No. XXX

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
JOHN DOE	§	NTH JUDICIAL DISTRICT

APPLICATION FOR WRIT OF HABEAS CORPUS
MOTION TO QUASH INDICTMENT
MOTION TO DISMISS
AND BRIEF IN SUPPORT

Judge Foo:

Defendant John Doe files this *Application for Writ of Habeas Corpus, Motion to Quash the Indictment, Motion to Dismiss, and Brief in Support* under the authority of the First, Fifth, Sixth and Fourteenth Amendments of the United States Constitution, Article I, Sections 10 and 19 of the Texas Constitution, and Articles 11.08, 27.08, and 28.05 of the Texas Code of Criminal Procedure for the following reasons:

I.

Applicant is illegally restrained of his liberty and confined on bond in Harris County, Texas by the Respondent, Sheriff of Harris County.

II.

Applicant is being held by Respondent, charged by two indictments in cause numbers 1178951 and 1178952 with Online Solicitation of a Minor.

III. **Summary of the Argument**

The defendant is indicted under the provisions of Texas Penal Code section 33.021, Online Solicitation of a Minor. This statute is unconstitutional for four reasons.

A. Section 33.021 is unconstitutional on its face under the First Amendment, as it is a content based restriction that severely criminalizes a substantial amount of harmless speech between adults that is protected under the First Amendment.

B. Section 33.021 is unconstitutionally vague under the First Amendment because it works to encompass a vast array of communications and will chill the exercise of free speech.

C. Section 33.021 is unconstitutionally overbroad under the First Amendment and is not narrowly tailored to promote a compelling state interest as it prohibits a substantial amount of protected speech that is unnecessary to the protection of children.

D. Section 33.021 violates the Dormant Commerce Clause Doctrine because it unduly burdens interstate commerce by attempting to place regulations on the entirety of the Internet.

Because the statute violates the First Amendment and the Dormant Commerce Clause Doctrine, it is void.

IV. BRIEF IN SUPPORT

A. CONTENT-BASED RESTRICTION OF PROTECTED HARMLESS SPEECH

A. Texas Penal Code Section 33.021(b)(1) is a content-based restriction that outlaws a substantial amount of harmless speech between adults that is protected under the First Amendment.

A.1. Section 33.021 includes adults in its definition of "minor" in section (a)(1)(A) -- "an individual who represents himself or herself to be younger than 17 years of age." Because there is no further requirement that the actor believe the "minor" to actually be under 17, the act prohibits some sexually explicit communication between adults, even when both parties are aware they are in solely adult company.

A.2. The United States Supreme Court case *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), is highly relevant to cases in which the actor is communicating with a person who represents himself to be a minor. There the Court examined the Child Pornography Prevention Act (CPPA), which criminalized the possession and distribution of "virtual child pornography." Child pornography was defined to include any sexually

explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." *New York v. Ferber*, 458 U.S. 747, 747 (1982) had upheld the ban on actual child pornography due to the compelling interest of protecting children from the production process. With virtual child pornography, however, there are no victims and the law works to only prohibit pure content. The Court in *Ashcroft v. Free Speech Coalition* held that the law was overbroad with respect to the First Amendment and reiterated the holding that "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 251. The Court rejected the government's argument that virtual child pornography might be used to entice real children to engage in sexual conduct and the argument that it would "whet the appetites" of pedophiles, responding "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 253. Further, the Court noted, "The provision prohibits a sexually explicit film containing no youthful actors, just

because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 258. In the same way, the Texas statute prevents sexual communication between consenting adults even where both of them know that one of them is "mislabeled" as a minor.

B. OVERBREADTH

B. Texas Penal Code Section 33.021(b)(1) is unconstitutionally overbroad on its face and is not narrowly tailored to promote a compelling state interest, as it prohibits a substantial amount of protected speech, the prohibition of which is unnecessary to the protection of children.

B.1. Section 33.021 is very similar to the statute at issue in *Reno v. ACLU*, 521 U.S. 844 (1997). There, the Court reviewed the Communications Decency Act (CDA) which criminalized using a telecommunications device to transmit communication that is obscene or indecent, *knowing* that the recipient is under 18. The Court held the act to be an unconstitutional restriction on adult speech. It explained:

> In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere

> with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be a minor-and therefore that it would be a crime to send the group an indecent message-would surely burden communication among adults.
>
> . . . .
>
> [The Government's] argument ignores the fact that most Internet forums-including chat rooms, newsgroups, mail exploders, and the Web-are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child-a "specific person ... under 18 years of age," 47 U.S.C.A. § 223(d)(1)(A) (Supp.1997)-would be present.

Reno v. ACLU, 521 U.S. at 876-80. In striking down the CDA, the *Reno* Court emphasized that, even where knowing communication with an actual minor is required to violate the law, burdens on adult speech are unacceptable if less restrictive alternatives are available and sexual expression which is indecent but not obscene is protected by the First Amendment.

B.2. In this case, less restrictive alternatives are available. For example, Texas might delete section 33.021(a)(1)(A), the definition of minor as an

individual who represents himself or herself to be younger than 17 years of age. Whether this would cure the overbreadth problem is unclear, from reading the second quoted paragraph of *Reno*, but the statute would at least be less overbroad.

B.3. Applicant's belief is, in this case, not dispositive. Even if he had believed the complainant to be an adult, he could challenge section 33.021 as unconstitutionally overbroad.

> When a statute prohibits speech or expressive conduct, the overbreadth doctrine allows a person whose own expression is unprotected to challenge the statute on the ground that it also prohibits protected speech. This is an exception to the general rule that a person to whom a statute may constitutionally be applied may not challenge the statute based on the possibility that it could be unconstitutional in other applications. Overbreadth challenges are permitted in the First Amendment context not for the benefit of the litigant, but for the benefit of society, to prevent the statute from chilling the constitutionally protected speech of other parties not before the court. A statute that is found to be overbroad may not be enforced at all, even against speech that could constitutionally be prohibited by a more narrowly drawn statute.

Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425, 435 (Tex. Sup. Ct. 1998) (cites omitted).

B.4. The statute reaches a substantial amount of constitutionally protected conduct. This definition of minor encompasses adults who define their age on MySpace as 14 just so they can set their profile for extra privacy. It may include adults whose "screennames" are monikers like little13yrold@aol.com or bornin1995@rr.com. It would certainly include adults who take part in commercial internet services catering to people who like to pretend they are children in order to engage in certain sexual fantasies.

C. VAGUENESS

C. Texas Penal Code Section 33.021(b)(1) is unconstitutionally vague on its face.

C.1. Section 33.021(a)(3) defines "sexually explicit" as:

> Any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct, as defined by [Texas Penal Code] Section 43.25.

The Texas Legislature somehow managed to define a phrase ("sexually explicit") that in normal usage is adjectival, as a noun. No matter: the legislature can give words special meanings for purposes of statutes (for example, defining "minors" to include "grownups pretending to be

minors"); there exists no obstacle to changing adjectives to nouns or nouns to verbs. Section 33.021(b)(1) then goes on to outlaw communicating "in a*[n any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct, as defined by [Texas Penal Code] Section 43.25]* manner" with a "minor". This makes absolutely no sense. It renders the statute unconstitutionally vague, illustrates the lack of thought that went into the drafting of this statute, and should put paid to any idea that the Texas Legislature knew what it was doing when it wrote 33.021.

C.2. If we could be generous and rewrite the statute for the legislature (we can't) so that "sexually explicit" means "relating to or describing sexual conduct", the statute would still be vague. "Sexual conduct" is defined as

> Sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

Texas Penal Code section 43.25(a)(2). A prohibited communication therefore would include anything "relating to" the laundry list of sexual conduct. How closely such communication may "relate" to these items and be permitted is unspecified; outlawed communications could include

anything from the word "breast" to a picture of a swimsuit. Even when considered along with the requirement of the intention to "arouse" any person, a good portion of commercial advertising could fit this description. The law would purport to criminalize the purveyor of any website that posts "sexually explicit" materials like sexy ads for Calvin Klein Jeans or the "Gossip Girls" show. If the website targets minors as a consumer group or knows that it commonly has minor viewers, then it would be intentionally communicating to minors in violation of the law. It could also include a father sending an email to his 16 year old son with a photo of a topless lady or a dirty joke. The "intent to arouse" element may be arguable in some cases, but the danger of arbitrary enforcement is real because Texas law allows a jury to infer such intent from the circumstances. A prosecutor would reasonably argue in any of these circumstances, "Why else would anyone send this cheesy nude picture but to titillate?"

C.3. To determine whether the challenged statute provides fair notice (and thus is not unconstitutionally vague), the court must examine whether it: (1) "give[s] the person of ordinary intelligence a reasonable opportunity to

know what is prohibited;" and (2) "provide[s] explicit standards for those who apply [it]." *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972)); *accord Sanchez v. State*, 995 S.W.2d 677, 689 (Tex.Crim.App.), cert. denied, 528 U.S. 1021, 120 S.Ct. 531, 145 L.Ed.2d 411 (1999).

C.4. As in overbreadth challenges, if the statute affects communication protected by the First Amendment, then a defendant has standing in some cases to challenge the statute as vague on its face, even if it does not affect her own First Amendment rights. *White v. State*, 50 S.W.3d 31 (Tex.App.-Waco 2001) *(citing Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 59-60, 96 S.Ct. 2440, 2447, 49 L.Ed.2d 310 (1976); *accord Long v. State*, 931 S.W.2d 285, 288 (Tex. Crim. App. 1996); *Smith v. State*, 772 S.W.2d 946, 950 (Tex. App. — Dallas 1989, pet. ref'd); *Al-Omari v. State*, 673 S.W.2d 892, 896 (Tex. App. — Beaumont 1983, pet. ref'd)). "The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas." *Young*, 427 U.S. at 60, 96 S.Ct. at 2447; *Al-Omari*, 673

S.W.2d at 896; *accord Morehead v. State*, 807 S.W.2d 577, 580 (Tex.Crim.App. 1991).

D. Violative of the
Dormant Commerce Clause Doctrine

D. Texas Penal Code Section 33.021(b)(1) violates the Dormant Commerce Clause Doctrine because it unduly burdens interstate commerce by attempting to place regulations on the entirety of the internet.

D.1. This "negative aspect" of the Commerce Clause represents the notion that by specifically granting congress the power to legislate in this area, it prohibits the states from legislation that unduly restricts interstate commerce. In *American Libraries Assoc. v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997) the District Court considered a New York law making it a crime for an individual to "intentionally use a computer to engage in a communication with a minor which depicted actual or simulated nudity, sexual conduct, or sadomasochistic abuse and which was harmful to the minor." In addition to being overbroad and vague with respect to the First Amendment, the court also held the law violated the Dormant Commerce Clause, noting that "the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from

inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether. Thus, the Commerce Clause ordains that only Congress can legislate in this area, subject, of course, to whatever limitations other provisions of the Constitution (such as the First Amendment) may require."

Other States Have Laws
That Pass First Amendment Muster

2. It would not be impossible for the Texas Legislature to write a law that protects our actual children from online solicitation without unduly interfering with adults' free speech. In contrast to the section 33.021, there are many state online solicitation laws that have withstood constitutional scrutiny. These laws are acceptable because they are said to restrict the conduct of luring as well as speech.

2.A. For example, in *Cashatt v. State*, 873 So.2d 430 (Fla. Dist. Ct. App. 2004), Florida's First District Court of Appeal upheld the Computer Pornography and Child Exploitation Prevention Act, which prohibited "knowingly utilizing a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a

child, to commit any illegal act described in chapter 794, relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." The Florida court upheld the law, deciding, "it passes the 'strict scrutiny' test because it promotes a compelling state interest in protecting children from persons who solicit or lure them to commit illegal acts, and is narrowly tailored to promote that interest, specifically limiting its prohibitions to communication intended to solicit or lure a child to commit illegal acts."

2.B. Nevada's luring law was also held to pass First-Amendment muster. *See State v. Colosimo*, 122 Nev. 950, 142 P.3d 352, 33 A.L.R.6th 785 (2006) (statute prohibiting a person from using a computer to contact or communicate with a child less than 16 years of age with the intent to persuade, lure, or transport the child away from his or her home or from any location known to his or her parent or guardian, without consent, with the further intent of engaging in sexual conduct with the child).

2.C. New York, too, has an online solicitation statute that passed the First Amendment's strict-scrutiny test. *See People v. Foley*, 94 N.Y.2d 668, 709

N.Y.S.2d 467, 731 N.E.2d 123 (2000) (knowing the character and content of the communication that, in whole or part, depicts actual or simulated nudity, sexual conduct, or sadomasochistic abuse, and that is harmful to minors, such person intentionally uses a computer system to initiate or engage in such communication with a minor, N.Y. Penal Law § 235.22(1), and, by means of such communication, such person importunes, invites, or induces a minor to engage in sexual conduct for such person's benefit).

2.D. In fact, Section 15.031 of the Texas Penal Code already outlaws luring an actual minor, or a person whom the actor believes to be an actual minor. Section 33.021's luring subsection, 33.021(c) would probably be constitutional if it could be applied only to an actor who believes that the person lured is a child.

V. PRAYER

For those reasons, Applicant prays that this Honorable Court issue a Writ of Habeas Corpus to the Sheriff of Harris County, Texas, commanding him to bring Applicant before this Court instanter, or at such time or place to be designated by this Court, and then and there to show cause, if any, why the Applicant should not be discharged from illegal confinement. Applicant further

prays that the court hold section 33.021 unconstitutional, quash the indictment, and dismiss the charges against Applicant.

Respectfully Submitted,
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VERIFICATION

STATE OF TEXAS §
COUNTY OF HARRIS §

On this day the Petitioner, Mark Bennett (attorney for the Applicant) appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said he read the Application for Writ of Habeas Corpus, the facts in it are true, according to his belief.

_____
Mark Bennett

SWORN TO and SUBSCRIBED before me by Mark Bennett on the _____ day of _____, 2009.

_____
Notary Public in and for
the State of Texas