STATE OF WISCONSIN
IN SUPREME COURT

Case No. 99-1334-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

LANE R. WEIDNER

Defendant-Respondent.

Certification by the Court of Appeals District III, of an Appeal from an Order of the Marathon County Circuit Court, the Honorable Dorothy L. Bain, Presiding

NON-PARTY BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN

ROBERT R. HENAK
HENAK LAW OFFICE, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Attorney for Nonparty, American Civil Liberties Union of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules and Statutes

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 99-1334-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

LANE R. WEIDNER

Defendant-Respondent.

NON-PARTY BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN

The American Civil Liberties Union of Wisconsin ("ACLU-WI"), respectfully submits this nonparty brief, pursuant to Wis. Stat. (Rule) 809.19(7), in support of Respondent, Lane R. Weidner.

The parties to this appeal define the issue as whether Wisconsin's "harmful to minors" statute, Wis. Stat. §948.11(2)(a), is constitutional as applied to cases in which there is no personal, face-to-face meeting between the defendant and the alleged victim. That issue would appear to be controlled by the analysis in *State v. Zarnke*, 224 Wis.2d 116, 589 N.W.2d 370 (1999).

ACLU-WI, however, believes that this case presents a more fundamental question: is the "harmful to minors" statute constitutionally invalid on its face for failure to require proof of knowledge of the

child's minority status in *all* cases? For the reasons which follow, 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 Wis. Stat. §948.11(2)(a), renders that statute constitutionally invalid on its face.

ACLU-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*, 521 U.S. 844 (1997) (Communications Decency Act's prohibition of knowing transmission of "indecent" or "patently offensive" communications to minors violates First Amendment); *id.* at 2346.

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

Because Wis. Stat. §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 harmful material, 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, narrative account 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*, 521 U.S. at 874-75; *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. Wis. Stat. §948.11(2)(c). This statute 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. *See id.*; *cf. Zarnke*, 589 N.W.2d at 374 (addressing effect of same affirmative defense under Wis. Stat. §948.05 (1995-96).

The absence of any requirement in §948.11(2) of proof 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 by 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 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). *See also Zarnke*, 589 N.W.2d at 376 (Under Wisconsin's child pornography statute, Court concludes that "the age of the performer is an elemental fact, and based upon the Court's decision in *Smith*, find[s] that the government must prove some level of scienter as to the performer's minority").

The state here, however, as did the Court of Appeals in *State v. Kevin L.C.*, 216 Wis.2d 166, 576 N.W.2d 62, 70-72 (Ct. App. 1997), seeks to limit application of *X-Citement Video* to its facts, and suggests that §948.11 is more analogous to a statutory rape law or a statute barring production of child pornography.

While the *Kevin L.C.* Court attempted to distinguish between the

knowledge of age found constitutionally required in *X-Citement Video* and that at issue here, it failed to provide any constitutionally-based rationale suggesting that distinction should make a difference. Indeed, it could not.

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 dispensing with the requirement of scienter and placing the risk of error on the defendant have 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. *See also Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) (severity of criminal sanctions may cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images).

Just as dispensing with a requirement of knowledge 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 the absence of a scienter requirement 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 they are communicating only 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.[1]

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*, 521 U.S. at 875 (even compelling interest in protecting children from harmful materials cannot justify unnecessarily broad suppression of speech intended for adults).

The state and the *Kevin L.C.* Court suggest that speakers can avoid self-censorship or possible felony conviction simply by making a reasonable effort to ascertain the age of their audience. 576 N.W.2d

---

[1] 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*, 521 U.S. at 870-72.

at 72. That may be true under some circumstances, *see 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), but that is not what §948.11 provides.

Rather, the statute requires a finding of guilt unless the speaker proves not only the reasonableness of his or her belief of the viewer's adulthood, but also that the viewer had committed fraud by displaying false documentation of age. The burden of proof on this issue, moreover, is on the speaker, thus leaving him or her to the whim of the fact-finder, regardless how reasonable in fact the attempts to ascertain the recipient's age. Once again, the incentive resulting from such uncertainty is toward self-censorship of even protected speech rather than run the risk of prosecution. *See Dombrowski, supra.*

The *Kevin L.C.* Court's suggestion 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. 576 N.W.2d at 72. The State's entire argument that Mr. Weidner should bear the risk of error under Wis. Stat. §948.11(2) similarly relies upon this statutory rape analogy. Both, however, overlook a critical factor distinguishing statutory rape from the conduct at issue under §948.11.

While consensual, adult sex might be legal, the Supreme Court currently holds that there is no *per se* constitutional right to have sex. *See Bowers v. Hardwick*, 478 U.S. 186 (1986). The minority status of

the victim of a statutory rape (or the production of child pornography) 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 under current Supreme Court precedent.

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); *see Zarnke*, 589 N.W.2d at 375-76.

The suggested analogy to statutory rape laws thus must fail.

It is not enough under the First Amendment that it may be "reasonable" to impose strict liability in a particular case under

§948.11(2) because the person exercising his or her right to free expression could attempt to ascertain the age of the audience. It is well-settled that the applicable standard for evaluation of infringements of free expression is not "reasonableness" but necessity. *E.g.*, *Reno*, 521 U.S. at 875 (governmental interest in protecting children from harmful materials "does not justify an unnecessarily broad suppression of speech addressed to adults" (citation omitted)); *R.A.V. v. St. Paul*, 505 U.S. 377, 395-96 (1992) (to be constitutionally permissible, suppression of free expression must be necessary to further compelling state interest); *Sable Communications v. FCC*, 492 U.S. 115, 126-127 (1989).

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). *See also Reno*, 521 U.S. at 878 (noting that the "Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute"). The younger the child, and thus the more in need of protection, the more obvious is her minority status and the more easily proven 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

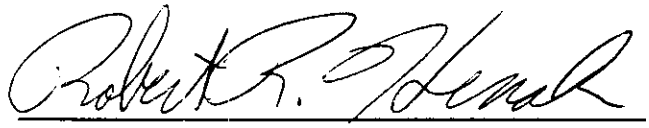
The Court of Appeals in *Kevin L.C., supra*, failed to provide any principled basis for distinguishing away *X-Citement Video* and the authorities and constitutional principles upon which that decision was based. The Supreme Court's recognition in those cases that the First Amendment mandates a showing 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) accordingly is unconstitutional, not just as applied to communications over the Internet, but on its face.

Dated at Milwaukee, Wisconsin, March 9, 2000.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN, Amicus Curiae

by: HENAK LAW OFFICE, S.C.



Robert R. Henak
State Bar No. 1016803

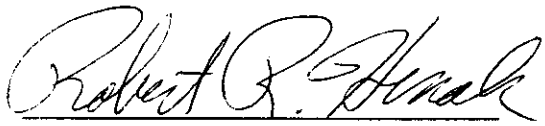
P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Weidner Amicus Brief.wpd

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 2,701 words.



Robert R. Henak

Weidner Brf. Cert.wpd