

THE MEDIA COALITION INC

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Memo in Opposition to Hawaii House Bill 2885

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The members of The Media Coalition believe that Hawaii House Bill 2885 threatens the distribution of First Amendment-protected material in Hawaii. Media Coalition members represent most of the book and magazine publishers, booksellers, librarians, recording, movie and video game manufacturers, and recording, video, and video game retailers in Hawaii and the rest of the United States.

H.B. 2885 requires that a retailer of videos or other First Amendment-protected material designed or primarily used for the sexual gratification of the user must segregate such material behind a curtain, screen or other device. This provision is onerous for retailers and is almost certainly unconstitutional because it restricts the access of adults to material constitutionally protected as to them.

H.B. 2885 has significant constitutional problems. Courts have allowed some limitations on the display of material "harmful to minors," as defined by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), but they have also ruled that these limitations may not unreasonably hinder the access of adults to such material. In the *Ginsberg* case, the Supreme Court established a three-prong test to determine what is legally "harmful to minors." H.B. 2885 would restrict access to a much broader range of material than could arguably be deemed "harmful to minors" under the *Ginsberg* test. It would improperly restrict the display of this material to adults as well as minors despite the material being legal for both.

Even if H.B. 2885 only applied to material that is "harmful to minors," the requirement that any material with a cover or content be kept behind a counter or in a controlled area would be an unreasonable hindrance on the right of adults to access such material. A retailer must be allowed to restrict access of minors to such material in a reasonable manner besides segregation. See, *Virginia v. American Booksellers Assn., Inc.*, 488 U.S. 905 (1988), on remand 882 F. 2d. 125 (4th Cir. 1989). H.B. 2885 on the contrary would force a retailer to create an "adults only" area that would pejoratively label a part of their inventory. They would inevitably lose patrons who, without being aware that the material in the segregated section is protected by the First Amendment, will refuse to enter places that deal in "dirty movies, books, or magazines." Some retailers would have little choice but to stop carrying much work with nudity, including much mainstream art, fashion, and photography material rather than to risk a prosecution. As a result, H.B. 2885 would exercise an unconstitutional "chilling effect" on the sale

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers in the United States.

of legally protected speech and seriously impair adults' access to material which they have a First Amendment right to read or see.

Additionally, the bill presents great practical difficulty for retailers of books, magazines, and other media. The standard for material that must be segregated, "the sexual gratification of the user" is vague and subjective. Some bookstores carry hundreds of thousands of books and the task of reviewing thousands of new items received each year to determine whether they could be used for the sexual gratification of the user and that must be segregated is difficult, time consuming for staff, and expensive for the proprietor. In addition, requiring retailers to segregate such material behind a curtain or screen would only add to the practical problems in allocating store staff, causing retailers to lose adult customers who may not want to purchase material without browsing.

Because it threatens the distribution of constitutionally protected material, H.B. 2885 will be vulnerable to a legal challenge if it is enacted. If it were to be overturned, the state could be ordered to pay the plaintiffs' attorneys' fees.

The members of Media Coalition strongly urge you to defend the First Amendment rights of retailers and all the citizens of Hawaii and vote against H.B. 2885.