THE MEDIA COALITION
DEFENDING THE FIRST AMENDMENT SINCE 1973

American Booksellers Association Association of American Publishers Authors Guild Comic Book Legal Defense Fund
Entertainment Software Association Freedom to Read Foundation Motion Picture Association of America Recording Industry Association of America

Memo in Opposition to Hawaii House Bill 567

We appreciate the legislature's concerns about the distribution of certain speech on the internet. However, we believe that House Bill 567 is unconstitutional for numerous reasons. Its broad requirements for mandatory blocking of content on the internet violates First Amendment and due process protections for free speech. It is also vague, confusing and internally inconsistent. 0The trade associations and organizations that comprise Media Coalition have many members throughout the country, including Hawaii: authors, publishers, booksellers and librarians, producers and retailers of recordings, films, home video and video games. Below, we explain the most glaring reasons this legislation violates constitutionally protected rights.

Summary of the bill:
It is unclear what part of H.B. 567 is actionable. It has similar but separate and inconsistent sections. Section 1(a) makes it a violation of §712- to manufacture or distribute a product that makes any content accessible on the internet without "digital blocking capability" (filtering software) that renders material covered §1(b) inaccessible by default, and to distribute or manufacture it[sic] to a minor unless the filtering software is "actively and properly operating." Section 1(b) has a separate requirement that anyone who manufactures or distributes a product that makes content on the internet accessible shall make "reasonable and ongoing" efforts to ensure that "revenge pornography" is inaccessible, prohibit the product from accessing any website that "facilitates prostitution" and render websites known to facilitate "human trafficking" inaccessible. Finally, §2 makes it a misdemeanor to manufacture or distribute a device that makes content available on the internet unless it contains filtering software that "makes any attempt to render" "revenge pornography," websites that "facilitates prostitution or human trafficking" and child pornography inaccessible. It separately bars manufacture or distribution to a minor unless it has filters are active and attempting to block "obscene" material described in §1(b) inaccessible but the material in this subsection does not meet the definition of obscene.

"Revenge Pornography" is defined as the nonconsensual disclosure of an image of a person who is nude or engaging in sexual conduct. The definition does not define "nude" or state whose consent is necessary. There is an existing Hawaii law that bars publication of certain nude images under specific circumstances but it is not referenced in this bill. The bill also does not define "facilitates prostitution" or "facilitates human trafficking."

The distributor shall deactivate the filtering software only if the consumer requests that it be disabled, presents proof that he or she is an adult, acknowledges receiving a written warning of the danger of turning off the filter and pays a $20 tax plus any additional charge imposed by the distributor.

In addition to these requirements, the manufacturer and each distributor must make reasonable and ongoing efforts to ensure that the filter is working properly. They must also create a website, call center or other reporting mechanism to allow a person to report blocking of non-obscene material or the failure to block obscene material. Once a report is made, the distributor



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has five days to assess the content and block material that is obscene and unblock speech that is not obscene. If the distributor declines to block material reported as obscene, the attorney general or any person may bring a civil suit to block unblocked content. If the attorney general or the person prevails, they may seek damages of $500 per unblocked depiction. If the distributor decides not to unblock material reported as not appropriate to block, any person may sue to get the speech unblocked but the attorney general is not authorized to bring such a suit. In either case, the prevailing party is entitled to attorneys' fees.

Speech is presumed to be protected by the First Amendment:
H.B. 567 imposes an unconstitutional censorship regime that suppresses speech based on its content and that violates due process protections. The Supreme Court has repeatedly made clear that all speech is protected by the First Amendment until a court rules otherwise. The burden is on the state to prove that speech does not enjoy protection under the Constitution in a judicial proceeding that provides full due process protections. "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based regulations are presumptively invalid,' *R.A.V. v. St. Paul,* 505 U. S. 377, 382 (1992), and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 817 (2000).

Nude images published without consent are protected by the Constitution:
The bill is overbroad because it requires blocking of non-obscene nude images, which are fully protected by the First Amendment. *Playboy*, 529 U.S. at 811; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). They are legal to publish even with consent and to view absent other narrowing elements such as an intent to harass. These images may be newsworthy, historic or educational like pictures of the prisoners at Abu Ghraib, the images of Janet Jackson's wardrobe malfunction, snapshots Anthony Weiner sent of himself to women he met online or images of partially nude female slaves or victims of war. All of these images were published without the consent of the person in the image. The state cannot force a device maker to block access to them. See *Antigone Books v. Brnovich* 2:14cv2100 (D. Ariz. July 10, 2015) (challenge to an Arizona law with an almost identical definition of "revenge pornography" as H.B. 567. The state of Arizona agreed to a permanent bar on enforcement of the law without submitting any documents to defend it to the court.)

Use of mandatory filters will inevitably be overbroad:
Even if a bar on publishing images without consent is suitably narrowly written, filters will inevitably block a substantial amount of legal speech and make the law unconstitutionally overbroad. Filtering software is not sophisticated enough to determine what images were published without consent and thus can be blocked. Nor can filters assess other elements, such as reasonable expectation of privacy or a publishers' intent to harm the person in the image, that are included in Hawaii's existing law. Research shows that filters block content based on certain kinds of nudity in images and the use of explicit language making them overbroad. Even in attempting to block categories of speech like sexual content, filters generally over block. See, American Library Policy Brief, Policy Brief No. 5, June 2014, pg. 16-18. Filters are a blunt instrument that are designed to block sexual material, hate speech or other types of content based on specific words or images of nudity or sex. They cannot make more nuanced determinations that require information beyond what is in the text or the image.

Voluntary filters are less restrictive means:

This is why the Supreme Court has cited voluntary filters as the best way to block unwanted speech online but has dismissed the idea of mandatory filters. In *Ashcroft v. American Civil Liberties Union*, the Court dismissed the argument that the government could impose mandatory filters on all internet users and held that the voluntary use of filters was a less restrictive means since the user could decide what material is appropriate for themselves or their children without censoring the internet for the entire population. 542 U.S. 656, 669 (2004). See also, *Playboy*, 529 U.S. at 822-26 (individual households opting into voluntary scrambling of adult cable channels was a less restrictive means for preventing signal bleed than system wide blocking).

Content-based tax on speech is unconstitutional:
H.B. 567 is also an unconstitutional tax on speech based on its content. The user of a product must pay a $20 tax to have the filters deactivated (and be subjected to a government-mandated lecture about the dangers of the internet) in order to access certain content. While a state may levy a general sales tax that includes the sale or rental of speech in any medium, the U.S. Supreme Court has repeatedly held that it the First Amendment bars the imposition of a specific tax on speech based on its content. In 1987, the Supreme Court ruled that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230. In 1983, the Court held that the power to single out the press with special taxes could be used to coerce or even destroy it and therefore violates the First Amendment. *Minneapolis Star v. Minnesota Commission of Revenue*, 460 U.S. 575. In 1991, the Court held that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Simon and Schuster, Inc. v. Members of the New York State Crime Board*, 502 U.S. 105. See also, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Grosjean v. American Press*, 297 U.S. 233 (1936). The determination that the tax is content-based is not changed by a declaration in the bill about how the money will be used. If the state believes those activities merit state funding, it can provide money from the general fund or from a tax that is not imposed based on the content of speech.

The bill may also be an unconstitutional tax on the internet as a medium. A person can access the same speech in books, magazines, movies or video games without paying the $20 tax. The Supreme Court has condemned this selective imposition of a punishment on one medium but not others or specific portions of a media. *See*, *Playboy*, 529 U.S. at 812 (striking down a regulation that targeted "adult" cable channels but permitted similar expression by other speakers); *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media … often present serious First Amendment concerns."); *Arkansas Writers' Project*, 481 U.S. at 228. ("Selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State.").

H.B. 567 is unconstitutionally vague:
It is settled law that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Winters v. New York*, 333 U.S. 507, 509 (1948). H.B. 567 is internally inconsistent, leaves key terms undefined, and refers to legally defined words to refer to terms that do not fit the commonly understood definition. The legal obligations of manufacturers and distributors in §1 and §2 are similar but not the same. In §1 the software must block the content for adults by default. The

word default is not in §2. In §1(a) makes it a violation of section 712- to manufacture or distribute a product that makes any content accessible on the internet without "digital blocking capability" (filtering software) that renders material covered §1(b) inaccessible by default, and to distribute or manufacture to a minor unless the filtering software is "actively and properly operating." There is no explanation to distinguish between the software working by default and the software properly operating. Also §1(b) has a separate requirement that anyone who manufactures or distributes a product that makes content on the internet accessible shall make "reasonable and ongoing" efforts to ensure that "revenge pornography" is inaccessible, prohibit the product from accessing any website that "facilitates prostitution" and render websites known to facilitate "human trafficking" inaccessible. There is no apparent reason why the bill uses three different phrasings to describe the distributors' responsibilities for blocking certain content. Later, §2 uses different wording to describe the legal obligations of the distributor; it requires them to *contains* the capability to "makes any attempt to render" the proscribed content "inaccessible." It is written so that it is unclear if the filters must be activated for an adult purchaser of the product. However, the deactivation process would be pointless if there was no obligation that the product comes with the filters working. In §1, the bill does not define "nude" or "facilitates prostitution." Finally, §1 and 2 refer to blocking "obscene" material described in §1(b) inaccessible but there is no reference in §1(b) to obscene material. The content described in §1(b) is not obscene as the word was defined by the Supreme Court in *Miller v. California,* 413 U.S. 15 (1973). Instead, H.B. 567 uses the term to refer generally to objectionable speech.

This lack of clarity will inevitably prompt distributors to act more broadly by over blocking content rather than risking being barred from doing business in the state or facing criminal prosecution. Beyond the overbroad blocking of content, it will have a significant chilling effect on publishers. An online magazine might not publish an article about legal brothels in Nevada or Amsterdam because it could be deemed to facilitate prostitution and result in their entire website being blocked. Booksellers may choose not to sell sexual health, art and history books that contain nude images for fear their online store could be rendered inaccessible. For publishers and booksellers, the chilling effect is exacerbated because the reporting system to get one's site unblocked only applies to material blocked for being obscene and not to the other content that must be rendered inaccessible. *See Baggett v. Bullitt*, 370 U.S. 360 (1964).

<u>The legislation violates due process protections of speakers</u>:
While the state can restrict or bar access to some speech such as obscene material, it must provide full due process protections before doing so. This is true whether the state is seizing copies of a book from a bookstore or imposing mandatory filtering on the internet by forcing private actors to block access to content under the threat of prosecution for failing to do so. As the Supreme Court said in *Marcus v. Search Warrant*, "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." 367 U.S. 717, 731 (1961).

The Supreme Court has held that due process rights are essential in judging whether speech is outside of First Amendment protection. In *Bantam Books v. Sullivan*, the Court explained why these protections are so important:

> "Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of

> constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrant*, supra, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. See, e. g., *Thornhill v. Alabama*, 310 U.S. 88; *Winters v. New York*, 333 U. S. 507; *NAACP v. Button*, 371 U.S. 415. '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .' *Speiser v. Randall*, 357 U.S. 513, 525.".

372 U.S. 58, 68 (1963).

Speech can only be suppressed after a court finds that is unprotected. In *Fort Wayne Books, Inc. v. Indiana*, the Supreme Court held, "While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (internal cites omitted). Similarly, in *Heller v. New York*, the Court noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." 413 U. S. 483, 492 (1973). Even probable cause is not sufficient to block access to a book, magazine or movie prior to a final judgment. *Fort Wayne Books, Inc.*, 489 U.S. at 66. ("…our cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation.")

If the state believes that material accessible on the internet in Hawaii is outside the protection of the First Amendment, it bears the burden of gathering evidence and, if appropriate, prosecuting the publisher in an adversarial judicial proceeding. H.B. 567 turns this principle on its head by blocking any content a computer program determines is illegal and then requiring the speaker or the person trying to access the material to vindicate their constitutional rights.

The state cannot put the burden on the speaker or the reader to prove that the material cannot be blocked. In *Southeastern Promotions, Ltd. v. Conrad*, the Supreme Court added that "a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor." 420 U.S. 546, 560 (1975)(emphasis in the original). Under H.B. 567, the speaker or recipient must discover they have been censored (possibly by multiple distributors with different filtering technology) and then file a formal request with each distributor that the content be unblocked subject to a five day waiting period. If the speech remains blocked by any or all of the distributors, the speaker must file a lawsuit to get judicial relief.

The government cannot get around these constitutional requirements by outsourcing this censorship regime to device manufacturers and distributors to act as its agent to suppress speech that the state is prohibited from doing on its own. In *Bantam Books*, the U.S. Supreme Court struck down a non-judicial determination of whether material is illegal for minors as a form of

"informal censorship." 372 U.S. 58 (1963). More recently, Judge Posner writing for the Seventh Circuit held that using "administrative methods" to censor speech "as distinct from punishing such dissemination… after it has occurred — is prohibited by the First Amendment as it has been understood by the courts." *Backpage. com, LLC v. Dart*, 807 F. 3d 229, 235 (7th Cir. 2015).

Nor can this legislation be saved by the promise by legislators or prosecutors that the statute will only be used only for the most egregious violations. In *U.S. v. Stevens* the Court said, "[T]he 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*, 559 U.S. 460, 480 (2010).

Finally, enactment of this bill could prove costly. If a court declares it unconstitutional in a facial challenge, there is a very good possibility that the state will be ordered to pay the plaintiffs' attorney's fees. In the challenge to the Arizona law mentioned above, the state agreed to pay the plaintiffs $200,000 in legal fees, even though the case was resolved by a joint motion of the parties requesting that the judge issue an order barring the state from enforcing the law.

If you would like to discuss our concerns further, we would welcome that opportunity to do so. Please contact our Executive Director David Horowitz at horowitz@mediacoalition.org or by phone at 212-587-4025 x3 . We ask you to protect the First Amendment rights of all the people of Hawaii and amend or defeat H.B. 567.