OA 1-11-90



IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

THE STATE OF FLORIDA,

Respondent.

Case Nos. **74,020 & 74,390**

Case No. **88-246**
IN THE SECOND DISTRICT
COURT OF APPEAL

ON DISCRETIONARY REVIEW FROM THE

SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

# BRIEF OF AMICI CURIAE, PHE, INC. AND ULTRA CORP. IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI

PHE, Inc. is a North Carolina corporation that, together with sister corporations, is engaged in the business of mailing throughout the Nation to adult customers various materials protected by the First Amendment, including sexually explicit magazines and videotapes, contraceptives, a medical newsletter entitled Sex Over Forty (which is edited by a physician), and a newspaper entitled Executive Health Report. PHE's sexually explicit speech is sent only to adults, and only upon request. In the vast majority of cases, PHE's customers order videotapes and magazines from PHE for viewing or reading in the privacy of their own homes.

Ultra Corp. is a Connecticut corporation that is also engaged in the business of mail-order distribution to adult customers of constitutionally protected, sexually explicit videotapes. Ultra's sexually explicit speech is sent only to adults, and only upon request. As with PHE, the vast majority of Ultra's customers order videotapes from Ultra for home viewing.

Both PHE and Ultra take great care to assure compliance with state and federal obscenity laws. PHE conducts rigorous multiple review procedures that include review of sexually explicit materials by independent psychologists and sociologists to ensure that no materials sold by PHE violate the obscenity standards of any community in which they are sold. PHE has also met with law enforcement

officials and sought their advice to ensure that no arguably obscene material is distributed by PHE. PHE has strictly abided by the advice it has received.

Despite these efforts, on August 4, 1986, PHE was indicted in Alamance County, North Carolina for the distribution of magazines and videotapes that conformed with guidelines provided by attorneys and law enforcement officials in Orange County, North Carolina (PHE's principal place of business). After less than an hour of deliberation, the jury acquitted PHE of all charges.

Notwithstanding the jury's verdict in this state prosecution, federal prosecutors in two States (not including Florida) informed PHE that prosecution of PHE under federal obscenity statutes was under serious consideration. The federal prosecutors have given PHE reason to fear that federal RICO charges, based solely on the alleged obscenity violations, will be included in the indictments. In negotiations, the federal prosecutors have insisted that to avoid prosecution, PHE will have to discontinue nationwide sale of *any* sexually oriented material, even of material protected by the First Amendment. PHE has refused. Nevertheless, the fearsome threat of a RICO indictment, including forfeiture of PHE's entire business, is a powerful incentive to back down. And press reports indicate that many Florida bookstores have been intimidated into shutting down through similar threats made by law enforcement officials. See n. 20, infra.

Ultra is a newer and smaller company than PHE, and it, too, takes extraordinary measures to ensure the lawfulness of the materials it distributes. It imposes a strict code, which prohibits the inclusion of violence, degradation, and numerous other categories of conduct, from its inventory of videotapes offered for sale.

PHE and Ultra distribute sexually explicit materials in Florida, despite the daunting presence of a state RICO statute, here at issue, that is aggressively enforced against sexual expression by state prosecutors. They are willing to do so only because they take such extreme measures to ensure the lawfulness of their speech. As a result, PHE and Ultra undoubtedly self-censor and do not distribute numerous fully constitutionally protected materials, which accordingly are not available to their Florida customers.

Amici's experiences have made them acutely aware of the threat to free expression posed by application of state and federal RICO statutes to expressive activities. They also are familiar with the extent to which laws against distribution of obscene materials interfere with Florida citizens' constitutional right -- rooted in the right to be let alone established in Article I, Section 23 of the Florida Constitution -- to "read or observe what [they] please[]." Stanley v. Georgia, 394 U.S. 557, 565 (1969). The United States Supreme Court has recognized that this right, "a citizen's right to satisfy his intellectual and

emotional needs in the privacy of his own home," id., is an aspect of privacy "fundamental to our free society," id. at 564.

Without sale, of course, neither constitutionally protected nor obscene materials are available to Florida's adult citizens for viewing in the privacy of their homes. Mail-order sale, such as that engaged in by amici, permits distribution of speech materials directly to the home, without risk of exposure to those who do not wish to view them. The individual and combined effect of Florida's RICO and obscenity statutes severely stifles mail-order and every other form of distribution of expressive materials that treat the subject of human sexuality. These statutes illegitimately involve the State in "telling a man, sitting alone in his own house, what books he may read [and] what films he may watch." Id. at 565. In large measure, these laws deny the adult citizens of Florida access to valuable, constitutionally protected speech such as that distributed by amici.

Amici, therefore, wish to participate in this case to explain the constitutional infirmities of Florida's obscenity statutes, and of Florida's RICO statutes as applied to predicate obscenity offenses.

## SUMMARY OF ARGUMENT

When the people of Florida approved Article I, Section 23 of the Florida Constitution in 1980, they adopted

a free-standing, textual right to be let alone and to be free from governmental intrusion that is far broader and affords far more protection to personal privacy and autonomy than does the federal Constitution. Section 23 protects reading and viewing "obscene" materials in the privacy of the home, because adults have a reasonable expectation of privacy in choosing their home reading or viewing materials, regardless of the social worth of those materials. Indeed, the federal Constitution's right to privacy protects these choices as well. Unlike the federal Constitution, however, the Florida Constitution affords the individual a meaningful opportunity to exercise this constitutional right -- by protecting the purchase, for home use, of reading or viewing materials of one's choice. Point I.A.

Moreover, Florida's obscenity statute does not further a compelling state objective, and it does not do so in a narrowly tailored manner. Rather than target materials that contain pornographic depictions of children, or exposure of obscene materials to minors or unwilling adults, or public exhibition of obscene materials, that statute broadly outlaws all sale of obscene materials, even sale to adults for private viewing in the home. The true rationale for this statutory prohibition -- majoritarian disapproval of even private viewing of obscene materials -- cannot be deemed "compelling" because the Florida Constitution protects the right to be let alone in the privacy of the home. Point I.B.

Furthermore, Florida's Racketeer Influenced and Corrupt Organizations Act ("RICO"), as applied to predicate offenses of obscenity, threatens draconian sanctions that, coupled with the unavoidable vagueness of the obscenity offense, engender the self-censorship of huge quantities of protected expression. Civil forfeiture of all corporate and personal assets -- a corporate death penalty --, imprisonment of up to thirty years, and other punishments, triggered by as few as two obscenity violations anytime within a five year period, senselessly impose a sweeping chilling effect on protected expression, a chilling effect prohibited by the First Amendment to the United States Constitution. Point II.

## ARGUMENT

### I. FLORIDA'S OBSCENITY STATUTE, F.S.A. § 847.011, AS APPLIED TO SALES TO ADULTS OF EXPRESSIVE MATERIAL FOR HOME USE, VIOLATES THE "RIGHT TO BE LET ALONE" SAFEGUARDED IN ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION

#### A. The Individual's Interest In Purchasing Even Obscene Expressive Materials For Home Viewing Is Protected Under Florida's "Right To Be Let Alone."[1/]

Section 847.011 of the Florida Statutes ("the obscenity statute") criminalizes the sale of "obscene"

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1/ Amici agree with petitioners and the court below that petitioners have standing to raise the privacy interests of their customers.

expressive materials.[2] The State seeks to apply that statute to prohibit even sales to consenting adults for use in the privacy of their own homes. If applied in those circumstances, the statute would violate the "right to be let alone and free from governmental intrusion into [one's] private life," embraced in Article I, Section 23 of the Florida Constitution.[3]

Twice last month, this Court reaffirmed that this Section 23 right to be let alone "'is much broader in scope than that of the Federal Constitution.'" In re T.W., 1989 WL 120662 (October 5, 1989) (quoting Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544, 548 (1985)); see Shaktman v. State, 1989 WL 120852 (October 12, 1989). "[T]he people of Florida unequivocally declared for themselves a strong, clear, freestanding,

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2/ Obscene materials are those found 1) to involve "patently offensive representations" of sexual activity; 2) to appeal to a prurient interest in sex; and 3) to be without serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15 (1973). See Caplan v. State, 336 So. 2d 1154 (1976) (Florida courts construe section 847.011 as consistent with the dictates of Miller).

3/ Article I, Section 23, provides as follows:

> "Right of Privacy.
>
> "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

and express right of privacy as a constitutional fundamental right." Id. The amendment "embraces more privacy interests, and extends more protection to the individual in those interests, than does the Federal Constitution." In re T.W., supra.

As conceived by the framers of the amendment, and as applied by this Court, this Section 23 right protects the fundamental interest in personal autonomy, "the right to make important decisions about one's own life." Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 Fla. St. U. L. Rev. 671, 764 (1978). As this Court recently observed:

> "One of [the] ultimate goals [of this privacy right] is to foster the independence and individualism which is a distinguishing mark of our society and which can thrive only by assuring a zone of privacy into which not even government may intrude without invitation or consent. The right of privacy, assured to Florida's citizens, demands that individuals be free from uninvited . . . interference in those aspects of their lives which fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest."

Shaktman v. State, supra.

The right to be let alone therefore encompasses the right of a minor to decide whether or not to have an abortion. In re T.W., supra. It also protects the right not only to use but also to obtain contraceptives; id. ("of all the decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how

one's body is to become the vehicle for another human being's creation. . . ."); the right to refuse a blood transfusion that is necessary to sustain life, Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); the right of an adult in a permanent vegetative state to removal of a life support system, Corbett v. D'Allessandro, 487 So. 2d 368 (Fla. 2d DCA), review denied, 492 So. 2d 1331 (Fla. 1986); and the right of a brain-dead infant to removal of a life support system, In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984). In these ways, Article I, Section 23 is parallel to, but far more protective than, the federal autonomy rights recognized under the due process clause of the fourteenth and fifth amendments. In re T.W., supra.

The right to be let alone also encompasses the right to read or view obscene materials in the privacy of one's own home. As this Court recently observed, "the central concern" of the right to be let alone "is the inviolability of one's own thought, person, and personal action." Shaktman v. State, supra. In reaching this conclusion, this Court relied upon Justice Brandeis' visionary and oft-quoted passage, dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928): The "right to be let alone . . . secures conditions favorable to the pursuit of happiness," protecting citizens "in their beliefs, their thoughts, their emotions and their sensations."

The U.S. Supreme Court relied upon precisely these values, and the same passages from Justice Brandeis' opinion in Olmstead, in holding that an individual has a constitutional right to possess and read even obscene materials in the privacy of his or her home. Stanley v. Georgia, 394 U.S. 557 (1969).[4/] The Court held the obscenity laws at issue in Stanley abridged the "fundamental . . . right to be free, except in very limited circumstances, from unwanted government intrusions to one's privacy." Id. at 564. This "'right to be let alone'" protects Americans in their "'beliefs . . . thoughts . . . emotions and . . . sensations,'" id. (quoting Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting)), and is, therefore, a "right to satisfy [one's] intellectual and emotional needs in the privacy of his own home." 394 U.S. at 565. This right encompasses the "right to receive information and ideas, regardless of their social worth." Id. at 564.[5/] Thus, "[c]ategorization of these films as 'obscene,'" and therefore

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4/ The ruling was unanimous, with three justices (including Justice Brennan) not reaching the First Amendment and privacy issues because they decided the case on narrower grounds. 394 U.S. at 569 (Stewart, J., concurring).

5/ The Court characterized this right as "fundamental to our free society," 394 U.S. at 564, and "so fundamental to our scheme of individual liberty," id. at 568.

unprotected by the First Amendment, was "insufficient" to justify the invasion of privacy imposed by the law. 394 U.S. at 565.

Stanley, of course, was a landmark privacy decision, and was relied upon conspicuously by the Supreme Court in its most well-known privacy ruling, Roe v. Wade, 410 U.S. 113, 152 (1973). When the people of Florida voted in 1980, therefore, to adopt an express, textual right to be let alone in the state Constitution, the right recognized in Stanley was prominently etched on the slate of established federal privacy rights. Because this new state right was meant to be "much broader in scope than that of the Federal Constitution," Shaktman, supra (Ehrlich, J., concurring specially), embracing "more privacy interests, and extend[ing] more protection to the individual in those interests than does the federal Constitution," In re T.W., supra, it follows of necessity that the Stanley right is embraced within Article I, Section 23, and that it is protected more fully in Section 23 than in the generalities of the Fourteenth Amendment's due process clause.

This Court has stated that "before the right of privacy is attached . . . a reasonable expectation of privacy must exist." Winfield v. Division of Pari-mutual Wagering, 477 So. 2d 544, 547 (1985); Shaktman, supra. And clearly, there is a reasonable expectation of privacy in the books one chooses to read or the films one chooses

to watch in the privacy of the home. This is the fundamental meaning of Stanley, which termed intrusion on these basic choices "a drastic invasion of personal liberties." 394 U.S. at 565. Moreover, even if there had not been a reasonable expectation of privacy in such choices before 1969 when Stanley was decided, Stanley itself, holding those choices to be protected by the federal Constitution, now provides that reasonable expectation of privacy.

This expectation of privacy is sufficient to establish that the Article I, Section 23 "right to be let alone" and to be "free from governmental intrusion" into private life is implicated by the present prosecutions. The district court erred in concluding that the relevant inquiry is whether petitioners' customers could legitimately expect privacy in the in-store purchase of obscene videocassettes for home use. Florida v. Long, 544 So. 2d 219, 222-223 (Fla. 4th DCA 1989). This Court has **not** required that before the "right to be let alone" is implicated the reasonable expectation of privacy must extend to the precise action the State would criminalize. To the contrary, in In re T.W., supra, the Court held that the right to be let alone itself protects a pregnant woman's right to undergo an abortion procedure, notwithstanding the fact that such procedures are accomplished through a commercial transaction in a clinic or hospital open to the public. The woman has a legitimate

expectation that her decision whether to bear a child is private, and it is enough to implicate the right to be let alone that interference with her right to undergo the abortion procedure would severely impede the exercise of her private and protected choice. Indeed, unless undergoing the procedure were protected, the woman's constitutional right to choose would be a meaningless fiction.

The same is true here.[6/] Indeed, because the right to possess and view obscene materials in the privacy of one's home is clearly embraced within Florida's "broad," "strong," right to be let alone, it necessarily follows that the right to purchase for home use is enfolded within the right "to be let alone." There has never been any doubt, for example, that the right to use contraceptives in the privacy of the home also protects the right to acquire contraceptives for such use. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v.

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6/ With respect to purchase of obscene materials through mail-order companies, the expectation of privacy plainly inherent in the entire transaction: the customer orders the expressive material from the privacy of his home through use of an order form sealed in an envelope and entrusted to the U.S. Mails, or over the telephone, and receives the product in a sealed package in his or her home mailbox. The ordering, the receipt, and the carriage of the order and the videocassette or magazine in the mails may reasonably be expected by the mail-order customer to be private. Cf. Shaktman.

Population Services Int'l, 431 U.S. 678 (1977). Nor has it ever been questioned that the right to decide whether to abort a pregnancy enfolds the right to purchase an abortion. Roe v. Wade, 410 U.S. 113 (1973).[7/] A right to read the materials of one's choice means nothing if the State may deny one the ability to acquire those materials. See State v. Kam, 748 P.2d 372, 379 (Hi. 1988); Pope v. Illinois, 107 S. Ct. 1918, 1930 (1987) (Stevens, J., dissenting); United States v. 12 200-foot Reels, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting); United States v. Thirty-Seven Photographs, 402 U.S. 363, 381-382 (1971) (Black, J., dissenting).[8/]

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7/ The privacy interests protected in Griswold and Roe are not different in kind from those protected in Stanley. As noted, the Roe Court relied upon Stanley in establishing the right to terminate an unwanted pregnancy, 410 U.S. at 152; and the Stanley Court relied upon Griswold in establishing the right privately to read or observe what one pleases, regardless of society's opinion of the worth of such materials, 394 U.S. at 564.

8/ In fact, the text of Section 23 provides additional support for protecting not only the right to read, but also the right to acquire, obscene materials to be read in the privacy of the home. Unlike the federal right to be let alone, Section 23 expressly protects not only the right "to be let alone," but also the right to be "free from governmental intrusion into . . . private life." Under long-standing canons of constitutional construction, every word and phrase in a constitutional provision must be construed to have independent force and meaning; constitutional provisions may not be construed in a manner that would render individual words or phrases superfluous or redundant. Thus, the freedom from "governmental intrusion into private life" must mean

(Footnote Continued)

The conclusion that the "right to be let alone" and to be "free from governmental intrusion" is implicated by the prosecutions here at issue is not undercut by the rulings of this Court, State v. Kraham, 360 So. 2d 393 (1978), or the U.S. Supreme Court, United States v. Reidel, 402 U.S. 351 (1971); United States v. Orito, 413 U.S. 139 (1973), suggesting that free speech rights do not protect purchase of obscene materials for home use. Obscene speech is unprotected by the First Amendment on the theory that such speech "by definition lacks any serious literary, artistic, political, or scientific value as communication." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973). Such materials are said

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(Footnote Continued)
something different from and in addition to the freedom "to be let alone." In the context of this case, the most reasonable meaning of the right to be free from governmental intrusion into private life is the right to be free from governmental actions that would effectively prevent, if not directly prohibit, exercise the right to read obscene materials in the privacy of the home. So construed, Section 23 would not only provide a theoretical, formalistic "right" to read obscene materials in the privacy of the home if an individual could somehow obtain such materials, but would also prohibit governmental actions whose very purpose is to render that "right" a meaningless fiction by preventing individuals from acquiring for home use materials they have a constitutional right to read in their homes.

Obviously, this construction of the two phrases of Section 23 is consistent with and would further the underlying purpose of Section 23's intentionally broad right of privacy. Indeed, a construction of Section 23 that resulted in a formalistic "right" that could never lawfully be exercised would be flatly inconsistent with that section's underlying purpose.

to make only a minimal contribution "as a step to truth," Roth v. United States, 354 U.S. 476, 485 (1957), and thus their control by the State is said to be "distinct from a control of reason and the intellect." Paris Adult Theatre I, 413 U.S. at 67. Accordingly, the First Amendment is held not implicated by regulation of the sale of obscene speech.

Whatever may be said about this rationale as a matter of First Amendment jurisprudence,[9/] it cannot impose a limit on the very different privacy right at issue here. In the words of the Florida Constitution itself, that right protects the individual's choices about his "private life," absent a countervailing compelling state interest. It therefore protects not only "reason" and "intellect"; the search for "truth"; and the communication of "literary," "artistic," "political," or "scientific" value; but also human "emotions and . . . sensations"; values that do not fall within the four enumerated categories; and what Justice

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9/ See L. Tribe, American Constitutional Law 915-916 (1988) ("It may be that hardcore pornography has little ideological content -- although hedonism is surely an idea -- but the first amendment has not generally been confined to the protection of high-minded discussion among savants, and in Cohen v. California, the Court reversed a conviction for wearing a jacket inscribed with the words "Fuck the Draft," reasoning that the Constitution protects the 'emotive function' of communication no less than its 'cognitive content.'").

Harlan once termed "the freedom of a man's inner life, be it rich or sordid," United States v. Reidel, 402 U.S. 351, 359-360 (1971) (concurring opinion). It is, as Justice Brandeis long ago recognized, "the most comprehensive of rights." Olmstead v. United States, 277 U.S. at 478 (Brandeis, J., dissenting).

Indeed, the individual's interest in controlling choices affecting his emotions and sensations, as distinct from the intellect, lies at the core of this Court's privacy decisions. Abortion rights, the rights to refuse a blood transfusion, and the right of a brain-dead infant or an adult in a permanent vegetative state to refuse, through their guardians, life sustaining treatments, have little to do with the intellect or reason, and much to do with human feeling. The reasons underlying the decisions denying free speech protection to transactions such as those at issue thus have no bearing on the scope of this right of privacy.

And because Article I, Section 23 is stronger than federal privacy guarantees, reaching more privacy interests and protecting privacy interests more completely, In re T.W., supra, it is of no significance here that the U.S. Supreme Court has not seen fit to extend Stanley's privacy rationale -- as distinct from its free speech rationale -- to protect sale and purchase of obscene expressive materials for home use. The federal limits on Stanley stem from the absence of a textual

basis even for the right "to be let alone" in the federal Constitution, and the refusal of a narrow majority of the Court to recognize the logical scope of the right recognized in Stanley. The people of Florida, in approving Article I, Section 23, plainly secured for themselves protections not found in the federal document.

The other rationale offered in Paris Adult Theatre I for not extending the holding of Stanley to movie-theatre exhibition of obscene motion pictures is completely inapplicable to the sale of videocassettes or other expressive materials for home use. Quoting Professor Bickel, the Court asserted that such exhibition impinges on the privacy of others. 413 U.S. at 59. Videocassettes purchased or rented in a store for home use simply do not come to the attention of an unwilling viewer. Videocassettes ordered through the mail are more private still. Cf. United States v. Chase, 135 U.S. 255, 261 (1890) (private letters, sealed in a "proper envelope," not criminalized by federal obscenity law then in effect -- "with a due regard to the security of private correspondence"). See L. Tribe, supra, at 917.

### B. The Obscenity Statute Is Not Narrowly Drawn To Further A Compelling State Interest.

The obscenity statute does not further a compelling state interest. It is grossly overbroad with

respect to any compelling interest the State might offer. Children, for example, can be protected -- both from appearing in pornographic materials and from exposure to them -- through laws narrowly drawn to achieve that purpose, without banning expressive material adults have a right to view in the privacy of their homes. Similarly, laws drawn to criminalize public exhibition of obscene materials, or distribution for such public exhibition, would more narrowly achieve the goal of shielding unwilling viewers from such materials than the blunderbuss prohibition at issue. And zoning regulations can guard against any adverse "secondary effects" adult businesses may bring with them. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). The obscenity statute, therefore, cannot be said narrowly to further any of these interests.

Moreover, certain objectives that **are** furthered by the statute are assuredly not sufficiently compelling to override the Florida Constitution's textual right "to be let alone." The State surely may not assert majoritarian moral disapproval of private home viewing of obscene expressive materials as a "compelling" justification for the ban. At a minimum, Section 23's privacy right is a right to be free from restrictions on one's private life driven by nothing more than moral condemnation of the private behavior in question. The whole point of constitutional protection is to insulate certain

rights from majoritarian disapproval. If majoritarian moral disapproval would suffice to override the individual's right to be let alone, no aspect of private life -- including contraception, abortion, and refusal of life support by those in a permanent vegetative state -- would be protected. Almost any law infringing on the right to privacy could be characterized as enforcing the majority's moral code.

Nor can speculative beliefs by some that viewing obscene materials contributes to antisocial behavior override the right to be let alone. First, there is no persuasive evidence of such a link, and strong reason to believe no reliable causal connection exists. Donnerstein, Linz & Penrod, The Attorney General's Commission on Pornography: The Gaps Between "Findings" And Fact, 1987 Am. Bar Found. Res. J. 713.10/

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10/ Even the Meese Pornography Commission concluded that materials depicting nonviolent consensual sex between adults have no demonstrable causal link to sexual violence. Attorney General's Commission on Pornography, I Final Report 337-338 (1986). And the category of obscene materials bears no particular relation to the materials believed by some Commissioners -- and certain social scientists -- to have some bearing on viewers' attitudes toward sexual violence. R-rated "Slasher" films may adversely affect such attitudes, but are legal everywhere, including Florida. X-rated films depicting consensual sex between adults *may* be unlawful, and yet have no demonstrated or even intuitive connection to attitudes toward sexual violence, much less to actually causing violence. See generally, E. Donnerstein, D. Linz, & S. Penrod, The Question of Pornography (1987).

The claim of causal connection is nothing more than intuition, informed by moral condemnation masquerading as science. Second, even if a statistical correlation could be demonstrated, the "right to be let alone" surely requires more to override it than a prediction of causality in a small number of cases. Almost any private choice -- to use contraceptives, have an abortion, disconnect a life support system, read the Bible, or read sexually oriented literature -- could conceivably contribute in a small number of cases to conduct society has a compelling interest in preventing. The right of privacy draws a circle around the protected choices, nevertheless, and requires society directly to forbid the antisocial conduct, rather than indirectly to further that goal by denying a private choice that does not have such consequences for the vast majority of the people. "[I]n the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .'" Stanley v. Georgia, 394 U.S. at 566-567 (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).

Purchase and sale of expressive materials for home use are indispensable to the exercise of the right to read or view such materials in the privacy of the home. Consequently, they are protected by "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. at 478 (Brandeis, J., dissenting).

## II. AS APPLIED TO PREDICATE ACTS OF OBSCENE SPEECH, FLORIDA'S RICO PROVISIONS VIOLATE THE FIRST AMENDMENT.

### A. The Imposition Of RICO Sanctions For Predicate Offenses Of Obscene Speech Must Be Evaluated Under The Exacting First Amendment Standards Applicable When Government Regulates Expression Based On The Content Of That Expression.

The application of RICO sanctions for the predicate offense of obscenity constitutes a direct, affirmative governmental regulation of expression based on the content of that expression. The First Amendment constrains regulation when, as in this case, "a significant expressive element drew the legal remedy in the first place." Arcara v. Cloud Books, Inc., 478 U.S. 697, 706 (1986).[11/] In Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989) the U.S. Supreme Court recently and unequivocally held that these stringent standards must govern the use of RICO to regulate obscenity. Finding it "incontestable that the[] proceedings were begun to put an end to the sale of obscenity," the Court applied "the

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11/ Accord Buckley v. Valeo, 424 U.S. 1, 16-17 (1976); United States v. O'Brien, 391 U.S. 367, 382 (1968); see generally Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1496-1502 (1975).

special rules applicable to removing First Amendment materials from circulation." 109 S. Ct. at 929. "The State," the Court held, "cannot escape the constitutional safeguards [for speech] of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'" Id. Accord Near v. Minnesota, 283 U.S. 697, 720 (1931).[12/] Accordingly, like all other "statutes designed to regulate obscene materials," RICO "must be carefully limited" to minimize the "inherent dangers" of censoring, or causing self-censorship of, constitutionally protected, nonobscene expression. Miller v. California, 413 U.S. 15, 23-24 (1973).

These exacting constitutional standards limit the tools used by the State to regulate even unprotected expression. Obscenity regulation -- including RICO -- must not only conform to the narrow substantive definition set forth in Miller. When seeking to restrict the dissemination of unprotected obscenity, government "is not free to adopt whatever procedures it pleases . . .

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12/ The Court rejected a similar semantic maneuver in Near. Attempting to justify the application of a nuisance abatement law to enjoin a newspaper from future libelous publication on the basis of a finding of past libel, the State in Near had argued that it was merely regulating a business causing a public nuisance. "Characterizing the publication as a business and the business as a nuisance," the Court held, "does not permit an invasion of the constitutional immunity against restraint." 283 U.S. at 720.

without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant of Property, 367 U.S. 717, 731 (1961); Smith v. California, 361 U.S. 147, 152 (1959). RICO therefore, like any other regulation of obscene speech, must employ "procedures that will ensure against the curtailment of constitutionally protected expression." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).[13/] See Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. at 929-930 (state RICO pretrial seizure unconstitutional in First Amendment context).

Most important for the present case, the means by which government seeks to punish unprotected speech must conform to exacting First Amendment limitations. Remedies or punishments wholly unobjectionable when applied to restrain nonspeech activity may be unconstitutional when applied in response to a finding of unprotected past expressi In Vance v. Universal Amusement Co., for example, the Supreme Court held that a public nuisance abatement statute of general applicability could not be applied to "abate" the "nuisance" of exhibition of obscene films by enjoining future exhibition of such

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13/ As explained in Schad v. Borough of Mt. Ephraim, "the standard of review is determined by the nature of the right assertedly threatened or violated, rather than by the power being exercised or the specific limitation imposed." 452 U.S. 61, 68 (1981) (zoning law prohibiting "live entertainment" including nude dancing, subject to strict scrutiny).

films. 445 U.S. 308 (1980) (per curiam). Noting that "regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance," id. at 315, the Court found that the suppression of future expression in response to a prior finding of obscenity constituted a prior restraint violative of the First Amendment. Id. at 315-317. Thus, the abatement "remedy" struck down in Vance was unconstitutional because it barred future speech, notwithstanding that it was imposed after a legally valid finding of obscenity. The limitations set forth in Vance apply fully to the use of RICO forfeiture as a means to regulate obscenity. Accord Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. at 931-933 (Stevens, J., concurring in part and dissenting in part).

**B. Florida's RICO Statute Engenders Sweeping Self-Censorship Of Constitutionally Protected Expression, And is Therefore Unconstitutional.**

Although the First Amendment does not protect obscene expression, Roth v. United States, 354 U.S. 476

(1957), only a small portion of sexually oriented expression is adjudicated obscene under the Miller standard.14/ As Miller's delimitation of unprotected obscenity makes clear, "[s]ex and obscenity are not synonymous." Roth 354 U.S. at 487. Rather,

> "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

Id. All sexually oriented expression that is not obscene receives full constitutional protection, even when presented as entertainment. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Jenkins v. Georgia, 418 U.S. 153 (1974).

The intractable difficulties of establishing a workable definition of unprotected "obscenity," however, have long been acknowledged. See, e.g., Miller 413 U.S. at 27-28. At best, "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." Bantam Books v. Sullivan, 372

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14/ As noted above, Miller defined obscenity as expression that: (1) taken as a whole, appeals to the "prurient" or morbid interest in sex, 413 U.S. at 24; see also Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985); (2) describes or depicts specific hard-core sexual conduct in a patently offensive way, Miller, 413 U.S. at 24; and (3) taken as a whole, lacks "serious literary, artistic, political, or scientific value." Id.

U.S. **58, 66 (1963).** As the Oregon Supreme Court recently observed:

> **"The** indeterminacy of the crime [of obscenity] . . . lies in tying the criminality of a publication to 'contemporary state standards.' Even in ordinary criminal law, we doubt that the legislature can make it a crime to conduct oneself in a manner that falls short of 'contemporary state standards.' In a law censoring speech, writing or publication, such an indeterminate test is intolerable. It means that anyone who publishes or distributes arguably 'obscene' words or pictures does so at the peril of punishment for making a wrong guess about a future jury's estimate of 'contemporary state standards' of **prurience."**

State v. Henry, **302** Or. 510, **732 P.2d 9, 10 (1987)** (holding obscenity law invalid under state constitution). Cf. Connally v. General Const. Co., **269** U.S. **385 (1926)** (finding unconstitutionally vague a state statute requiring that minimum wages conform to prevailing community standards). Potential speakers confront similar problems in determining whether speech will be found "patently offensive" under contemporary community standards. And, as Justice Scalia recently observed with respect to the **"value"** part of the Miller test: **"it** is quite impossible to come to an objective assessment of (at least) literary or artistic **value."** Pope v. Illinois, **107** S. Ct. **1918, 1923 (1987)** (Scalia, J., concurring). 15/

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15/ One commentator has described the Miller test as "inevitably **obscure."** See Schauer, Fear, Risk and the First Amendment: Unravelling the **"Chilling** Effect", **58** B.U.L. Rev. **685, 702 (1978).**

These uncertainties inevitably engender some self-censorship of protected expression by cautious would-be speakers. But the First Amendment has been held generally to tolerate this degree of diminishment of expression because it is thought to be relatively modest and unavoidably incidental to the State's valid goals of regulating unprotected obscene speech. See Fort Wayne Books, 109 S. Ct. at 925. But the coupling of direct and draconian sanctions with the uncertainties of Miller's definition of obscenity exacerbates the risk of self-censorship dramatically, vastly expanding the amount of protected expression chilled by the State. Potential speakers will steer far wider of the unlawful zone if they face devastating penalties for a wrong guess in this uncertain area. The First Amendment therefore requires that careful scrutiny be given to the sanctions imposed for violation of obscenity laws to ensure that they do not increase the risk of self-censorship of protected expression to constitutionally intolerable levels.

It is axiomatic that the deterrent effect of a government sanction will increase as the sanction becomes more severe. Erlich, The Deterrent Effect of Criminal Law Enforcement, 1 J. Legal Stud. 259 (1977); R. Posner, Economic Analysis of Law 165 (1977). This is equally true when the sanction is imposed for violation of a law regulating expression. See Mayton, Toward a Theory of First Amendment Process: Injunction of Speech,

Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245 (1982). Commentators have recognized that "the risk of self-censorship [of protected expression] is likely to be compounded by the potential severity of the sanctions that can be imposed against speakers." Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 24-27 (1981); accord Mayton, 67 Cornell L. Rev. at 266-67. See generally Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect", 58 B.U.L. Rev. 685 (1978).

In New York v. Ferber, the Supreme Court specifically directed that the severity of consequences for violating a regulation of sexual expression be considered in evaluating the chilling effect of that regulation. 458 U.S. 747, 774 (1982).[16/] Lower courts have similarly recognized the importance of severity of punishment in gauging the chilling effect of laws regulating expression. See Polykoff v. Collins, 816 F.2d

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16/ The Supreme Court has also taken account of the enhanced chilling effect of draconian sanctions in analogous contexts. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (because the threat of huge punitive damages awards in defamation cases chills protected expression, the availability of such damages must be constitutionally limited); see also Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (arguing that only "the most nominal punishment" could constitutionally be inflicted for the alleged speech crime at issue).

1326, 1340 (9th Cir. 1987) (excessive penalties cause undue chill).17/

Florida's draconian RICO provisions exert a chilling effect that overwhelms any ever before considered in the First Amendment context. RICO subjects a convicted defendant to an array of devastating criminal and civil sanctions. Criminal penalties include massive fines and prison terms of up to 30 years, penalties that can be imposed for "crimes" so slight as selling two copies of a periodical found to be obscene anywhere in the State. The concomitant civil penalties are even more daunting, particularly to a corporate distributor of expressive materials. A defendant may be ordered to

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17/ Although the majority opinion of the Supreme Court in Fort Wayne Books held that the maximum prison term and possible fine under the Indiana RICO statute at issue were not so severe, by themselves, as to exert an unconstitutional chilling effect, the criminal punishments under consideration there -- a maximum prison term of ten years and a $20,000 fine for two RICO counts, or a five-year term and $10,000 for one count -- are dwarfed by those threatened for violation of Florida's RICO statute, and discussed in text infra. 109 S. Ct. at 929.

The Supreme Court's ruling in Fort Wayne Books, moreover, specifically reserved the question at issue here -- whether the combination of criminal penalties and forfeiture provisions would exert so great a deterrent effect on protected expression as to violate the First Amendment. 109 S. Ct. at 929. Obviously, the court would not expressly have left that question open if it thought previous decisions had foreclosed a First Amendment challenge. As discussed in text infra, that question is properly before this Court.

divest himself of all interest in an expressive enterprise, § 895.05(1)(a); may be permanently enjoined from engaging in similar expressive activities in the future, id. (1)(b); may face dissolution of any corporate expressive enterprise, id. (1)(c); and may face suspension or revocation of any license or permit required to continue business as an expressive enterprise. Id. § 1(d). In addition, a defendant faces "civil" forfeiture of all assets, including expressive materials. Id. § (2).

The First Amendment requires that the entirety of this range of government sanctions be taken into account in assessing the chilling effect of Florida's RICO statute. An expressive enterprise considering the dissemination of books or films in Florida with any sexual content must contemplate the very real possibility of exposure to the full range of draconian sanctions. The statute explicitly states that "[t]he application of one civil remedy under any provision of this act does not preclude the application of any other remedy, civil or criminal, under this act or any other provision of law," and that RICO's "[c]ivil remedies . . . are supplemental, and not mutually exclusive." § 895.05(2)(c)(10). Indeed, the statute all but assures that an expressive enterprise will be subjected to the full range of sanctions, including forfeiture. Any "final judgment or decree rendered in favor of the state in any criminal proceeding" under Florida RICO estops the defendant from

contesting the issue of RICO liability in subsequent civil proceedings. § 895.05(2)(c)(8). In Florida, therefore, two findings of obscenity render the defendant's assets subject to virtually automatic forfeiture.18/

Thus, this case is far different from Fort Wayne Books. The Court did not reach the issue of massive civil forfeiture in Fort Wayne Books, because it did not consider the effect of an estoppel provision like that contained in Florida's RICO law. The relevant Indiana sanctions were a maximum five-year prison term and $10,000 fine per RICO count, and the Court ruled that these were not so severe as to raise constitutional concerns. 109 S. Ct. at 929. Under Florida's RICO statute, however, the potential prison sentence is **six** times that at issue in Fort Wayne Books -- a maximum of thirty years. A rational publisher or disseminator of sexually oriented material must thus take into account the very real risk of a thirty-year prison sentence and the virtual certainty that isolated convictions for

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18/ Certainly, the defendants in this case would -- upon threat of the prosecutions that were eventually brought against them -- have had standing to bring a declaratory judgment action challenging the entire range of sanctions threatened by Florida's RICO statute.

obscenity in any Florida community will result in forfeiture of all corporate assets.19/

This latter threat is in itself so draconian as to impose an unconstitutional chilling effect. Section 895.05(2)(a) provides for the forfeiture of "all property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through" a pattern of racketeering activity -- which, of course, can be found on the basis of two isolated obscenity convictions within five years of each other. Under this provision, therefore, two obscenity convictions can result in a publisher or disseminator of expression forfeiting not only the proceeds of the illegal activity, but also the inventory, assets and income of the speech enterprise, including constitutionally protected expressive materials, physical assets such as automobiles and real estate, and intangible property such as stock.

The risk of forfeiture on this scale is far from speculative. In United States v. Pryba, for example, the United States District Court for the Eastern District of Virginia interpreted analogous federal RICO

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19/ See Fort Wayne Books v. Indiana, 109 S. Ct. at 931-934 (Stevens, J., dissenting) (Indiana's criminal and civil penalties are part of interlinked whole, and their effect on protected expression should be evaluated cumulatively).

provisions to authorize the forfeiture of millions of dollars worth of the defendants' assets -- including books, periodicals, and videotape motion pictures -- based upon a finding that the defendants had transported and sold less than $200 worth of obscene materials. 674 F. Supp. 1504 (E.D. Va. 1987). Similarly, the Indiana Supreme Court has interpreted its RICO civil forfeiture provision -- which is almost identical in wording to the one at issue here -- to authorize the forfeiture of two operating bookstores and a new, unopened bookstore on the basis of only four obscene tapes offered for sale at the operating stores. 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 564 (1987), rev'd, 109 S. Ct. 916 (1989).

RICO civil sanctions, therefore, threaten nothing less than a corporate death penalty. Florida's statute authorizes the forfeiture of all property "used in the course of, intended for use in the course of, derived from, or realized through" obscene speech. Under this provision, the proceeds from two isolated examples of expression found to be obscene in any community poison all proceeds derived from the sale not only of those unlawful materials, but also of all constitutionally protected materials, and all assets of a corporation that publishes or distributes such materials. If, for example, a nationwide film distributor such as Loews Incorporated exhibits the critically acclaimed but "X" rated motion picture "Last Tango In Paris" in theaters

across the State, and if two exhibitions of the film were found to violate the obscenity laws anywhere in the State, then RICO would authorize the government to seize and forfeit all Loews' assets. Or if a college bookstore were prosecuted for the sale of two copies of Henry Miller's Tropic of Capricorn, James Joyce's Ulysses, or Playboy or Penthouse magazine, in a community in which the book or magazine was found to be obscene, the bookstore's assets (and perhaps the college's assets) would be forfeited in their entirety. Moreover, a defendant corporation could lose all permits and licenses necessary to conduct business and be banned from disseminating expression in the future.

These risks are particularly acute for nation-wide distributors such as amici. Expression that would be considered appropriate in most communities might nonetheless be found to be obscene in one or two. Under RICO as applied in this case, two such findings would subject the distributor to mandatory forfeiture of all its assets. Distributors, moreover, have no way to discern or predict reliably the standards of small communities in distant parts of the country. Largely as a result of the existence of such risks, and Florida's extraordinarily aggressive use of RICO against businesses selling sexually oriented expression, amici have severely curtailed the range of expression they sell to lessen the risk of draconian RICO penalties. These businesses take

extraordinary measures to stay within the bounds of the law. See pages 1 - 4, supra. Their self-censorship thus presents a very real demonstration of RICO's pernicious effects on protected expression.

Confronted with threats and uncertainties of this magnitude, any rational film exhibitor or bookstore owner would be foolish not to self-censor much sexually explicit expression that would probably be constitutional but might be found obscene. Indeed, they would be foolish not to seriously consider self-censoring **all** sexually explicit expression.[20/] Because the expression thus self-censored is presumptively protected under the First Amendment -- and the vast majority of such expression would doubtless not be found obscene -- the unprecedented severity of RICO forfeiture and the other RICO sanctions creates a plainly unconstitutional chilling effect. The net result, of course, is that the citizens of Florida are being deprived of substantial amounts of fully protected and valuable expression.[21/]

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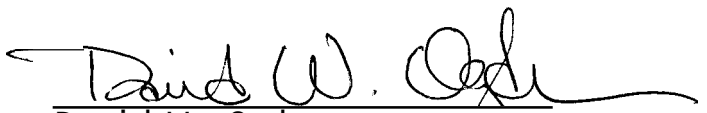
20/ Indeed, many Florida corporations have in fact been dissuaded from continuing to disseminate sexually oriented expression. Press reports indicated that law enforcement officials in Florida were successful in using Florida's RICO statute to close down bookstores because of their expressive activity. Wall St. J. August 25, 1987, at 25.

21/ When applied in response to a finding of past unprotected expression, RICO's forfeiture sanctions also
(Footnote Continued)

## CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the brief of petitioners, the judgment of the District Court should be reversed.

Respectfully submitted,



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(Footnote Continued)
constitute a classic prior restraint in violation of the First Amendment because the intended effect of such forfeiture -- not just the unavoidably incidental effect -- is to restrain all future expression -- including constitutionally protected expression -- on the basis of a finding of unprotected expression in the past. See Near v. Minnesota, 283 U.S. 697 (1931). The issue whether RICO forfeiture constitutes a forbidden prior restraint, however, is not directly before this Court because no such restraint has been imposed in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by United States mail to Peggy A. Quince, Esq., 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602; Deborah Brueckheimer, Esq., Assistant Public Defender, P.O. Box 9000, Bartow, Florida 33830; and John H. Weston, Clyde F. DeWitt, Cathy E. Crosson, Weston & Sarno, 433 North Camden Drive, Suite 900, Beverly Hills, California 90210, on this 13th day of November, 1989.

DAVID W. OGDEN, Esq.