REPORTERS COMMITTEE
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Sen. Donna Mercado Kim
Senate President
Hawaii State Capitol
415 S. Beretania St.
Room 409
Honolulu, HI 96813

Rep. Joseph M. Souki
House Speaker
Hawaii State Capitol
415 S. Beretania St.
Room 431
Honolulu, HI 96813

Re: H.B. 622, S.B. 828 (News Media Privilege/Shield Law)

Dear Sen. President Kim and House Speaker Souki:

The Reporters Committee for Freedom of the Press writes to urge the members of Hawaii's Legislature to avoid passing amendments that would gut Hawaii's reporter shield law, embodied in both House and Senate versions of H.B. 622. The Reporters Committee urges this legislative body to pass the original draft of the bill, which removes the sunset provision and enacts the language of the shield law set to expire on June 30.

The Reporters Committee takes issues with several amendments in both the House and Senate versions of H.B. 622. If passed, the amendments would provide one of the weakest protections for journalists and their sources in the nation and do more harm than good in advancing public discourse on important public issues in Hawaii. Passing such a diluted version of the state shield law shows a disregard for the important principle that journalists must be free to work independently of the judicial process, ignores the public interest in a reporter's right to keep information confidential, and dismisses the very real chilling effect on the public's receipt of information on important controversies.

First, the language in both bills exempting reporters from invoking an absolute privilege in civil cases ignores the important role journalists play in informing the public about such matters and could threaten to drag journalists into the very cases they cover. Second, excluding unpublished material from shield law protections would intrude on the editorial process and would make

potential sources less likely to speak to reporters, resulting in a "chilling effect" on the flow of information. And lastly, Senate amendments strictly defining and limiting the scope of shield law protections only to journalists working in traditional media outlets such as newspapers, magazines or wire services ignores the evolving nature of the industry and threatens to eviscerate the application of the law to those working in novel newsroom environments.

Diluting the scope of privilege protections to journalists writing about civil cases ignores the important function the news media play in informing the public about cases of public concern. Recent civil litigation involving Enron's collapse, the Catholic Church's priest abuse scandals, Bridgestone/Firestone's allegedly defective tires, tobacco company liability and almost any product liability lawsuit involve issues that greatly affect the public interest. Without more robust privilege protections, information gathered to inform the public about such important topics could leave journalists at risk of eventually being dragged into such litigation, consuming staff time and resources that should be used for reporting and editing.

The Senate bill which eliminates language protecting unpublished information from the shield law protections is also troubling. Subpoenas seeking unpublished material obtained during news gathering intrude on the editorial process. Rather than conducting their own investigations to find appropriate witnesses, litigants will find it simpler and cheaper to compel journalists to reveal their sources or to hand over information. Forced disclosure of unpublished sources and information will cause individuals to refuse to talk to reporters, resulting in a "chilling effect" on the free flow of information and the public's right to know.

We are particularly worried by amendments that severely limit the scope of who may avail themselves of the protections of the shield law. As it is written, language in both the conference committee draft bill and the Senate version of H.B. 622 severely weakens the state reporter privilege law by limiting its use to a narrowly defined class of traditional news reporters. Such an approach does not take into account the evolving nature of the media landscape and threatens to exclude individuals whose aim is to inform their community about matters of public importance. As they are written, the proposed statutory definitions for terms such as "newspaper," "magazine," and "wire service" may well turn into relics inadequate to the task of helping future judges apply Hawaii's reporter shield law.

The Senate bill's requirement that journalists are paid for their work and entities such as newspapers and magazines have paid circulations for at least one year simply ignores the proliferation of both citizen-journalists who report on issues of public concern for no compensation and the rise of new media which are not printed on paper and do not charge customers for their content. These definitional constraints also ignore clear First Amendment precedent.

Long before the advent of the Internet, the U.S. Supreme Court recognized that the definition of "press" does not depend on the medium of distribution of the speech in

question. In *Lovell v. City of Griffin*, the Court made clear that "[t]he liberty of the press is not confined to newspapers and periodicals. … The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 303 U.S. 444, 452 (1938).

State and federal courts have adopted workable definitions of news media in reporter's privilege cases, concluding that a testimonial privilege applies to individuals engaged in the practice of compiling information for public dissemination. The criteria adopted encompass not simply the traditional press but also nontraditional newsgatherers such as those who, without any affiliation with a recognized media entity, publish their material online. It is the journalist's function that should determine whether he or she could be fairly classified as a member of the media and therefore entitled to the protections of reporter shield laws such as the one under consideration in Hawaii.

The U.S. Court of Appeals for the Second Circuit was among the first to establish that a nontraditional journalist can invoke a reporter's privilege when, at the time of the newsgathering, he or she has the intent to investigate and disseminate news to the public.[1] In determining whether it should apply a reporter's privilege to the book author, the court stated that:

> [T]he individual claiming the privilege must demonstrate, through competent evidence, the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process. … Further, the protection from disclosure may be sought by one not traditionally associated with the institutionalized press.

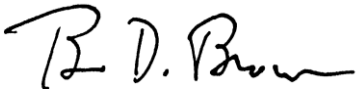
In the years since the Second Circuit passed this seminal decision, other courts have also relied on this functional analysis to determine who may properly avail themselves of a reporter's privilege and Hawaii's expiring reporter shield law embodies the Second Circuit's reasoning in allowing non-traditional journalists to avail themselves of the law's protections. We urge the members of Hawaii's Legislature not to eviscerate the important protections afforded by this valuable legislation by strictly defining both the class of journalists and the various media in which they work.

Examples abound of how nontraditional authors have made groundbreaking contributions to the public interest throughout this nation's history, from the reform of the meat industry in the early 20th century, to exposing the health hazards of tobacco, to shaping public opinion about the Vietnam War. *See* Leon Harris, *Upton Sinclair: American Rebel* 85-90 (1975); Carl Jensen, *Stories That Changed America: Muckrakers of the 20th Century* 78-81 (2000). In light of the recent evolutions in the media industry and its shift toward online publication that is increasingly being created by non-traditional journalists, H.B. 622 presents an opportunity for members of the Hawaii Legislature to take the lead in preserving a valuable piece of legislation that others look to as a model of robust protections for journalists since it was first enacted five years ago.

[1] *Von Bulow v. von Bulow*, 811 F.2d 136, 144-145 (2d Cir. 1987).

We thank you for your consideration of our concerns.

Very truly yours,



Bruce D. Brown

Enclosures

cc: Sen. Clayton Hee, Chair, Conference Committee
Sen. Maile Shimabukuro, Co-chair, Conference Committee
Sen. Mike Gabbard, member, Conference Committee
Sen. Les Ihara, Jr., member, Conference Committee
Sen. Sam Slom, member, Conference Committee
Rep. Karl Rhoads, Chair, Conference Committee
Rep. Della Au Belatti, member, Conference Committee
Rep. Chris Lee, member, Conference Committee
Rep. Cynthia Thielen, member, Conference Committee