

**Written Testimony of the Free Speech Coalition**  
Submitted to the  
**Subcommittee on the Constitution, Civil Rights, and Property Rights**  
of the Judiciary Committee of the United States Senate  
March 16, 2005

The Free Speech Coalition is the trade association of the adult entertainment industry. Our mission is to improve the quality of life for all of those working in that industry and to facilitate the distribution of adult-themed expression and products through education, public and legislative advocacy, and, as a last resort, litigation. Since 1991, our membership has comprised all segments of the industry, including large and small manufacturers, distributors, retailers, creative artists, World Wide Web sites, and adult entertainment cabarets. Our members produce and market motion pictures and other images, text, and novelties produced by and for consenting adults. Consistent with our concern that adult-themed expression be strictly limited to adults, the Free Speech Coalition is the only organization which offers up to \$10,000 annually for information leading to the conviction of manufacturers or distributors of child pornography.

The Free Speech Coalition is profoundly concerned about the legal environment in which our members strive to meet the widespread demand for their products. We thus regret that this Subcommittee has proceeded to hearing without inviting the adult entertainment industry to participate. Specifically, we were twice prepared to testify before you in person, but we were told that this would not be possible at this time. We look forward to the opportunity to do so in the very near future. We recognize and thank this Subcommittee for the opportunity to present this written testimony, but the give and take of our democracy demands that the issues under consideration be debated openly and that all responsible voices be heard in the legislative process.

In recent months, this Subcommittee has scheduled hearings on subjects of central concern to our membership without even notifying, let alone consulting, the adult entertainment industry. We find it difficult to believe that any other industry in this Country would be so shut out of the halls of Congress, let alone one which annually generates 10 billion dollars in sales to Americans. One result of regulation without dialog is flawed legislation which falls short of achieving its legitimate objectives and which ultimately suffers invalidation under our Constitution. Recent examples include the difficulties encountered by the Child Online Protection Act and the invalidation of portions of the Child Pornography Prevention Act, which the Free Speech Coalition was itself forced to challenge because of its impact upon constitutionally protected expression. We stand ready, willing and able to participate fully and productively in this Subcommittee's future hearings and proceedings. We expect that we will be permitted to appear before you soon in order to address your questions and concerns.

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Obscenity prosecutions uniquely threaten the ability of our members and many others to provide materials to satisfy Americans' demand for sexually oriented expression. It is a well-settled proposition of our American constitutional law that all expression, including that addressing sexual themes, is presumed to be protected by the First Amendment. We recognize that the courts have also held that material which fits the strict legal definition of obscenity is not so protected. But no given work can be deemed to be legally obscene until after the government has proven that it meets the constitutionally required definition, beyond a reasonable doubt in a criminal case. When properly understood and applied, that definition is quite speech-protective.

But numerous features of the governing obscenity definition make it difficult, if not impossible, to predict in advance what works will be prosecuted or ultimately deemed obscene.

The adult entertainment industry now produces well over 10,000 titles per year, but the number of titles even charged with obscenity has never exceeded 500 in any year. Recently, acquittals in obscenity cases have become common, largely because the obscenity test – quite properly – relies in substantial part upon evolving “contemporary community standards” in order to evaluate expression which is charged as obscene. It is especially important to note here that throughout the last 30 years, federal obscenity prosecutions have been extremely rare, representing well under one percent of prosecutions nationally. At the same time, most local jurisdictions in this country have never seen the need to prosecute obscenity, despite the near-universal distribution of adult-themed products in the United States.

The recent dismissal of a federal obscenity prosecution in the Western District of Pennsylvania highlights a particularly disturbing feature of obscenity law in recent years. The *Extreme Associates* case involved expression by and for adults alone. The Government did not even allege that the material at issue was disseminated to children, and it goes without saying that the material was produced without any children involved. The child pornography laws, federal and state, are very severe. And unlike obscenity, child pornography is regularly, vigorously, and consistently prosecuted throughout the United States today. The reason for this is that child pornography laws are well-defined and carefully targeted to address a very serious social ill. In contrast, obscenity laws impose virtually standardless regulation, endangering expression solely between consenting adults. But it is fundamental to a free and democratic society that adults choose for themselves what they say, hear, read and see. Whether in the marketplace of goods or in the marketplace of ideas, individuals retain the autonomy to select that which has value to them.

This is not to say that individuals may impose their personal preferences upon others. Thus those who would avoid sexually oriented expression altogether cannot limit others from viewing it. Likewise, those who enjoy such expression and find it worthwhile may not expose it to the unwilling. The decision in the *Extreme Associates* case expressly and fully protects children and unwillingly exposed adults from obscene sexual expression. Had that case involved either minors or non-consenting adults, it would not have been dismissed.

The ruling in the *Extreme Associates* case represents the appropriate line to draw. It is, indeed, a line required by our constitutional protections and it is fully consistent with our most basic social and legal traditions. Sexually explicit expression is inappropriate for the billboard, the unsolicited mailing and Internet spam. It is inappropriate if directed at children. But for thirty-five years we have recognized the right of adults to read and see any material, even the obscene, in the privacy of the home. This results not only from our profound commitment to freedom of speech and of the press but also from our careful concern for individual privacy and autonomy in intimate matters. This Nation has thrived without substantially restricting expression on political, religious, economic and many, many other subjects. There is no reason why a strong and democratic society needs to ban or burden expression because of its sexual content. The decision in the *Extreme Associates* case does no more than recognize this Nation's basic commitments and concerns.

Americans rely on the commercial marketplace to produce and distribute their goods and services, including those to which they are constitutionally entitled. That marketplace has a swift and certain justice of its own. Products of little value to Americans will quickly disappear from our markets. It is not the role of government to interfere with this process, especially in the realm of expression and ideas.

We urgently hope for the opportunity to elaborate our views before this Subcommittee and other interested legislators. In particular, we welcome a discussion of the implications of the Supreme Court's old decision in *Stanley v. Georgia*, its new one in *Lawrence v. Texas*, and its holdings in the many other First Amendment cases over the years which fully support the decision in the *Extreme Associates* case.

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Constitutional decisions – even those which turn out to be the most important in the long run – are often unpopular initially. This is because our Bill of Rights essentially protects the individual even against the majority. It provides the balance between majority rule and our respect for the individual. When courts reach constitutional decisions, they do so by drawing upon principles which form the foundation of our government and our society. Sometimes the application of these principles produces unanticipated results. But upon reflection, we generally see how our founding principles ultimately strengthen our Nation.

This Nation has progressed because pioneers have been free to extend the bounds of our liberty and our lives. A Nation built on freedom does not stumble in recognizing and enhancing it. For this reason, a new constitutional decision, especially one drawing upon our most basic free speech and privacy traditions, should not be reflexively condemned. The true measure of such a decision must be carefully considered over time.

The Free Speech Coalition recognizes that the result in the *Extreme Associates* case will surprise and even frighten some. Such reactions are also part of our history and tradition. But in time, this case, too, will take its place among the important decisions which have recognized and applied the basic freedoms enshrined in the Bill of Rights. Under the result reached in that case, no adult will be forced to encounter obscene materials, and sexually oriented expression can still

be kept away from children. Willing and interested adults, however, will be able to obtain expression which addresses their interests, concerns, and tastes. *That* is our abiding constitutional tradition, and the Free Speech Coalition firmly believes that everyone ultimately benefits when we recognize, respect, and even celebrate our tradition of freedom.

Respectfully submitted,

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