

**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.:** \_\_\_\_\_

**MARTHA COAKLEY, in her official capacity as )  
ATTORNEY GENERAL OF THE COMMON- )  
WEALTH 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, )**

**Defendants.**

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, by their undersigned attorneys, for this Complaint against 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, allege:

## PRELIMINARY STATEMENT

1. By passing sections 2 and 3 of Chapter 74 of the Acts of 2010 (“Sections 2 and 3”), the Commonwealth of Massachusetts has enacted a broad censorship law that imposes severe content-based restrictions on the availability, display, and dissemination of constitutionally-protected speech on the Internet by making it a crime to “distribute, sell, ... exhibit or display” matter which is “harmful to minors,” including “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.” Chapter 74 of the Acts of 2010 (amending Mass. G.L. Chap. 272, Sec. 31).

2. For most communications over the Internet, it is not possible for a person sending or posting the communication to ensure that the communication will not be read or seen by a minor. Sections 2 and 3 thus sweep within its scope all Internet communications—such as postings on websites and through listservs, which might be read or seen by a minor—and not merely those communications directed to a specific minor. Nor does the Act provide for a national community standard applied to Internet communications.

3. The United States Supreme Court invalidated a federal law similarly restricting Internet communications on First Amendment grounds in Reno v. ACLU, 521 U.S. 844 (1997), and the Third Circuit invalidated a second such federal law on First Amendment grounds in ACLU v. Mukasey, 534 F. 3d 181 (3<sup>rd</sup> Cir. 2008); cert. denied, 129 S.Ct. 1032 (2009).

4. Seven state laws containing similar content-based restrictions on Internet communications have now been struck down or enjoined as unconstitutional. PSINet, Inc. v. Chapman, 362 F. 3d 227 (4<sup>th</sup> Cir. 2004) (Virginia); American Bookseller Foundation v. Dean, 342 F. 3d 96 (2<sup>nd</sup> Cir. 2003) (Vermont); Cyberspace Communications, Inc. v. Engler, 238 F. 3d 420 (6<sup>th</sup> Cir. 2000) (Michigan); ACLU v. Johnson, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999) (New Mexico); ACLU v. Goddard, Civ. 00-0505 (D. Ariz. Aug. 11, 2004); Southeast Booksellers Ass'n v. McMaster, 282 F. Supp. 2d 389 (D.S.C. 2003) (South Carolina); American Library Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York). A similar state statute in an eighth state (Ohio) was upheld only after the state's attorney general declined to defend the full breadth of the statute and instead argued for, and the courts adopted, a narrowing construction of the statute, so that it would apply only to person-to-person Internet communications, such as email and instant messages. American Booksellers Foundation for Free Expression v. Strickland, 601 F.3d 622 (6<sup>th</sup> Cir. 2010). No state statute similar in scope to the Act has been found to be constitutional.

5. Nevertheless, on April 12, 2010, Governor Deval Patrick signed into law Chapter 74 of the Acts of 2010, which contains these constitutionally unsound provisions. Sections 2 and 3—the portion of Chapter 74 challenged by this Complaint—amended Mass G.L. Chapter 272, Section 31, which, together with Section 28 of Chapter 272, is referred to in this Complaint as “the Act.” Exhibit A attached hereto is a copy of relevant portions of Chapter 74 of the Acts of 2010. Exhibit B attached hereto is a copy of sections 28 and 31, as amended by Chapter 74.

6. Chapter 74 also addresses the crime of assault and battery by means of a bodily substance upon correctional facility employees. That portion of Chapter 74 is not at issue in this

case. Nor does this case concern other Massachusetts statutes which concern the criminalization of obscenity or speech used to entice or lure minors into inappropriate activity.

7. Sections 2 and 3 will take effect on July 12, 2010.

8. This action seeks to have the Act as amended by Sections 2 and 3 declared facially unconstitutional and void by reason of the First, Fifth and Fourteenth Amendments to, and Commerce Clause of, the United States Constitution, and to have the State enjoined from enforcing the Act as amended by Sections 2 and 3.

9. Under the Act, any nudity or sexual conduct can potentially be criminal if communicated on the Internet and accessible in Massachusetts, so long as someone finds it to be “harmful to minors.” This is true even if the communicator does not direct the communication to a specific individual but, instead, for example, merely posts the material on a website. This could include book excerpts or covers, or DVD covers displayed on a website of one of the plaintiffs, or movies streamed on or downloaded from those sites.

10. Since all speech on the Internet is accessible in Massachusetts, regardless of the geographical location of the person who posted it, the Act threatens Internet communications nationwide and even worldwide. The Internet represents the most participatory marketplace of mass speech yet developed. It is in many ways a far more speech-enhancing medium than radio, television, print, the mails, or the proverbial village green. Hundreds of millions of people can now engage in interactive communication on a national and global scale via computer networks that are connected to the Internet. The Internet enables average citizens, with a few simple tools and at a very low cost, to participate in local or worldwide conversations, publish an online newspaper, distribute an electronic pamphlet, and communicate with a broader audience than ever before possible. The Internet also provides millions of users with access to a vast range of

information and resources. Internet users are far from passive listeners—rather, they are empowered by the Internet to seek out exactly the information they need and to respond with their own communication if desired.

11. Because of the way the Internet works, Sections 2 and 3's prohibition on the electronic distribution to minors of material that is "harmful to minors" effectively bans distribution of that same material to adults. Material deemed "harmful to minors" is constitutionally protected for adults. This includes, for example, valuable works of literature and art, safer sex information, examples of popular culture, and a wide range of robust human discourse about current issues and personal matters that may include provocative or sexually oriented language and images.

12. The Act also prohibits speech that is valuable and constitutionally protected for minors, especially older minors, including sex education materials.

13. The inevitable effect of Sections 2 and 3, if permitted to stand, will be that Internet content providers will limit the range of their speech, because there are no reasonable technological means that enable users of the Internet to ascertain the age of persons who access their communications, or to restrict or prevent access by minors to certain content. Consequently, Sections 2 and 3 reduce adult speakers and users in cyberspace to reading and communicating only material that is suitable for young children.

14. Sections 2 and 3 thus violate the First and Fourteenth Amendments to the United States Constitution through the impermissible criminalization of protected speech, violate the First and Fourteenth Amendment rights of plaintiffs, their members, their users, and tens of millions of other speakers and users of the Internet, and threaten them with irreparable harm.

15. Plaintiffs (including the members of the named plaintiffs and others on whose behalf they bring this action, “plaintiffs”) include a broad range of individuals and entities who are speakers, content providers and access providers on the Internet. Plaintiffs post and discuss content including visual and verbal depictions of nudity and sexual conduct, visual art and images, resources on AIDS prevention, and books and resources for sex education for all youth, including gay and lesbian youth.

16. Sections 2 and 3 violate the Commerce Clause of the United States Constitution because they regulate commerce occurring wholly outside of the Commonwealth of Massachusetts; because they impose an impermissible burden on interstate and foreign commerce; and because they subject interstate use of the Internet to inconsistent state regulations. An online user outside of Massachusetts cannot know whether someone in Massachusetts might download his or her content posted on the Internet; consequently, the user must comply with Massachusetts law or face the threat of criminal prosecution.

17. Sections 2 and 3 violate the Due Process Clauses of the Fifth and Fourteenth Amendments because they are impermissibly vague and fail to provide a person of ordinary intelligence fair notice of what is prohibited. The term “minor” for the purposes of Sections 2 and 3 is defined as “a person under eighteen years of age.” “Harmful to minors’ matter” is defined as matter that is “obscene or, if taken as a whole. . . lacks serious literary, artistic, political or scientific value for minors.” However, matter could have “serious literary, artistic, political or scientific value” for a 17-year-old that would not necessarily have the same value for a twelve-year-old. Plaintiffs would therefore be forced to guess at the bottom end of the range of ages to which Sections 2 and 3 apply and thus would not have fair notice of what conduct would subject them to criminal sanctions under Sections 2 and 3.

18. Also impermissibly vague as applied to the Internet is the term “taken as a whole” in the above definition of “harmful to minors.” As described further below, the Internet is a vast collection of interconnected networks with links to each other. What is a “whole” in that context is unclear. Is it a single text work or group of pictures on a website? Is it a page of a website? Is it the entire website? Further, although some Plaintiffs in the current action may exert some control over the websites they themselves operate, they generally exert no control over other websites that link to theirs. It is therefore unclear how the phrase “as a whole” would apply to websites operated by Plaintiffs.

19. Plaintiffs seek to have Sections 2 and 3 declared void, and seek injunctive relief prohibiting enforcement of Sections 2 and 3 as an amendment to the Act.

### **JURISDICTION AND VENUE**

20. This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court’s jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). It seeks remedies under 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §§ 1983 and 1988, and Fed. R. Civ. Proc. 65.

21. Venue is proper in this district under 28 U.S.C. § 1391(b).

### **THE PARTIES**

22. Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION (“ABFFE”) was organized as a not-for-profit organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE is incorporated in Delaware and has its principal place of business in New York City. Most of the

members of ABFFE are bookstores in the United States, including 16 in Massachusetts. Many of ABFFE's members engage in electronic communications, including maintaining websites to sell books, and emails to communicate with customers. The websites may include images of nudity or sexual conduct, especially when such images appear in the books offered for sale.

ABFFE sues on its own behalf, on behalf of its members (including its Massachusetts members, and its members outside of Massachusetts which sell books and other materials to consumers in Massachusetts, and which maintain websites accessible in Massachusetts), and on behalf of their readers and customers.

23. Plaintiff AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS ("Massachusetts ACLU") is the Massachusetts affiliate of the American Civil Liberties Union, a nationwide, nonpartisan organization of over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution, including the Bill of Rights. The Massachusetts ACLU is incorporated in Massachusetts and has its principal place of business in Boston. Many (and likely all) members of the Massachusetts ACLU engage in electronic communications. Members of the Massachusetts ACLU distribute and receive communications, both by electronic means and in person, which are constitutionally-protected as to adults but may be deemed by some to be "harmful to minors." The Massachusetts ACLU sues on its own behalf, on behalf of others who use its online computer communications systems, and on behalf of its members who use online computer communications systems. The Massachusetts ACLU maintains a website ([www.aclum.org](http://www.aclum.org)).

24. Plaintiff ASSOCIATION OF AMERICAN PUBLISHERS, INC. ("AAP") is the national association of the United States book publishing industry. AAP's approximately 300 members include most of the major commercial book publishers in the United States, as well as

smaller and non-profit publishers, university presses and scholarly associations. AAP members publish hardcover and paperback books in every field and a range of educational materials for the elementary, secondary, post-secondary and professional markets. In addition to publishing in print formats, AAP members are active in the eBook and audiobook markets and also produce computer programs, databases, websites and a variety of multimedia works for use in online and other digital formats. Members of AAP also produce computer software and electronic products and services. Also, members of AAP have websites featuring their publications which may include images of sexual conduct, especially when such images appear in the publications. AAP is incorporated in New York, and has its principal places of business in New York City and in the District of Columbia. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment. AAP sues on its own behalf, on behalf of its members, and its members' readers and customers.

25. Plaintiff COMIC BOOK LEGAL DEFENSE FUND ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment rights of the comic book industry. CBLDF represents over 1,000 comic books authors, artists, retailers, distributors, publishers, librarians, and readers located in Massachusetts, throughout the country and the world. CBLDF sues on its own behalf, on behalf of its members, and on behalf of the readers of their material.

26. Plaintiff FREEDOM TO READ FOUNDATION, INC. ("FTRF") is a non-profit membership organization established in 1969 by the America Library Association to promote and defend First Amendment rights, to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire and to set legal precedent for the freedom to read on behalf of all citizens. FTRF is incorporated in Illinois and has its

principal place of business in Chicago. Its members include libraries and librarians, most (if not all) of whom engage in electronic communications. FTRF sues on its own behalf, on behalf of its members, on behalf of the librarians, employees and users of its member libraries.

27. Plaintiff HARVARD BOOK STORE, INC. has operated a bookstore in Cambridge, Massachusetts for over 75 years. It carries a broad range of new and used books. Harvard Book Store also operates a website ([www.harvard.com](http://www.harvard.com)) on which visitors may obtain information, both written and pictorial, about Harvard Book Store and the books it has available. Some of the books carried by the store and described and discussed on the website relate to sexual themes and topics, and some of the material shown on the site may be considered by some to be “harmful to minors.” Harvard Book Store is a Massachusetts corporation; its principal place of business is in Cambridge, Massachusetts. It sues on its own behalf and on behalf of its customers and the users of its website.

28. Plaintiff PHOTOGRAPHIC RESOURCE CENTER, INC. (“Photographic Resource Center”) is a non-profit organization that serves as a vital forum for the exploration and interpretation of new work, ideas, and methods in photography and related media. The Photographic Resource Center presents exhibitions on a wide variety of subjects. The Photographic Resource Center also operates a website ([www.bu.edu/prc/](http://www.bu.edu/prc/)) on which visitors may obtain information, both written and pictorial, about the Photographic Resource Center and its activities. Some of the exhibitions presented by the organization and described and discussed on the website contain sexually frank themes and imagery, and some of the material shown on the site may be considered by some to be “harmful to minors.” The Photographic Resource Center sues on its own behalf, on behalf of others who use its online computer communications systems, and on behalf of its members who use online computer communications systems.

29. Plaintiff PORTER SQUARE BOOKS, INC. operates a bookstore in Cambridge, Massachusetts. It carries a broad range of books. Porter Square also operates a website ([www.portersquarebooks.com](http://www.portersquarebooks.com)) on which visitors may obtain information, both written and pictorial, about Porter Square Books and the books it has available. Some of the books carried by the store and described and discussed on the website relate to sexual themes and topics, and some of the material shown on the site may be considered by some to be “harmful to minors.” Porter Square Books is a Massachusetts corporation; its principal place of business is in Cambridge, Massachusetts. It sues on its own behalf and on behalf of its customers and the users of its website.

30. Plaintiff MARTY KLEIN is the Editor, Publisher and Writer for, and owner of, the website [Dr. Marty Klein: Straight Talk on Sex, Love and Intimacy](http://www.sexed.org), at [www.sexed.org](http://www.sexed.org). which provides advice and information on a number of subjects relating to sex and sexuality, including birth control, safer sex and sexual pleasure. Dr. Klein has a Bachelor’s degree in Sociology from the State University of New York at Stony Brook, a Master’s degree in Sociology from Indiana University, a Master’s degree in Psychology from the Fielding Institute, Santa Barbara, Calif. (now the Fielding Graduate University), and a Ph.D from the Institute for Advanced Study of Human Sexuality, San Francisco, California. He has been a licensed marriage and family therapist in the State of California for 30 years. Dr. Klein sues on his behalf and on behalf of the users of [www.sexed.org](http://www.sexed.org).

31. Defendant MARTHA COAKLEY is the Attorney General of the Commonwealth of Massachusetts and is sued in her official capacity as such. She is the chief law enforcement officer of the State of Massachusetts. Attorney General Coakley retains general prosecutorial authority to ensure that the laws (including the Act) are faithfully executed, and has statewide

authority to prosecute criminal cases. Pursuant to Mass. G.L. chap. 12 sections 3 and 27, General Coakley may appear on behalf of the Commonwealth in all suits and shall control cases, even criminal, when present, including those under the Act.

32. Defendants 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 Gerald T. Leone, Jr., are District Attorneys for all of the counties in Massachusetts and are sued in their official capacities as such. They have authority concomitant with that of Attorney General Coakley to prosecute criminal violations in their respective counties.

## **FACTS**

### **I. The Internet Generally**

33. The Internet is a decentralized, global medium of communication that links people, institutions, corporations and governments around the world. It is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers. While estimates are difficult due to its constant and rapid growth, the Internet connects billions of users. It is estimated that there are 1.73 billion Internet users worldwide (September 2009). There are Internet users in virtually all (if not all) of the approximately 195 countries in the world. In many countries, including the United States, Japan, South Korea, Finland, and the Netherlands, more than three-fourths of the population uses the Internet. There are over 250 million Internet users in North America.

34. Because the Internet merely links together numerous individual computers and computer networks, no single entity or group of entities controls the material made available on the Internet or limits the ability of others to access such materials. Rather, the range of digital

information available to Internet users—which includes text, images, sound and video—is individually created, maintained, controlled and located on millions of separate individual computers around the world.

35. The Internet presents extremely low entry barriers to anyone who wishes to provide or distribute information or gain access to it. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides the average citizen with an affordable means for communicating with, accessing and posting content to a worldwide audience.

## **II. How People Access the Internet**

36. Individuals have several easy means of gaining access to computer communications systems in general, and to the Internet in particular. Many educational institutions, businesses, and local communities maintain a computer network linked directly to the Internet and enable users to easily gain access to the network.

37. Many libraries provide their patrons with free access to the Internet through computers located at the library. Some libraries also host online discussion groups and chat rooms. Many libraries also post their card catalogs and online versions of material from their collections.

38. Individuals may connect to the internet anonymously and without charge at many hotels, coffee shops and fast food restaurants. Some cities run municipal wireless internet services that allow individuals similar free and anonymous connectivity throughout large metropolitan areas.

39. Internet Service Providers (“ISPs”) allow subscribers access to the Internet by using a modem and a personal computer or other device to access computer networks that are linked directly to the Internet.

### **III. Ways of Exchanging Information on the Internet**

40. Most Internet users select user names, e-mail addresses, or both that allow them to connect to the Internet and to communicate with other users. Many user names are pseudonyms or pen names that often provide users with a distinct online identity and help to preserve their anonymity and privacy. The user name and e-mail address are the only indicators of the user's identity; that is, persons communicating with the user will only know them by their user name and e-mail address (unless the user chooses to reveal other personal information).

41. Once an individual connects to the Internet, there are a wide variety of methods for communicating and exchanging information with other users.

42. The simplest and perhaps most widely used method of communication on the Internet is via electronic mail, commonly referred to as "e-mail." Using one of dozens of available "mailers"—software capable of reading and writing an e-mail—a user is able to address and transmit via computer a message to a specific individual or group of individuals who have e-mail addresses.

43. "Listsers" (online discussion groups) are another of the most popular forms of electronic communication. Users also can communicate within a group by subscribing to automated electronic mailing lists that allow any subscriber to a mailing list to post a particular message that is then automatically distributed to all of the other subscribers on that list. Listsers cover virtually every topic imaginable. Listsers can be formed by individuals, institutions or organizations, or by particular computer networks.

44. Similarly, users also can communicate within a group by subscribing to automated electronic mailing lists that allow any subscriber to a mailing list to post a particular

message that is then automatically distributed to all of the other subscribers on that list. These lists are sometimes called “mail exploders” or “listservs.”

45. “Chat rooms” also allow users to engage in simultaneous conversations with another user or group of users by typing messages and reading the messages typed by others participating in the “chat.” Chat rooms are available on the Internet and on commercial online services. Although chat rooms are often set up by particular organizations or networks, any individual user can start an online “chat.”

46. Online discussion groups, listservs, mailing lists, and chat rooms create an entirely new global public forum—a cyberspace village green—where people can associate and communicate with others who have common interests, and engage in discussion or debate on every imaginable topic.

#### **IV. The World Wide Web**

47. The World Wide Web (the “Web”) is the most popular way to provide and retrieve information on the Internet. The Web comprises more than 230 million separate “websites” that display content provided by particular persons or organizations. The growth is outstanding; there were about 47 million websites added in 2009.

48. Most website addresses, including websites that end in .com, .org, and .edu, which are the most common “top-level” domain names, do not indicate the location of the website or the location of the entity which operates the website. For example, both the website of Amazon www.amazon.com, based in the United States, and the website of the bookstore Waterstones www.waterstones.com, based in the United Kingdom, end in .com. Some websites use country code top-level domains (e.g., .cn, .uk, .us, etc.) which may indicate the country in

which the entity maintaining the website is located. For example, the British Library's website is [www.bl.uk](http://www.bl.uk).

49. It is thus difficult to determine where the entities that maintain most websites are located.

50. It is estimated that at least 40%, and likely substantially more, of the websites in the world are maintained outside of the United States.

51. Any Internet user anywhere in the world with the proper software can create her own Web page, view Web pages posted by others, and then read text, look at images and video and listen to sounds posted at these sites.

52. The Web serves in part as a global, online repository of knowledge, containing information from a diverse array of sources, which is easily accessible to Internet users around the world. Though information on the Web is contained on individual computers, each of these computers is connected to the Internet through Web protocols that allow the information on the Web to become part of a single body of knowledge accessible by all Web users.

53. Many large corporations, banks, brokerage houses, newspapers and magazines now provide online editions of their publications and reports on the Web or operate independent websites. Many government agencies and courts also use the Web to disseminate information to the public. In addition, many individual users and small community organizations have established individualized home pages on the Web that provide information of interest to members of the particular organization, communities, and other individuals.

54. To gain access to the information available on the Web, a person generally uses a Web "browser"—software such as Internet Explorer, Firefox or Yahoo—to display, print and

download documents that are formatted in the standard Web formatting language. Each document on the Web has an address that allows users to find and retrieve it.

55. Most Web documents also contain “links.” These are short sections of text or image that refer and link to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user on her computer screen, the referenced document is automatically displayed, wherever in the world it actually is stored. Links, for example, are used to lead from overview documents to more detailed documents on the same website, from tables of contents to particular pages, and from text to cross-references, footnotes, and other forms of information. For example, the National ACLU’s Web page provides links to several other Web pages also offered by the ACLU, including issue pages such as “Immigrants’ Rights” and “LGBT Rights,” as well as advocacy pages such as those linked to “ACLU Updates.”

56. Links may also take the user from the original website to another website on a different server connected to the Internet, a server that may be located in a different area of the country, or even the world. For example, the National ACLU has a Web page about its Reproductive Freedom Project which also includes links to similar resources elsewhere on the Web, including the Web pages of Planned Parenthood and the National Organization of Women. While linking to these websites from the ACLU website appears seamless from the user’s point of view, in fact these websites are each located on entirely separate computers that are not maintained or controlled by the ACLU.

57. Through the use of these links, the Web unifies access to the diverse and voluminous information made available by millions of users on the Internet into a single body of knowledge that can be searched and accessed.

58. A number of “search engines” and directories—such as Google, Yahoo, and Bing—are available free of charge to help users navigate the World Wide Web. Once a user has accessed the search service, he or she simply types a word or string of words as a search request and the search engine provides a list of sites that match the search string.

59. As can be seen from the various ways that people can exchange information and communicate via this new technology, the Internet is “interactive” in ways that distinguish it from traditional communication media. For instance, users are not passive receivers of information as with television and radio; rather, a user can easily respond to the material he or she receives or views online. In addition, “interactivity” means that Internet users must actively seek out with specificity the information they wish to retrieve and the kinds of communications in which they wish to engage. For example, a user wishing to read news articles on a topic must connect to the Internet and then, using a search engine, define a search, review the relevant header lines—which provide brief content descriptions—for each message, and then access a particular message to read its content. Similarly, to gain access to material on the World Wide Web, a user must know and type the address of a relevant site or find the site by typing a relevant search string in one of several available search engines or by activating a website link.

#### **V. The Range of Content Available on the Internet**

60. The information made available on the Internet is as diverse as human thought. Content on the Internet is provided by the millions of Internet users worldwide, and the content ranges from academic writings, to humor, to art, to literature, to medical information, to music, to news, to movie clips, and to human sexuality. For example, on the Internet one can view the full text of the Bible, all of the works of Shakespeare, and numerous other classic or current works of literature. One can browse through paintings from museums around the world, view in

detail images of the ceiling of the Sistine Chapel, or hear selections from the latest hip hop music albums. At any one time, the Internet serves as the communication medium for literally hundreds of thousands of global conversations, political debates, and social dialogues.

61. Although the overwhelming majority of the information on the Internet does not involve nudity or sexual activity, such material is available on the Internet. For example, an Internet user can read online John Cleland's eighteenth-century novel, Fanny Hill: Memoirs of a Woman of Pleasure and view the 1766 illustrations; receive visual instructions on how to practice safer sex; participate in a question and answer forum on methods for enhancing sexual experiences; and exchange links to a popular new hip hop music video. Much of this material is similar, if not identical, to material that is routinely discussed in cafes and on street corners, and that is distributed through libraries, bookstores, record stores, and newsstands.

## **VI. The Statutory Language at Issue**

62. On April 2, 2010, Governor Deval Patrick signed into law Chapter 74 of the Acts of 2010, effective July 12, 2010, amending section 31 of chapter 272, so that section 28 of Chapter 272 ("Matter harmful to minors, dissemination; possession; defenses") would apply to matter created and transmitted electronically.

63. Section 28 provides as follows:

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 thousands 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 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.

64. Section 31, as amended, defines “matter” for purposes of section 28 as:

Matter, any handwritten or printed material, visual representation, live performance or sound recording including, but not limited to, books, magazines, motion picture films, pamphlets, photographic 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 and, as amended, defines “visual material” as any motion picture film, picture, photograph, videotape, book, magazine, pamphlet that contains pictures, photographs or similar visual representations or reproductions, or depiction by computer, telephone or any other device capable of electronic data storage or transmission. Undeveloped photographs, pictures, motion picture films, videotapes and similar visual representations or reproductions may be visual materials notwithstanding that process, development or similar acts may be required to make the contents thereof apparent.

65. “Minor” is defined as “a person under eighteen years of age.”

66. Section 31, as amended, defines “harmful to minors” for purposes of section 28

as:

“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.

67. There is no way for online speakers to check age-verifying documents of persons who access their content.

68. A violation of Section 28 of Chapter 272 as a first offense is punishable by imprisonment for not more than five years or a fine of not more than \$10,000, or both. A violation therefore constitutes a felony. Chapter 274, Section 1.

## **VII. Sections 2 and 3's Impact on Internet Speech**

69. Because of the nature of the Internet, Sections 2 and 3 cause certain constitutionally protected speech among adults to be banned.

70. The United States Congress and the states of Arizona, Michigan, New Mexico, South Carolina, Vermont and Virginia previously enacted laws which, like Sections 2 and 3, applied the harmful to minors test to Internet speech. All of them were either held unconstitutional or enjoined on First Amendment grounds. Ohio and Utah also passed such laws. The Ohio statute has been narrowed by the courts to constitutional dimensions. The Utah statute is being challenged in federal court and has been preliminarily enjoined.

71. Speech on the Internet is generally available to anyone with access to this technology. Anyone who posts content to the Web, chat rooms, listserves, mailing lists, and discussion groups makes it automatically available to all users worldwide, including minors. Because minors have access to all of these forums, any "harmful to minors" communication in these forums could be punishable under the Act. Knowledge that the recipient is a minor is not required under the Act, and knowledge of the "character and content" of the material is presumed. Due to the very nature of the Internet, virtually every communication on the Internet may potentially be received by a minor and therefore may potentially be the basis for prosecution.

72. Because many of the terms in the Act are vague and overbroad, the Act further chills the speech of content providers on the Web. For example, the Act fails to distinguish

between material that is “harmful” for older as opposed to younger minors. Matter that would have “serious literary, artistic, political or scientific value” for an 17-year-old would not necessarily have the same value for a twelve-year-old. Consequently, providers of content would be forced to guess at the bottom of the age range defined by the Act as to what constitutes material that lacks such value.

73. The Act also fails to define the term “as a whole” in the definition of matter that is “harmful to minors,” a phrase whose meaning is particularly ambiguous when applied to the Internet.

74. Further, the reference to “prevailing standards of adults in the county where the offense was committed as to suitable material for such minors” is overbroad because, due to the borderless nature of the Internet, it effectively imposes the standards of a Massachusetts county on content providers and users in all other states even if other states have more liberal standards regarding what is considered “harmful to minors.” As a consequence, content providers and users of the Web would need to err on the side of caution and not post content on the Web that they would otherwise have posted. In this way, Sections 2 and 3 chill speech on the Web and thus cause irreparable harm to the First Amendment freedoms of online speakers.

75. Most of the millions of users on the Internet are speakers and content providers subject to the Act. Anyone who sends an e-mail, participates in a discussion group or chat room, or maintains a home page on the Web potentially is subject to the Act because his or her communication might be accessed by a minor in the Commonwealth of Massachusetts. Given the technology of the Internet, there are no reasonable means for these speakers to ascertain the age of persons who access their messages, or for restricting or preventing access by minors to certain content. From the perspective of these speakers, the information that they make available

on the public spaces of the Internet either must be made available to all users of the Internet, including users who may be minors, or it will not be made available at all.

76. Users who communicate on mailing lists have no way to determine the ages of other subscribers to the list. Content providers on the Web have no reasonable way to verify the age of persons who access their websites. For these reasons, there is no practical way for content providers to withhold material that may be “harmful to minors”—as prohibited by the Act—from people younger than 18 years old.

77. Moreover, the Act is overbroad because it allows prosecution even if the sender had no knowledge or reason to know of the recipient’s age. Although knowledge of the “character and content” of the material is required, knowledge that the recipient is a minor is not required.

78. Because Internet speakers have no means to restrict minors in Massachusetts from accessing their communications, the Act effectively requires almost all discourse on the Internet—whether among citizens of Massachusetts or among users anywhere in the world—to be at a level suitable for young children. The Act therefore bans an entire category of constitutionally protected speech between and among adults on the Internet.

79. In addition, any person who disagrees with or objects to sexual content on the Internet could cause a speaker to be prosecuted under the Act by having a minor view the online speech, resulting in a “heckler’s veto” of Internet speech. Further, any person who disagrees with sexual content on the Internet could cause a speaker to fear prosecution under the Act by claiming to be a minor, whether or not the person actually is so.

80. The Act also prohibits older minors from communicating and accessing protected speech. Even if some depictions or discussions of nudity and sexual conduct may be considered

by some to be inappropriate or “harmful” for younger minors, many depictions and discussions—including safer sex resources—are valuable, at least for older minors.

81. Even if there were means by which speakers on the Internet could ascertain or verify the age of persons who receive their content (and there are no such means), requiring users to identify themselves and to disclose personal information in order to allow verification of age would prevent Internet users from maintaining their privacy and anonymity on the Internet.

### **VIII. Sections 2 and 3’s Burden on Interstate Commerce**

82. The Act impacts the speech of online speakers across the nation—not just in the Commonwealth of Massachusetts—because it is practically and economically unfeasible for most Internet users to determine the geographic location of persons who access their information. Internet users elsewhere have no practical way to determine whether information posted to the Web, discussion groups, listservs, or chat rooms will be accessed by persons residing in Massachusetts. The various sites on the Internet can be accessed by anyone in the world; therefore, there is no feasible way for speakers to ensure that residents of Massachusetts will not receive their communications. Thus, all users, even if they do not reside in Massachusetts or intend to communicate with residents of Massachusetts, must comply with the Act.

83. The Act unjustifiably burdens interstate commerce and regulates conduct that occurs wholly outside the Commonwealth of Massachusetts. The Act chills speakers outside of Massachusetts and curtails speech that occurs wholly outside the borders of Massachusetts, thereby causing irreparable harm. Like the nation’s railways and highways, the Internet is by its nature an instrument of interstate commerce. Just as goods and services travel over state borders by train and truck, information flows across state (and national) borders on the Internet. Internet content providers that are located outside of Massachusetts, such as the National ACLU and

Sexual Intelligence, as well as people participating in chat rooms, newsgroups, or listserves, have no feasible way to determine whether their information will be accessed or downloaded by someone who is located in Massachusetts. Just as a user of the Internet cannot identify the age of another user of the Internet, one also cannot identify where a particular user or speaker resides, or from where a particular user may be accessing or downloading information on the Internet. Due to the nature of the technology, a non-Massachusetts resident, even if he or she has no desire to reach anyone in Massachusetts, will be forced to self-censor his or her speech on the Internet in order to comply with the Act and avoid the possibility that a minor from Massachusetts will gain access to this information, thereby subjecting the speaker to prosecution in Massachusetts. Therefore, the Act interferes significantly with the interstate flow of information and with interstate commerce.

84. Moreover, interstate and international computer communications networks—like the nation’s railroads—constitute an area of the economy and society that particularly demands uniform rules and regulations. The states of Arizona, Michigan, New Mexico, South Carolina, Vermont and Virginia previously enacted laws similar to the Act, which were enjoined on Commerce Clause grounds because of the inconsistent obligations imposed on online speakers across the country.

85. Because the definition of “harmful to minors” in Chap. 272, sec. 31 depends, in part, upon prevailing standards in the adult community in the various counties in Massachusetts, the Act effectively imposes regulations on interstate speech that conflict with the community standards of other States and their local communities. If each state implements its own regulations, as Massachusetts has done, regarding what information can be legally distributed via this new technology, interstate commerce will be greatly inhibited and disrupted as persons

around the world try to discern what can and cannot be communicated in the many different jurisdictions connected to the Internet.

**IX. The Ineffectiveness of the Act and the Effectiveness of Alternative Means**

86. Because of the global nature of the Internet, defendants cannot demonstrate that the Act is likely to reduce the availability in Massachusetts of material that may be “harmful to minors” on the Internet.

87. It is estimated that at least 40%—and probably much more—of the content provided on the Internet originates abroad. Content is available to users worldwide and may be accessed as easily and as cheaply as content that originates locally. Because it is not technologically possible to prevent content posted abroad from being available to Internet users in Massachusetts, the Act will not accomplish its purported purpose of keeping inappropriate content from minors in Massachusetts.

88. Conversely, there are many alternative means that are more effective at assisting parents in limiting a minor’s access to certain material if desired.

89. Many computers—straight out of the box—include a “parental controls” feature. If a computer does not already have such a feature, it is easy to download one, for free, from many online services, such as AOL. These features enable parents to block access to sexually explicit materials on the Web, to prevent minors from giving personal information to strangers by e-mail or in chat rooms, and to maintain a log of all online activity on a home computer. Parents can also use screening software that blocks messages containing certain words, as well as tracking and monitoring software. Perhaps most effectively, a parent can restrict and observe a child’s use of the Internet by placing a computer in a family room.

90. User-based blocking programs are not perfect, both because they fail to screen all inappropriate material and because they inadvertently block valuable Internet sites. However, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than the Act's imposition of criminal penalties for protected speech upon the universe of Internet users.

**X. The Act's Impact on the Plaintiffs**

91. Plaintiffs interact with and use the Internet in a wide variety of ways, including as content providers, access providers, and users. The Act burdens plaintiffs in all of these capacities. Plaintiffs who are users and content providers are subject to the Act. These plaintiffs fear prosecution under the Act for communicating, sending, displaying, or distributing material that might be deemed by some to be "harmful to minors." They also fear liability for material posted by others to their online discussion groups, chat rooms, mailing lists, and websites. Plaintiffs have no way to avoid prosecution under the Act and are left with two equally untenable alternatives: (a) risk prosecution under the Act, or (b) attempt to engage in self-censorship and thereby deny adults and older minors access to constitutionally protected material.

**A. American Booksellers Foundation for Free Expression**

92. Plaintiff ABFFE has hundreds of bookseller members who are located from coast-to-coast, as well as in Massachusetts, many of whom sell materials that contain nudity or descriptions of the nude human body, and which deal frankly with the subject of human sexuality. ABFFE's members are not "adult bookstores." Many member bookstores use the Internet and electronic communications to obtain information and excerpts of books from publishers. For example, member booksellers may feature current popular books which include

images depicting nudity and sexual conduct. Some member bookstores also have their own Web pages that discuss the contents of books sold in stores.

93. ABFFE members' right to learn about, acquire, and distribute material containing nudity and sexual conduct, and their patrons' right to purchase such materials, will be seriously infringed by the Act if it is not enjoined because ABFFE members and the publishers with whom they transact business will be forced to self-censor or risk prosecution under the Act.

**B. American Civil Liberties Union of Massachusetts**

94. In addition to their legal advocacy to uphold the Bill of Rights, plaintiff ACLU of Massachusetts and the National ACLU have long devoted considerable resources to public education about civil liberties. Since 1993, the ACLU's public education efforts have included extensive online resources that offer electronic copies of ACLU publications, reports, court briefs, news releases, and other material related to the ACLU's legal, legislative, educational and advocacy work.

95. The National ACLU maintains its extensive online resources on the Internet's World Wide Web. The ACLU of Massachusetts' website, in addition to offering its own resources, provides links to the National ACLU's website. Some of the ACLU's online resources contain sexual subject matter or nudity. Examples include copies of ACLU court briefs in cases involving arts censorship, obscenity, and discrimination against gays and lesbians.

96. The National ACLU also hosts unmoderated online discussion groups that allow citizens to discuss and debate a variety of civil liberties issues. These services allow online users to express their uncensored views on civil liberties issues and to interact with ACLU staff or featured speakers. Many of the communications in the ACLU's discussion groups have included and will continue to include sexual content, such as a discussion of teen pregnancy and teen

parenthood, a discussion of sexual privacy and state laws on criminal sodomy, a discussion of the defense of pornography, and other erotic expression under the First Amendment.

97. The ACLU does not moderate its computer communications systems because such editing or censorship would be antithetical to the ACLU's belief in freedom of speech. Furthermore, the ACLU considers minors to be an important audience for its online resources. The ability of minors to participate in chat rooms or discussion groups with other minors and with adults is a vital part of their education. It is particularly important that minors be able to access information about their rights and to learn about and debate controversial issues.

98. In addition to its own online resources, ACLU staff and members use other online services such as e-mail, outside discussion groups, and online mailing lists as an important low-cost method of communicating and sharing documents and information with each other and with those outside of the ACLU. Some of this material also discusses nudity or sexual conduct, such as descriptions of the human body or human reproduction.

99. If the Act is not enjoined, ACLU of Massachusetts and the National ACLU will be compelled either to refrain from offering constitutionally protected civil liberties materials and from sponsoring constitutionally protected political debates, or to face potential criminal prosecution.

**C. Association of American Publishers, Inc.**

100. Plaintiff AAP sues on behalf of its members who are content providers and users of the Internet. Although their businesses are primarily based on print publishing, AAP's members are very actively involved in the Internet. AAP's members create electronic products to accompany and supplement their printed books and journals; create custom educational material on the Internet; communicate with authors and others, receive manuscripts,

and edit, typeset, and design books electronically; transmit finished products to licensed end-user customers, communicate with bookstores and other wholesale and retail accounts; and promote authors and titles online.

101. Many of AAP's members have Web pages and provide information to the world on the Internet. Some of the content provided by AAP's members contains nudity or sexual conduct. Many of the efforts to ban books in various communities have been directed at books published by AAP's members, and AAP fears that the Act will spawn similar efforts directed at AAP's online publishing. If the Act is not enjoined, AAP members will be forced either to risk criminal liability or to stop providing online access to constitutionally protected books and other related materials.

**D. The Comic Book Legal Defense Fund**

102. Plaintiff CBLDF is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world, including in Massachusetts.

103. Some of the comic books created, published, distributed, and offered for sale by CBLDF's members, which include manga (a form of comic book which originated in Japan, but is now widely distributed in other parts of the world, including the United States, in which the drawings sometimes include sexually-explicit images), though constitutionally protected, could be deemed to be harmful to minors and therefore subject to the Act. The First Amendment rights of CBLDF and its members will be adversely affected unless Sections 2 and 3 are enjoined.

**E. Freedom to Read Foundation, Inc.**

104. Plaintiff FTRF and its library and librarian members, both public and private, serve as both access and content providers on the Internet. Because the Internet offers their patrons a unique opportunity to access information for free, many libraries provide their patrons with facilities that patrons can use to access the Internet. Many libraries also have their own websites and use the Internet to post card catalogues, to post information about current events, to sponsor chat rooms, to provide textual information or art, or to post online versions of materials from their library collections. Patrons can, for example, access the websites of certain libraries from anywhere in the country to peruse the libraries' card catalogues, review an encyclopedia reference, or check a definition in the dictionary.

105. Some of the materials provided or made available by libraries contain nudity or sexual content. For example, FTRF member libraries' online card catalogues include such works as Forever by Judy Blume, Women on Top by Nancy Friday, Changing Bodies, Changing Lives by Ruth Bell, Our Bodies, Our Selves by the Boston Women's Health Collective and It's Perfectly Normal by Robie Harris.

106. If the Act is not enjoined, libraries will be inhibited from both posting and providing access to materials on the Internet that contain nudity or sexual conduct. Adult library patrons and Internet users would thus be deprived of access to these constitutionally protected library materials. Given the global and unrestricted nature of the Internet and the past attempts by persons to bar literature and reference items from library collections, many of FTRF's members may choose not to post a substantial amount of expressive material at all—material that many adults might consider useful for themselves or their own children—rather than risk prosecution for posting material that might be illegal in Massachusetts.

**F. Harvard Book Store, Inc.**

107. Plaintiff Harvard Book Store, Inc., in addition to operating a “bricks and mortar” bookstore in Cambridge, Massachusetts, operates a large website ([www.harvard.com](http://www.harvard.com)) highlighting the variety of First Amendment-protected products that it stocks. Harvard Book Store stocks a wide variety of books. It stocks 60,000 titles in its store; its website currently offers over 3 million titles, including books, videos, audio books, and calendars.

108. The titles that Harvard Book Store carries include both fiction and non-fiction works about sexual relationships, both heterosexual and homosexual. The website announces and describes recent books and other materials of interest. The website also offers an e-mail newsletter discussing upcoming events, new books not to miss, and other matters considered to be of interest. Were the Act to be enforced, Harvard Book Store would be “chilled” in determining what materials would be featured and described, and how they would be featured and described.

109. Plaintiff Harvard Book Store fears prosecution under the Act because its website on occasion contains material that may be considered by some to be “harmful to minors.” For example, covers of books sometimes contain nude or sexually frank images.

**G. Photographic Resource Center, Inc.**

110. Plaintiff Photographic Resource Center is an independent non-profit organization that serves as a vital forum for the exploration and interpretation of new work, ideas, and methods in photography and related media. The Photographic Resource Center presents exhibitions, fosters education, develops resources, and facilitates community interaction for local, regional, and national audiences. In addition to operating a gallery space in Boston,

Massachusetts, the Photographic Resource Center operates a website ([www.bu.edu/prc/](http://www.bu.edu/prc/)) showcasing the center's exhibitions and works by the artists whom it exhibits.

111. Plaintiff Photographic Resource Center fears prosecution under the Act because it exhibits, and its website on occasion contains, material that may be considered by some to be "harmful to minors." Photographic Resource Center fears prosecution for the unknowing distribution to a minor of material that may be deemed harmful to minors.

#### **H. Porter Square Books**

112. Plaintiff Porter Square Books, in addition to operating a "bricks and mortar" bookstore in Cambridge, Massachusetts, operates a website ([www.portersquarebooks.com](http://www.portersquarebooks.com)) highlighting the variety of First Amendment-protected products that it stocks. Porter Square Books stocks a wide variety of books. It stocks 33,500 titles in its stores; its website currently offers approximately 5 million titles, including books, videos, magazines, books on tape, music and calendars.

113. The titles that Porter Square Books carries include both fiction and non-fiction works about sexual relationships, both heterosexual and homosexual, many of which include depictions. The website announces and describes recent books and other materials of interest. The website also offers an e-mail newsletter discussing upcoming events, new books not to miss, and other matters considered to be of interest. Were the Act to be enforced, Porter Square Books would be "chilled" in determining what materials would be featured and described, and how they would be featured and described.

114. Plaintiff Porter Square Books fears prosecution under the Act because it stocks, and its website on occasion contains, material that may be considered by some to be "harmful to minors." Porter Square Books fears prosecution for the unknowing distribution to a minor of

material that may be deemed harmful to minors.

**I. Dr. Marty Klein**

115. Plaintiff Marty Klein’s website ([www.sexed.org](http://www.sexed.org)) provides users with help to understand and accept themselves and their sexuality. It includes:

- Answers to dozens of questions from users and others about sex--some common, some exotic.
- Dr. Klein’s articles about various aspects of sexuality.
- The latest issue of Sexual Intelligence®, with links to its archive and annual awards.

116. The articles and other information available on [sexed.org](http://sexed.org) necessarily involve the use of sexually explicit language and visual images. Frank, detailed explanations are given in order for the information that the site provides to be useful to its viewers.

117. Dr. Klein fears that making materials available online could constitute “distribution” of “harmful to minors” material and thus subject him to prosecution under the Act.

118. If the Act is not enjoined, Dr. Klein must choose between risking criminal prosecution or curtailing his speech by removing from his site any material that could be alleged to be “harmful to minors.”

**CAUSES OF ACTION**

**COUNT I**

**Violation of Adults’ Rights Under the First and Fourteenth Amendments of the United States Constitution**

119. Plaintiffs repeat and re-allege paragraphs 1–118 as if set forth entirely herein.

120. The Act violates the rights of plaintiffs, their members, and their users under the First and Fourteenth Amendments of the United States Constitution on its face and as applied because it effectively bans constitutionally protected speech by and between adults.

121. The Act violates the rights of plaintiffs, their members, and their users under the First and Fourteenth Amendments to the United States Constitution because it is not the least restrictive means of accomplishing any compelling governmental purpose.

122. The Act violates the rights of plaintiffs, their members, and their users under First and Fourteenth Amendments to the United States Constitution because it is substantially overbroad.

## COUNT II

### **Violation of Minors' Rights Under the First and Fourteenth Amendments of the United States Constitution**

123. Plaintiffs repeat and re-allege paragraphs 1–118 as if set forth entirely herein.

124. The Act violates the rights of plaintiffs, their members, and their users under the First and Fourteenth Amendments to the United States Constitution because it interferes with the rights of minors to access and view material that to them is protected by the First Amendment.

125. The Act is unconstitutional because it prohibits the dissemination to all minors of any material that is deemed “harmful to minors” of any age, despite the fact that some of the material has value for older minors.

126. The Act violates rights of plaintiffs, their members and their minor users under the First and Fourteenth Amendments because it is substantially overbroad.

## COUNT III

### **Violation of the Right to Communicate and Access Information Anonymously Under the First and Fourteenth Amendments of the United States Constitution**

127. Plaintiffs repeat and re-allege paragraphs 1–118 as if set forth entirely herein.

128. The Act violates the rights of plaintiffs, their members, and their users under the First and Fourteenth Amendments to the United States Constitution to communicate and access

information anonymously, insofar as it effectively requires Internet users to identify themselves in order to gain access to constitutionally-protected speech.

#### **COUNT IV**

##### **Violation of the Commerce Clause of the United States Constitution**

129. Plaintiffs repeat and re-allege paragraphs 1–118 as if set forth entirely herein.

130. The Act violates the rights of plaintiffs, their members, and their users under the Commerce Clause because it regulates communications that take place wholly outside of the State of Massachusetts.

131. The Act violates the rights of plaintiffs, their members, and their users under the Commerce Clause because it constitutes an unreasonable and undue burden on interstate and foreign commerce.

132. The Act violates the rights of plaintiffs, their members, and their users under the Commerce Clause because it subjects interstate use of the Internet to inconsistent regulations.

#### **COUNT V**

##### **Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution**

133. Plaintiffs repeat and re-allege paragraphs 1–118 as if set forth entirely herein.

134. The Act violates the rights of plaintiffs, their members, and their users under the Due Process Clauses of the Fifth and Fourteenth Amendments because it is impermissibly vague and fails to provide a person of ordinary intelligence fair notice of what is prohibited.

## **PRAYER FOR RELIEF**

**WHEREFORE**, plaintiffs respectfully request that the Court:

- A. Declare that M.G.L. Ch. 272, sec. 28, to the extent that it restricts dissemination of harmful to minors materials by 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 other than directly to a specific minor known to the sender to be a minor, violates the First, Fifth and Fourteenth Amendments and the Commerce Clause of the United States Constitution;
- B. Preliminarily and permanently enjoin defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from enforcing that provision;
- C. Award plaintiffs their reasonable costs and fees pursuant to 42 U.S.C. § 1988; and
- D. Grant plaintiffs such other and further relief as the Court deems just and proper.

Dated: July 12, 2010

Respectfully submitted

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# EXHIBIT A

Chapter 74 of the Acts of 2010

AN ACT RELATIVE TO ASSAULT AND BATTERY BY MEANS OF A BODILY SUBSTANCE UPON CORRECTIONAL FACILITY EMPLOYEES AND EXPANDING THE PROHIBITION ON THE DISSEMINATION OF OBSCENITY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

. . .

SECTION 2. Section 31 of chapter 272 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by striking out, in lines 40 to 43, inclusive, the definition of Matter and inserting in place thereof the following definition:-

“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, photoelectronic or photo-optical system.

SECTION 3. The definition of visual material in said section 31 of said chapter 272, as so appearing, is hereby amended, by inserting after the word computer , the following words:- , telephone or any other device capable of electronic data storage or transmission.

Approved, April 12, 2010

# EXHIBIT B

**PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES**

**TITLE I. CRIMES AND PUNISHMENTS**

**CHAPTER 272. CRIMES AGAINST CHASTITY, MORALITY, DECENCY AND GOOD ORDER**

**Chapter 272: Section 28. Matter harmful to minors, dissemination; possession; defenses**

Section 28. 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.

**Chapter 272: Section 31. Definitions**

Section 31. As used in sections twenty-eight, twenty-eight C, twenty-eight D, twenty-eight E, twenty-nine, twenty-nine A, twenty-nine B, thirty and thirty D, the following words shall, unless the context requires otherwise, have the following meanings:—

“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.

“Lascivious intent”, a state of mind in which the sexual gratification or arousal of any person is an objective. For the purposes of prosecution under this chapter, proof of lascivious intent may include, but shall not be limited to, the following:

(1) whether the circumstances include sexual behavior, sexual relations, infamous conduct of a lustful or obscene nature, deviation from accepted customs and manners, or sexually oriented displays;

(2) whether the focal point of a visual depiction is the child's genitalia, pubic area, or breast area of a female child;

(3) whether the setting or pose of a visual depiction is generally associated with sexual activity;

(4) whether the child is depicted in an unnatural pose or inappropriate attire, considering the child's age;

(5) whether the depiction denotes sexual suggestiveness or a willingness to engage in sexual activity;

(6) whether the depiction is of a child engaging in or being engaged in sexual conduct, including, but not limited to, sexual intercourse, unnatural sexual intercourse, bestiality, masturbation, sado-masochistic behavior, or lewd exhibition of the genitals.

"Minor", a person under eighteen years of age.

"Nudity", uncovered or less than opaquely covered human genitalia, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitalia 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, photoelectronic or photo-optical system.

"Performance", any play, dance, exhibit, or such similar activity performed before one or more persons.

"Obscene", matter is obscene if taken as a whole it

(1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed;

(2) depicts or describes sexual conduct in a patently offensive way; and

(3) lacks serious literary, artistic, political or scientific value.

"Sexual conduct", human masturbation, sexual intercourse, actual or simulated, normal or perverted, any lewd exhibitions of the genitalia, flagellation or torture in the context of a sexual relationship, any lewd touching of the genitalia, 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.

“Visual material”, any motion picture film, picture, photograph, videotape, book, magazine, pamphlet that contains pictures, photographs or similar visual representations or reproductions, or depiction by computer, telephone or any other device capable of electronic data storage or transmission. Undeveloped photographs, pictures, motion picture films, videotapes and similar visual representations or reproductions may be visual materials notwithstanding that processing, development or similar acts may be required to make the contents thereof apparent.