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February 9, 2011

LATE TESTIMONY

In the Economic Development and
Public Safety, Government Operations, and Military Affairs Committees
Hawaii State Senate

Memorandum in Opposition to Hawaii Senate Bill 1234

The members of Media Coalition believe that Senate Bill 1234 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 S.B. 1234 and would be unconstitutional even if the definition of “pornographic for minors” was constitutionally correct. Finally, S.B. 1234 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: book and magazine 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. S.B. 1234 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*, 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 are applying §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. 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 upon which §712-1215 was based, 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. However, such laws might still be unconstitutional as a violation of the Commerce Clause of the U.S. Constitution. In addition to First Amendment deficiencies, the courts have also ruled that these state laws violate the Commerce Clause, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

Finally, H.B. 1234 would make it illegal to communicate sexually explicit material if it can be accessed by any adult if that adult merely 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. This would allow any adult to enter a chat room or visit a website devoted to sexual health or similar topics 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 appropriate for minors. It would even be a crime to communicate such sexual content when the sender knows the recipient is an adult despite claiming to be a minor. While this may not be the intent of the statute, it is not enough that the government tells us that it will not be used in such a fashion. 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' attorneys' fees. In the successful challenge to the Illinois legislation, the state agreed to pay to the plaintiffs more than \$500,000.

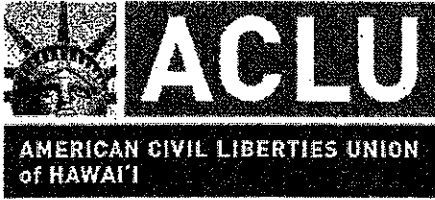
If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #3 or at horowitz@mediacoalition.org. Again, we ask you to please protect the First Amendment rights of all the people of Hawaii and reconsider both the existing law and S.B. 1234.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

LATE TESTIMONY



Committee: Committees on Public Safety, Government Operations and Military Affairs and Economic Development and Technology
Hearing Date/Time: Thursday, February 10, 2011, 2:50 p.m.
Place: Room 224
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 1234, Relating to Pornography Offenses Against Children

Dear Chairs Espero and Fukunaga and Members of the Committees on Public Safety, Government Operations and Military Affairs and Economic Development and Technology:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 1339, relating to pornography offenses against children.

S.B. 1234 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 S.B. 1234 is to be applied to the internet, it is clearly unconstitutional for the following reasons:

First, S.B. 1234 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, S.B. 1234 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 S.B. 1234 "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

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Chairs Espero and Fukunaga and Members of the Committees on
Public Safety, Government Operations and Military Affairs and Economic Development and
Technology

February 10, 2011

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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*, 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
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LATE TESTIMONY**MEMO**

DATE: Thursday, February 10, 2011

TO: Senator Will Espero, Chair
Committee on Public Safety, Government Operations and Military Affairs

Senator Carol Fukunaga, Chair
Committee on Economic Development and Technology

FROM: John Radcliffe for
Motion Picture Association of America

RE: **SB1234 Relating to Pornography Offense Against Children**

Pursuant to my conversation with one of the staff, attached is a proposed amendment to SB1234, Relating to Pornography Offenses Against Children scheduled for hearing this afternoon at 2:45 p.m. If you have any questions or concerns, please call me at (808) 754-4026 or via email at hawaiilobbyist@aol.com

Redline of Senate Bill 1234/House Bill 1007

Additions to the language in SB 1234/HB 1007 as introduced are bolded. Language in the present version of the bills to be removed is in parenthesis. If the language in the parentheses is underlined, it is a language from the bill that was intended to change existing law but needed to be removed.

A BILL FOR AN ACT

RELATING TO PORNOGRAPHY OFFENSES AGAINST CHILDREN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 712-1215, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

"(1) A person commits the offense of promoting pornography for minors if:

(a) Knowing its character and content, the person disseminates, other than over the Internet or by other electronic communication, [~~to a minor~~] material which is pornographic for minors[;] to:

(i) A minor known by the person to be under the age of eighteen years; or

(ii) the person believes that the other person is a minor under 18 years of age. (Another person who represents that person to be under the age of eighteen years);
or

(b) Knowing the character and content of a motion picture film or other performance which, (in whole or in part,) is pornographic for minors, the person:

(i) Exhibits such motion picture film or other performance to a minor; or

(ii) Sells to a minor an admission ticket or pass to premises where there is exhibited or to be exhibited such motion picture film or other performance; or

(iii) Admits a minor to premises where there is exhibited or to be exhibited such motion picture film or other performance."

(2) Disseminating pornographic for minors materials to a minor over the Internet or by other electronic communication.

(a) A person commits the crime of furnishing pornographic to minors materials to a minor over the Internet or by other electronic dissemination if, knowing the character and content of the material furnished, the person knowingly transmits directly to a specific individual, actually known or believed by such

person to be a minor, material that is pornographic to minors over the Internet or by any other electronic device (other than a listserve or generally available chat room).

(b) For the purposes of determining whether the material is "pornographic to minors" under this subsection 2, standards of the national community shall be applied.

(c) A transmission of pornographic to minors materials to or in a listserve or chatroom shall not be a crime under this subsection 3 unless the transmission is by its terms directed to a specific individual who is known or believed by the transmitter to be a minor.

SECTION 2. Section 712-1210, Hawaii Revised Statutes, is amended by amending the definition for the term "pornographic for minors" to read as follows:

"Pornographic for minors." Any material or performance is "pornographic for minors" if:

(1) It is primarily devoted to explicit and detailed narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse; and:

(a) The average person, applying contemporary community standards would find that, taken as a whole, it appeals to the prurient interest of minors in sex;

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

(c) Taken as a whole, it lacks serious literary, artistic, political, or scientific merit; or

(2) It contains any photograph, drawing, or similar visual representation of any person of the age of puberty or older revealing such person with less than a fully opaque covering of his or her genitals and pubic area, or depicting such person in a state of sexual excitement or engaged in acts of sexual conduct or sadomasochistic abuse; and:

(a) The average person, applying contemporary community standards would find that, taken as a whole, it appeals to the prurient interest of minors in sex;

(b) It depicts or describes sexual conduct in a patently offensive way and;

(c) Taken as a whole, it lacks serious literary, artistic, political, or scientific merit.

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

Report Title:

Pornography Offenses Against Children

Description:

Amends the offense of promoting pornography to minors to extend the prohibition against disseminating pornographic material to minors to include disseminating pornographic material to another person who represents that person to be a minor; and adds the offense of promoting child abuse in the third degree to the information charging law.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.