HB1007, hd1

Measure Title:

RELATING TO PORNOGRAPHY OFFENSES AGAINST CHILDREN

Report Title:

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. Effective January 7, 2059. (HB1007 HD1)

MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Foundation for Free Expression Association of American Publishers, Inc. Comic Book Legal Defense Fund Entertainment Consumers Association Entertainment Merchants Association
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America, Inc. National Association of Recording Merchandisers Recording Industry Association of America, Inc.

March 15, 2011

Committees on Public Safety, Government Operations, and Military Affairs and
Economic Development and Technology
Hawaii Senate

Memorandum in Opposition to Hawaii House Bill 1007 HD1

The members of Media Coalition believe that House Bill 1007 and existing Hawaii statute §712-1215 are unconstitutional for several reasons. The definition of "pornographic for minors" used in §712-1215 violates the First Amendment. Applying §712-1215 to the Internet violates the First Amendment and would 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 by the First Amendment 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 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'

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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 outside the First Amendment 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 in 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). In Illinois, a law was enacted that barred the sale to minors of video games with sexual content but omitted the third prong of the *Miller/Ginsberg* test. It 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*. Applying the law to the Internet 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 generally available on the Internet should know that minors could be 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*, 3:10-CV-193 (D. Alaska Oct. 20, 2010).

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 less than 16 years old. It does not require that the sender of the material believe that the recipient is less than 16 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 subscribe to a list serve discussing sexual health or visit a website with photography or paintings and claim to be a minor. Then, the site or participants on the list serve would be forced to either restrict the discussion to what is suitable for minors or risk prosecution. 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 Committees and the Attorney General to do so. If you would like to discuss further our concerns with this bill or the underlying law, 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 §712-1210 and H.B. 1007 HD1.

Respectfully submitted,

/s/ David Horowitz

David Horowitz
Executive Director
Media Coalition, Inc.

THE SEX ABUSE TREATMENT CENTER

A Program of Kapi'olani Medical Center for Women & Children

DATE: March 17, 2011

TO: The Honorable Will Espero, Chair
The Honorable Michelle Kidani, Vice Chair
Committee on Public Safety, Government Operations, and Military Affairs

The Honorable Carol Fukunaga, Chair
The Honorable Glenn Wakai, Vice Chair
Committee on Economic Development and Technology

FROM: Adriana Ramelli, Executive Director
The Sex Abuse Treatment Center

RE: Support for HB1007 HD1
Relating to Pornography Offenses Against Children

Good afternoon Senators Espero and Fukunaga and members of the Committee on Public Safety, Government Operations, and Military Affairs, and Senators Fukunaga and Wakai and members of the Committee on Economic Development and Technology. My name is Adriana Ramelli and I am the Executive Director of the Sex Abuse Treatment Center (SATC), a program of the Kapi'olani Medical Center for Women & Children (KMCWC), an affiliate of Hawaii Pacific Health.

The SATC strongly supports HB1007 HD1 as amended. This important bill will help strengthen law enforcement efforts to investigate and prosecute those who intend to send pornography to children via internet.

Experts estimate that over 30 million minors use the internet regularly. Sadly, all of them are at risk of electronic enticement by sexual predators. While educating children and parents about internet safety are important safeguards, education and parental monitoring of internet usage alone cannot protect children from those who seek to exploit them.

Every year about half of those served by our staff are minors and their sexual victimization typically starts with the grooming process. This process, used by sex offenders to recruit and prepare a child for sexual victimization, can include various tactics to gain a child's trust and to also desensitize them to sexual activity. As part of the online grooming process, sex offenders often display sexual images of themselves or other pornographic images over the internet to vulnerable children to desensitize them in preparation to engage them in sexual activity. We must take strong steps to put a stop to this dangerous criminal offense that puts our children at risk.

We urge you to pass HB1007 HD1. Hawaii's laws must keep pace with escalating internet use by minors and the sobering realities of child sexual exploitation.

Thank you for the opportunity to testify.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committees on Public Safety, Government Operations & Military Affairs and Economic Development and Technology
Hearing Date/Time:	Thursday, March 17, 2011, 2:45 p.m.
Place:	Room 224
Re:	*Testimony of the ACLU of Hawaii in Opposition to H.B. 1007, HD1 Relating to Pornography Offenses Against Children*

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

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 1007, HD1, relating to pornography offenses against children.

H.B. 1007, HD1, 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, HD1, is to be applied to the internet, it is clearly unconstitutional for the following reasons:

First, H.B. 1007, HD1, 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, HD1, 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, HD1, "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

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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*, 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,

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Staff Attorney
ACLU of Hawaii

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