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IN THE SUPREME COURT OF FLORIDA

TOMMIE LYNN STALL,
TODD EDWARD LONG, et al.,

Petitioners,

v. Case No. **74,020 & 74,390**

STATE OF FLORIDA,

Respondents.
_____/

BRIEF AMICUS CURIAE

OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION

OF FLORIDA, INC.

IN SUPPORT OF PETITIONERS

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS

The American Civil Liberties Union Foundation of Florida, Inc. (ACLU) is a statewide, non-partisan organization dedicated to the constitutional principles of individual liberty. Since its founding, the ACLU has focused on free speech cases, and in more recent times, in cases involving the right to privacy.

The ACLU believes that the fundamental freedoms of speech and press can be safeguarded effectively only if the First Amendment is strictly applied. Accordingly, the ACLU opposes any restraint on the right to create, publish, or distribute expressive materials for adults who wish to read or view them, on the basis of the "obscene" or "pornographic" content of those materials.

The ACLU is also committed to the preservation of the right to privacy under the U.S. Constitution and under the Florida Constitution, Article I, Section 23, which this Court has held to provide more expansive protection than the federally-recognized right. In this age of expanding computer and surveillance technology, and of increasing governmental intrusion into virtually every realm of life, the ACLU believes most Americans are properly concerned with the erosion of their right to privacy -- the right to be left alone in the conduct of their personal affairs and intimate decision-making. The citizens of Florida have voiced these legitimate concerns in their popular enactment of the privacy amendment to this State's Constitution. The ACLU believes that amendment should be interpreted broadly to include

the right to choose freely the materials one wishes to view in the privacy of one's home.

These cases therefore raise free speech and privacy concerns of vital importance to the ACLU. In recent years, law enforcement officials not only in Florida but around the nation have launched a dramatic offensive against sexually-oriented speech, relying on RICO-type statutes in an attempt to drive such speech from the marketplace altogether, despite its immense popularity and acceptance. It is crucial that reviewing courts function as a brake upon this censorial campaign; decisions upholding such overreaching prosecutorial tools are not only erroneous, they fuel a climate of censorship to the extreme detriment of the fundamental right to free speech.

Likewise, a concerted governmental effort to censor the reading and viewing materials adults may choose for their private enjoyment jeopardizes the right of all citizens to individual autonomy and freedom from governmental intrusion. A crabbed interpretation of this right *so* recently and explicitly added to the Florida Constitution is an insult to the citizens of this State and their clearly announced aspirations to preserve personal autonomy against encroachment by ever-more-intrusive government.

The ACLU therefore strongly urges this Court to reconsider the decision of the District Court of Appeal below.

SUMMARY OF ARGUMENT

Recent Florida Supreme Court precedent establishes that the Florida Constitution, Article I, Section 23, is both independent

of existing federal privacy rights and more expansive in its protection of the right to privacy. The addition of this privacy amendment has squarely placed upon the state the burden of justifying the challenged intrusion into the realm of private individual choice. Although the State has not shown that the challenged RICO and obscenity laws, which dramatically impact citizens' ability to freely choose to read and view erotic materials, are justified by compelling necessity and represent the least intrusive means of achieving any legitimate and compelling governmental aim, the District Court of Appeal upheld those laws. It did *so* without subjecting the challenged statutes to strict scrutiny, and without due recognition of this Court's broad interpretation of the scope of privacy rights under the Florida Constitution. The District Court of Appeal also failed to give adequate consideration to the very persuasive authority of the Hawaii Supreme Court, which reached precisely the opposite result in its well-reasoned decision of State v. Kam, 748 P.2d 372 (1988). This Court has never before addressed this issue; its consideration of these cases is therefore both appropriate and desirable.

ARGUMENT

THE DECISION BELOW REQUIRES REVIEW AND REVERSAL BECAUSE IT CONTRAVENES THE RIGHT OF PRIVACY AS GUARANTEED BY ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION

Justice Brandeis long ago observed that our Constitution embodies a fundamental freedom from governmental intrusion into the sphere of personal autonomy and privacy:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They

> recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion) (emphasis added). The voters of Florida have endorsed this prohibition against governmental intrusion into their private lives by passing the Florida privacy amendment in 1980.

In reversing the trial court's decision that F.S.A. Section 847.011 violates the right of privacy, the District Court of Appeal erroneously declined to subject the challenged law to strict scrutiny under this Court's decisions holding that the Article I, Section 23 right of privacy extends beyond the scope of the federally-recognized right. This Court should address the question in order to clarify, and hopefully to affirm, the right of privacy in this regard.

In Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985), this Court recognized the essential purpose and expansive scope of the privacy amendment:

> "This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, Section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental instrusion' in order to make the privacy right as strong as possible.
>
> "Since the people of this state exercised their perogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the

> right is much broader in scope than that of the Federal Constitution." (Emphasis added.)

This Court also emphasized in Winfield, 477 So.2d at 547, that the proper standard for evaluating asserted violations of the right to privacy is one of strict scrutiny:

> "This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstratins that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." (Emphasis added.)

The District Court of Appeal acknowledged, as does the respondent in its Brief on Jurisdiction (at pg. 3), that this Court has never considered the validity of Section 847.011 under the Florida Constitution's privacy clause. The court below summarily rejected the petitioners' argument that the obscenity law violated the right to privacy, concluding that right "is not *so* broad that a person can take it with him to the store in order to purchase obscene material -- even though he has the right to possess such material in the privacy of his home." This conclusion, the ACLU submits, is erroneous and damaging to the nature and extent of privacy rights afforded by the Florida Constitution.

The right to privacy is not location specific. It turns upon the notion of a sphere of personal autonomy and private decisionmaking in areas such as procreative decisions and the selection of books one will read or films one will view. It assures the right of access to information regarding these personal or intimate choices; e.g., the right to receive information about contraceptives. Carey v. Population Services

International, **431** U.S. **678, 700-702 (1977).** These rights are not confined to the home but rather depend upon the subject matter of the information sought or the nature of the personal decision.

In the Supreme Court's decision that there is a constitutional right to possess even "obscenity" for private use, Stanley v. Georgia, **394** U.S. **557, 565 (1969),** the Court discussed the nature of the privacy rights at stake, in light of the First Amendment:

> "If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

In State v.Kam, **748** P.2d **372, 376 (1988),** the Hawaii Supreme Court considered "the paradoxical conflict" between criminal obscenity laws and the privacy right announced in Stanley:

> "Is an individual's fundamental privacy right to own and view pornographic material violated when he or she is effectively denied the right to obtain such material (since generally, pornography is bought for private use at home)?"

The Hawaii Court resolved this conflict in favor of privacy rights, and struck down the state's obscenity statute under the privacy clause of the state Constitution (materially identical to Florida's privacy amendment): "Since a person has the right to view pornographic items at home, there necessarily follows a correlative right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless." **748** P.2d at **380.**

Amicus urges this Court to accept this case for review in order to assess the petitioners' challenge under the Florida right to privacy and particularly in light of the Kam decision. This issue of the scope of the privacy amendment is a substantial one which merits this Court's close attention.[1]

CONCLUSION

For the foregoing reasons, the American Civil Liberties Union Foundation of Florida, Inc., as amicus curiae urges this Court to grant review of these cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion has been sent by regular U.S. Mail to John C. Wilkins III, Esq., 770 East Main Street, Bartow, FL 33830; John Weston, Esq., 433 North Camden Drive, Suite 900, Beverly Hills, CA 90210; Peggy A. Quince, Esq., Asst. Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Bldg., Tampa, FL 33602; and Deborah

1 In addition, the District Court of Appeal neglected to consider seriously the growing and long-overdue trend among state courts to fundamentally reassess obscenity laws, especially in light of their incurable vagueness. The thoughtful opinion of the trial court below follows several other States which have now rejected the criminalization of obscenity as unconstitutional, either on vagueness, privacy, or free speech grounds. See, e.g., State v. Henry, 732 P.2d 9 (Or. 1987), aff'g. on other grounds, 717 P.2d 189 (Or. App. 1986). The ACLU strongly urges this Court to make its own contribution to this process of re-evaluation under the Florida Constitution.