

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-First State Legislature
Regular Session of 2021
State of Hawai`i

March 30, 2021

RE: S.B. 309, S.D. 1, H.D. 1; RELATING TO PRIVACY.

Chair Nakashima, Vice Chair Matayoshi, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) submits the following testimony supporting the intent of S.B. 309, S.D. 1, H.D. 1, with suggested amendments.

Prior to the 2020 Legislative Session, the Department had the good fortune to participate as a member of the Twenty-First Century Task Force (“Task Force”). The Task Force was established through House Concurrent Resolution No. 225 (2019) and was comprised of various members in the private and public sector who committed an extraordinary amount of time and effort in the construction of numerous legislative proposals. S.B. 309, S.D. 1, H.D. 1 is one such proposal set out by the Task Force, which would add intentional disclosure or threat of disclosure of certain types of deep fake images to the offense of violation of privacy in the first degree (§711-1110.9, H.R.S.).

The Task Force took up the issue of “deep fake” videos and images and unanimously approved an amendment that would address the growing problem. It also acknowledged that technology was improving rapidly, and that social media was making it easier to share such content. The Task Force agreed that the effects of deep fake technology at the personal and societal level can have devastating and have far-reaching negative implications for individuals. The Task Force recommended that the legislature establish criminal violations for those who violate a person's privacy by creating sexually explicit deep fake videos and images that include their likeness without their consent. This amendment to HRS Section 711-1110.9 was addressed in H.B. 2572 (2020) along with a number of other proposals by the Task Force, but unfortunately that bill did not become an act during the Legislative Session.

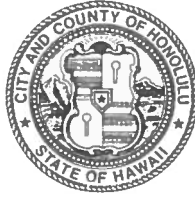
The Department humbly requests that the amendments adopted by the House Committee on Commerce and Consumer Protection—which attempt to address concerns

raised by the Motion Picture Association of America (MPA-A)—be removed, as they appear to be hopelessly vague and ambiguous. The original language of S.B. 309 was very narrowly tailored to prohibit deep fake technology as it pertains to individuals in the nude and/or engaging in sexual conduct. Due to the explicit conduct prohibited, the committee should focus on the act itself rather than if the picture is “realistic”. In many circumstances, proving beyond a reasonable doubt that a picture is “realistic” would be extremely difficult, as it would hinge on how individuals perceive the minor subtleties of an edited photo. The Department believes any individual who publishes a nude image using deep fake technology should be held accountable, regardless of the defendant’s editing prowess, as the debilitating effect this has on a victim can be limitless. The Department would also note that the First Amendment concerns raised by the MPA-A have already been addressed when the statute was amended to include the intent clause in subsection (b). It is that specific language that ensures the statute is constitutional and will not infringe on free speech thus negating the need for subsection (2)(c) in S.B. 309, S.D. 1, H.D. 1. The passage of the original version of S.B. 309 would not only align with the Task Force’s recommendations to the Legislature, but in criminal cases, would provide more privacy for Hawaii residents in the future.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the intent of S.B. 309, S.D. 1, H.D. 1, with suggested amendments. Thank you for the opportunity to testify on this matter.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE RP-KK

March 30, 2021

The Honorable Mark M. Nakashima, Chair
and Members
Committee on Judiciary
and Hawaiian Affairs
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members:

SUBJECT: Senate Bill No. 309, S.D. 1, H.D. 1, Relating to Privacy

I am Randall Platt, Captain of District 4 of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the intent of Senate Bill No. 309, S.D. 1, H.D. 1, Relating to Privacy, but we have the following concerns.

Technology has advanced to the point where the realistic image of a person can be used in still or video photography to represent or portray that actual person. When that image is used to depict a person in a state of undress or participating in a private sexual act (when in fact that person was not an actual participant), it should be a criminal violation of a person's right to privacy. The release of or the threat to release such recordings or images that clearly depict that actual person can cause irreparable personal, professional, and financial harm.

The current draft of this bill includes language in section 2 (1) (c) that is both vague and confusing, making it difficult to determine what does not apply. What may be a matter of legitimate concern or newsworthy to one officer may not be so for another. We find that the amendments to this bill would make it difficult to interpret and enforce.

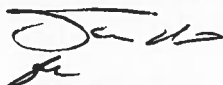
The Honorable Mark M. Nakashima, Chair
and Members

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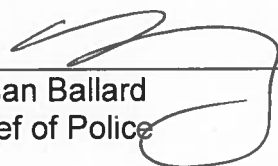
Thank you for the opportunity to testify and for considering our comments and concerns.

Sincerely,



Randall Platt, Captain
District 4

APPROVED:

For  _____
Susan Ballard
Chief of Police



SB 309, SD 1, HD 1, RELATING TO PRIVACY

MARCH 30, 2021 · HOUSE JUDICIARY AND
HAWAIIAN AFFAIRS COMMITTEE · CHAIR REP.
MARK M. NAKASHIMA

POSITION: Support.

RATIONALE: Imua Alliance supports SB 309 SD 1, HD 1, relating to privacy, which adds the intentional disclosure or threat of disclosure of certain types of realistic deep fake images or video to the offense of violation of privacy in the first degree; requires the depicted person to suffer harm from the image or video; exempts images and videos that are a matter of public concern, works of political or newsworthy value; or are commentary, criticism, or any other disclosure protected by the United States Constitution or State Constitution.

Imua Alliance is one of the state's largest victim service providers for survivors of sex trafficking. Over the past 10 years, we have provided comprehensive direct intervention (victim rescue) services to 150 victims, successfully emancipating them from slavery and assisting in their restoration, while providing a range of targeted services to over 1,000 victims and individuals at risk of sexual exploitation. During the pandemic, demand for victim services to our organization has skyrocketed by 330 percent, driven in part by a fivefold increase in direct crisis calls from potential trafficking victims.

Each of the victims we have assisted has suffered from complex and overlapping trauma, including post-traumatic stress disorder, depression and anxiety, dissociation, parasuicidal behavior, and substance abuse. Trafficking-related trauma can lead to a complete loss of identity.

A victim we cared for in 2016, for example, had become so heavily trauma bonded to her pimp that while under his grasp, she couldn't remember her own name. Yet, sadly, many of the victims with whom we work are misidentified as so-called "voluntary prostitutes" and are subsequently arrested and incarcerated, with no financial resources from which to pay for their release.

Sex trafficking is a profoundly violent crime. At least 23 percent of trafficking victims in Hawai'i report being first exploited before turning 18, according to a recent report, with the average age of trafficked keiki's initial exposure to exploitation being 11. Based on regular outreach and monitoring, we estimate that approximately 150 high-risk sex trafficking establishments operate in Hawai'i. In a recent report conducted by the State Commission on the Status of Women, researchers from Arizona State University found that 1 in every 11 adult males living in our state buys sex online. When visitors are also counted, that number worsens to 1 in every 7 men walking the streets of our island home and a daily online sex buyer market of 18,614 for O'ahu and a total sex buyer population for the island of 74,362, including both tourists and residents.

ASU's findings are grim, but not surprising to local organizations that provide services to survivors of sex trafficking. Imua Alliance, for example, has trained volunteers to perform outreach to victims in high-risk locations, like strip clubs, massage parlors, and hostess bars. More than 80 percent of runaway youth report being approached for sexual exploitation while on the run, over 30 percent of whom are targeted within the first 48 hours of leaving home. With regard to mental health, sex trafficking victims are twice as likely to suffer from PTSD as a soldier in a war zone. Greater than 80 percent of victims report being repeatedly raped and 95 percent report being physically assaulted, numbers that are underreported, according to the United States Department of State and numerous trauma specialists, because of the inability of many victims to recognize sexual violence. As one underage survivor told Imua Alliance prior to being rescued, "I can't be raped. Only good girls can be raped. I'm a bad girl. If I *want* to be raped, I have to *earn* it."

Many of our victims are subjected to so-called "revenge porn," or the nonconsensual disclosure of images and/or videos of themselves engaged in a sex act or in the nude as a means of shaming them into sexual servitude. In 2014, Hawai'i passed Act 116, which criminalizes revenge porn under HRS §711-1110.9, violation of privacy in the first degree. Following the lead of the Cyber Civil Rights Initiative, we believe that revenge porn is tantamount to sexual assault and that efforts

to threaten, humiliate, and intimidate people, especially young women, through such means is an abhorrent violation of privacy, and one we are committed to providing greater awareness of and outreach for in the coming year.

Accordingly, we support this bill's application of our state's violation of privacy provisions to so-called "deep fakes," which are digitally altered images of people that are difficult to distinguish from real images and videos, and in which targeted individuals often appear in the nude or in sexually explicit situations. **As technology has accelerated, so has the ability of unscrupulous individuals to use digital imaging software to humiliate others.** Celebrities are the most frequent targets of deep fake activity, but this technology is becoming more widely accessible, placing everyday individuals in danger (to be clear, we firmly believe that participants in the entertainment industry should be strenuously protected from illicit image manipulation).

We also note that this measure has political repercussions. In an age in which misinformation has become a weapon of political campaigns and Right-Wing extremists, we must be concerned about the potential of deep fake technology to impact democratic elections. **It is by no means implausible that deep fake software will be used to generate politically compromising images and videos in the near future, placing our system of free and fair elections at risk of being corrupted** by individuals intent on undermining our democratic heritage in the name of xenophobia—the very same kind of people who attacked the United States Capitol earlier this year.

Kris Coffield · Executive Director, Imua Alliance · (808) 679-7454 · kris@imuaalliance.org

SB-309-HD-1

Submitted on: 3/30/2021 6:02:44 AM

Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Irish Barber	IATSE Local 665	Support	No

Comments:

COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

Aloha, Chair Nakashima, Vice Chair Matayoshi and Committee Members -

Mahalo for hearing SB 309 so that we may provide written testimony. The men and women of IATSE Local 665 stands in strong support of this bill as it protects the privacy and dignity of innocent citizens of this State.

We stand with our Union Sisters and Brothers at SAG-AFTRA. Deepfake pornography has been made of over 1,000 SAG-AFTRA members and is being used to harass college students and former partners. Deepfakes have been weaponized primarily against women for as long as they have existed, but even male celebrities, and politicians have fallen victim. This form of harassment and abuse can wreak havoc on people's lives, and no criminal recourse exists for the victims. Privacy protection is a basic human right, and all individuals should be free from this cruel mistreatment.

Please pass SB 309.

Respectfully,

Irish Barber

Business Representative

SB-309-HD-1

Submitted on: 3/30/2021 7:15:50 AM

Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
John D. Smith	Individual	Support	No

Comments:

I support this bill and pass it through.