TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

ON THE FOLLOWING MEASURE:
H.B. NO. 1007, RELATING TO PORNOGRAPHY OFFENSES AGAINST CHILDREN.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 22, 2011 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Attorney General strongly supports this bill.

The purpose of this bill is to provide greater protection to children from sexual offenders and predators in the Internet age. Current law prohibits disseminating pornographic material to minors. This bill extends this prohibition to include disseminating pornographic material to a person who represents himself or herself as a minor. This amendment to section 712-1215(1), Hawaii Revised Statutes, will allow state and county law enforcement officers to pose as children online and make out a criminal case when a predator promotes pornography to minors while attempting to exploit them through the Internet. This bill also adds the offense of promoting child abuse in the third degree to section 806-83(a), Hawaii Revised Statutes, the information charging law.

Predators meet children through the Internet and entice them to engage in sexual offenses. Grooming children is a key aspect of this predatory behavior. It usually involves conduct to gain the child's trust, develop the relationship,

make the child feel comfortable with the offender and the idea of engaging in sexual acts, and ultimately make the child more willing to engage in sexual acts with the offender. Predators engaged in the electronic enticement of children often send their victims pornographic images as part of a scheme to groom child victims for sexual acts.

Law enforcement officers pose as children online while investigating Internet crimes against children. Predators, believing they are communicating with children, send pornographic images to the officers. This bill allows for the prosecution of child predators who disseminate pornography to officers while attempting to groom children for sexual acts.

This bill also adds the offense of promoting child abuse in the third degree to the list of offenses that may be initiated by information charging for purposes of efficiency. The offense of promoting child abuse in the third degree involves the knowing possession of child pornography. The ability to use the information charging process for this offense will save judicial, prosecutorial, and police resources. Witnesses will be spared from coming to court to testify at probable cause hearings, officers and investigators will be able to stay on the job protecting and serving the community, and the State will benefit from financial savings while still protecting and preserving suspects' rights.

We respectfully request passage of this measure.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Judiciary
Hearing Date/Time:	Tuesday, February 22, 2011, 2:00 p.m.
Place:	Room 325
Re:	*Testimony of the ACLU of Hawaii in Opposition to H.B. 1007, Relating to Pornography Offenses Against Children*

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 1007, relating to pornography offenses against children.

H.B. 1007 and the underlying statute violate the constitution in they fail to include an essential element of the Supreme Court's Ginsberg/Miller test. The definition of "pornographic for minors" in §712-1210 violates the First Amendment in that it lacks the "patently offensive" prong required by the Supreme Court in the three-part test from *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified by *Miller v. California*, 413 U.S. 15 (1973).

Furthermore, to the extent that the H.B. 1007 is to be applied to the internet, it is clearly unconstitutional for the following reasons:

First, H.B. 1007 is a content-based criminal prohibition on speech, and such restrictions are "presumed invalid" because they have the "constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. at 660. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Second, H.B. 1007 is not "narrowly tailored" if it is significantly overinclusive, *Simon and Schuster v. Members of NYS Crime Victims Board*, 502 U.S. 105, 121 (1991), or if it is significantly underinclusive, *Arkansas Writer's Project Inc. v. Ragland*, 481 U.S. 221, 232 (1987); *Central Hudson Gas & Electric Corp. v. PSC*, 447 U.S. 557, 564 (1980) (law "may not be sustained if it provides only ineffective or remote support for the government's purpose"); *Turner Broadcasting Syst. v. FCC*, 512 U.S. 622, 624 (1994) (defendant has burden of showing statute will in fact alleviate the alleged harms in a "direct and material way").

Third, because H.B. 1007 "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another," it is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose the statute was enacted to serve." *Ashcroft v. ACLU*, 542 U.S. at 665. *See also Bolger v. Youngs Drug Products*,

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463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Butler v. Michigan*, 352 U.S. 380 (1957). *Cf. Ginsberg v. State of NY*, 390 U.S. 629, 634-35 (1968) (upholding restriction on direct sale to minors because it "does not bar the appellant from stocking the magazines and selling them" to adults).

Fourth, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. at 665. Notably, no such alternatives have been discussed here.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

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MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

February 20, 2011

In the Judiciary Committee
Hawaii House of Representatives

Memorandum in Opposition to Hawaii House Bill 1007

The members of Media Coalition believe that House Bill 1007 and Hawaii statute §712-1215 are both unconstitutional for multiple reasons. The definition of "pornographic for minors" used in §712-1215 violates the First Amendment. §712-1215 may not be applied to the Internet either with its present language or with the changes proposed in H.B. 1007 and would be unconstitutional even if the definition of "pornographic for minors" was constitutionally correct. H.B. 1007 also gives a "heckler's veto" regarding sexual material to any adult who claims to be a minor. The trade associations and other organizations that comprise Media Coalition have many members throughout the country including Hawaii: publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

Presently, HRS §712-1215 bars anyone from disseminating to a minor material that is "pornographic for minors." "Pornographic for minors" is defined in HRS §712-1210 as any material that is primarily devoted to narrative accounts of sexual activity or contains images of sexual activity or specific nudity; and: (a) It is presented in such a manner that the average person applying contemporary community standards, would find that, taken as a whole, it appeals to a minor's prurient interest; and (b) Taken as a whole, it lacks serious literary, artistic, political, or scientific value. H.B. 1007 would criminalize the dissemination of such material to an adult if the adult has represented him or herself to be a minor.

Speech is protected unless the Supreme Court tells us otherwise. As the Court said in *Free Speech Coalition v. Ashcroft*, "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.234, 241 (2002). Unless speech falls into one of these limited categories or is otherwise tied to an illegal act such as luring or enticing a minor, there is no basis for the government to bar access to such material.

The definition of "pornographic for minors" in the existing law is almost certainly unconstitutionally overbroad. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). Governments may restrict minors' access to some sexually explicit speech but it is a narrow range of material determined by a specific test. In *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified by *Miller v. California*,

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413 U.S. 15 (1973), the Supreme Court created a three-part test for determining whether material which is First Amendment protected for adults but is unprotected as to minors. Under that test, in order for sexual material to be constitutionally unprotected as to a minor, it must, when taken as a whole,

(i) predominantly appeal to the prurient, shameful or morbid interest of minors in sex;

(ii) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(iii) lack serious literary, artistic, political or scientific value.

Even material that meets this definition may be barred for minors only as long as the prohibition does not unduly burden the rights of adults to access it.

The definition used to determine what material is "pornographic for minors" in §712-1210 and is made illegal for minors in §712-1215 lacks the second or "patently offensive" prong from the *Miller/Ginsberg* test. A recent law enacted Oregon barring dissemination of sexual material to minors was struck down by the Ninth Circuit Court of Appeals as overbroad for making illegal material that was beyond the scope of the *Miller/Ginsberg* test. *Powell's Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010). Similarly, a recent Illinois law barred the sale to minors of video games with sexual content but omitted the third prong of the *Miller/Ginsberg* test. The law was permanently enjoined by the U.S. District Court and the ruling was heartily affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

To the extent prosecutors apply §712-1215 to Internet communication or intend to, it would still be unconstitutional even if the definition of "pornographic for minors" used the three-prong test in *Miller/Ginsberg*. To do so treats material on the Internet as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a bookstore. There is no way to know whether the person receiving the "pornographic" material is a minor or an adult. At the same time, anyone who makes material available on the Internet should know that there could be minors accessing their content. That general knowledge satisfies the knowledge requirement in a criminal statute. As a result, the effect of banning the computer dissemination of material "harmful to minors" is to force a provider, whether a publisher or an on-line carrier, to deny access to both minors and adults, depriving adults of their First Amendment rights. The U.S. Supreme Court has already declared unconstitutional two federal laws that restricted the availability of matter inappropriate for minors on the Internet. *Reno v. ACLU*, 117 S.Ct. 2329 (1997); *Ashcroft v. ACLU*, 534 F.2d 181 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032 (2009). New York Revised Penal Law §235.21, the law §712-1215 was based upon, was found unconstitutional when New York amended it to apply to content available on the Internet. *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997). Similar state laws banning sexual speech for minors on the Internet have been ruled unconstitutional. *See, PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2d Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180

(D.S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). Such laws were also enacted last year in Massachusetts and Alaska. Legal challenges were brought against both laws and in each case a preliminary injunction has been granted. *American Booksellers Foundation for Free Expression v. Coakley*, 2010 WL 4273802 (D. Mass. 2010); *American Booksellers Foundation for Free Expression v. Sullivan* (citation not yet available) (opinion available at http://www.mediacoalition.org/mediaimages/Decision_10.20.10.pdf).

The only exceptions to these decisions have been laws that were limited to speech illegal for minors that were intended to be communicated to a person the speaker has specific, rather than general, knowledge is a minor. States have also passed laws to outlaw such speech if it is tied to an otherwise illegal activity such as luring or enticing a minor

Finally, H.B. 1007 is overbroad in that it would make it illegal for an adult to communicate to another adult material that is legal for adults if the recipient adult simply claims to be a minor. It does not require that the sender of the material believe that the recipient is less than 18 years old. Even if the speaker knows the recipient is an adult, this legislation would make that speech a crime. This, in essence, creates a "heckler's veto" in that it would allow any adult to enter a chat room or visit a website devoted to sexual health or similar topic and claim to be a minor. Then, the site or other participants in the chat room would be forced to either risk prosecution or restrict the discussion to what is suitable for minors. While this may not be the intent of the statute, it is the plain language of the text and it is not enough that the government tells us that it will not be used in such a manner. As Justice Roberts wrote last year, "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. *U.S. v. Stevens*, 130 S. Ct. 1577 (2010).

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorney's fees. In the successful challenge to the Illinois legislation, the state agreed to pay to the plaintiffs more than $500,000.

We believe Hawaii can protect minors while also respecting the First Amendment. We are happy to work with the Committee and the Attorney General to do so. If you would like to discuss further our concerns on this bill, please contact me at 212-587-4025 #3 or at horowitz@mediacoalition.org. Again, we ask you to please protect the First Amendment rights of all the people of Hawaii and reconsider the existing law and H.B. 1007.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

JUDtestimony

From: Dara Carlin, M.A. [breaking-the-silence@hotmail.com]
Sent: Monday, February 21, 2011 7:47 PM
To: JUDtestimony
Subject: HB1007 to be heard Tuesday, 02/22/11, at 2:00pm in Room 325

Importance: High

TO: Representative Keith-Agaran, Chair
Representative Rhoads, Vice Chair
Judiciary Committee Members

FROM: Dara Carlin, M.A.
Domestic Violence Survivor Advocate
881 Akiu Place
Kailua, HI 96734

DATE: 02/22/11

RE: Strong Support for **HB1007**

Good Afternoon Representatives and thank you for allowing me the opportunity to provide testimony on this topic. Child Pornography is no small problem (and it wasn't ten years ago either). Please support the passage of HB1007.

Huge Kid Porn Ring Busted

Lynn Burke 04.14.00

Editor's note: This story was updated on April 18, after its original publication on April 14.

Underneath a **monstrous heap** of electronic kiddie porn, federal prosecutors have uncovered a suburban Texas couple, three foreign webmasters, and **thousands of customers worldwide** who left behind a trail of credit card charges totaling $1 million. Federal prosecutors, who watched with glee as a grand jury handed down an 87-count indictment against the peddlers Thursday, say they've never had such a **big** case.

U.S. Attorney for the Northern District of Texas Paul Coggins said the case is a major step forward in a high-stakes fight against the people who sexually abuse children and sell images of the abuse on the Web. Catching the webmaster, he said, makes finding their victims a real possibility. "Where these webmasters are establishing sites could well be where these scenes of sexual abuse take place," Coggins said.

Prosecutors say the children in this case are 4-12 years old. "These kids are being scarred for life somewhere, (and) someone needs to be prosecuting."

The indictment charges Fort Worth's Thomas and Janice Reedy with operating a commercial kid porn ring from their home. According to the Texas Secretary of State, the Reedys incorporated their company, called Landslide, Inc., on Feb. 13, 1997.

Prosecutors say Landslide acted as the "gatekeeper" between one Russian and two Indonesian webmasters who supplied customers with pornographic images of children in exchange for US$29.95 per site. Landslide supplied the password-protected access to the sites -- including childrenforcedtoporn.com, childrape.com, and childrenofgod.com -- and handled the credit card transactions.

Those charges left behind a handy trail of evidence for prosecutors, who say the Reedys made $1,111,266 in less than a year. They kept a third of the profits and sent the rest to the foreign webmasters. People close to the case said the size of the Reedys' business was **enormous**.

"The extent of the kiddie porn business, the scope of the customers, (and the fact that) **they are spread across the states and across the globe**, shocked me," Coggins said.

Lead prosecutor Terri Moore agreed, calling the scope of the operation "absolutely frightening."

"I'm a seasoned prosecutor and I was appalled, I was floored," she said.

Parry Aftab, director of anti-child pornography group Cyberangels, called Landslide a major commercial scheme, setting it apart from most child pornography on the Internet, which is not commercial. "This is a very, very important case," she said. "For child pornography, this is as important as the World Trade Center bombing."

Without commenting specifically on Landslide, Aftab said **commercial rings are extremely dangerous and even deadly for the children who are targeted**. "They are particularly heinous," she said. "**Many of them kill the children after they abuse them.** They use foreign children, from Eastern Europe and South America. It is the kind of world you can't imagine."

The Reedys, who are being held in federal prison until a detention hearing next week, have been forced to take down their alleged kid porn, and most of the sites they once operated are now out of service. But they're still using the landslide.com site to assert their innocence. "We have committed no illegal act, and are confident to be found innocent of any such charges," the site reads.

They're even soliciting funds for their defense on the site. "Please buy an Adult Check ID, and show your support to fight this injustice!" their message reads, with a link to a form where customers can offer up their credit digits. They also offer several links to the paid adult pornography sites that are still running, even as they are being held in jail. [Editor's note: Cybernet Ventures Inc., the owner/operator of Adult Check, says it is in no way associated with Landslide, Inc., and is not supporting the Reedys' defense.] If found guilty, the Reedys face stiff penalties for each of the 87 counts handed down, which carries with them a maximum penalty of 15 years imprisonment and a $250,000 fine.

The Russian webmaster is charged with 12 counts of the same crimes, while the Indonesian webmasters face 16 counts each. U.S. prosecutors are hoping to extradite the accused and try them in Dallas.

Prosecutors hope the Landslide bust will signal an end to the relative ease with which people have been peddling the illegal material over the Internet, but say they know the problem is not likely to go away anytime soon.

"It's a major case. It's like we caught the head of three (drug) cartels. And it will have repercussions," said Coggins. "But it would be extremely naïve to say this is the end of it. It's **huge** and **there are hundreds of these webmasters out there.**"

Respectfully,

Dara Carlin, M.A.
Domestic Violence Survivor Advocate

2/21/11 Testimony IN SUPPORT of HB1007 with Amendments

Aloha Representatives,

I am in SUPPORT of this measure with Amendments.
Requested Amendments are **Bolded.**

I am a survivor of domestic violence. My divorce, custody and division of marital assets occurred in front of Judge Keith E. Tanaka on Maui. During my custody hearings I displayed a large and clearly offensive array of child and sexually explicit materials hand drawn by my ex and media photo's he manipulated by hand. My ex denied these were his possessions until, page after page went by, with my showing Judge Tanaka all the different sexual positions depicting anal sex and graphics of what my ex wanted done with women and children, he admitted to ownership and hand drawn creation. This was held against me as harassment, and leading and most struck from the record. This was not held against my ex. MY son was and still is alleging sexual misconduct, neglect and abuse by the father. The judges response was to award sole physical and legal custody of my son to my ex who has a history of family and domestic violence, substance abuse, lying, was accused of sexual abuse by his children and their therapists and stalking and terroristic threatening of prior wife and children. He also has a large and colorful history of sexually exploitive media depicting men, women and children in unacceptable clothing and sexual positions. Calling it all harassment by me against my ex, Judge Tanaka instead moved us out of my home, never allowing us to return, allowed him back on the property where we were forced to pay him rent, alimony, endure terroristic threatening and later forced to flee. Fleeing was held against me in the custody and property hearings! Judge Tanaka ultimately gave this man my son, barred me from all contact with my son, allowed him to relocate out of the State (while my son was in state custody for sexual abuse of a child) and gave him all real property in 2 states and all valuables in the marital estate saying that I was harassing him. My Son, last I spoke with him months ago, was clear that he had been watching sexually based movies and reading magazines and seeing more hand illustrations of inappropriate sexual contact. My son also addressed shower observation and slept in the same bed. My son was 8 at the time, now 11. Penalties need to be strong and convictions need to happen quickly. Judges need to follow statute.

The following occurred in my case and was ignored by Judge Tanaka:
1. . My ex has a large and colorful history of sexually exploitive media depicting men, women and children in unacceptable clothing and sexual positions. This was confirmed by my son, myself and his ex wife. Judge Tanaka knew his character.
2. My son reported viewing movies, magazines and drawings of sexually based materials.
3. My son reported that while he was being abused a video camera was running and was made available for private and select viewing audiences by his father. He was also threatened with distribution to friends if he did not behave.
4. My son reported abuse by a neighbor when "his services" were traded for drugs
5. Pornography and drugs were kept in the home when my son was in the care of my ex
6. Multiple loaded and unloaded weapons and knives were in the home unsecured where my son has access and use.
7. My son reported that his grand father guarded the door while he was being abused and that the movies were watched by the grandfather and others.
8. My ex denied his abusive criminal, substance and violent history as well as his use of pornographic materials.
9. My ex made multiple fraudulent statements and created and submitted false documents on which he forged anothers signature using it to gain custody and property.
10. My son had a cigarette burn on his chest.
11. My ex daily drove my son on high levels of oxycontin, marijuana and alcohol
12. Drug paraphernalia was in the home and drug use (including snorting Oxycontin, smoking marijuana and alcohol use) occurred in the presence of my son.
13. My ex bartered for drugs and drew large amounts of marijuana on the property

14. My ex and his therapist was doing medquest fraud and State discontinued services with no penalty for the fraud
15. My ex is buying and selling securities with no license and not paying GET on rental and other income
16. My ex threatened my son to make specific statements and promised gifts for performance
17. My ex broke into my home when I resided on the marital property and did criminal property damage and theft
18. My ex had my mothers personal information which was taken from her purse
19. My ex spliced into my cable when I lived on the marital property and got into my computer
20. My ex endangered the welfare of a minor and abused household members and animals on the property.
21. My ex has used electronic stalking and interference with my computer and cell phone

My amendments in Bold:

1. **This act needs to** affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before the effective date of this Act **in contested custody and DV family court cases only wherein multiple identified effects on a person or property occurred in the last 5 years.**
2. **Penalties need to be immediate and need to be effective in Family court. A family court judge should not be able to call application of this act "harassment" and downgrade or use it against the victim or in the determination of property and custody.**
3. **Fines or costs levied should not be able to be assessed against the victim in family court.**

I appreciate your making this process more strict and protective for the victim.

Thank You,

Paige Calahan
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