IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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. 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, Defendants.	) Civil Action No. 10-11165) Judge Rya W. Zobel

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO MOTION FOR A PRELIMINARY INJUCTION

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INTRODUCTION

Plaintiffs have brought a sweeping constitutional challenge to the Massachusetts statute prohibiting the dissemination of matter harmful to minors, M.G.L. c. 272, §§ 28 & 31, as amended by Sections 2 and 3 of Chapter 74 of the Acts of 2010 (the "Amended Statute"), and they now seek a preliminary injunction to prevent enforcement of the statute as applied to Internet communications. Plaintiffs liken the Amended Statute to a number of statutes in other jurisdictions that have been struck down as unconstitutional under the First Amendment and the Commerce Clause. The Amended Statute does not share the constitutional defects that courts have identified in these other cases. Rather, the Amended Statute prohibits only the dissemination of matter that is obscene as to minors under the prevailing Supreme Court test, where the disseminator specifically intends to disseminate the matter to someone under eighteen. Contrary to plaintiffs' assertions, the statute does not regulate any protected adult-to-adult speech, nor does it criminalize the publication of harmful matter on the Internet for all to see, even with the knowledge that a minor may gain access to it. Plaintiffs' contrary and unreasonably broad reading of the Amended Statute is foreclosed by a prior opinion of the Massachusetts Supreme Judicial Court ("SJC"), which interpreted § 28 to require purposeful (not simply knowing) conduct. Properly construed, the Amended Statute prohibits electronic communication of matter that is obscene as to minors *only if* the defendant specifically intended to direct the matter to a minor, a prohibition that plaintiffs concede would be constitutional. *See* Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, Dkt #20 ("Pffs' Mem."), at 1.

FACTUAL BACKGROUND

I. SEXUAL PREDATORS USE THE INTERNET AS A MEANS TO HARM MINORS.

The Internet has opened a new front in the practice of child predation.[1] Electronic forms of communication offer offenders new, often anonymous, means of cultivating potential victims. In fact, there is a growing body of evidence that sex offenders routinely use the Internet to groom their young victims. The National Juvenile Online Victimization Study ("Online Victimization Study"), an analysis of arrests by federal, state, county, and local law enforcement agencies in Internet-related sex crimes between July 1, 2000, and June 30, 2001, found that 64% of offenders communicated online with their victims for more than a month before a face-to-face meeting, communicating "extensively" with them. *See* Janis Wolak, David Finkelhor & Kimberly Mitchell, *Internet-Initiated Sex Crimes Against Minors: Implications for Prevention Based on Findings from a National Study*, 35(4) *J. of Adolescent Health* 424.e11, 424.e15-e18 (2004) (hereinafter, Wolak, Finkelhor & Mitchell, *Internet-Initiated Sex Crimes Against Minors*); *see also* Janis Wolak, et al., *Online "Predators" and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, 63(2) *American Psychologist* 111, 112-15 (2008) (discussing how online grooming occurs) (hereinafter, Wolak et al., *Online Predators*); Michele L. Ybarra & Kimberly J. Mitchell, *How Risky are Social Networking Sites? A Comparison of Places Online Where Youth Sexual Solicitation and Harassment Occurs*, 121(2) *Pediatrics* e350,

[1] The "Internet" refers to the global network of comprised of "tens of millions of local networks linking hundreds of millions of computers, owned by governments, public institutions, non-profit organizations, private companies and individuals around the world." Expert Declaration of Scott Bradner, Dkt #19-1 ("Bradner Decl.") ¶ 24. The "World Wide Web" or "Web" is one of many methods of communicating over the Internet. *Id.* ¶ 43. The Web consists of "hundreds of millions of Internet-connected web sites." *Id.* ¶ 55. Most web sites make some or all of their content accessible to all Internet users, for free, without requiring the viewer to identify him- or herself. *Id.* ¶ 55. Other methods of communication over the Internet include Internet chat, instant messaging ("IM"), blogs, twitter, video streaming, electronic mail ("email"), and social networking web sites. *Id.* ¶ 43. Some of these methods, including email and IM, permit one Internet user to send a private message directly to another Internet user. *Id.*

e354 (2008) (noting that 15% of respondents to a 2006 poll of 1,588 youth aged 10 to 15 reported receiving an unwanted sexual solicitation via the Internet during the previous year). Sexual offenders "used these [electronic] interactions to establish romantic or otherwise close relationships before they first met victims face-to-face." Wolak, Finkelhor & Mitchell, *Internet-Initiated Sex Crimes Against Minors*, at 424.e18. Offenders also usually made their interest in a sexual relationship known. *Id.*

Seventy-seven percent of the cases documented in the Online Victimization Study involved multiple forms of online communication between offender and victim. *Id.* at 424.e16 (Table 2). In both online police sting operations and cases involving actual juvenile victims, the first online meeting between the offender and his putative victim usually occurred in an Internet chat room. *See* Kimberly Mitchell, Janis Wolak & David Finkelhor, *Police Posing as Juveniles Online to Catch Sex Offenders: Is It Working?*, 17(3) *Sexual Abuse: A Journal of Research and Treatment* 241, 253 (2005) (reporting that 56% of first contacts involving police and 79% of first contacts involving juvenile victims occurred in chat rooms). Instant messages ("IMs"), however, are increasingly more popular among teens than chat rooms, with 30% of youths between the ages of 10 and 17 reporting they used a chat room in 2005 while 68% of such youths reported sending an IM at least once that year. *See* Ybarra & J. Mitchell, *How Risky are Social Networking Sites?*, at e351.[2]

Of those youths who reported receiving an unwanted online sexual solicitation in a 2006 survey, nearly 43% received that solicitation via IM and about 32% occurred in chat rooms. *Id.*

[2] Online communications in a public "chat room" are visible to any other participant in that "chat room." Ybarra & J. Mitchell, *How Risky are Social Networking Sites*, at e351. IMs, meanwhile, are private, person-to-person communications from one "screen name" to another. *Id.* Many IM services allow users to create profiles—which can include pictures and other information—and to search for other users' screen names in a directory, though this feature often may be manually restricted through an IM service's privacy settings. *Id.*

at e354 (Table 4). The electronic means by which teens communicate with one another are, of course, evolving rapidly. The impact of new technologies on sexual predation is difficult to gauge. *See* Wolak et al., *Online Predators*, at 124 (pointing, in particular, to the impact of Internet-accessible cell phones and other wireless handheld devices).

For biological and social reasons, older minors are more at risk from Internet sex predators than younger ones. *See id.* at 115-16. Indeed, 99% of the victims documented in the Online Victimization Study were between the ages of 13 and 17, none were younger than 12, and 76% were 13, 14, or 15 years old. *See* Wolak, Finkelhor & Mitchell, *Internet-Initiated Sex Crimes Against Minors*, at 424.e16 (Table 2). Older teens are learning to develop romantic relationships while also engaging in more complex and interactive Internet use than younger teens. Wolak et al., *Online Predators*, at 116 (noting that in a U.K. study of Internet use by youths aged 12 to 17, those aged 15 to 17 were most prone to take risks involving privacy and contact with strangers). In fact, many of these young victims may view these relationships as romances. *Id.* at 115-16.

Moreover, despite the Internet's international scope, half of all arrests for sex crimes that were initiated with an Internet relationship between 2000 and 2001 involved an offender and victim who lived within 50 miles of each other. Wolak, Finkelhor & Mitchell, *Internet-Initiated Sex Crimes Against Minors*, at 424.e17.

II. THE MASSACHUSETTS LEGISLATURE ENACTED THE CHALLENGED AMENDMENTS TO PROHIBIT USE OF THE INTERNET AS A MEANS TO HARM MINORS.

Massachusetts law has long prohibited the dissemination to minors of sexually explicit matter deemed harmful to them. *See, e.g.*, R.S. 1836, c. 130, § 10 (prohibiting the introduction into any "family, school, or place of education" of any "pamphlet, ballad, printed paper, or other

thing, containing obscene language, or obscene prints, pictures, figures, or descriptions, manifestly tending to the corruption of the morals of youth"). In its current form, in effect since December 29, 1982, General Laws c. 272, § 28, provides in pertinent part:

> **Section 28. Matter harmful to minors, dissemination; possession; defenses**
>
> 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 . . . . 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.

The term "harmful to minors" is defined in § 31, as follows:

> [M]atter 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.

Section 31 also has a separate definition of "matter," discussed below, which is the subject of the challenged amendments in this case.

On February 5, 2010, the Massachusetts SJC ruled that then-existing statutory definitions of "matter" and "visual material" in M.G.L. c. 272, § 31, did not encompass "electronically transmitted text, or 'online conversations' for the purposes of a prosecution for attempted dissemination of matter harmful to a minor [under M.G.L. c. 272, § 28]." *Commonwealth v. Zubiel*, 456 Mass. 27, 27-28, 921 N.E.2d 78, 79 (2010). In reaching that conclusion, the SJC

overturned the conviction of a man who had cultivated a relationship with someone he believed to be a 13-year-old girl, by engaging in a series of online conversations, using chat and IM services, over a nine-day period, culminating in an attempt at an actual meeting during which he was arrested. *Zubiel*, 456 Mass. at 28-29, 921 N.E.2d at 79-80. In fact, the "girl" with whom Zubiel was conversing was an undercover officer, Deputy Sheriff Melissa Marino of the Plymouth County Sheriff's Department. The IMs from Zubiel to Marino included discussions of sexual topics, inquiries about the girl's sexual experience, and a request for her to send a nude picture of herself. *Id.* Their exchange concluded with an agreement that Marino would meet Zubiel so he could "teach [her] everything." *Id.* Zubiel was arrested when he arrived at an apartment complex in Marshfield, Massachusetts, where he believed the girl lived. *Id.*

The SJC's opinion in *Zubiel* prompted an immediate reaction from the other branches of state government. *See* Jonathan Saltzman & John R. Ellement, *SJC Says Lewd IMs to Minors Not Illegal*, *Boston Globe*, Feb. 6, 2010, *available at* http://www.boston.com/news/local/massachusetts/articles/2010/02/06/sjc_says_lewd_ims_to_minors_not_illegal/ (reporting on legislative and executive branch plans to respond to the SJC's decision). A spokesperson for Massachusetts Governor Deval Patrick was quoted as saying Patrick intended to file a bill in the next week to address "an obvious gap in the law." *Id.* The article also described state Rep. Eugene L. O'Flaherty, chairman of the House Committee on the Judiciary, and House Speaker Robert A. DeLeo as proponents of "fixing the law." *Id.*

Several bills were filed (H. 4489, H. 4528, H. 4529), and, ultimately, language substantially similar to H. 4529 was added to another bill, S.997, which became Chapter 74 of the Acts of 2010. *See* Journal of the House, Wednesday, February 24, 2010 *available at* http://www.mass.gov/legis/journal/hj022410.pdf; *see also* Senate Session of March 4, 2010,

Senate Broadcast Services, http://masslegislature.tv/?l=sen_video (click "Search Archives" tab; then search by date "March 4, 2010") (hereinafter Senate Session of March 4, 2010). During Senate debate on the subject, state Senator Cynthia Stone Creem made clear that the legislation was a response to the *Zubiel* decision. *See* Senate Session of March 4, 2010 (beginning at 29:26). Specifically, Creem stated:

> [. . .] The [SJC] ruled that the messages [sent by Zubiel] did not fall under the statutory definition of matter harmful to minors because the key language of the law talks about handwritten or printed materials or visual representations and when that law was enacted, nobody even thought about texting, Blackberrys, or whatever. They thought that covered it. I believe that the clear intent of the statute when it was passed was to include these forms of communications. Indeed, the [SJC] ruled specifically, I quote, that ... the legislative intent was to protect children from sexual exploitation and abuse. So while the intent was there, the strict ruling under the court was that the statute didn't apply. So the problem for prosecutors in this case and now for prosecutors ... across the state, is the court refused to read twenty first century technology into a statute definition drafted in 1967.

Id. (beginning at 30:25). Senators unanimously approved the amendment on March 4, 2010. *See* Senate Journal for Thursday, March 4, 2010, *available at* http://www.mass.gov/legis/journal/186/sj030410.htm.

Governor Patrick signed Chapter 74 of the Acts of 2010 into law on April 12, 2010, effective July 12, 2010. *See* 2010 Massachusetts Session Laws, http://www.mass.gov/legis/laws/seslaw10/index.htm. Section 2 of the amendments updated the definition of what constitutes "matter" in § 31, and Section 3 amended the definition of "visual material," as follows:

> SECTION 2. Section 31 of chapter 272 of the General Laws . . . is hereby amended by striking out . . . 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 the 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 wire, radio, electromagnetic, photo-electronic or photo-optical system.
>
> SECTION 3. The definition of "visual material" in said section 31 of 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 or storage.

Mass. St. 2010, c. 74, §§ 2, 3. Neither change offered any statement, or in any way changed the law, on the mental state required for conviction under M.G.L. c. 272, § 28.

ARGUMENT

I. THE SJC HAS INTERPRETED § 28 TO REQUIRE SPECIFIC INTENT TO DISSEMINATE TO A MINOR.

Before this Court can assess plaintiffs' standing and the likelihood of success of plaintiffs' federal constitutional claims, it is necessary to understand what activity the Amended Statute actually proscribes. Plaintiffs allege that "merely post[ing] material on a website" could subject someone to prosecution under § 28 "even if the communicator does not direct the communication to a specific individual less than eighteen years old." Amended Complaint for Declaratory and Injunctive Relief, Dkt # 6 ("Am. Compl.") ¶ 9. Plaintiffs fault, at least in part, the statute's "weak 'scienter' requirement," asserting that "Massachusetts law only requires that the transmitter have 'a general awareness of the character of the matter' as to the age of a minor." Pffs' Memo. at 12.

The definition of "knowing" contained in § 31, to which plaintiffs refer ("a general awareness of the character of the matter"), logically applies to the only occurrence of the word

"knowing" in § 28, appearing in the statute's third clause: "knowing it [the matter] to be harmful to minors." However, the SJC has interpreted the first clause of § 28, describing the prohibited conduct ("[w]hoever disseminates to a minor any matter harmful to minors"), to require *purposeful*—not merely *knowing*—conduct. *See Commonwealth v. Belcher*, 446 Mass. 693, 696, 846 N.E.2d 1141, 1144 (2006) ("General Laws c. 272, § 28, requires purposeful activity for proof of guilt.").

By requiring proof of "purposeful" conduct under § 28, *Belcher*, 446 Mass. at 696, 846 N.E.2d at 1144, the SJC established § 28 as a specific intent crime. *See Commonwealth v. Gunter*, 427 Mass. 259, 268, 692 N.E.2d 515, 523 (1998) (noting that " '[i]n a general sense, "purpose" corresponds loosely with the common-law concept of specific intent, while "knowledge" corresponds loosely with the concept of general intent.'") (quoting *United States v. Bailey*, 444 U.S. 394, 405 (1980)). To prove specific intent, the Commonwealth bears the burden of demonstrating not only that a defendant "consciously intended to take certain *actions*, but that he also consciously intended certain *consequences*." *Gunter*, 427 Mass. at 269, 692 N.E.2d at 523 (emphasis added); *see also id.* at 269 n.12, 692 N.E.2d at 523 n.12 (noting that the "critical requirement" of an instruction on specific intent is that "the defendant must intend that the *particular consequences* constituting the crime follow from his act or conduct) (emphasis added); *Commonwealth v. Collier*, 427 Mass. 385, 388 n.4, 693 N.E.2d 673, 675 n.4 (1998) (defining specific intent "in terms of a purposeful and focused intention on the part of a defendant to bring about a specific result").

In the context of § 28, this means that the Commonwealth must prove not only that a defendant purposefully "disseminate[d]" matter harmful to minors (the act) but that the defendant specifically intended to disseminate the matter "*to* a minor" (the specific consequences

or result of the act, making it criminal). M.G.L. c. 272, § 28 (emphasis added). In *Belcher*, the SJC noted that by using the words "exhibited" or "displayed" in conjunction with the words "*to* a person under eighteen years of age," the trial judge in that case adequately instructed jury as to § 28's intent requirement. 446 Mass. at 696, 846 N.E.2d at 1144 (emphasis in original). And, even prior to *Belcher*, the Massachusetts Appeals Court dismissed a case brought under § 28 for insufficient evidence where no minors saw the matter and where the evidence suggested that the defendant did not intend for them to see it. *Commonwealth v. Rollins*, 60 Mass. App. Ct. 153, 157, 160, 799 N.E.2d 1287 (2003), *cited with approval in, Belcher*, 446 Mass. at 696, 846 N.E.2d at 1144.

The SJC's discussion of child enticement under M.G.L. c. 265, § 26C, is instructive. This statute prohibits conduct that causes "a child under the age of 16 or someone [the defendant] believes to be a child under the age of 16" to "enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that [the defendant] or another person will" violate one of eighteen enumerated crimes. *See Commonwealth v. Disler*, 451 Mass. 216, 884 N.E.2d 500 (2008); *Commonwealth v. Filopoulos*, 451 Mass. 234, 884 N.E.2d 514 (2008). Two of the listed offenses—statutory rape and indecent assault and battery on a child—are strict liability crimes. Commenting on the apparent paradox that the Commonwealth would, in those strict-liability cases, need to prove that a defendant possessed a specific intent to commit a crime that did not itself require proof of intent, the SJC stated:

> [Section 26C] require[s], in all cases, that the Commonwealth prove that the defendant *intended to commit a criminal offense*. [If the underlying offense is statutory rape], the Commonwealth will be required to prove that the defendant enticed a child (or someone whom the defendant believed to be a child) *with the intent to have sexual relations with a person under sixteen years of age* . . . . This approach would not require that the Commonwealth prove that the

> defendant knew the exact age of the child. However the defendant could not be found guilty unless the Commonwealth proves that his intention was to direct his sexual advances to an underage individual, *i.e.*, and intent to do a criminal act.

Disler, 451 Mass. at 227-28, 884 N.E.2d at 510; *see also Filopoulos*, 451 Mass. at 238-39, 884 N.E.2d at 518.

Under § 28, the Commonwealth must prove that, having a general awareness of the character of the matter, the defendant *purposefully* disseminated the harmful matter *to a minor*. As in the enticement context, this requires proof that the defendant specifically intended "to direct [the matter] to an underage individual." *Disler*, 451 Mass. at 227-28, 884 N.E.2d at 510. Otherwise, there is no crime. The fact that, in the context of § 28, this scienter requirement was established by judicial construction, rather than Legislative drafting, is irrelevant. It is well settled that judicial construction adds to the meaning of a statute as certainly as if the words were placed there by the Legislature. *See Wainwright v. Stone*, 414 U.S. 21, 23 (1973).

Thus, contrary to plaintiffs' assertions, communications that are addressed to the general public and not specifically directed to minors (such as generally-accessible Web postings or comments in a public chat room) do not come within the statute's reach, even if the speaker is on notice that a minor may access them, and even if the speaker knows the matter may be harmful to minors. This distinction is critical. Indeed, it is outcome-determinative, as plaintiffs concede that if the Amended Statute prohibits only "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," it "would be constitutional." Pffs' Mem. at 1.

II. THE STATUTE'S ENFORCEMENT HISTORY CONFIRMS THAT IT PUNISHES PURPOSEFUL DISSEMINATION OF HARMFUL MATTER TO MINORS, NOT ADULT-TO-ADULT SPEECH.

A review of cases across the state involving § 28 reveals that Massachusetts prosecutors have consistently enforced the statute in conformity with the SJC's holding in *Belcher* that an accused must have the specific intent to disseminate the matter to a minor. In performing this review, the Attorney General's office provided members of the eleven District Attorney's Offices with two spreadsheets compiling cases involving at least one charge under § 28, brought in the Superior Court and in the District Courts.[3] The spreadsheets did not include charges of attempt to violate § 28, except those that happened to accompany a charge for a direct violation of § 28. Due to time constraints, cases in which the § 28 charge was paired with a crime that, by its nature, involves direct contact between the accused and a minor victim were excluded from the review.[4]

Based on the results of the District Attorney's Offices' review to date, in every case, the underlying facts supported a conclusion that the defendant specifically directed the matter to a minor or minors. *See* Affidavits of Joseph M. Ditkoff (Suffolk District), David J. Gold (Bristol District), Elin H. Graydon (Eastern District), Edward N. Karcasinas, Jr. (Middle District), Varsha Kukafka (Norfolk District), Jane Davidson Montori (Hampden District), Judith Ellen Pietras (Northwestern District), Joseoph A. Pieropan (Berkshire District), Kimberly A. Rugo (Northern District), Thomas G. Shack, III (Cape and Islands District), and Robert C. Thompson (Plymouth

[3] Defendants will file the spreadsheets under cover of an appropriate declaration, in the event that this Court grants defendants' Motion for an Order Granting Leave to Disclose Criminal Offender Record Information and for a Protective Order, filed herewith.

[4] For example, cases including one or more of the following charges were not reviewed: (1) forcible rape of a child, M.G.L. c. 265, § 22A; (2) statutory rape of a child, M.G.L. c. 265, § 23; (3) indecent assault and battery on a child under 14, M.G.L. c. 265, § 13B; (4) unnatural act with a child under 16, M.G.L. c. 272, § 35A; (5) enticement of a child under 16, M.G.L. c. 265, § 26C; and (6) assault with intent to rape a child, M.G.L. c. 265, § 24B. In the Superior Court, only 23 of the 230 cases listed did not include at least one of the foregoing six charges. The same applied to100 of the 211 cases listed for the District Courts.

District), filed herewith. In no case was a §28 charge brought against a defendant who distributed harmful matter to a general audience without specifically targeting a minor or minors.

III. PLAINTIFFS LACK STANDING.

To meet constitutional requirements for standing under Article III, a plaintiff must establish that "(1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court." *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8 (1st Cir. 1996) (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)). The party invoking federal jurisdiction has the burden of demonstrating that it has standing. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56 (1st Cir. 2003).

In a pre-enforcement facial challenge to a criminal statute on the grounds that it abridges a party's First Amendment rights, a plaintiff may establish the requisite injury by showing either "a credible threat of present or future prosecution" under the challenged statute or that "the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *N.H. Right to Life*, 99 F.3d at 13-14. "A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable." *Id.*; *see also Younger v. Harris,* 401 U.S. 37, 41-42 (1971) (plaintiffs who did not allege "that they ha[d] ever been threatened with prosecution, that a prosecution [wa]s likely, or even that a prosecution [wa]s remotely possible" failed to establish a case or controversy; allegations that plaintiffs "fe[lt] inhibited" in the exercise of First Amendment rights were insufficient); *Sullivan v. City of Augusta*, 511 F.3d 16, 25 (1st Cir. 2007) (holding that organizers of street marches lacked

standing to challenge an ordinance requiring a permit for activities that did not apply to plaintiffs); *Rodos v. Michaelson*, 527 F.2d 582, 585 (1st Cir. 1975) (holding that plaintiffs lacked standing to challenge criminal statute on due process grounds where statute regulated abortions performed after the 23rd week of pregnancy and plaintiff-doctors expressed no interest in performing abortions beyond the 19th or 20th week).

Accordingly, plaintiffs in this case can establish standing only if " '[they have] alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the [Amended Statute], and there exists a credible threat of prosecution.'" *N.H. Right to Life*, 99 F.3d at 14 (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)). In light of § 28's strong scienter requirement and the statute's enforcement history, discussed above, plaintiffs' fear of prosecution is reasonable only if they allege that they purposefully direct communications to minors.

Several of the plaintiff organizations, American Booksellers Foundation for Free Expression ("ABFFE"); Association of American Publishers, Inc. ("AAP"); and Comic Book Legal Defense Fund ("CBLDF"), assert that "[t]he online information that [plaintiffs'] members provide serves both adults and minors," without alleging that they purposefully direct any electronic communications to minors. Declaration of Christopher Finan ¶ 9 (ABFFE); Declaration of Allen R. Adler ¶ 6 (AAP); Declaration of Charles Brownstein ¶ 7 (CBLDF). Plaintiff American Civil Liberties Union of Massachusetts ("ACLUM") alleges that it "considers minors to be an important audience for its online resources" and alleges that "[t]he ability of minors to participate in chat rooms or discussion groups with minors and with adults is a vital part of their education," but it does not allege that it purposefully directs communications to minors. Declaration of Carol V. Rose ¶ 10. ACLUM further alleges that "ACLU staff and

members use other online services such as e-mail, outside discussion groups, and online mailing lists," but does not allege that these communications are directed to minors, purposefully or otherwise. Am. Compl. ¶ 98. Plaintiffs Harvard Book Store, Inc., Porter Square Books, Inc., and Photographic Resource Center, Inc., all allege a fear that merely displaying material on their website may expose them to prosecution. Declaration of Carole Horne ¶ 4; Declaration of Dale Szczeblowski ¶ 4; Declaration of Glenn Ruga ¶ 4. But none alleges that it purposefully communicates with minors over the Internet. *Id.*

Plaintiff Marty Klein does assert that he sends personal emails directly to individuals, often in response to sexually explicit questions. Declaration of Marty Klein ¶¶ 5-6. However, Klein states that when he sends personal emails directly to a person, he does not know that person's age or location. *Id.* ¶ 6. While this may describe recklessness with respect to the age of the recipients, it does not describe the purposeful conduct required by the statute. Moreover, even if there are cases in which Klein intentionally directs material to someone he believes to be a minor, see Klein Decl. ¶ 17 (describing sex-related question from Internet user identifying herself as a 16-year-old girl), the Amended Statute's definition of "harmful to minors" specifically excludes material that has any "serious literary, artistic, political or scientific value for minors." M.G.L. c. 272, § 31. Thus, as discussed, *infra*, Section IV.B.3, the statute does not reach information about reproduction and sexual health that has serious value for older minors. Finally, Klein asserts that "teenagers are part of [the] target audience" of his website, "Straight Talk." *Id.* ¶ 24. But, as discussed above, posting material for a general audience, even if one knows or has reason to believe that minors will be part of that audience, does not amount to specific intent to direct the material to a minor, as required by the Amended Statute.

In sum, none of the plaintiffs has alleged that he (or it) engages in, or intends to engage in, behavior that is prohibited by the Amended Statute, or that would render plaintiffs' fears of prosecution reasonable. Plaintiffs' subjective fears of prosecution under the Amended Statute do not suffice to establish standing. *N.H. Right to Life*, 99 F.3d at 14. Accordingly, plaintiffs fail to establish a genuine case or controversy under Article III.

IV. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION.

A. The Preliminary Injunction Standard

Under the settled standard for evaluating a motion for a preliminary injunction, the moving party—in this case, plaintiffs—bears the burden of establishing: (1) a likelihood of success on the merits; (2) a potential for irreparable injury; (3) that the balance of equities favors the moving party; and (4) that the public interest would not be adversely affected by an injunction. *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991). Likelihood of success on the merits is the "sine qua non" of this inquiry, without which "the remaining factors become matters of idle curiosity." *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002).

B. Plaintiffs' First Amendment Claim is Not Likely to Succeed.

In general, a plaintiff seeking to invalidate a statute on its face must demonstrate that the law is unconstitutional in all of its potential applications. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). The First Amendment overbreadth doctrine is an exception to this, permitting a plaintiff to succeed based on a showing that the "law punishes a 'substantial' amount of protected free speech." *Id.* Invalidating a statute for overbreadth is "strong medicine." *Id.* at 120. Accordingly, to merit such relief, the overbreadth must "be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Id.* at 120.

Furthermore, under the doctrine of constitutional avoidance, a court must construe a statute's reach narrowly to avoid constitutional problems, unless such a construction would be "plainly contrary" to the Legislature's intent. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988); *see also United States v. X-Citement Video, Inc.,* 513 U.S. 64, 69 (1994) ("[A] statute is to be construed where fairly possible so as to avoid substantial constitutional questions."); *Ferber v. New York,* 458 U.S. 747, 769 n.2 (1982) (noting that federal courts addressing overbreadth claims "should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction").

Here, as discussed above, this Court need not strain to read the Amended Statute narrowly because the Massachusetts SJC has already interpreted the statute to require purposeful conduct, restricting the statute's reach to instances in which matter "harmful to minors" is disseminated with the specific intent that it reach someone under eighteen years of age. Reading the strong scienter requirement in conjunction with the statute's definition of matter "harmful to minors," discussed below, the Amended statute regulates only matter that is obscene as to minors *and* is specifically directed to minors. As such, it does not regulate any—much less a substantial amount of—protected adult-to adult speech.

1. The Amended Statute is a permissible regulation of juvenile obscenity under *Ginsberg v. New York*.

The Amended Statute is a "variable obscenity" statute of the type approved in *Ginsberg v. New York,* 390 U.S. 629 (1968). In *Ginsberg*, the Supreme Court upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age sexually explicit material that was obscene as to them but not as to adults. *Id.* at 631, 636-37. In so doing, the Court held that a state may "adjust" the definition of obscenity, "'by permitting the appeal of this

type of material to be assessed in terms of the sexual interests' . . . of minors." *Id.* at 638 (quoting *Mishkin v. New York,* 383 U.S. 502, 509 (1966)).

The prevailing standard for determining whether expressive material is obscene, and thus unprotected, is set forth in *Miller v. California,* 413 U.S. 15, 24 (1973). The *Miller* test asks (1) "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* (internal quotations and citations omitted). Adjusting this standard to apply to minors, as *Ginsberg* permits states to do, and viewing it alongside the Amended Statute's definition of matter "harmful to minors," it becomes clear that the Amended Statute applies only to material that is obscene as to minors:

The *Miller/Ginsberg* Test for Juvenile Obscenity	The Amended Statute's Definition of "Matter Harmful to Minors" (M.G.L. c. 272, § 31)
Matter is obscene as to minors if:	"[M]atter is harmful to minors if it is obscene[5] or, if taken as a whole, it
(1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest of minors;	(1) describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors;
(2) the work depicts or describes, in a patently offensive way with regard to minors, sexual conduct specifically defined by the applicable state law; and	(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) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.	(3) lacks serious literary, artistic, political or scientific value for minors.

[5] "Obscene" is defined elsewhere in § 31, in accordance with the *Miller* test for adult obscenity, applied with reference to prevailing standards of the county in which the offense was committed. Plaintiffs do not challenge the

The Amended Statute's definition of "harmful to minors" tracks the *Miller/Ginsberg* test for juvenile obscenity in all material respects. To complete the definition of "harmful to minors" set forth above, § 31 also specifically defines "nudity," "sexual conduct," and "sexual excitement." In addition, § 28 provides for an affirmative defense if "the defendant was in a parental or guardian relationship with the minor," an element that the Supreme Court has deemed important in evaluating restrictions on juvenile obscenity. *See Reno v. ACLU*, 521 U.S. 844, 865 (1997) ("*Reno*"). An affirmative defense exempting "bona fide school[s], museum[s] or librar[ies]," their employees, and any "retail outlet affiliated with and serving the educational purpose of such organization" further limits the statute's reach. M.G.L. c. 272, § 28.

For these reasons, the Amended Statute targets only juvenile obscenity, as defined by the relevant Supreme Court case law, which is unprotected as to minors. *See Ginsberg*, 390 U.S. at 639-46. Combining this definition of juvenile obscenity with the requirement that a defendant purposefully disseminate the matter "*to* a minor," the Amended Statute restricts only unprotected speech and does not burden any protected adult-to-adult speech.

2. Unlike other statutes that have been invalidated or enjoined, the Amended Statute does not burden protected adult-to-adult speech.

Because the Amended Statute requires proof that a defendant purposefully (*i.e.*, with specific intent), rather than merely knowingly, disseminated juvenile obscenity to a minor, the statute does not regulate the content of generally-accessible websites, which are not purposefully directed to minors. The Amended Statute's strong scienter requirement thus cures a deficiency identified by the Supreme Court in *Reno*, where the Court observed that merely requiring *knowledge* that a child is one of the recipients of a communication is insufficient to protect adult-

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Amended Statute to the extent it regulates adult obscenity. *See* Pffs' Mem. at 3. Plaintiffs do, however, challenge the use of a county-wide standard, discussed *infra*, Section IV.B.5.

to-adult communications over the Internet because "[given] the size of the potential audience for most [Internet communications], in the absence of a viable age verification process, the sender must be charged with the knowing that one or more minors will likely view it." 521 U.S. at 876.

On this basis alone, the Amended Statute can be distinguished from the many statutes cited by plaintiffs that courts have enjoined or found unconstitutional under the First Amendment, each of which encompassed generally-accessible Web postings and other forms of mass-communication not purposefully directed to minors.[6] On the other hand, courts have upheld as constitutional statutes, such as the Amended Statute, that exclude generally-accessible Web postings and other forms of undirected mass-communication from their reach, either by explicitly exempting such communications or through a strengthened scienter requirement. *See Amer. Booksellers Found. for Free Expression v. Strickland*, 601 F.3d 622 (6th Cir. 2010)

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[6] *See Reno*, 521 U.S. 859-60, 883 (holding unconstitutional portions of the federal Communications Decency Act of 1996 ("CDA"), which prohibited "knowing transmission" of indecent messages to minors or "knowing display" of patently offensive messages "in a manner that is available" to minors); *ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009) (holding unconstitutional the federal Child Online Protection Act ("COPA"), which prohibited knowing posting of material harmful to minors on the World Wide Web for commercial purposes); *PSInet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir.), *reh. den.*, 372 F.3d 671 (4th Cir. 2004) (holding unconstitutional Virginia statute prohibiting the knowing display for commercial purposes of matter harmful to juveniles); *Amer. Booksellers Found. for Free Expression v. Dean*, 342 F.3d 96, 100 (2nd Cir. 2003) (holding unconstitutional Vermont statute prohibiting dissemination of matter harmful to minors with actual knowledge that the recipient is a minor; state defendants could "point to no decisions of the Vermont Supreme Court [to suggest] that that court would construe the statute" not to apply to material placed on a website or shared with an email or internet discussion group); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (affirming preliminary injunction against enforcement of New Mexico statute even though it had "knowing and intentional" scienter requirement where statute's affirmative defenses addressed group communications, undermining state's contention that statute should be interpreted narrowly to exclude such communications); *ACLU v. Goddard*, No. Civ.00-505 TUC ACM. 2004 WL 3770439 (D. Ariz. Apr. 23, 2004) (permanently enjoining Arizona statute making it a crime to "intentionally or knowingly transmit or send" by means of "electronic mail, personal messaging or any other direct [I]nternet communication" any item "harmful to minors" where sender "knows or believes" that a minor in Arizona will receive them; statute did not define "direct Internet communication" or distinguish prohibited acts of "transmit[ting]" or "send[ing]" from exempted act of "posting"); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) and *Cyberspace Commc'ns, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (enjoining Michigan statute prohibiting knowing dissemination to minor of harmful sexually explicit matter over the Internet); *State v. Weidner*, 611 N.W. 2d. 684 (Wis. 2000) (holding Wisconsin statute unconstitutional for lack of scienter requirement). *Cf. Southeast Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005) (holding unconstitutional South Carolina statute prohibiting dissemination of harmful material to minors without mention of scienter requirement; court premised its analysis on assumption that the statute burdened protected adult speech and was subject to strict scrutiny).

(upholding Ohio statute prohibiting dissemination of harmful matter to juveniles where statute applied only to "personally directed" forms of communication); *Simmons v. State*, 944 So.2d 317 (Fla. 2006) (upholding Florida statute prohibiting dissemination of matter harmful to minors by electronic mail sent to a specific individual that the sender knows or believes to be a minor); *People v. Hsu*, 82 Cal. App. 4th, 99 Cal. Rptr. 2d 184 (2000) (upholding California statute prohibiting distribution of harmful matter to minor over the Internet "with the intent of arousing . . . the lust or passions or sexual desire of that person or minor" and "with the intent . . . of seducing a minor"); *Hatch v. Super. Ct. of San Diego County*, 80 Cal. App. 4th 170, 195, 94 Cal. Rptr. 2d 453 (2000) (same as *Hsu*). *Cf. People v. Foley*, 94 N.Y.2d 668, 684, 731 N.E.2d 123 (2000) (upholding New York statute prohibiting intentional transmission of sexually graphic images to minors where "[b]y means of such communication he importunes, invites or induces a minor" to engage in sexual activity). Here, plaintiffs appear to concede that if the Amended Statute is interpreted as the SJC has construed it and as defendants' have enforced it—to apply only to communications specifically directed to minors—the statute would be constitutional. Pffs' Mem. at 1. For this reason alone, plaintiffs fail to establish the requisite likelihood of success on the merits.

3. The Amended Statute does not restrict older minors' First Amendment rights.

Plaintiffs' assertion that the Amended Statute infringes on the First Amendment rights of older minors "to obtain ideas and information about sexuality, reproduction, and the human body," Pff Memo. at 13, also presents no likelihood of success. The Amended Statute regulates only the dissemination of material that is obscene as to minors under the *Miller/Ginsberg* test. Such material is constitutionally unprotected as to minors, and a state may completely bar minors

from accessing such information, except through a parent or guardian. *See Ginsberg*, 390 U.S. at 637-39. For a variable obscenity statute like the Amended Statute to withstand constitutional challenge, a court need only find "that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641. Here, it cannot be said that it was irrational for the Massachusetts Legislature to deem unsuitable for minors materials that qualify as obscene as to them under the prevailing federal standard for obscenity.

The cases cited by plaintiffs are not to the contrary. *Board of Education v. Pico,* 457 U.S. 853 (1982), and *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), both addressed students' First Amendment rights in a school setting. The plurality opinion in *Pico* focused heavily on the school's role as an inculcator of democratic values, 457 U.S. at 868-69, a concern wholly inapplicable here. *Tinker* addressed students' rights to engage in political symbolic speech on school grounds. Neither case addressed a right of adolescents to receive sexually explicit information. Indeed, in *Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986), the Court distinguished *Tinker* and concluded that public schools could sanction lewd and offensive speech by older juveniles. *Id.* at 680-86.

Moreover, while *Carey v. Population Services International,* 431 U.S. 678 (1977), and *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), pertain to sexuality, they do not support plaintiffs' contention. *Carey* addressed birth control and the "right to privacy in connection with decisions affecting procreation," not free speech. 431 U.S. at 693. The Court in *Erznoznik* held that an ordinance banning all nudity (not just sexually explicit nudity) at all drive-in theaters whose screens were visible from public streets was too broad to be justified by an interest in protecting minors. 422 U.S. at 213-14. But, the Court neither held nor suggested that older juveniles have a right to receive sexually explicit information that is obscene as to them. *See id.*

To the extent that older minors do have a legitimate interest in sexual-health information, the Amended Statute does not impinge upon that interest. Tracking *Miller/Ginsberg*, the Amended Statute's test for juvenile obscenity excludes material that has any "serious literary, artistic, political or scientific value for minors." M.G.L. c. 272, § 31. In the context of adult obscenity, this final *Miller* prong is evaluated on the basis of whether "any reasonable person" would find serious value in the material, without reference to community standards. *Pope v. Illinois*, 481 U.S. 497, 500 (1987). By extension, in the context of variable or juvenile obscenity, the question is whether "any reasonable minor, including a seventeen-year-old, would find serious value." *Amer. Booksellers Ass'n v. Webb*, 919 F.2d 1493, 1504 (11th Cir. 1990); *see also Amer. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989) ("[I]f a work is found to have 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 taken as a whole.") (internal quotations omitted).

Here, the Amended Statute requires a specific intent to disseminate the material to minors. Thus, whether the material meets the *Miller/Ginsberg* test for juvenile obscenity can be assessed on a case-by-case basis in terms of the audience for which it was intended. Accordingly, plaintiffs are unlikely to succeed in demonstrating that the Amended Statute infringes any constitutional right of older minors.

4. The Amended Statute survives strict scrutiny.

Even if this Court concludes that the Amended Statute constitutes a content-based restriction on protected speech and applies strict scrutiny, the Court nevertheless should deny plaintiffs' motion for a preliminary injunction because the statute is "narrowly tailored to promote a compelling government interest." *United States v. Playboy Entm't Group*, 529 U.S.

803, 813 (2000). Indeed, it is the "least restrictive means" of achieving that interest. *Sable Comm'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989).

It is well settled that the state has a "compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Id.*; *see also Reno,* 521 U.S. at 875 ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials."). In *Ginsberg,* the Supreme Court held that this interest justified a complete ban on the sale of juvenile obscenity to minors. 390 U.S. at 640.

The Amended Statute is aimed not just at protecting minors from exposure to harmful materials, but, specifically, to protect them from sexual predators who purposefully disseminate these materials to them as part of a larger cycle of abuse. Because the Amended Statute requires a specific intent to disseminate the matter to a minor, the statute does not prohibit publication of harmful matter to a general audience, such as in a Web posting, even if the poster knows that minors may gain access to the information. Although this means that minors may still have access to harmful materials on the Web, this does not render the statute ineffective to achieve its purpose. Rather, the Amended Statute is an effective way of protecting minors against predators who use electronic forms of communication as a means of establishing direct contact with potential victims and grooming them for abuse by purposefully exposing them to matter that, for the minor victims, is obscene.

Moreover, the Amended Statute is the least restrictive means of achieving this goal. The definition of matter harmful to minors is limited to material that is obscene in adult terms or obscene as to minors, and only communications purposefully directed to minors are affected. In

addition, plaintiffs are unlikely to succeed in demonstrating that filtering software is a less restrictive means of furthering this interest.

Plaintiffs' expert, Scott Bradner, opines that "[t]he 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 Decl. ¶ 67. Bradner adds that parents can configure such software "to block access to content that the parent considers unsuitable for the child." *Id.* But, as Bradner notes, such software can block only "certain forms" of incoming transmissions. *Id.* ¶ 68. Bradner does not elaborate on what forms of communication would be filtered by the software. Thus, although filtering software may block sexually explicit speech and images on the Web, nothing submitted by plaintiffs suggests that it can block—or block effectively—such content in (or attached to) direct forms of communication, such as email, IMs, and text messages. Bradner's affidavit offers nothing on this point.

Plaintiffs assert in their brief that online users can purchase special user-based filtering software that "allow users to block 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 in the home computer." Pffs' Mem. at 18. However, plaintiffs do not go so far as to assert that filtering software provides an effective method to prevent minors from *receiving* sexually explicit messages and images through email, IMs, and texts. In sum, plaintiffs have not demonstrated that they are likely to succeed in proving that filtering software provides an effective, and less restrictive, means of furthering the compelling government interest in protecting minors from sexual predators who use electronic forms of communication to groom potential victims.

5. Defining "community standards" in terms of the relevant Massachusetts county does not render the statute unconstitutional.

Plaintiffs next argue that, in the context of the Internet, it is unconstitutional to define the relevant community standards for assessing what is "harmful to minors" as those in the "county where the offense was committed." M.G.L. c. 272, § 31; *see* Pffs' Mem. at 19-20. In *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) ("*Ashcroft*"), eight justices concurred in the judgment that the use of local community standards in COPA did not "*by itself* render the statute substantially overbroad." The Ninth Circuit, in attempting to glean the holding the Supreme Court's fractured opinion in *Ashcroft*, viewed comments by Justices O'Connor and Breyer that application of a local community standard raised constitutional concerns, and favoring application of a national standard, as forming the narrowest grounds for concurrence. *United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009). Therefore, the Ninth Circuit concluded that a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email." *Id.* The Eleventh Circuit, in an unpublished opinion, has declined to follow *Kilbride*. *See United States v. Little*, 365 Fed. Appx. 159 (11th Cir. 2010) (unpublished).

A well-reasoned decision of the District Court for the District of Columbia illustrates why the Ninth Circuit's reasoning in *Kilbride* was faulty:

> [In *Ashcroft*,] [e]ight justices concurred in the judgment that the use of community standards did not "*by itself* render the statute substantially overbroad." [*Ashcroft*], 535 U.S. at 585, 122 S. Ct. 1700. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, did so based on their belief that COPA was sufficiently narrow in application that any variation in community standards did not render the statute substantially overbroad. *Id.* at 577-84, 122 S. Ct. 1700 (Thomas, J.). The remaining five justices indicated, however, that the possibility of varying community standards raised potential constitutional concerns. . . . Of the five justices who found the use of community standards to be

> constitutionally problematic, only Justice Breyer based his decision on the belief that a national community standard applied. Notwithstanding their concerns, the other four justices were willing to accept the constitutional viability of community standards in the absence of evidence establishing substantial overbreadth based on the amount of speech covered and the degree of variance among communities. Because Justice Breyer disregarded the possibility that local community standards might be constitutional in light of the facts and circumstances of the case and instead imposed a uniform national standard that no other justice thought was necessary, his rationale is not the narrowest, and as a result, it does not control.

United States v. Stagliano, 693 F. Supp. 2d 25, 31 n.8 (D.D.C. 2010).

Moreover, COPA, the statute at issue in *Ashcroft*, applied to the World Wide Web generally, raising concerns that websites nationwide, or indeed, worldwide, would have to comply with the standards of the most conservative American community or face prosecution. Here, in contrast, generally-accessible websites are not covered by the Amended Statute because the SJC has held that it applies only to situations in which the defendant specifically intends to direct the communication to a minor. Plaintiffs themselves have suggested that, if limited in this way, the Amended Statute "would be constitutional." Pffs' Mem. at 1. Thus, plaintiffs fail to demonstrate a reasonable likelihood of success on this aspect of their claim.

C. Plaintiffs' Commerce Clause Claim is Not Likely to Succeed.

Plaintiffs' Commerce Clause claim is also likely to fail. As discussed above, when properly construed, the Amended Statute prohibits only the dissemination of matter that is obscene as to minors and that is specifically directed to minors. No legitimate commercial interest is served by such activity. Thus, the Commerce Clause is not implicated. *See Foley*, 94 N.Y.2d at 684, 731 N.E.2d 123 (2000) (holding that statute prohibiting intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity did not violate Commerce Clause because no "legitimate commerce" is derived from such activity);

Hatch, 80 Cal. App. 4th at 195, 94 Cal. Rptr. 2d 453 (2000) (finding that the Commerce Clause provides no protection for communications sent with the illicit intent to seduce a minor).

Even if the Amended Statute is subject to scrutiny under the Commerce Clause, this Court should reject plaintiffs' argument, based on *Amer. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), that the Internet inherently requires national, uniform regulation. Pffs' Mem. at 21-23. Simply logging onto the Internet does not, and should not, insulate a person from the reach of state criminal statutes. *Hatch*, 80 Cal. App. 4th at 194, 94 Cal. Rptr. 2d 453. Moreover, because the Amended Statute does not apply to content distributed to a general audience or posted on generally-accessible websites, it does not require all Internet speakers to conform to Massachusetts standards. And, there is simply no basis to conclude that the Amended Statute applies to anything other than communications originating or terminating in Massachusetts, according to the well-established principle that Massachusetts criminal statutes do not apply extraterritorially. *See Commonwealth v. Armstrong*, 73 Mass. App. Ct. 245, 249, 897 N.E.2d 105, 109 (2008) (collecting cases).

Because the Amended Statute neither regulates wholly out-of-state conduct nor discriminates between in-state and out-of-state conduct, at most, it is subject to the low level of scrutiny prescribed under the *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.") Here, as discussed above, only those who purposefully direct communications of sexually explicit material—lacking any serious literary, artistic, political or scientific value—to a Massachusetts minor, or to a minor from within Massachusetts, are affected by the Amended

Statute. Weighing the interests of this small subset of Internet users against the state's compelling interest in protecting its minors from online predators, "the benefits to [Massachusetts] in protecting its youth from sexual predators and harmful materials certainly outweigh any effect that th[e] law could have on interstate commerce." *Strickland*, 601 F.3d at 628.

D. Plaintiffs' Vagueness Claim is Not Likely to Succeed.

Plaintiffs assert that the Amended Statute is void for vagueness due to ambiguity of two of its terms. *See* Pffs' Mem. at 24-25. These claims, also, are unlikely to succeed. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1845 (2008). A statute is unconstitutionally vague on its face if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* Of course, to require perfect clarity would ignore the limitations inherent in any attempt to communicate meaning through the written word. Thus, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.*

Plaintiffs first challenge the term "minors," as used in "harmful to minors," asserting that the term is vague because "material that may be considered appropriate for a seventeen year old may not be considered appropriate for a thirteen year old." Pffs' Mem. at 24. This is problematic, according to plaintiffs, because "Web publishers cannot tell which [subset of] minors should be considered in deciding the content of their Web sites." Pffs' Mem. at 24 (quoting *ACLU v. Mukasey*, 534 F.3d 181, 205 (3d Cir. 2008) ("*Mukasey*")). Although this concern was paramount in evaluating a statute such as COPA, which regulated material posted

on the Web for all to see, it is simply not present here because the Amended Statute does not apply to materials published to a general audience. Rather, because the SJC has held that the Amended Statute applies where a defendant has the specific intent to disseminate the matter to a minor, would-be speakers can evaluate the appropriateness of the matter in terms of the audience for which it is intended.

Plaintiffs next argue that the term "taken as a whole," as used in the *Miller/Ginsberg* test, is vague in the context of the Internet. Plaintiffs point to the Third Circuit's opinion in *Mukasey*, which held that COPA's use of the term "as a whole," among a number other ambiguous terms, rendered the statute unconstitutionally vague. In reaching this conclusion, the Third Circuit adopted the reasoning of the district court, which observed that, unlike a printed book or magazine, "Web pages and sites are hyperlinked to other Web pages and sites. . . . Instead of having a two-hundred page book or an issue of a magazine to look to for context, COPA invokes some undefined portion of the vast expanse of the Web to provide context for material allegedly violating the statute. As a result, a Web publisher cannot determine what could be considered context by a fact finder, prosecutor, or court." *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 818-19 (E.D. Pa. 2007) ("*Gonzales*").

The reasoning of the *Gonzales* court should be viewed with great skepticism. As observed by a district judge of the District of Columbia, "Since *Miller*, the definition of obscenity and, in particular, the 'as a whole' requirement have had settled legal meaning." *Stagliano*, 693 F. Supp. 2d at 35 (rejecting vagueness and overbreadth challenge to federal obscenity statute). Although the term may be somewhat less precise in the context of the Internet, "the Supreme Court has held that a 'lack of precision is not itself offensive to the requirements of due process.'" *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)).

All that is required is that the statute give sufficient warning of what is proscribed. "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *Roth*, 354 U.S. at 491-92. The "as a whole" requirement of *Miller* is no less clear in the Internet setting "than in countless other cases where courts have applied that requirement in a new factual setting." *Stagliano*, 693 F. Supp. 2d at 35. By using the settled *Miller/Ginsberg* standard for juvenile obscenity, including the "as a whole" requirement, the Amended Statute, "provide[s] sufficient guidance to [potential defendants] that whatever arguably obscene material they distribute on the Internet will be judged, not in isolation, but in context." Plaintiff's vagueness claim is thus unlikely to succeed.

E. Plaintiffs Fail to Meet the Remaining Requirements for a Preliminary Injunction.

The remaining requirements for a preliminary injunction likewise cannot be met when the Amended Statute is viewed in light of the strong scienter requirement imposed by the SJC and the statute's consistent enforcement in accordance with that requirement. Because the Amended Statute, when properly construed, regulates only the purposeful dissemination to minors of material that is obscene as to them under the established *Miller/Ginsberg* test, the statute does not prohibit any protected adult-to-adult speech, and it does not interfere with any legitimate commercial interest under the Commerce Clause. Therefore, there is no basis for plaintiffs assertions that they will suffer an irreparable loss of First Amendment freedoms or a violation of their Commerce Clause rights if their motion for a preliminary injunction is denied.

In the absence of a showing of a "danger of irreparable loss [that] is both great and immediate," *Younger*, 401 U.S. at 45, this Court should not depart from the bedrock principle of

federalism, which dictates that, with few exceptions, "state courts [should be left] to try state cases free from interference by federal courts." *Id.* at 43. Here, in light of the absence of a credible threat of injury to plaintiffs, and the state's compelling interest in protecting minors from sexual predators on the Internet, the balance of harms weighs against the extraordinary measure of enjoining a state criminal statute. Indeed, such an injunction would be contrary to the public interest.[7]

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court deny plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted,

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[7] Alternatively, if the Court finds that there is substantial uncertainty over the meaning of the Amended Statute, and that clarification by the SJC could avoid the need for a federal constitutional ruling, this Court should abstain from deciding the issue, *Mangual*, 317 F.3d at 63, and, instead, certify the question to the SJC. *See* Mass. S.J.C. R. 1:03 § 1 (providing for certification "if there are involved in any proceeding before [the federal court] questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court"). Abstention under the circumstances would best promote the interests of comity and federalism and preserve the state court's traditional role as the final arbiter of the meaning of state statutes.

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 26, 2010.

/s/ *Jessica V. Barnett*
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