result of that act. Of course, the prosecutor must decide whether there is sufficient evidence that the defendant knowingly and willfully made a false statement, but the fact that application of the statute's standards sometimes requires an assessment of the surrounding circumstances to determine if the statute is violated does not render it unconstitutional."[28]

Using the same statutory approach which the Court applied in *Banta*, the Gang Act is clearly sustainable. Its provisions are activated with the commission of an identified offense while the suspect is associated with a criminal street gang. As such, the results of the suspect's actions are irrelevant to the charge. The mere fact that the underlying circumstances of an offense might need to be assessed prior to making a determination as to whether the Gang Act applies, does not affect its constitutionality. Accordingly, Appellants argument to the contrary has no merit.

II. **The Gang Act is Not Unconstitutionally Over-Broad.**

Appellants' "over breadth" argument centers primarily upon First Amendment grounds. Contrary to their contention, the mere fact that a statute might impact First Amendment rights does not require its invalidation "out-of-hand." As the Supreme Court noted in upholding Georgia's anti-mask statute in the face of a similar challenge in *State v. Miller,*[29]

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[28] *Id.*, 281 Ga. at 617.

[29] *Supra,* 260 Ga. at 671.

> [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.

The Gang Act's purpose, to contend with the scourge of gang crime and the toll that it has taken on the state of Georgia,[30] can be subjected to a similar "narrowing construction" and interpreted in accord with its expressed purposes so that it survives an over breadth attack on general grounds similar to those the Supreme Court invoked in *State v. Miller*:

> When addressing a facial over breadth challenge, the court's first task is to ascertain whether the statute reaches a substantial amount of constitutionally protected conduct. [cit] However, " *a . . . statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction ....*[31]

Thus, the Supreme Court's approach in upholding the anti-mask statute was to find a "narrowing construction" in harmony with the statute's codified purposes:

> Miller asserts that the statute criminalizes a substantial amount of innocent behavior… As we interpret the statute, it does not sweep so broadly. When read with the "Statement of Public Policy," the meaning and purpose of the statute are clear. The language of the statute itself is therefore easily susceptible to a narrowing construction

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[30] O.C.G.A. § 16-15-2.

[31] *State v. Miller*, 260 Ga. at 673 (emphasis added).

> that avoids any constitutional over breadth problem…. *Further, we construe the statute in conjunction with its policy statement* to apply only to mask-wearing conduct when the mask-wearer knows or reasonably should know that the conduct provokes a reasonable apprehension of intimidation, threats or violence. So narrowed, the statute does not reach a substantial amount of constitutionally protected conduct.[32]

Examining the Gang Act in accord with its "policy statement" set forth in O.C.G.A.§ 16-15-2, the meaning and purposes clearly emerge: To combat the spread of criminal street gang crime and violence. Thus, the Gang Act is easily susceptible to a narrowing construction, such that Appellants cannot demonstrate that it reaches a substantial amount of constitutionally-protected conduct.

A. The Gang Act punishes only *Criminally* Associating.

In Appellants' over breadth challenge, they fail to note the distinction between prosecutions for mere association and for a criminal association. The inapposite cases that the Defense primarily relies upon demonstrate this.[33]In contrast with the provisions at issue in the cases Appellants cite, the Gang Act is not a series of statutes that criminalize or punish defendants for political affiliation. It pertains solely to *criminal* acts and *criminal* associations, neither of which are

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[32] *State v. Miller,* 260 Ga. at 674. *See also Johnson v. State,* 264 Ga. 590, 591, 449 S.E.2d 94 (1994) ("The statutes are not unconstitutionally over-broad, since they do 'not reach a substantial amount of constitutionally protected conduct.'"); *Land v. State,* 262 Ga. 898, 899, 426 S.E.2d 370 (1993) (upholding anti-riot statute against the suggestion that the statute would have authorized punishment for sports fans).

[33] *See, infra*.

cloaked with First Amendment protection.

Like the Gang Act, RICO punishes criminal conduct and criminal associations. This clearly is Constitutionally allowed as demonstrated in a case involving RICO charges brought against a white supremacist group, wherein the Ninth Circuit Court of Appeals denied a defendant's claim that the RICO laws violated his First Amendment rights of political advocacy and association:

> Congress has made association with an enterprise one element of a RICO offense. This element does not unconstitutionally punish associational status. The courts have recognized that RICO proscribes conduct and not status or belief.[34]

Appellants' arguments ignore the distinctions set forth in these cases and the Gang Act. In short, *criminal associations*, rather than associations in general, form the basis of prosecutions under the Gang Act. This makes the Gang Act's provisions just as sustainable as are those of RICO.

B. The Gang Act does not impermissibly infringe upon the right to freely associate.

"Associating" is not an offense under the Gang Act. Neither is "membership" or "employment." The Gang Act punishes *criminal activity* and

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[34] *United States v. Yarbrough,* 852 F.2d 1522, 1540 (9th Cir. 1988), *cert. denied at* 488 U.S. 866. *See also Thai v. United States,* 2006 U.S. Dist. LEXIS 94625 (E.D.N.Y. 2006) ("…the constitutional safeguards of the First Amendment do not extend to an 'association' that commits criminal acts.'"); *Jund v. Town of Hempstead*, 941 F.2d 1271, 1282-83 (2d Cir. 1991) (noting that "[i]t is elementary that criminal acts . . . may be punished," and holding that RICO liability for Hobbs Act violations does not interfere with rights of political committee members to free political association) .

does infringe upon any legitimate right of association. In other words, the Gang Act proscribes against specific conduct, not simple association.

This Court rejected similar challenges to the anti-masking act in *State v. Miller,*[35] where it held that Georgia's "anti-mask" statute did not violate free association rights, stating that those rights were tempered by the State's interest in contending with criminal activity:

> In sum, when individuals engage in intimidating or threatening mask-wearing behavior, their interest in maintaining their anonymity while in the public square must give way to the weighty interests of the State discussed above.[36]

Prosecution under the Gang Act requires criminal activity both on the part of the criminal street gang in question and by the individual defendant, personally. This "criminal act requirement," part-and-parcel to the Gang Act's application,[37] has been held to sustain related provisions in other states.[38] Actions only become

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[35] 260 Ga. 669, 398 S.E.2d 547 (1990)

[36] *State v. Miller,* 260 Ga. at 676. *See also Daniels v. State*, 264 Ga. 460, 448 S.E.2d 185 (1994).

[37] In requiring the commission of specified criminal offenses for its application, the Gang Act circumvents the issues considered with regard to the statute in question in *Lanzetta v. New Jersey,* which, "condemn[ed] no act or omission*." Lanzetta v. New Jersey,* 306 U.S. 451, 458, 59 S. Ct. 618, 83 L. Ed. 888 (1939)

[38] *See, State v. Bennett*, 150 Ohio App. 3d 450, 462, 782 N.E.2d 101 (2002), *appeal denied at* 98 Ohio St. 3d 1514 *("*…R.C. 2923.42 comports with the due-process requirements set forth in Scales because it punishes conduct, not association."); *Helton v. State*, 624 N.E.2d 499, 511 (Ind. Ct. App. 1993), *cert denied* at 520 U.S. 1119 ("The Gang Statute does not cut deeper into the freedom of association than is necessary to deal with the substantive evil of gang violence and does not make criminal all association with an organization which has been shown to engage in illegal activity.");*State v. Walker*, 506 N.W.2d 430, 433 (Iowa Sup. Ct. 1993) ("Walker's contention is that the statute sweeps into its ambit conduct generally protected by the freedom of association right found in the first amendment. The contention ignores a key

criminalized under the Gang Act when performed in accord with criminal gang activity, commensurate with an independent criminal offense. Again, the Gang Act punishes conduct, and not association, which *takes it out of the realm of a First Amendment violation.* In addition, the Gang Act specifically differentiates between groups involved in criminal activities and those that are not, in terms of which will fall within its purview. See O.C.G.A. § 16-15-3(2). Under the analysis set forth in *Miller*, this demarcation is dispositive.

C. The Gang Act does not impermissibly infringe upon the right of free expression.

Appellants cannot demonstrate that the Gang Act unconstitutionally infringes on free speech. The Act is content-neutral. It does not proscribe any particular type or mode of speech. In addition, any effect that the Gang Act might conceivably have on First Amendment rights would be related to its criminality, not expression, further demonstrating its validity.

In finding the Georgia's "anti-mask" statute constitutional in the face of a similar challenge, the Georgia Supreme Court stated:

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element of the offense. To support a conviction the accused must also be shown to aid and abet in an actual criminal act. Mere association is insufficient. For this reason, the facial attack fails.")*State v. Williams*, 148 Ohio App. 3d 473,479, 773 N.E.2d 1107 (2002*), appeal denied at* 97 Ohio St. 3d 1483 *("*Furthermore, the commission of a felony is not a protected activity even when it is committed by a group exercising their constitutional right to free association."); *Palos v. Sisto*, 2007 U.S. Dist. LEXIS 66983 (E.D. Cal. 2007) *(holding in a writ of habeas corpus case, "*The statute does not make membership in a group criminal, but rather the active participation in a criminal street gang by one who devotes a substantial part of his time and effort to the gang's illegal activities criminal.")

> The statute is content-neutral. It proscribes a certain form of menacing conduct without regard to the particular message of the mask-wearer. To the extent that the statute does proscribe the communicative aspect of mask-wearing conduct, its restriction is limited to threats and intimidation, which is not protected expression under the First Amendment.[39]

The argument in favor of the Gang Act's constitutionality is even stronger than it was for the statute in *Miller*. There, a violation of the "anti-mask" provision represented a criminal offense in-and-of-itself. The Gang Act requires that a defendant personally commit a separate and distinct offense in order to be charged.

In *Gravely v. Bacon*,[40] the Supreme Court upheld an ordinance pertaining to nude dancing, determining that it did not infringe upon protected speech in an unconstitutional fashion:

> This narrowing construction means the ordinance does not prohibit the live performance of plays, operas, or ballets at theatres, concert halls, museums, educational institutions, or similar establishments. These establishments have not been shown to contribute to increased crime and neighborhood blight, and the performances do not communicate an erotic message with an emphasis on specified sexual activities or anatomical areas. Nor does the ordinance extend to private conduct or public entertainment that does not

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[39] *State v. Miller, supra,* 260 Ga. at 673*; See also Daniels v. State*, *supra,* 264 Ga. 460.

[40] 263 Ga. 203, 429 S.E.2d 663 (1993).

> involve live performances, such as television shows, motion pictures, or museums….[41]

In *Briggs v. State*,[42] the Georgia Supreme Court upheld an anti-pirating statute, in part, because the code section was intended to protect the public and entertainment industry from piracy and bootlegging, a legitimate governmental interest unrelated to free speech concerns noting: "To the extent that it can be said that it curtails an artist's or transferor's desire to remain anonymous, its deterrent effect on legitimate expression is minimal." Other states and federal courts have upheld criminal provisions where, like the Gang Act, they pertain to modes of expression related to criminality, rather than methods of discourse.[43]

As noted above, the Georgia Gang Act is implicated only by the commission of an enumerated criminal offense. If the enumerated offense is committed by an individual associated or employed with a criminal street gang, Gang Act charges may apply. Like the nude dancing law in *Gravely v. Bacon,*[44] the Gang Act

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[41] *Id., 263 Ga. at 205 (emphasis added). See also Land v. State,* 262 Ga. 898, 900, 426 S.E.2d 370 (1993), cert. denied at 509 U.S. 909 ("There is no constitutional infraction involved in the prohibition of words or conduct likely to produce an immediate danger of a breach of the public peace.").

[42] 281 Ga. 329, 331, 638 S.E.2d 292 (2006),

[43] *United States v. Rowlee,* 899 F.2d 1275, 1278 (2nd Cir. 1990), cert. denied at 498 U.S. 828 ("First Amendment does not provide a defense to conspiracy charge where speech 'is an integral part of conduct in violation of a valid criminal statute.'"); *State v. Ochoa, 189 Ariz. 454, 459, 943 P.2d 814 (1997) cert. denied at* 522 U.S. 1083 *("*Rather, the provision enumerates categories of evidence, describing certain modes of expression that bear upon the issue of an individual's membership in a 'criminal street gang.'")

[44] 262 Ga. at 900.

discerns between items, like clothing, that can be admitted as evidence of gang membership only when they are related to criminal gang activity as opposed to instances when they are not. In fact, wearing gang-identified clothing, unlike the nude dancing in *Gravely,* represents no criminal offense under the Gang Act. Instead, it is a statutory item of proof. O.C.G.A. § 16-15-3 (2).[45]

Indeed, the argument for the constitutionality of the Gang Act is stronger than for the nude dancing statute in *Gravely,* wherein a form of dancing did represent a crime. Thus Appellants' argument that the Gang Act violates free expression rights fails.[46]

D. The Gang Act regulates conduct and thus does not affect speech.

Appellants cannot identify any protected form of expression or association that the Gang Act actually infringes. Rather, as shown above, the Gang Act prohibits only conduct that is already criminalized under Georgia law.

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[45] "The existence of such organization, association, or group of individuals associated in fact may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics." O.C.G.A. § 16-15-3 (2).

[46] *See I.D.K., Inc. v. Ferdinand,* 277 Ga. 548, 551, 592 S.E.2d 673 (2004) (upholding permit requirements for those serving alcohol in adult entertainment establishments as a proper exercise of police power); (*New York v. Ferber,* 458 U.S. 747, 761-62, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); *Daytona Grand, Inc. v. City of Daytona Beach,* 490 F.3d 860, (11th Cir. 2007) (upholding numerous ordinances effecting adult entertainment establishments); *Zibtluda, LLC v. Gwinnett County*, 411 F.3d 1278, *1289* (11th Cir. 2005) (finding that an adult entertainment related ordinance constitutional).

Accordingly, Appellants and their *Amici* cannot demonstrate any *actual* First Amendment violation.[47]

Conclusion

The Georgia Legislature enacted and reinforced the Gang Act in response to a crisis of rising criminal gang activity infecting Georgia communities. Significantly, the *Mille*r court pointed out that the Georgia legislature has a responsibility under its constitution to provide safety and protection for its citizens:

> "The state's interests furthered by the Anti-Mask Act lie at the very heart of the realm of legitimate governmental activity. Safeguarding the right of the people to exercise their civil rights and to be free from violence and intimidation is not only a compelling interest, it is the General Assembly's affirmative constitutional duty." [48]

This sentiment is echoed in the scholarly resource set forth in the brief of the Cities of Johns Creek and Sandy Springs in this appeal, positing that the Equal Protection Clause of the United States Constitution provides a guarantee of safety and protection to law abiding citizens from "lawbreakers."[49]

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[47] *Briggs v. State*, 281 Ga. 329, 638 S.E.2d 292 (2006) (holding that an "anti-piracy" statute regulated the conduct and manner of distribution of speech and not speech itself); *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (holding that a law prohibiting the burning of a draft card regulates conduct).

[48] *Miller, supra,* at 672 citing Georgia Constitution of 1983, Art. I, Sec. I. Par. VII.

[49] See Brief of Cities of Johns Creek and Sandy Springs at page 27, n. 54.

In rendering its determination that the "Anti-Mask" statute was not overly broad, was not vague and did not violate the First Amendment, the Court in *Miller* examined authoritative research articles, the historical setting of the measure's enactment, the criminal activities that the statue was designed to combat, newspaper articles demonstrating the breadth of the criminal conduct in question, and the demonstrated need of the statute—all matters that were set forth in the briefs of amici curiae Georgia Gang Investigators Association and the Cities of Johns Creek and Sandy Springs in this case.[50]

Appellants and their *Amici* complain bitterly about differences between specific provisions of Georgia's Gang Law and those of other states, which they contend are both more effective and constitutionally less objectionable. In reality, however, these are policy arguments to be addressed to the Legislature, not valid constitutional claims.

Respectfully, the Georgia Association of Chiefs of Police urges the Court to reject Appellants' challenges to the Gang Act, which is a most vital tool in securing the safety of Georgia's community from the blight of criminal gang activity. We, therefore, urge the Court to affirm the trial court's finding that the Gang Act is constitutional.

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[50] *See Miller* 260 Ga. at 671-2. *See also* Briefs of Georgia Gang Investigators Association and the Cities of Johns Creek and Sandy Springs.

Respectfully submitted,

Michael A. Caldwell
Georgia Bar No. 102775
General Counsel,
Georgia Association of Chiefs of Police, Inc.,
Amicus Curiae

DeLong, Caldwell & Bridgers, LLC
Suite 3100, Centennial Tower
101 Marietta St. NW
Atlanta, GA> 30303
(404)979-3150
(404)979-3170 (Fax)
michaelcaldwell@dcnblaw.com