**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**
**EASTERN DIVISION**

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| **AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS; ASSOCIATION OF AMERICAN PUBLISHERS; COMIC BOOK LEGAL DEFENSE FUND; HARVARD BOOK STORE, INC.; PHOTOGRAPHIC RESOURCE CENTER, INC.; PORTER SQUARE BOOKS, INC.; and MARTY KLEIN** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **Civil Action No. 1:10-CV-11165** |
| **MARTHA COAKLEY, in her official capacity as ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; JONATHAN W. BLODGETT; TIMOTHY J. CRUZ; ELIZABETH D. SCHEIBEL; WILLIAM R. KEATING; WILLIAM M. BENNETT; JOSEPH D. EARLY, JR.; MICHAEL O'KEEFE; DAVID F. CAPELESS; DANIEL F. CONLEY; C. SAMUEL SUTTER and GERARD T. LEONE, JR. in their official capacities as MASSACHUSETTS DISTRICT ATTORNEYS,** | ) | **Judge Rya W. Zobel** |
| **Defendants.** | ) | |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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Plaintiffs respectfully submit this memorandum in support of their motion for a preliminary injunction.

## INTRODUCTION

On February 5, 2010, the Massachusetts Supreme Judicial Court held that the Massachusetts law which imposes criminal penalties for disseminating matter "harmful to a minor" did not apply to electronically transmitted text, in that case "instant messages." *Commonwealth v. Zubiel,* 456 Mass. 27, 921 N.E.2d 78 (2010). In the next day's *Boston Globe*, a spokesman for Governor Deval Patrick was quoted as saying that the Governor "plans to file a bill next week to close . . . 'an obvious gap in the law.'" Jonathan Saltzman & John R. Ellement, *SJC Says Lewd IMs to Minors Not Illegal, Boston Globe*, Feb. 6, 2010, http://www.boston.com/news/local/massachusetts/articles/2010/02/06/sjc_says_lewd_ims_to_minors_not_illegal/. Subsequently, three bills were filed (H. 4489, H. 4528, H. 4529) and, without any hearing, language substantially similar to H. 4529 was ultimately added to another bill (S.997) dealing with assault and battery by means of a bodily substance upon correctional facility employees, which was passed as Chapter 74 of the Acts of 2010.

However, rather than limiting the amendment to electronic dissemination of "harmful to minors" material sent by a defendant directly to an individual known or believed by the defendant to be a minor—a prohibition which would be constitutional, the Massachusetts legislature passed an amendment broadly restricting the dissemination on the Internet of *any* material which is "harmful to minors." Sections 2 and 3 of Chapter 74 of the Acts of 2010 (amending MASS. GEN. LAWS ch. 272, § 31), *as applied through* MASS. GEN. LAWS ch. 272, § 28 (the "Amended Statute"). Thus, the Amended Statute violates the First, Fifth and Fourteenth Amendments because:

- The Amended Statute restricts adults from engaging in protected speech on the Internet.
- The Amended Statute is substantially overbroad.
- The Amended Statute criminalizes protected speech among and to older minors.
- The statutory requirement that the matter be "taken as a whole" is unconstitutionally vague in the context of Internet communications and speech.
- The Amended Statute requires that, for the determination of community standards, the relevant community be the county, rather than the nation.

In addition, the Amended Statute also violates the Commerce Clause because:

- The Amended Statute regulates speech that occurs wholly outside the borders of Massachusetts.
- The Amended Statute imposes an unjustifiable burden on the interstate commerce over the Internet.
- The Amended Statute subjects online speakers to inconsistent state laws.

Eighteen federal judges in five circuits have struck down state statutes forbidding Internet communications deemed harmful to minors like the one at issue here.[1] In doing so, they relied

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[1] *PSInet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), *reh. den.* 372 F.3d 671, *aff'g* 167 F. Supp. 2d 878 (W.D. Va. 2001); *Amer. Booksellers Found. for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003), *aff'g* 202 F. Supp. 2d 300 (D.Vt. 2002); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1998); *Southeast Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005); *ACLU v. Napolitano*, Civ. No. 00-0505 (D.Ariz. June 14, 2002) (permanent injunction), *sub nom. ACLU v. Goddard*, 2004 WL 3770439 (D. Ariz. Apr. 23, 2004) (statute as amended in 2003 permanently enjoined); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (summary judgment and permanent injunction), 55 F. Supp. 2d 737 (E.D. Mich. 1999) (preliminary injunction), *aff'd*, 238 F.3d 420 (6th Cir. 2000) (unpublished); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).[1] As to the First Amendment issues, all of these cases relied heavily on *Reno v. ACLU*, 521 U.S. 844 (1997) ("*Reno*"), in which a unanimous Supreme Court struck down a similar federal statute. The COPA statute, a federal statute similar to the Amended Statute, was held unconstitutional. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009). In addition, the Wisconsin Supreme Court found the Wisconsin statute unconstitutional for lacking an appropriate scienter requirement. *State v. Weidner*, 611 N.W. 2d. 684 (Wis. 2000).

on Commerce Clause or First Amendment grounds that apply with equal force to the Amended Statute.

Plaintiffs brought this litigation because the Amended Statute's sweeping restrictions and burdens on the communication of constitutionally protected health, literature, arts, and other information over the Internet would severely damage the commercial and democratic potential of this revolutionary, interactive global medium. Plaintiffs understand first-hand how, because of the practical inability to choose or restrict information by geography and age of viewers, the Amended Statute would chill and disrupt the free flow of information that is so essential to Internet growth and commerce. Plaintiffs also understand that the Amended Statute would be ineffective and are aware of a range of far more effective and flexible tools that enable parents and other responsible adults, at low or no cost, to control Internet access by minors consistent with their own needs and values. *See infra.*

Plaintiffs do not challenge the Massachusetts laws criminalizing child pornography, sexual solicitation or luring of minors, or obscenity over the Internet. However, a striking judicial consensus holds that state statutes such as the Amended Statute, which impose a content-based criminal ban on fully protected adult speech in a medium that is inherently interstate in nature while providing no practical protection to children, cannot constitutionally stand. The Commerce Clause and First, Fifth and Fourteenth Amendment violations are described in detail below.

## STATEMENT OF FACTS

### I. PLAINTIFFS AND THEIR SPEECH

Plaintiffs represent a spectrum of individuals and organizations—including booksellers, an online photographic not-for-profit organization, a licensed marriage and family therapist, and organizations representing booksellers, publishers and other media interests—that use the

Internet to communicate, disseminate, display and access a broad range of speech.[2] Although plaintiffs do not speak with a single voice or on a single issue, they all engage in speech that at times involves sexually explicit matters. Thus, they justifiably fear that their online speech may be considered by some to be "harmful to minors" under the Amended Statute, even though it is constitutionally protected for adults. Plaintiffs include speakers and content providers who communicate online both within and outside of the Commonwealth of Massachusetts. Like all speech on the Internet, all of the plaintiffs' Internet speech is accessible within and outside of the Commonwealth of Massachusetts.

Extensive information about the plaintiffs is contained in the Complaint and the declarations accompanying this motion. Additional information can be obtained from the Internet websites of the plaintiffs. Attached as Attachment A hereto is a list of the plaintiffs' Web addresses.

## II. THE AMENDED STATUTE

On July 12, 2010, Massachusetts amended its criminal "harmful to minors" statute, Chapter 272, Section 28, by expanding the definitions applicable to that law, which are contained in Chapter 272, Section 31. (Sections 28 and 31 are annexed as Attachment B.) The amendments extended the scope of the existing law so that Section 28's prohibitions applied to all electronic communications, including those over the Internet.

## III. THE INTERNET

The basic structure and operation of the Internet has been examined and described by a number of courts, including the Supreme Court in *Reno*,[3] the Eastern District of Pennsylvania in

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[2] "Plaintiffs" refers collectively to plaintiffs, their members, subscribers, readers and users.

[3] The United States Supreme Court's decision in *Reno* is based on extensive factual findings of the United States District Court for the Eastern District of Pennsylvania, which the Supreme Court incorporated by reference into its ruling. *See Reno*, 521 U.S. at 849.

*Gonzales,* the Third Circuit in *Mukasey* and the Southern District of New York in *Pataki.* Plaintiffs have submitted an extensive expert declaration of Scott Bradner in support of their motion (cited herein as "Bradner").

A number of facts about the Internet are particularly relevant to the issues in this case:

(1) For the vast majority of Internet communications and information, including those potentially subject to prosecution under the Amended Statute, it is not technically, economically and/or practically feasible for organizational or individual speakers to ascertain the age of persons accessing materials over the Internet, or to restrict or prevent access by minors to them. *See* Bradner at para. 18.

(2) For the vast majority of Internet communications and information, including those potentially subject to prosecution under the Amended Statute, it is not economically and/or practically feasible for organizational or individual speakers to ascertain the geographic location of persons accessing materials over the Internet, nor is it technically, economically and/or practically feasible to restrict or prevent these communications and materials from traveling through or being received in Massachusetts. *See* Bradner at para. 19.

(3) Most communications and information on the Internet are available for free, even when displayed or disseminated by a commercial organization. Requiring users to register and provide personal data in order to receive such information will deter them from exploring or receiving such information to the detriment of commercial interests, users, and the development of new business models made possible by the Internet. *See* Bradner at para. 20.

(4) The majority of communications and materials on the Internet that could be subject to the prohibitions of the Amended Statute are published outside the United States, and such material will continue to be as available to minors searching for it as information displayed or posted in Massachusetts itself. *See* Bradner at para. 21.

(5) Widely available, user-based methods and tools, which can block out unwanted material or services regardless of geography or commercial purpose, provide a far more effective and less restrictive alternative for parents and families to control access by minors to information that is deemed unsuitable based on individual family values and circumstances. *See* Bradner at para. 21.

(6) While computers connected to networks do have "addresses," they are digital addresses on the network rather than geographic addresses in real space. *See* Bradner at para. 37. The geographic indicators that do exist do

not necessarily indicate the geographic location of the user, because users can gain access to their particular e-mail accounts and other information from anywhere without any sort of indication that the user may be accessing the Internet from a place other than their home access point. *See* Bradner at para. 37-38.

(7) No aspect of the Internet can feasibly be closed off to users from another state. *See* Bradner at para. 19, 46. An Internet user who posts a Web page or participates in a chat room or discussion group cannot prevent residents of Massachusetts or New Mexicans or New Yorkers from accessing that page and, indeed, will not even know the state of residency of any visitors to that site, unless the information is voluntarily (and accurately) given by the visitor.

## ARGUMENT

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## PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION TO PREVENT DEFENDANTS FROM ENFORCING THE AMENDED STATUTE AGAINST INTERNET USERS.

### I. PLAINTIFFS MEET THE STANDARDS FOR A PRELIMINARY INJUNCTION.

Plaintiffs satisfy the requirements for preliminary relief. In order for the Court to grant a preliminary injunction, the plaintiffs must demonstrate (a) the likelihood of success on the merits; (b) the potential for irreparable harm if the injunction is denied; (c) whether the harm to the defendant from granting preliminary relief exceeds the harm to the plaintiff from denying it; and (d) the effect of the court's ruling on the public interest. *Rio Grande Cmty. Health Cntr., Inc. v. Rullan,* 397 F.3d 56, 75 (1st Cir. 2005). "The *sine qua non* of that formulation is whether the plaintiffs are likely to succeed on the merits." *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993).

#### A. Plaintiffs Will Suffer Irreparable Harm In the Absence of an Injunction.

As the Supreme Court has stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Reno*, 929 F. Supp. at 851 ("[s]ubjecting speakers to criminal

penalties for speech that is constitutionally protected in itself raises the specter of irreparable harm"). Likewise, deprivation of plaintiffs' constitutional rights under the Commerce Clause constitutes irreparable injury. *See Pataki*, 969 F. Supp. at 168; *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1966) ("A presumption of irreparable harm flows from and is triggered by an alleged deprivation of constitutional rights."). Therefore, in order to show irreparable injury, plaintiffs need only demonstrate that the Act threatens their rights under the First Amendment and the Commerce Clause, which threat will be discussed fully below. *See Reno*, 929 F. Supp. at 851 (discussing irreparable harm under the First Amendment); *Pataki*, 969 F. Supp. at 168 (discussing irreparable injury under the Commerce Clause).

**B. Plaintiffs Have a Likelihood of Success on the Merits.**

Plaintiffs have a likelihood of success on the merits because the Act, like the state statutes in New York, New Mexico, Michigan, Virginia, Arizona, South Carolina and Vermont, is plainly unconstitutional under the First Amendment and the Commerce Clause. We will fully discuss the Amended Statute's constitutional inadequacies in the sections that follow; but, for the purposes of the preliminary injunction, plaintiffs note that they are likely to succeed on the merits for the following reasons.

***First,*** the Amended Statute is unconstitutional because it bans a large amount of speech that adults have a constitutional right to receive and address to one another, because there is no way for the vast majority of online speakers to distinguish between adults and minors in their audience. As a result, online users must either censor all their speech to a level fit for minors or risk criminal prosecution under the Amended Statute. This chills protected speech, which is antithetical to the First Amendment.

***Second,*** the Amended Statute fails the strict scrutiny analysis, which is required for content-based regulations, because it is not narrowly tailored to achieve Massachusetts's interest

in protecting minors for material that may be "harmful." In particular, less restrictive alternatives include, *inter alia*, user-based content-filtering software, which enables individuals to regulate and monitor what their children read and see on the Internet.

***Third,*** the Amended Statute is substantially overbroad because it criminalizes a wide range of speech that is constitutionally protected for older minors when compared to what is "harmful" for younger minors.

***Finally,*** the Amended Statute violates the Commerce Clause of the United States Constitution because it regulates communications occurring wholly outside the Commonwealth of Massachusetts, imposes an impermissible burden on interstate commerce, and subjects plaintiffs to inconsistent state regulations.

### C. The Harm to Plaintiffs in Denying the Relief Vastly Exceeds any Harm to Defendants From Granting It.

The only legitimate harm that defendants could allege is an inability to prosecute persons like the defendant text-messaging author in *Commonwealth v. Zubiel*, *supra*. That could have been alleviated by prompt passage of a statute which actually and only fills the gap found to exist in that case. On the other hand, plaintiffs, mainstream businesspersons, are faced with unconstitutional restrictions on their communicative activities with the potential of a criminal charge hanging over them.

### D. The Effect of a Preliminary Injunction on the Public Interest.

There can be no greater beneficial act in the public interest than to uphold the constitutional rights of the public. As shown below, the Amended Statute violates no less than three fundamental provisions of the U.S. Constitution -- the Commerce Clause, the First Amendment and the due process clause of the Fifth Amendment as applied through the Fourteenth Amendment.

### E. Remedies At Law Are Inadequate.

A remedy at law would also be inadequate. Where State conduct threatens First Amendment rights, "[n]o remedy at law would be adequate to provide such protection." *Allee v. Medrano*, 416 U.S. 802, 815 (1974). Therefore, plaintiffs need only show that the Amended Statute threatens their rights under the First Amendment and the Commerce Clause in order to demonstrate the remedies at law are inadequate.

## II. THE AMENDED STATUTE VIOLATES THE FIRST AMENDMENT.

In accord with the Supreme Court ruling striking down the Communications Decency Act, and as every federal court reviewing similar Internet "harmful to minors" laws has held, the Amended Statute violates the First Amendment.[4] Like these other enjoined federal and state statutes, the Amended Statute bans an entire category of materials that by definition is entirely lawful as to adults, but may be prohibited as to certain minors. The Amended Statute would criminalize the mere display and communication of such speech by a large number of speakers using any method of Internet communication. (Section 28, defined in section 31, applies to the "exhibit or display" of harmful to minors material.) Due to the unique nature of the online medium and the practical inability of speakers on the Internet to choose or restrict viewers of their speech, the Amended Statute would effectively limit much constitutionally protected

[4] The Court in *Am. Libraries Ass'n. v. Pataki*, *supra*, after holding the New York statute unconstitutional under the Commerce Clause, declined to decide the First Amendment issue in light of the pending decision by the U.S. Supreme Court in *Reno*, *supra*.

content available through the Internet to a level deemed suitable for younger minors.[5] As explained further below, such a broad and restrictive content-based regulation of speech is not narrowly tailored to advance the Commonwealth's asserted interest. In addition, less restrictive user-based methods exist for parents to control minor access to sexually explicit Internet content. Accordingly, the Amended Statute violates the First Amendment and, as applied to the Internet, must be enjoined as unconstitutional.

### A. The Supreme Court Has Ruled That Internet Regulations Such As The Amended Statute Are Per Se Unconstitutional Because They Flatly Ban Constitutionally-Protected Speech For Adults.

The Amended Statute violates the First Amendment for precisely the same reasons that two federal statutes and seven state statutes have been found unconstitutional by the United States Supreme Court, four courts of appeals, and nine federal district courts.[6] The Supreme Court has made it clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno,* 521 U.S. at 874 (quoting *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)). At the same time, Internet speakers cannot distinguish between minors and adults in their audience. Bradner at para. 18. Moreover, in most cases, the Internet also does not permit users to control who accesses the information they make available online or where those persons are. *Reno*, 217 F. 3d at 175; Bradner at para. 19. Since one "knows" that there are many minors using Internet browsers, Internet users are, therefore, functionally prohibited from

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[5] The National Research Council, the working arm of the National Academy of Sciences and the National Academy of Engineering, has issued a comprehensive study, which was commissioned by Congress, on protecting children on the Internet. Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, *Youth, Pornography, and the Internet* 11-13 (Dick Thornburgh & Herbert S. Lin, eds., 2002) ("NCR Report") (summarizing alternatives); *Id.* at § 14.4.3 ("in an online environment in which it is very difficult to differentiate between adults and minors, it is not clear whether denying access based on age can be achieved in a way that does not unduly constrain the viewing rights of adults").

[6] See citations, *supra*, pp. 2-3.

preventing sexually frank material from passing to minors unless it is restricted as to all, thus functionally rendering the Amended Statute a flat ban on such communications.

Even under the guise of protecting children, the government may not justify the complete suppression of constitutionally protected speech because to do so would "burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *see also Denver Area Educ. Telecomms. Consortium v. FCC,* 518 U.S. 727, 759 (1996) (the government may not "reduc[e] the adult population … to … only what is fit for children") (internal quotations omitted); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252 (2002) ("The Government cannot ban speech fit for adults simply because it may fall into the hands of children"); *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 814 (2000) ("even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if protection can be accomplished by a less restrictive alternative."). In striking down the CDA's prohibitions on transmissions to minors by means of the Internet, the Supreme Court noted that while "we have repeatedly recognized the governmental interest in protecting children from harmful materials … that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875. Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Supreme Court has *never* upheld a criminal ban on non-obscene sexually explicit communications between adults. *Id.*[7]

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[7] *See also Bolger v. Young Drug. Products Corp.,* 463 U.S. 60, 74 (1983) (striking down a ban on mail advertisements for contraceptives); *cf. Ginsberg v. New York*, 390 U.S. 629, 634-35 (1968) (upholding restriction on the direct commercial sale to minors of material deemed "harmful to minors" because it "does not bar the appellant from stocking the magazines and selling them" only to adults); *Am. Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990), (noting that *Ginsberg* did not address the "difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them"). *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001) (holding Massachusetts may not totally bar truthful speech contained in cigarette advertisements in an attempt to achieve substantial and compelling interest of protecting minors).

But, adult Internet speakers cannot engage in "sexually frank" communications and also comply with the Amended Statute. Rather, Internet users in general, and plaintiffs in particular, can only comply with the Amended Statute if they speak in language suitable for children. Thus, like the CDA found unconstitutional by the United States Supreme Court in *Reno*, the Amended Statute improperly and unconstitutionally operates as a criminal ban on constitutionally protected speech among adults on the Internet. *Reno*, 521 U.S. at 874.

The Amended Statute's weak "scienter" requirement does not obviate this constitutional deficiency. Massachusetts law only requires that the transmitter have "a general awareness of the character of the matter" as to the age of a minor. But even if the test were "actual knowledge," that would not support the constitutionality of the Amended Statute. The Supreme Court of the United States addressed the constitutionality of similar provisions of the Communications Decency Act and found them wanting. *Reno, supra.*

There is no basis for distinguishing the Amended Statute from the other statutes already addressed by other courts, particularly the CDA addressed by the United States Supreme Court. The various statutes are comparable in all relevant respects. Thus, the Amended Statute imposes a flat ban on constitutionally protected speech over the Internet, and is, therefore, unconstitutional.

### B. The Amended Statute Unconstitutionally Restricts Older Minors' First Amendment Rights.

The Amended Statute is unconstitutionally overbroad because it proscribes speech on the Internet that may be "harmful" to younger minors but that unquestionably is constitutionally protected for older minors. The Supreme Court has ruled in many contexts that the First Amendment protects minors as well as adults, and that minors have the constitutional right to speak and to receive the information and ideas necessary for their intellectual development and their participation as citizens in a democracy, including information about reproduction and

sexuality. *See Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975) (minors are entitled to a "significant measure" of constitutional protection); *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 511 (1969) (school district could not suspend student for engaging in constitutionally protected expressive conduct); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 693 (1977) (state can not ban distribution of contraceptives to minors) (plurality opinion); *Board of Educ. v. Pico*, 457 U.S. 853, 865, 870-71 (1982) (First Amendment rights apply to students in the school setting and therefore local school boards could not remove books from school library shelves simply because they disliked the ideas contained in those books).

The Amended Statute impermissibly burdens the right of older minors to obtain ideas and information about sexuality, reproduction, and the human body—subjects that are of special interest to maturing adolescents. As a practical matter, given the blanket access to the Internet, the Amended Statute can make no distinction between "nudity" and "sexual conduct" that may be inappropriate for younger minors and "nudity" and "sexual conduct," such as explicit safer sex information, that may be valuable when communicated to teenagers. Recognizing this problem, courts in other states have upheld statutes regulating the dissemination of material deemed "harmful to minors" only after construing them to prohibit only that material that would lack serious value for older minors. *See Am. Booksellers Ass'n v. Webb*, 919 F.2d at 1505 (concluding that "if any reasonable minor, including a seventeen-year-old, would find serious value, the material was not 'harmful to minors'" for purposes of the statute); *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989) (concluding that "if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles" (quoting *Commonwealth v. Am. Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988))).

### C. Strict Scrutiny Applies: To Be Sustained, The Amended Statute Must Materially Advance The Government's Interest And Be Narrowly Tailored With No Less Restrictive Alternatives Available.

Material which is "harmful to minors" is constitutionally protected as to adults. Thus, the Amended Statute is presumptively invalid and subject to strict scrutiny under well-established First Amendment precedent. *Playboy Entm't Group, Inc.*, 529 U.S. at 817; *Reno v. ACLU*, 521 U.S. at 868, 870 (holding content-based restrictions on speech are reviewed under a strict scrutiny analysis and there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]). Under strict scrutiny, it is not enough for Massachusetts merely to identify a compelling government interest; it must show that the Act will actually and materially "achieve its goal" and that no less restrictive alternatives exist to achieve that interest. *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (the government "must demonstrate" that "the regulation will in fact alleviate these harms in a direct and material way"), *claim dismissed*, 910 F. Supp. 734 (D.D.C. 1995); *Sable*, 492 U.S. at 126-29 (the government must prove that less restrictive alternatives have been tested and failed).

1. The Amended Statute Is Not Narrowly Tailored To Achieve A Compelling State Interest.

As a content-based regulation of protected speech, the Amended Statute is presumptively invalid. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Turner Broad. Sys., Inc.*, 512 U.S. at 641 (The First Amendment "does not countenance governmental control over the content of messages expressed by private individuals"). Such a regulation can be upheld only if it is justified by a compelling governmental interest and is "narrowly tailored" to effectuate that interest. *See Reno*, 521 U.S. at 879. The Amended Statute is not narrowly tailored.

The apparent initial state interest in this case was to fill the gap resulting from the decision in *Commonwealth. v. Zubiel*, *supra*, so that a person-to-person communication to a person known to be a minor via the Internet of "harmful to minors" material would be unlawful.

This was a legitimate state interest. However, the legislature, apparently desiring to protect minors from all "harmful to minors" material on the Internet, prohibited *any* transmission on the Internet of "harmful to minors" material, which certainly is not narrowly tailored to meet the Commonwealth's legitimate interest.

As a practical matter, the Amended Statute forces speakers to fear that they might have to defend themselves against prosecution whenever sexually frank content is posted to the Internet. This results because all Internet communications are available to minors, because there is an absence of a viable age verification process, and because the statute is not limited to one-on-one communications directly to a person known to be a minor.

2. The Amended Statute Fails Strict Scrutiny Because It Is An Ineffective Method For Achieving The Government's Interest.

The Amended Statute also fails the strict scrutiny analysis because it is a strikingly ineffective method for addressing the government's asserted interest. Under strict scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 564 (1980). The government bears the burden of showing that its scheme will in fact alleviate the alleged "harms in a direct and material way." *Turner Broadcast Systems*, 512 U.S. at 664. In this case, the defendants have not and cannot meet this burden.

As Justice Scalia wrote in *Florida Star v. B.J.F.,* "a law cannot be regarded as … justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring). Due to the nature of the online medium, even a total content-based ban in the United States would fail to eliminate "harmful to minors" material available online. The Internet is a global medium, and material posted on a computer overseas is just as available as information posted next door. "[A] large percentage, perhaps 40% or more, of content on the

Internet originates abroad." *Reno,* 929 F. Supp. at 848.[8] Thus, the Amended Statute will not prevent minors from receiving the large percentage of "harmful" material that originates abroad. This reality prompted Judge Dalzell of the Federal District Court for the Eastern District of Pennsylvania to conclude in the lower court ruling in *Reno*:

> [T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

*Reno,* 929 F. Supp. at 882-83 (Dalzell, J.). Thus, the Amended Statute is unconstitutional because it fails to alleviate the alleged "harms in a direct and material way." *Turner Broadcast Systems,* 512 U.S. at 664.

3. Less Restrictive, More Effective Alternatives Are Available.

The Amended Statute also fails strict scrutiny because it is not the least restrictive means of achieving the government's asserted interest. *See Sable*, 492 U.S. at 126 (in order to survive strict scrutiny, means chosen to regulate speech must be carefully tailored to achieve legislative purpose). A less restrictive and more effective solution lies in widely-available user-based (*i.e.*, parental) controls on computers. *See Reno*, 521 U.S. at 877 (noting user-based software can provide a "reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children . . .") (emphasis in original); *Denver Area*, 518 U.S. at 759 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material). *See also Reno,* 521 U.S. at 877; NRC Report, Executive Summary at 10 ("filters can be highly effective in reducing the exposure of

[8] A more recent finding is approximately 50%. *Gonzales*, 478 F. Supp. 2d at 789. *See also* Bradner at para. 20.

minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable"); *see generally id.* at Section 2. Recently finding unconstitutional a federal statute similar to the Amended Statute, the Third Circuit stated that "given the vast quantity of [foreign-originated] speech that COPA [the federal statute at issue] does not cover but that filters do cover, it is apparent that filters are more effective" than a criminal prohibition like that imposed by Massachusetts. *Mukasey*, 534 F.3d at 203.

"The most reliable method of protecting minors and others from unwanted Internet content is through the use of filtering software installed on the user's own computer." Bradner at para. 67. Most Internet Service Providers ("ISPs") and commercial online services provide without additional cost features that subscribers may use to prevent children from accessing chat rooms and to block access to websites and news groups based on keywords, subject matter, or other designations. "Parents can, and do, install such software on their children's computers and configure it to block access to content that the parent considers unsuitable for the child." *Id.* "This type of filtering software is widely available and works without regard to the geographic location of the content and without regard to the commercial or non-commercial nature of the source of the content." *Id.*. These services also offer screening software that blocks messages containing certain words and tracking and monitoring software to determine which resources a particular online user, such as a child, has accessed. They also offer the possibility of children-only discussion groups that are closely monitored by adults. *See generally Gonzales*, 478 F. Supp. 2d at 789-792.

Online users also can purchase special software applications, known as user-based filtering software, that enable them to control access to online resources. These applications allow users to block access to certain websites and resources, to prevent children from giving personal information to strangers by email or in chat rooms and to keep a log of all online

activity that occurs on the home computer. AOL maintains a parental control feature that allows parents to establish a separate account for their children and choose predefined limits for e-mail, chat room capabilities, and Web access that are based on the age range of the child. *See Engler*, 55 F. Supp. 2d at 744; *Reno,* 929 F. Supp. at 842.

In addition, user-based, content filtering programs such as CyberPatrol, SurfWatch, and NetNanny maintain lists of web sites known to contain sexually explicit material. When installed, this software blocks access to web sites containing sexually explicit material, and blocks Internet searches, utilizing particular key words such as "sex" or character patterns such as "xxx." *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611, 625; *Reno*, 929 F. Supp. at 839-42. Concerned parents can also choose to obtain Internet access through ISPs which allow their users to access only a limited number of child-appropriate sites. *See* Committee to Study Tools and Strategies for Protecting Kids from Pornography, *supra*, at 271-72.

The NRC Report highlights a number of other specific steps that the government can take to address the availability of sexually explicit material to minors online, including to:

> promote media literacy and Internet safety education (including development of model curricula, support of professional development for teachers on Internet safety and media literacy, and encouraging outreach to educate parents, teachers, librarians, and other adults about Internet safety education issues); support development of and access to high-quality Internet material that is educational and attractive to children in an age-appropriate manner; and support self-regulatory efforts by private parties.

NRC Report at 8. The NRC Report also noted that "neither technology nor policy can provide a complete - or even a nearly complete - solution.... [S]ocial and educational strategies to develop in minors an ethic of responsible choice and the skills to effectuate these choices and to cope with exposure are foundational to protecting children from negative effects that may result from exposure to inappropriate material or experiences on the Internet." *Id.*, Executive Summary, at

12; *see also id.* at Chapter 10. All of these approaches are notably less restrictive than the Massachusetts criminal ban.

On the basis of the foregoing, it is clear that the Amended Statute violates strict scrutiny and is unconstitutional.

4. The Use Of Massachusetts Community Standards To Define What Is "Harmful To Minors" On The Internet Is Unconstitutional.

Chapter 272, Section 31 provides that the contemporary community standards of the county where the offense allegedly occurs are the relevant standards for determining whether material is harmful to minors for the purposes of Section 28. While this is an appropriate standard with respect to sales or transfers taking place wholly within the Commonwealth, it is inappropriate and unconstitutional when applied to the Internet. In *U.S. v. Kilbride*, 584 F. 3d 1240 (9th Cir. 2009), the 9th Circuit Court of Appeals carefully analyzed the "fractured decision" in *Ashcroft v. ACLU*, 535 U.S. 564 (2002):

> Five Justices concurring in the judgment, as well as the dissenting Justice, viewed the application of local community standards in defining obscenity on the Internet as generating serious constitutional concerns. At the same time, five justices concurring in the judgment viewed the application of a national community standard as not or likely not posing the same concerns by itself. Accordingly, following *Marks [v. U.S.*, 430 U.S. 188, 193 (1997)], we must view the distinction Justices O'Connor and Breyer made between the constitutional concerns generated by application of a national and local community standards as controlling.
>
> [We] join Justices O'Connor and Breyer in holding that a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email.

584 F. 3d at 1254. *Contra, U.S. v. Little*, 365 Fed. Appx. 159 (11th Cir. 2010) (not for publication). A county in Massachusetts certainly does not meet this standard. And the *Kilbride* position is logically correct. When a communication is sent to a listserv or chat room, or from a website, the sender cannot know for certain in what jurisdictions minors may receive the communication. (The same is true even in the context of a one-to-one communication.) For

example, a receiving minor, who resides in New York, may have taken his laptop and received the email while visiting his or her family in Utah or Massachusetts.

## III. THE AMENDED STATUTE VIOLATES THE COMMERCE CLAUSE.

The Amended Statute violates the Commerce Clause in three ways. First, it regulates commercial activity occurring entirely in other states. Second, it directly regulates inherently interstate activity, threatening it with inconsistent standards. Third, it imposes an undue burden on interstate commerce that is not justified by unique local benefits.

### A. The Amended Statute Impermissibly Attempts To Regulate Commercial Activity Entirely In Other States.

Our federal system necessarily forbids one state from directly regulating commercial activity occurring entirely outside its borders or regulating in-state conduct with the "practical effect of exporting that state's domestic policies" to every other state.

> [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

*Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). There is no doubt that the Amended Statute falls squarely within this proscription.

The Amended Statute applies both in-state and out-of-state to speakers on the Internet. A speaker on the Internet knows as a certainty that his or her speech is capable of being received in Massachusetts. Indeed, all Internet communications are available in the Commonwealth of Massachusetts or anywhere else with Internet access, regardless of where they originated, even if they are not directed to Massachusetts. Thus, the Amended Statute directly burdens commerce in every other state by improperly requiring speakers in those states, both on the Web and otherwise over the Internet, to consider Massachusetts's standards and requirements to avoid

potential prosecution in Massachusetts, even if the particular message is not intended to be directed to any one in Massachusetts.

### B. The Amended Statute Directly Burdens A Means Of Commerce That Inherently Requires Nationally Uniform Regulation.

The Amended Statute also independently runs afoul of the Commerce Clause because it violates the "long-established rule barring the states from regulating those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Pataki*, 969 F. Supp. at 181-82 (collecting authority) (internal quotation marks omitted).

Just as trucks and trains carry tangible items interstate, the Internet transmits speech and expression interstate, as well as commercial goods. The considerations that have foreclosed most state regulation of other modes of interstate transportation apply with even more force to the Internet:

> The Internet, like rail and highway traffic at issue in the cited cases, requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations. Regulation on a local level, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different [communities]. . . New York is not the only state to enact a law purporting to regulate the content of communications on the Internet. Already [as of 1997] Oklahoma and Georgia have enacted laws designed to protect minors from indecent communications over the Internet; as might be expected, the states have selected different methods to accomplish their aims. Georgia has made it a crime to communicate anonymously over the Internet, while Oklahoma, like New York, has prohibited the online transmission of material deemed harmful to minors.

*Id.* at 182.

Importantly, this doctrine does not depend upon Congressional preemption. To the contrary, *Wabash, St. Louis & Pacific Railroad v. Illinois*, 118 U.S. 557 (1886), which struck down state regulation of core railroad operations, was followed the next year by creation of the Interstate Commerce Commission. *Interstate Commerce Act of 1887*, 24 Stat. 379 (1887).

Federal legislation thus came in response to the declared constitutional and practical disabilities of the states.

This basis of invalidity does not depend upon a showing that, at this moment, commerce is in fact being subjected to inconsistent requirements or otherwise is being unduly burdened. The validity of Massachusetts's regulation of the Internet does not and cannot depend on what Maine decides to do; nor do Massachusetts statutes flicker in and out of validity as other states adopt and amend their laws. Instead, although the Supreme Court has noted actual inconsistencies in state regulation when they exist, the critical element is the potential for burdensome inconsistencies if states attempt to regulate in the field. *Wabash*, 118 U.S. at 572. ("If each state was at liberty to regulate the conduct of carriers ... the confusion likely to follow could not be productive of great inconvenience and [] hardship. Each state could provide for its own passengers and regulate ... regardless of the interest of others."). As the Court explained in *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945): "If one state may regulate train length, so may all the others, and they need not prescribe the same [] limitation." Thus, the Court struck the statute down even though only one other state had actually imposed different limits. *Id.* at 774 n.3. Significantly, the Court recognized that trains could comply with the length limits of all states, however varied they might be, by simply conforming to the shortest limit imposed by any state. *Id.* at 773. Thus, the states did not impose unavoidably conflicting demands. Nevertheless, because of the inherently interstate nature of railroad operations, allowing any state regulation would impermissibly permit the state with the lowest limit "to control train operations beyond the boundaries of the state." *Id.* at 775; *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 88-89 (1987) (restating vitality of "needed uniformity" constraint on states).

The Internet is precisely the type of interstate commerce that requires regulation at the national level. If Massachusetts can regulate Internet content, the other 49 states can also do so,

with predictably unfortunate results. This is yet another reason why the Amended Statute cannot stand.

### C. The Balance Of Benefits And Burdens Strongly Disfavors The Amended Statute.

As the *Pataki* court noted in analyzing the New York statute, " [e]ven if the Act were not a per se violation of the Commerce Clause by virtue of its extraterritorial effects, the Act would nonetheless be an invalid indirect regulation on commerce, because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers." *Pataki* 969 F. Supp. at 177; *see also Johnson*, 194 F.3d at 1162 (same conclusion with respect to New Mexico statute); *PSINet*, 108 F. Supp. at 626-27 (same conclusion with respect to Virginia statute); *Engler*, 55 F. Supp. 2d at 751-52 (same conclusion with respect to Michigan statute). This is consistent with a long line of Supreme Court jurisprudence. *See e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1907) (fruit-packing statute invalid because the burden it imposed on interstate commerce was "clearly excessive in relation to the putative local benefits"); *Edgar v. Mite Corp.*, 457 U.S. 624, 643-44 (1982) (state interests in protecting shareholders and regulating state corporations were insufficient to outweigh burdens imposed by allowing state official to block tender offers).

The Amended Statute similarly fails under a burden analysis.

***First,*** as set forth above, the Amended Statute regulates a wide range of entirely out-of-state communications which Massachusetts has *no* legitimate interest in regulating.

***Second,*** also as noted above, the Amended Statute will be wholly ineffective in achieving Massachusetts's goal of protecting minors because nearly half of all Internet communications originate overseas, and will not be affected by a state Internet censorship statute. *Gonzales*, 478 F. Supp. 2d at 789; *Pataki*, 969 F. Supp at 177-79.

***Finally,*** the Amended Statute, like the other state statutes found unconstitutional, "casts its net worldwide and produces "[a] chilling effect that …is bound to exceed the actual cases that are likely to be prosecuted, as Internet users will steer clear of the Act by significant margin." *Pataki*, 969 F. Supp. at 179.

Balanced against the limited local benefits, the Amended Statute is "an extreme burden on interstate commerce" which cannot be justified. *Pataki*, 969 F. Supp. at 179.

For the reasons detailed above, the Amended Statute violates the dormant Commerce Clause. It must be declared unconstitutional and its enforcement as to Internet communications enjoined.

## IV. THE AMENDED STATUTE IS UNCONSTITUTIONALLY VAGUE.

The Amended Statute is unconstitutionally vague and thus violates the plaintiffs' due process rights as guaranteed by the Fifth and Fourteenth Amendments. *See United States v. Williams*, 553 U.S. 285, 304 (2008). First, the term "minors" in the phrase "harmful to minors" is vague because material that may be considered appropriate for a seventeen year old may not be considered appropriate for a thirteen year old. As the Third Circuit recognized in *Mukasey*, "Web publishers cannot tell which of these minors should be considered in deciding the content of their Web sites." *Mukasey*, 534 F.3d at 205 (holding the federal COPA statute was unconstitutionally vague).

Second, the Amended Statute requires that three components "taken as a whole" (appeal to the prurient interest of minors, patent offensiveness, and serious value) be applied to matter to determine whether it is "harmful to minors." This language mirrors the test established by the Supreme Court for determining what is "harmful to minors" in *Miller v. California*, 413 U.S. 15 (1973) and *Ginsberg v. New York*, 370 U.S. 629 (1968). When dealing with actual materials, the phrase "taken as a whole" is not vague. One looks at the book as a whole, the movie or video as

a whole, the periodical as a whole, etc. In the Internet context, what constitutes a "whole" is not clear. Is it the screen view, the web page or the web site? Does one include hyperlinked materials?

> Instead of having a two-hundred page book or an issue of a magazine to look to for context, . . . [the Amended Statute] invokes some undefined portion of the vast expanse of the Web to provide context for material allegedly violating the statute.

*Gonzales*, 478 F. Supp. 2d at 818-19 (E.D. Pa. 2007).

It is this sort of vagueness in a law directed at First Amendment protected freedoms that the Supreme Court in *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) said cannot be tolerated.

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
>
> * * *
>
> These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their existence almost as potently as the actual application of sanctions. . . . .
>
> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. (Emphasis added.)

*See also Baggett v. Bullitt*, 377 U.S. 360, 373 (1964); *See also Ozonloff v. Berzak*, 744 F.2d 224, 231 (1st Cir. 1984) ("government standards tending to inhibit speech must be clear and precise").

For these same reasons, the federal COPA statute was found unconstitutionally vague:

> [A] Web publisher will be forced to guess at the bottom end of the range of ages to which the statute applies, and thus will not have "fair notice of what conduct would subject them to criminal sanctions under COPA" and "will be deterred from engaging in a wide range of constitutionally protected speech."
>
> * * *

> COPA's use of the phrase "as a whole" is vague because it is unclear how that phrase would apply to the Web.

*Mukasey*, 534 F.3d at 205.

The Amended Statute is likewise unconstitutionally vague.

## CONCLUSION

For the above reasons, plaintiffs respectfully request that the Court enjoin enforcement of the Amended Statute as applied to the Internet.

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Respectfully submitted,

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## ATTACHMENT A

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|---|---|
| American Booksellers Foundation for Free Expression | www.abffe.com |
| American Civil Liberties Union of Massachusetts | www.aclum.org |
| Association of American Publishers | www.publishers.org |
| Comic Book Legal Defense Fund | www.cbldf.org |
| Harvard Book Store, Inc. | www.harvard.com |
| Photographic Resource Center, Inc. | www.prcboston.org |
| Porter Square Books, Inc. | www.portersquarebooks.com |
| Marty Klein | www.sexed.org |

# ATTACHMENT B

Section 28 provides:

> Whoever disseminates to a minor any matter harmful to minors, as defined in section thirty-one, knowing it to be harmful to minors, or has in his possession any such matter with the intent to disseminate the same to minors, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars for the first offense, not less than five thousand nor more than twenty thousand dollars for the second offense, or not less than ten thousand nor more than thirty thousand dollars for the third and subsequent offenses, or by both such fine and imprisonment. A prosecution commenced under this section shall not be continued without a finding nor placed on file. It shall be a defense in any prosecution under this section that the defendant was in a parental or guardianship relationship with the minor. It shall also be a defense in any prosecution under this section if the evidence proves that the defendant was a bona fide school, museum or library, or was acting in the course of his employment as an employee of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization.

As amended, section 31 of the Chapter provides the following definitions relevant to section 28 (deletions shown by ~~strikethrough~~; additions by **boldface**):

> "Disseminate", to import, publish, produce, print, manufacture, distribute, sell, lease, exhibit or display.
>
> "Harmful to minors", matter is harmful to minors if it is obscene or, if taken as a whole, it (1) describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors; (2) is patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for such minors; and (3) lacks serious literary, artistic, political or scientific value for minors.
>
> "Knowing", a general awareness of the character of the matter.
>
> * * *
>
> "Minor", a person under eighteen years of age.
>
> "Nudity", uncovered or less than opaquely covered human genitals, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple or areola only are covered.

"Matter", any handwritten or printed material, visual representation, live performance or sound recording including, but not limited to, books, magazines, motion picture films, pamphlets, phonographic records, pictures, photographs, figures, statues, plays, dances, **or any electronic communication including, but not limited to, electronic mail, instant messages, text messages, and any other communication created by means of use of the Internet or wireless network, whether by computer, telephone, or any other device or by any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system.**

* * *

"Sexual conduct", human masturbation, sexual intercourse, actual or simulated, normal or perverted, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship, any lewd touching of the genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, and any depiction or representation of excretory functions in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted.

"Sexual excitement", the condition of human male or female genitals or the breasts of the female while in a state of sexual stimulation or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.