SB 1234

RELATING TO PORNOGRAPHY OFFENSES AGAINST CHILDREN.

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.

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

ON THE FOLLOWING MEASURE:
S.B. NO. 1234, RELATING TO PORNOGRAPHY OFFENSES AGAINST CHILDREN.

BEFORE THE:

SENATE COMMITTEES ON
PUBLIC SAFETY, GOVERNMENT OPERATIONS, AND MILITARY AND ON ECONOMIC DEVELOPMENT AND TECHNOLOGY

DATE: Thursday, February 10, 2011 **TIME:** 2:50 p.m.

LOCATION: State Capitol, Room 224

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

Chair Espero and Fukunaga and Members of the Committees:

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.

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.

February 9, 2011

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

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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.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

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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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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