No. 05-1555

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

EXTREME ASSOCIATES, INC., ROBERT ZICARI, AND JANET ROMANO,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF OF FOCUS ON THE FAMILY, FAMILY RESEARCH COUNCIL, THE ALLIANCE DEFENSE FUND, AND ALAN SEARS AS *AMICI CURIAE*, SUPPORTING APPELLANT UNITED STATES

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Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological, and spiritual health of children and their families in the United States and throughout the world.

Focus on the Family's Founder and Chairman, Dr. James Dobson, a distinguished child psychologist, served as a Commissioner on the Attorney General's Commission on Pornography in 1985-86 and is the author of scores of books, pamphlets, and papers on child development, education, marriage, and society.

Focus on the Family and Dr. Dobson have produced two major videos, "A Winnable War" and "Fatal Addiction: Ted Bundy's Final Interview", which directly discuss the harms of pornography to children, men, women, and families in America, as well as Dr. Dobson's interview with Ted Bundy and his book *Pornography: Addictive, Progressive and Deadly.* Tom Minnery of Focus was compiler and editor of the book *Pornography: A Human Tragedy*, chronicling analyses and commentary on the testimony and findings of the Attorney General's Commission on Pornography. In addition, Focus continues to produce resource materials on these issues, such as "An Overview of Online Pornography: The Problems, a Legal Review, and Activist Organizations", "The Power of the Picture", "When Sex Becomes An Addiction", "An Affair of the Mind", and "Toxic Porn." Worldwide, countless concerned citizens, public officials, professionals, and parents have seen and read these videos and books. Millions of people hear Focus on the Family's daily radio broadcasts dealing with family concerns and interests on over 2,000 outlets in North America. Its monthly magazine has a circulation of nearly two million. Focus on the Family regularly communicates and counsels with victims and families who have children devastated by pornography, molestation, and abuse. See: www.family.org.

Family Research Council is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. FRC is a voice for the pro-family movement in Washington, D.C., and provides policy analysis, legislative assistance, and research for pro-family organizations. It also seeks to educate legislators on issues that affect American families.

In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC works to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. Its research, publications, and films on the impact of pornography have been distributed to over 400,000 scholars, students, organizations, and citizens. FRC's legal and public policy experts are continually sought out by members of Congress and State legislators for assistance and advice on the unique relationship between parents and their children.

FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court and federal courts, including those involving the regulation and harmful

effects of pornography, obscenity, and child pornography. FRC publishes and disseminates resource materials, legal memoranda, and public policy studies on pro-family issues. These publications include discussions on the problems and legal controversies surrounding pornography. See: www.frc.org.

The Alliance Defense Fund is a legal alliance that has worked with over 125 organizations defending religious freedom and traditional family values in hundreds of cases throughout the United States. It has actively participated or funded such cases in the United States Supreme Court, United States Courts of Appeals, and United States District Courts, as well as in state courts throughout the United States.

Alan Sears served as the Director of the Attorney General's Commission on Pornography. He is an expert on First Amendment issues and has testified before committees of the U.S. House and Senate, and before 22 state legislatures. As a former federal prosecutor, he prosecuted hundreds of complex federal crimes and argued numerous cases before the United States Court of Appeals.

Each Amicus works to preserve and protect the family and has particular knowledge about the social and legal impact of pornography that will be helpful to the Court in this case.

Amici Curiae file this brief pursuant to FRAP 29(a).

CORPORATE DISCLOSURE STATEMENT

Joining in this brief *amici curiae* brief are three non-profit, citizen advocate, pro family organizations which promote public decency, family values, and the welfare of children. The fourth amicus curiae is an individual who has a long and abiding interest infighting for decency and family values through his work in the executive branch of the federal government. None of the *amici* is a subsidiary or affiliate of a publicly-owned corporation, none has any relationship to any party to this action or to any other *amicus* organization, and none of the *amici* has any financial interest in the outcome of this matter. The three corporate *amici* are all separate public interest, educational organizations under IRS Code § 501 (c)(3).

ARGUMENT

THE DISTRICT COURT ERRED IN STRIKING DOWN FEDERAL STATUTES PROHIBITING THE COMMERCIAL DISTRIBUTION OF OBSCENE MATERIALS

The District Court committed clear error in striking down, as applied, federal obscenity statutes prohibiting the distribution of commercial obscenity. United States v. Extreme Associates, 352 F. Supp. 2d 578 (W.D. Pa. 2005). The facts of the case, and the interests claimed by the defendants, fall far outside the scope of the authorities upon which the District Court below relies. Furthermore, the court was wrong to subject federal obscenity laws to strict scrutiny under the doctrine of substantive due process, and it was wrong in asserting that morality cannot provide a rational basis for Congress to regulate the commercial distribution of obscenity.

Because the distribution of commercialized obscenity has never been protected under the First Amendment, because there is no fundamental substantive due process right involved, and because morality is an important government interest which was not categorically rejected by the Court in Lawrence v. Texas, 539 U.S. 558 (2003), this Court should hold that the federal obscenity statutes at issue in this case are constitutional, both facially and as applied to the defendants in this case.

The District Court Opinion

The case involves a criminal prosecution charging nine counts of violating federal obscenity statutes and one count of conspiracy based on that conduct, 18 U.S.C. §§ 371, 1461, 1462 and 1465. The defendants were charged with distribution of obscene materials via the mails and the Internet through their website, known as

www.extremeassociates.com. Defendants did not dispute, for purposes of the motion in this case, that the films involved are obscene. 352 F. Supp. 2d at 585.

The District Court did not review these statutes under prevailing obscenity standards. Rather, the Court employed a substantive due process analysis to conclude that the federal ban on mailing and e-mailing obscene films violated the recipient's fundamental substantive due process right to view obscenity in the privacy of his home. Extreme Associates, 352 F. Supp. 2d at 592, citing Stanley v. Georgia, 394 U.S. 557 (1969). In so doing, the District Court incorrectly extended the holding in Stanley to protect illegal conduct proscribed by the federal obscenity statutes.

The Court ruled that because the federal obscenity statutes were used to abridge a fundamental right, strict scrutiny should apply, and that the government had no compelling reason to justify its laws. In the alternative, the Court said that even if rational basis scrutiny were the appropriate standard of review, the government's interest in morality was not a legitimate reason for legislating, because of the Supreme Court's ruling in Lawrence v. Texas. The District Court misinterpreted and misapplied Supreme Court precedent at every turn, and its decision should be reversed.

A. THE STANLEY COURT DREW A CLEAR LINE BETWEEN PRIVATE POSSESSION AND COMMERCIALIZED DISTRIBUTION OF OBSCENE MATERIALS.

In siding with the defendant, the Stanley Court took pains to distinguish the case from the long line of authority upholding prohibitions against distribution of obscene materials. As the Court held in Stanley:

> We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth and the cases following that

> decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. 394 U.S. at 568

The wall of distinction thus erected by the Supreme Court now stands between Extreme Associates and the protection it seeks.

B. THE SUPREME COURT HAS CONSISTENTLY UPHELD THE POWER OF STATE AND FEDERAL GOVERNMENTS TO RESTRICT COMMERCIAL DISTRIBUTION OF OBSCENE MATERIALS.

The Stanley court recognized and accepted as axiomatic the power of the federal government to prohibit the distribution of obscene materials through the mails. Justice Marshall recited with approval a litany of Supreme Court cases upholding regulation and even criminalization of commercial transmissions of obscenity. Stanley, at 560-61. "Those cases dealt with the power of the State and Federal Governments to *prohibit or regulate certain public actions* taken or intended to be taken with respect to obscene matter." Id. at 561. (Emphasis added). The public actions in the cases referred to by Justice Marshall are the commercialized distribution, sale, or mailing of obscenity. Stanley, on the other hand, involved private possession of obscene materials, not commercial distribution.

Writing for the Court in Stanley, Justice Marshall relied on Roth v. United States, 354 U.S. 476 (1957), and its progeny to find that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. 394 U.S. at 563. "Roth and the cases following it discerned ... an 'important interest' in the regulation of commercial distribution of obscene material." 394 U.S. at 563-64.

Expressing the conceptual and legal distinction between private possession of obscenity and commercialized distribution of obscene material, the Court stated:

> But that case [Roth] dealt with public distribution of obscene materials *and such distribution is subject to different objections*. For example, there is always the danger that obscene material might fall into the hands of children, ... or that it might intrude upon the sensibilities of privacy of the general public.

394 U.S. at 567 (emphasis added).

Indeed, Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973), expressly affirmed the public interest in maintaining a decent society by restricting commercialized obscenity:

> The States have a long-recognized legitimate interest in permitting regulation of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions.... In an unbroken series of cases extending over a long stretch of this Court's history it has been accepted as a postulate that the primary requirements of decency may be enforced against obscene publications.

Paris, 413 U.S. at 57 (internal quotes and citations omitted).

In particular, Paris held that a legitimate state interest exists in restricting commercialized obscenity–even where effective safeguards against exposure to juveniles and to passersby exist. *Id.* The Court described this public interest in expansive terms:

> These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.... It concerns the tone of the society, the mode, ... the style and quality of life, now and in the future.... [T]here is a right of the Nation and of the States to maintain a decent society.

Id. at 58-59 (quotation marks and citation omitted).

The Supreme Court has been crystal clear and steadfast in affirming the power of state and federal governments to regulate or prohibit the flow of commercialized

obscenity. For this reason, the Court in Stanley was careful to distinguish commercialized obscenity from the private possession of obscenity and thereby reinforced the government's ability to regulate the commercial aspects of obscenity.

The Supreme Court has made it clear that there is no First Amendment right to commercially distribute or receive obscenity. Paris Adult Theater I v. Slaton, 413 U.S. at 57. Failing to find the result it wished to reach under the established rule of law, the trial court switched gears and purported to create, from the shadows of the constitution, a substantive due process right to possess obscenity in the privacy of one's own home. The District Court states that,

> "Neither the Supreme Court nor the Court of Appeals for the Third Circuit has considered a substantive due process challenge to the federal obscenity statutes by a vendor arguing that the laws place an unconstitutional burden, in the form of a complete ban on distribution, on an individual's fundamental right to possess and view what pleases in his own home, *as established in* Stanley."

352 F. Supp. 2d at 590.

This is not surprising, since neither Stanley nor Lawrence ever created a substantive due process right to distribute or receive commercialized obscenity. Nonetheless, the District Court's analysis requires this Court to address two questions: First, is there a substantive due process right, recognized in Stanley or Lawrence, that would protect an interest in sending or receiving commercialized obscenity? Second, even if such a right exists, is it unconstitutionally burdened by federal obscenity statutes criminalizing commercial distribution of obscenity? The answer to both questions is a resounding "No."

C. THE SUPREME COURT HAS REPEATEDLY AND DIRECTLY REJECTED EVERY CLAIM OF RIGHT UNDER STANLEY TO DISTRIBUTE OBSCENE MATERIALS.

The District Court's first error was in asserting that the federal obscenity statutes, prohibiting the transmission of commercialized obscenity by mail or by the Internet, place a burden on the exercise of fundamental rights of liberty or privacy recognized in Stanley.

Justice Marshall never referred to the doctrine of substantive due process, but rather made it clear that Stanley was based solely upon a First Amendment claim:

> Appellant raises several challenges to the validity of his conviction. We find it necessary to consider only one. Appellant argues here ... that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment.

394 U.S. at 557, 559.

The defendants in this case are not the first to seek shelter under the shadow of Stanley v. Georgia. In four cases, the Supreme Court has considered and rejected such challenges to federal obscenity statutes.

In U.S. v. Reidel, 402 U.S. 351, 356 (1971), the Supreme Court held that the federal obscenity statute which prohibits mailing of obscene materials[1] was not unconstitutional as applied to the distribution of obscene materials to willing adult recipients.

> [T]he trial judge reasoned that 'if a person has a right to receive and possess this material, then someone must have the right to deliver it to him.' He (the trial judge) concluded that §1461 could not be validly applied 'where obscene material is not directed at children, or is not directed at an unwilling public, where the material such as in this case is solicited by adults....'

[1] See Title, 18 United States Code, section 1461

402 U.S. at 355.

Meeting the trial judge's Stanley argument head-on, the Supreme Court continued:

> The District Court gave Stanley too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion abjured. Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here – dealings that Roth held unprotected by the First Amendment.

Id.

The Supreme Court considered and rejected the challenge based on Stanley. At no point did the Court intimate a fundamental substantive due process right flowed from Stanley. If such a right existed, it would not have escaped the Court's notice in Reidel.

In U.S. v. Thirty Seven (37) Photographs, 402 U.S. 363 (1971), the Supreme Court dealt with the constitutionality of 19 U.S.C. § 1305 (a), the federal statute that prohibits the importation of obscene material. One of the challenges to the statute was that it was overbroad because it included within its ban obscene material for private use, making it invalid under Stanley. As in Riedel, the trial court improperly read Stanley as protecting not only the right to read obscene material in the privacy of one's home, but also the right to receive it for that purpose. In reversing the trial court, the Supreme Court said:

> [W]e have today held that Congress may constitutionally prevent the mails from being used for distributing pornography. In this case, neither the importer nor his putative buyers have rights that are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under Stanley

> may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce.

402 U.S. at 376.

Thus, the Supreme Court upheld the power of Congress to exclude obscene materials from interstate commerce, even if intended for private use and carried by the user himself.

Again in United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973), the Court held that Congress has the constitutional power to proscribe the importation of obscene matter even though the materials were for the importer's private, personal use and possession. Responding to the argument that Stanley creates a right to acquire or import obscene materials, Chief Justice Burger stated:

> We are not disposed to extend the precise, carefully limited holding of Stanley to permit importation of admittedly obscene materials simply because it is imported for private use only.... We have already indicated that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others. ... Nor is there any correlative right to transport obscene material in interstate commerce ....

413 U.S. at 128.

Lastly, in U.S. v. Orito, 413 U.S. 139 (1973), the Supreme Court held that Congress has the power to prevent obscene material from entering the stream of commerce, and that the constitutionally protected zone of privacy does not extend beyond the home. 413 U.S. at 143. The essence of the defendant's argument in Orito was that Stanley created a correlative right to receive, transport, or distribute obscene materials for private use in the home. Responding to this argument, the Chief Justice stated that cases such as Reidel and Thirty Seven (37) Photographs "negate the idea that some zone of

constitutionally protected privacy follows such material when it is moved outside the home area protected by Stanley." 413 U.S. at 141-42. Chief Justice Burger made it clear that neither the First Amendment nor any privacy right prevents Congress from prohibiting the movement of commercialized obscenity in interstate commerce:

> Given (a) that obscene material is not protected under the First Amendment ... (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce ... and (c) that no *constitutionally protected privacy is involved*, ... we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter. (Emphasis added).

413 U.S. at 143.

The Supreme Court has made it clear that a crucial inquiry in determining whether an unenumerated fundamental right exists under the doctrine of substantive due process is whether the asserted right is ". . .objectively, deeply rooted in this Nation's history and tradition" and whether the right is ". . .implicit in the concept of ordered liberty, such that neither liberty nor justice would exists if [it] were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 721 (1997). Based on the foregoing cases, it cannot seriously be argued that any fundamental substantive due process right to possess obscenity in the home is rooted in our Nation's history and tradition, or is implicit in the concept of ordered liberty.

Nonetheless, the District Court, in the case at bar, took a First Amendment case (Stanley), transformed it into a substantive due process case, and then incorrectly used substantive due process analysis to invalidate federal obscenity laws

D. LAWRENCE v. TEXAS DOES NOT GRANT THE RIGHTS ASSERTED BY THE DEFENDANTS.

In Lawrence v. Texas, the United States Supreme Court held unconstitutional a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual acts. 539 U.S. 558, 579 (2003). The defendants in Lawrence were two men who engaged in consensual sodomy (anal sex) in the privacy of a home. 539 U.S. at 577. The Court said that the act of engaging in consensual homosexual sex in a home is an aspect of liberty under the due process clause of the Fifth Amendment. The Court did not find it to be a fundamental right, and the Court did not subject the law to strict scrutiny analysis. *Id.* Rather, the Court said that the Texas statute furthered no legitimate interest which would justify criminalizing the particular activity in question when limited to the privacy of the home. *Id.* That a State's governing majority has traditionally viewed a practice as immoral is not, the Court said, a sufficient reason to uphold a law criminalizing non-commercial consensual sex in the privacy of a home. *Id.*

While the majority in Lawrence eschewed formal Equal Protection Clause analysis, the discriminatory effect of the Texas statute was cited as a basis for invalidating the law: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination in both the public and the private spheres." 539 U.S. at 575. In contrast, the case at bar presents no evidence of any discriminatory impact upon a discrete class.

The Lawrence majority carefully restricted its analysis to the facts of the case. Justice Kennedy expressly stated, "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships

where consent might not easily be refused. *It does not involve public conduct or prostitution.*" 539 U.S. at 578. (emphasis added). Lawrence involved only non-commercial consensual sex between two men in the privacy of a home, and a statute criminalizing homosexual but not heterosexual sex. That fact pattern, of course, is drastically different from the one here, where the government merely seeks to regulate public commercial activities occurring outside the home, and where no discrimination exists against a class of people.

Lawrence only deals with non-commercial sexual activity. A state could still, for instance, punish the hiring of a male prostitute to come into a home and engage in sex with another man. The activity in the instant case is the same. First, federal obscenity statutes prohibit the transmission by mail or Internet of commercialized obscenity. This is clearly a public act outside the ambit of either Stanley or Lawrence. Second, commercialized obscenity in many cases involves people being paid to engage in sex acts, also known as prostitution and pimping and pandering. Thus, Lawrence provides no basis to overturn federal statutes governing public commercial activity.

E. LAWRENCE DOES NOT ELIMINATE MORALITY AS A RATIONAL BASIS FOR CONGRESS' ENACTMENT OF THE FEDERAL OBSCENITY STATUTES.

The District Court erroneously based its analysis on the false premise that Stanley recognizes a fundamental substantive due process right to possess obscenity in the privacy of the home. After creating this new right, the trial court applied strict scrutiny and asked "whether the federal obscenity statutes place a sustainable burden ..." on that right. 352 F. Supp. 2d at 592. As previously established, however, Stanley does not

create any substantive due process right, let alone a fundamental one. Thus, the sustainability of the government burden on the interest must be analyzed under rational basis scrutiny – the most deferential level of review.

The court below declared that Lawrence "can be reasonably interpreted as holding that public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality." 352 F. Supp. 2d at 591. (Of course, as noted above, the commercial distribution of obscene materials to the public is by definition not private conduct.) Again, the District Court overreads, misinterprets, and misapplies the holding in Lawrence, a case where a state criminal law prohibited non-commercial consensual sodomy engaged in by homosexuals, but imposed no such prohibition on heterosexual sex. It did not reject morality as a legitimate governmental justification for any law related to sexual conduct, but rather found the particular moral argument advanced by the Texas legislature to be insufficient in light of the competing interests in that case.

In a recent case, Williams v. Attorney General of Alabama, 378 F. 3d 1232 (2004), *cert. denied* February 22, 2005, the United State Court of Appeals for the Eleventh Circuit upheld an Alabama anti-obscenity statute that prohibited the commercial distribution of any device primarily used for the stimulation of the human genitals. The Circuit Court in Williams refused to create a new fundamental right to sexual privacy which would trigger strict scrutiny review. 378 F. 3d at 1238. The Court reasoned that the Supreme Court in Lawrence did not go that far (Lawrence was decided under rational basis review), and that "for us preemptively to take that step would exceed our mandate as a lower court." *Id.* As the Court in Williams stated: "One of the cardinal rules of

constitutional jurisprudence is that the scope of the asserted right – and thus the parameters of the inquiry – must be dictated by the precise facts of the immediate case." 378 F. 3d at 1240.

So, we return to the question posed by the District Court as to whether the state's interest in morality is trumped by any constitutional right of a person to receive commercialized obscenity. *Amici* assert that morality is alive and well as a legitimate, indeed compelling interest that justifies a great many restrictions on otherwise-unbridled liberty. As the Eleventh Circuit said in Williams:

> Moreover, the Supreme Court has noted on repeated occasions that laws can be based on moral judgments. *See* Barnes v. Glen Theatre, 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991) (upholding a public indecency statute, stating, "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation"); *id.* (noting that "a legislature could legitimately act... to protect 'the social interest in order and morality'") (citation ommission); Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2930, 49 L.Ed.2d 859 (1976) (plurality opinion) (upholding the death penalty, noting that "capital punishment is an expression of society's moral outrage at particularly offensive conduct"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973) (holding that Georgia had a legitimate interest in regulating obscene material because the legislature "could legitimately act ... to protect 'the social interest in order and morality'") (quoting Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957)); United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971) (noting that "criminal punishment usually represents the moral condemnation of the community").

The Eleventh Circuit also noted the proper role of lower federal courts in interpreting and applying cases decided by the Supreme Court: "One would expect the Supreme Court to be manifestly more specific and articulate than it was in Lawrence if

now such a traditional and significant jurisprudential principle has been jettisoned wholesale. ..." 378 F.3d at 1238.

Further elaborating on the limited role of courts (especially lower courts) in our system of representative democracy, the majority in Williams cited Justice Frankfurter:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society... Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. Dennis v. United States, 341 U.S. 494, 525 (1951), cited at 378 F.3d at 1250.

Thus, the District Court exceeded its proper authority when it declared, in the face of compelling Supreme Court precedent, that Congress cannot use morality as a justification for enacting federal laws prohibiting the commercialized transmission of obscenity.

CONCLUSION

This Court should reverse the District Court and uphold the federal statutes prohibiting the distribution of commercialized obscenity. The Court should reject the holding of the District Court that an unenumerated fundamental substantive due process right exists to possess obscenity in the privacy of one's home, that such a right is abridged by federal statutes prohibiting the commercialized transmission of such materials, and that moral considerations can provide no rational basis for Congress' enactment of the federal laws prohibiting commercialized transmission of obscenity.

CERTIFICATION OF
BAR MEMBERSHIP

I, Philip J. Prygoski, hereby certify that I am a member in good standing of the State Bar of Michigan (P23362). A Certificate of Good Standing from the State Bar of Michigan is attached.

Philip J. Prygoski
Counsel for Amici Curiae

Dated: April 13, 2005

State Bar of Michigan

Certificate

of Good Standing

This certifies that Philip J. Prygoski, P23362 of Lansing, Michigan is an active member of the State Bar of Michigan in good standing. He was admitted to practice in Michigan on December 11, 1973 in Washtenaw County.

Chad Sluss
Member Services
March 31, 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation

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(s)_____

Attorney for AMICI CURIAE

Dated: 4-12-05

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing Brief Amici Curiae have been sent by U.S. Mail on April 13, 2005, to:

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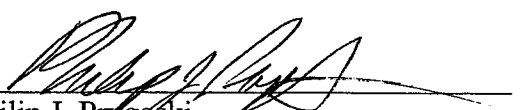
I ALSO HEREBY CERTIFY that ten (10) hard copies of the brief have been sent to the Office of the Clerk of the Third Circuit Court of Appeals.



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CERTIFICATION THAT THE E-BRIEF
AND THE HARD COPIES ARE IDENTICAL

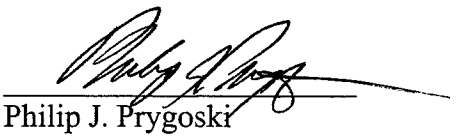
I, Philip J. Prygoski, hereby certify that the text of the e-brief filed in this case and the text of the hard copies of the brief filed in this case and served on the parties are identical.

Philip J. Prygoski
Counsel for Amici Curiae

Dated: April 13, 2005

CERTIFICATION OF VIRUS CHECK

I, Philip J. Prygoski, hereby certify that a virus check (Computer Associates eTrust, version 7) was performed on the PDF file of the brief .



Philip J. Prygoski
Counsel for Amici Curiae

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