STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 97-1087-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN L. CARLEY,

Defendant-Appellant.

On Appeal From The Judgment Of Conviction And Order Entered In The Circuit Court For Richland County, The Honorable Kent C. Houck, Presiding

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NON-PARTY BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, INC.

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The American Civil Liberties Union of Wisconsin Foundation, Inc. ("ACLUF/WI"), respectfully submits this nonparty brief, pursuant to Wis. Stat. (Rule) 809.19(7)(b), in support of Kevin L. Carley on the question whether the absence of any requirement of scienter regarding the child's minority status, the crucial element separating constitutionally protected conduct from that deemed criminal under the harmful to minors statute, Wis. Stat. §948.11(2)(a), renders that statute constitutionally invalid on its face.

ACLUF/WI does not dispute the importance of protecting children. However, even the compelling interest in protecting the well-being of children cannot justify unnecessarily broad restrictions on the right to free expression. *E.g.*, *Reno v. ACLU*, 117 S.Ct. 2329

(1997) (Communications Decency Act's prohibition of knowing transmission of "indecent" or "patently offensive" communications to minors violates First Amendment); *id.* at 2346.

In deciding this case, ACLUF/WI asks the Court to keep in mind as well that application of §948.11 is not limited to cases in which pedophiles force 7-year olds to watch dirty movies. An adult bookstore in Kenosha stands charged with a felony because it did not know that two patrons who entered the store and viewed sexually explicit but non-obscene movies were a few months shy of their 18th birthdays. *See State v. C&S Management, Inc.*, 198 Wis.2d 844, 544 N.W.2d 237 (Ct. App. 1995). Owners and operators of movie theaters and cable TV channels showing sexually explicit movies likewise could be subjected to criminal liability if, unbeknownst to them, a minor happened to be in the audience. A college fraternity similarly would be guilty if a 17-year old freshman happened to enter a party while a "stag film" was playing. Accordingly, this Court's resolution of the issue will have significant impact on the legitimate exercise of the right to free expression.

ARGUMENT

WIS. STAT. §948.11(2)(A) UNCONSTITUTIONALLY PERMITS CONVICTION WITHOUT REQUIRING PROOF OF KNOWLEDGE REGARDING THE SOLE ELEMENT DISTINGUISHING CONSTITUTIONALLY PROTECTED FROM CRIMINAL CONDUCT

Wis. Stat. §948.11(2)(a) imposes strict criminal liability for expression which, under most circumstances, is fully protected by the First Amendment to the United States Constitution. Such a regula-

tory scheme violates the requirement of *scienter* in matters of free expression, and the statute accordingly is unconstitutional on its face.

Because §948.11 concerns First Amendment rights, the state must bear the burden of proving its constitutionality beyond a reasonable doubt. *State v. Thiel*, 183 Wis.2d 505, 515 N.W.2d 847, 854 (1994), *cert. denied*, 513 U.S. 878 (1994).

Pursuant to Wis. Stat. §948.11(2)(a):

> Whoever, with knowledge of the nature of the material, sells, rents, exhibits, transfers or loans to a child any material which is harmful to children, with or without monetary consideration, is guilty of a Class E felony.

Section 948.11 defines what material may be deemed "harmful to children:"

> "Harmful to children" means the quality of any description or representation, in whatever form, of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture or brutality, when it:
>
> > 1. Predominantly appeals to the prurient, shameful or morbid interest of children;
> >
> > 2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for children; and
> >
> > 3. Lacks serious literary, artistic, political, scientific or educational value for children, when taken as a whole.

Wis. Stat. §948.11(1)(b).

Section 948.11 has been called a "variable obscenity statute," meaning that it "prohibits a person from distributing or exhibiting to children any materials deemed to be obscene to children, but not

obscene to adults." *Thiel,* 515 N.W.2d at 854. Exhibition or distribution of non-obscene, albeit sexually explicit materials to adults, after all, is protected by the First Amendment. *E.g., Reno,* 117 S.Ct. at 2346; *United States v. X-Citement Video,* 513 U.S. 64, 72 (1994) (citations omitted). Accordingly, "one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults." *Id* at 72-73.

In *X-Citement Video,* the Supreme Court construed a federal statute banning interstate transportation of child pornography as requiring proof of knowledge that the performer was a minor. The Court noted that it previously had held that a statute which dispensed with any *mens rea* requirement as to the contents of an allegedly obscene book would violate the First Amendment. 513 U.S. at 73-74 (citing *Smith v. California,* 361 U.S. 147, 154 (1959). Observing that "the age of the performers is the crucial element separating legal innocence from wrongful conduct," *id.* at 73, the Court read its prior decisions as indicating "that a statute completely bereft of a *scienter* requirement as to the age of the performers would raise serious constitutional doubts." *Id.* at 78.

Section 948.11 suffers from the same constitutional defect which concerned the majority in *X-Citement Video.* The language of §948.11(2)(a) does not specifically require knowledge of the age of the child. Indeed, the statute creates an affirmative defense which indicates that knowledge that the viewer is a child rather than an adult is *not* an element of the offense:

> It is an affirmative defense to a prosecution for a violation of this section if the defendant had reasonable cause to believe that the child had attained the age of

> 18 years, and the child exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that the child had attained the age of 18 years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.

Wis. Stat. §948.11(2)(c). This language precludes a finding that knowledge is a statutory element, by setting up instead an "affirmative defense" upon which the defendant has the burden of proof, and arbitrarily limits even that "reasonable ... belie[f]" defense to situations when the belief is based upon specific types of evidence.

ACLUF/WI respectfully submits that the absence of any requirement in Wis. Stat. §948.11(2) that the defendant know or have reason to know the child is underage violates the First and Fourteenth Amendments to the United States Constitution and Article I, §§1, 3 & 8(1) of the Wisconsin Constitution. As in *X-Citement Video*, the sole factor distinguishing constitutionally protected speech from conduct criminalized by §948.11, is the question of age. If the person viewing the materials is 18 years old, a defendant's actions in displaying those materials would be fully protected by the First Amendment. Where the viewer has not reached his or her eighteenth birthday, however, even if only be a few months, the exact same conduct becomes a felony. In other words, §948.11 is completely bereft of a *scienter* requirement as to the sole deciding factor between constitutionally protected conduct and that constituting a felony.

Such a statute simply cannot stand consistent with the requirements of the First Amendment. *See, e.g., X-Citement Video*, 513 U.S. at 78; *New York v. Ferber*, 458 U.S. 747, 765 (1982) ("As

with obscenity laws, criminal responsibility may not be imposed without some element of *scienter* on the part of the defendant"); *Smith, supra*; *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1290-92 (9th Cir.), *rev'd on other grounds*, 513 U.S. 64 (1994).[1]

The state, however, seeks to limit application of *X-Citement Video* to situations in which the age of the victim was a crucial factor only in assessing the character and content of the material, and suggests that §948.11 is more analogous to a statutory rape law or a statute barring production of child pornography. State's Brief at 18-21. The state is wrong on both counts.

The state is correct that the age of the performers in *X-Citement Video* impacted the "character and content of the material" in the sense that it was the presence of underage performers which rendered the materials "child pornography." At no time, however, did the Supreme Court suggest that its holding was limited to that exact circumstance.

To the contrary, the Court in *X-Citement Video* focused on the minority status of the performers, not as part and parcel of the "character and content" determination as suggested by the state, but as an element of independent significance. *See* 513 U.S. at 72 ("Age of minority in [18 U.S.C.] § 2252 indisputably possesses the same status as an elemental fact because non-obscene, sexually explicit materials involving persons over the age of 17 are protected by the

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[1] *See also Berry v. City of Santa Barbara*, 40 Cal. App. 4th 1075, 1087-88, 47 Cal. Rptr. 2d 661, 669 (1995) (municipal "harmful to minors" ordinance survived First Amendment scrutiny under *X-Citement Video* when construed to require both knowledge of the content and character of the "harmful" materials and knowledge of, or failure to exercise reasonable care in ascertaining, the viewer's minority status).

First Amendment" (citations omitted)); *id.* at 73 ("Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct").

Also while the state seeks to distinguish between the knowledge of age found constitutionally required in *X-Citement Video* and that at issue here, it fails to provide any constitutionally-based rationale suggesting that distinction should make a difference. Indeed, it cannot.

The Supreme Court in *Smith v. California,* 361 U.S. 147, 154 (1959), held that a statute which dispensed with any *mens rea* requirement regarding the element separating constitutionally protected from illegal conduct, in that case knowledge of the contents of an obscene book, would violate the First Amendment. The reason, of course, is that the imposition of strict liability has both the purpose and the effect of causing the individual to err on the side of caution or, in the case of free speech, on the side of self-censorship. The result of this self-censorship is suppression of constitutionally protected speech. *Id.* at 152-54.

Just as strict liability regarding the character and content of the materials in *Smith* and the age of performers in *X-Citement Video* is impermissible on First Amendment grounds, so too is such liability regarding the minority status of the audience of constitutionally protected speech. To hold otherwise, as does §948.11, and impose criminal liability even on those who reasonably believe their audiences are limited to adults, would cause the speakers to censor themselves, either by withholding their speech from everyone, or by limiting their speech to that deemed appropriate for children. To

avoid the risk of absolute liability, the speaker thus is forced to forgo speech the state could not constitutionally suppress directly. Such "self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith*, 361 U.S. at 154.[2]

Legal doctrines such as strict liability therefore "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith*, 361 U.S. at 151. *See also Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("[A] rule that would impose strict liability on a publisher for [unprotected speech] would have an undoubted 'chilling' effect on speech . . . that does have constitutional value"); *Mishkin v. New York*, 383 U.S. 502, 511 (1966) ("The constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material").

The same is true even regarding laws intended to protect children. *See X-Citement Video, supra; Ferber*, 458 U.S. at 765 ("As with obscenity laws, criminal responsibility may not be imposed [for possession of child pornography] without some element of scienter on the part of the defendant"); *Thiel*, 515 N.W.2d at 856. *See also Reno*, *supra* (even compelling interest in protecting children from harmful materials cannot justify unnecessarily broad suppression of speech intended for adults).

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[2] Vague regulations of expression similarly cause uncertainty for the speaker and likewise pose significant First Amendment concerns for the same reasons stated here: such uncertainty results in self-censorship, especially where, as here, a wrong guess can result in criminal liability. *Reno*, 117 S.Ct. at 2344-45.

The state's argument that scienter need not be required because the offense here is more like statutory rape or the production of child pornography, which is essentially the same thing, also is incorrect. Judge Sykes rejected the same argument in *State v. Richard B. Stephens*, Milw. Co. Case No. F-961191 (Order, 9/12/96):[3]

> The State argues that Wis. Stat. §948.11 is comparable to child sexual assault statutes, which, as noted above, do not require proof that the defendant actually knew the victim was a minor. The State cites a footnote in *X-Citement Video* in which the Supreme Court acknowledged the exemption for child sex offenses in which the victim's actual age is determinative despite a defendant's lack of knowledge of the victim's age. *See, X-Citement Video*, 115 S. Sct. [sic] at 469. Despite this acknowledgement, however, the Court nevertheless concluded that the anti-obscenity statute before it in that case should *not* be lumped together with child sexual assault legislation in which criminal strict liability regardless of a defendant's knowledge of the victim's age is constitutionally permissible. Again, I am bound by this conclusion.
>
> Wis. Stat. §948.11 is an anti-obscenity statute aimed at "restricting the flow of obscene materials to minors." *State v. Thiel*, [183 Wis.2d 505, 523, 515 N.W.2d 847 (1994)]. It is not a child sexual assault statute. In a sense, the federal law at issue in *X-Citement Video* more closely resembled a child sexual assault statute than Wis. Stat. §948.11 because its purpose was to deter the production of child pornography -- which often involves sexual assaults on children -- by creating a federal penalty for its distribution. Yet the Supreme Court said such a statute must contain a knowledge requirement as to the victim's age in order to be constitutional.

[3] A copy of the *Stephens* decision is attached to Carley's post-conviction motion (R67).

The state also overlooks an important factor distinguishing statutory rape from the conduct at issue under §948.11. While consensual, adult sex might be legal, there is no *per se* constitutional right to have sex. The minority status of the victim of a statutory rape thus only separates legal conduct from that which is illegal. Imposing strict liability in such cases may deter some legal conduct, but has no deterrent effect on one's constitutional rights, and thus can have no constitutional significance.

The minority status of the child in a claimed §948.11 violation, on the other hand, is the sole factor separating not just legal, but constitutionally protected speech from criminal conduct. The difference is critical. As the Supreme Court explained in *Smith* in rejecting a similar analogy to other strict liability offenses,

> The appellee and the court below analogize this strict liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors--in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. . . . . His ignorance of the character of the food is irrelevant. *There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller.*

361 U.S. at 152-53 (emphasis added).

The state's suggested analogy to statutory rape laws thus must

fail.

Finally, it should be noted that strict liability simply is not necessary to further the interest in protecting children. The strength of that interest varies inversely with the age of the child. *See Thiel*, 515 N.W.2d at 859 (harmfulness of material to be assessed in light of age of minor viewer). The younger the child, and thus the more in need of protection, the more obvious is her minority status and the defendant's knowledge of that status. It is only when the minor nears adulthood that the constitutional requirement of scienter would have any likely effect on the probability of conviction. In that situation, however, the state's interest is at its weakest as the minor shortly would have an absolute right to view such materials in any event.

CONCLUSION

The state fails to provide any reasoned basis for distinguishing away *X-Citement Video* and the authorities upon which that decision was based. The Supreme Court's recognition in those cases that the First Amendment mandates a showing of scienter regarding the crucial element separating constitutionally protected conduct from that deemed illegal thus must apply here as well. Wis. Stat. §948.11(2)(a) is unconstitutional on its face and this Court should so hold.

Dated at Milwaukee, Wisconsin, September __, 1997.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,786 words.

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