D.C. CRIMINAL CODE REFORM COMMISSION

TESTIMONY ON THE FORBID LEWD ACTIVITY AND SEXUAL HARASSMENT ("FLASH") ACT OF 2023

COMMITTEE ON THE JUDICARY & PUBLIC SAFETY HEARING
May 17, 2023

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715

I. Introduction

Chairperson Pinto, thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety at the public hearing on the "Forbid Lewd Activity and Sexual Harassment "FLASH" Act of 2023 ("the Act"), held on May 17, 2023. I am presenting this testimony on behalf of the Criminal Code Reform Commission ("CCRC"). The CCRC is a small, independent District agency focused on developing recommendations to reform the criminal statues in the District. The FLASH Act creates a *civil* cause of action, but the CCRC submitted recommendations for an analogous criminal offense, Distribution of an Obscene Image, as part of the Revised Criminal Code Act ("RCCA"). Based on the research and recommendations regarding that criminal offense, the CCRC has advice and comment relevant to the civil action that would be created under the FLASH Act.

The CCRC takes no position on the substantive merits of the FLASH Act, or on how the Act should be changed in subsequent versions. Instead, this testimony analyzes how the Act may infringe upon Constitutionally protected free speech rights, and ambiguities and potential overbreadth of the Act as currently drafted.

Finally, please note that there is an appendix attached to this testimony which provides comparable or related statutes from other jurisdictions, from the current D.C. Code, and from the RCCA.

II. Background Considerations

The Act would establish a private right of action against any adult who sends another adult an unsolicited "obscene image", which is defined to include certain types of sexual imagery[1], through electronic means. The Act would allow the recipient of the unsolicited image to sue the sender and demand damages for emotional distress, statutory damages, punitive damages, and injunctive relief, as well as court costs and attorney's fees. The stated purpose of the Act is to "provide victims of 'cyberflashing' the opportunity to seek justice," and to "ensure online platforms are safe for all users."[2] There are no criminal penalties set out in the Act.

The District currently has a criminal obscenity statute that encompasses some of the conduct that the FLASH Act intends to address. D.C. Code § 22-2201 states, in relevant part, that "It shall be unlawful in the District of Columbia for a person knowingly...to sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation."[3] The statute has an

[1] The Act defines "obscene image" as "an image that depicts a real or fictitious person 18 years of age or older engaging in or submitting to an actual or simulated: (1) sexual act; (2) sadomasochistic abuse; (3) masturbation; (4) sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; (5) sexual contact; or (6) sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering."

[2] https://www.brookepintodc.com/newsroom/councilmember-pinto-introduces-legislation-to-provide-victims-of-online-sexual-harassment-opportunities-to-seek-justice

[3] D.C. Code § 22-2201(a)(1).

affirmative defense if the "dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material."[4] The offense has a maximum penalty of 180 days imprisonment for a first offense,[5] and for a second or subsequent offense, a maximum penalty of 3 years imprisonment with a mandatory minimum of six months.[6] The current D.C. Code obscenity offense is infrequently charged; between the years of 2010 and 2019, only one charge was brought under the general obscenity offense.[7]

The D.C. Court of Appeals has made clear that the terms "obscene" and "indecent" should take on the meaning proscribed in the Supreme Court case *Miller v. California*, discussed below.[8] Although the scope of the current criminal obscenity offense is not entirely clear, it does overlap to a degree with the civil action created under the Act, to the extent that the term "obscene image" as used in the Act includes an "obscene, indecent, or filthy. . . picture[.]"

III. Potential First Amendment Concerns for the FLASH ACT

A. The First Amendment and Obscenity

The First Amendment to the Constitution of the United States provides, in part, that Congress shall make no law abridging the freedom of speech. Over time, the Supreme Court has recognized been notable categories of speech that do not receive full protection under the First Amendment. Examples include prohibitions on incitement which could lead to imminent lawless action[9], prohibitions on false advertising[10], prohibitions on intimidation[11], and obscenity. Each of these prohibitions faced challenges in identifying where exactly First Amendment protections against otherwise free speech ended. Obscenity has proved to be among the most challenging.

From 1957 to 1973 the Supreme Court heard several cases in which the Court struggled to define obscenity. The tests that they produced in *Roth v United States*[12], and later in *Memoirs*

[4] D.C. Code § 22-2201(c).
[5] D.C. Code § 22-2201(e).
[6] D.C. Code § 22-2201(e).
[7] D.C. Code § 22–2201(a) generally prohibits distribution of obscene materials. Subsection (b) of the statute prohibits distribution of obscene materials to a minor and is irrelevant for this discussion, as the civil action under the FLASH Act would only apply to distribution of obscene images to adults. According to data provided by D.C. Superior Court, between 2010 and 2019, there was one charge brought under subsection (a), and two charges brought under subsection (b).
[8] *4934, Inc. v. Washington*, 375 A.2d 20, 23 (D.C. 1977).
[9] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[10] *Peel v. Attorney Reg. & Discip. Comm'n*, 496 U.S. 91 (1990).
[11] *Virginia v. Black*, 538 U.S. 343 (2003).
[12] All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. *Roth v. United States*, 354 U.S. 476, 484 (1957)

v. Massachusetts[13] proved to be unworkable, and eventually the Court created a new standard in *Miller v. California* that is still in use to this day.

In *Miller*, the Supreme Court established that in order to find material to be "obscene", and not subject to First Amendment protections, courts must find that: (a) 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law[14]; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[15] In order for a work to be deemed obscene, *all three* prongs of the *Miller* test must be satisfied.

While most of the Supreme Court case law on obscenity concerns criminal statutes, statutes that create a civil cause of action in response to obscenity are still subject to First Amendment scrutiny. In *New York Times v. Sullivan,* the court made clear that even in a lawsuit between private parties, the state exercised power by creating a civil cause of action against protected speech.[16] *New York Times Co. v. Sullivan* involved a libel action, and we have not found any cases relating to the type of civil action that would be created under the FLASH Act.[17] However, given that the FLASH Act's civil action creates liability based on the content of speech, it is very likely that the civil action would similarly constitute the exercise of state power and implicate the First Amendment. Indeed, the Supreme Court has reversed obscenity cases Court where the court overturned a statute that attempted to regulate speech improperly.[18]

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[13] ...as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because if affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966)

[14] It is important to note that in the second prong of the test, *Miller* set out a requirement that a valid restriction on the First Amendment be "specifically defined".

[15] *Miller v. California*, 413 U.S. 15, 24 (1973). Within the *Miller* framework, the consideration of contemporary community standards allowed for regulation of obscenity to be more robust in places where it was felt to be appropriate while still allowing for places in the country where the First Amendment was more likely to protect potentially obscene conduct.

[16] "We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

[17] In addition, although *New York Times Co. v. Sullivan,* involved a *private* action, the plaintiff in that case was a public official. It is unclear how the analysis under *Sullivan* would change had the plaintiff been a private citizen, although it does not appear that the outcome would change based on the Court's reasoning. The Court held that state action exists because the state *created* the cause of action, not because the plaintiff happened to be a public official, and the Court characterized the lawsuit as "a civil lawsuit between private parties."

[18] *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 789, (2011) (Overturning a civil fine for not properly labeling violent video games); *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 738, (1996) (Partially overturned a statute that instructed private actors to regulate content on cable television); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (Overturning both civil and criminal penalties for overbroad regulation of obscenity).

B. The First Amendment and the FLASH Act

The FLASH Act defines the term "obscene image." However, neither the definition nor the other elements of the civil action created under the Act requires that the image satisfies the three-part *Miller* test. As a result, the Act appears to encompass images that are not obscene under *Miller* and are protected by the First Amendment. For example, the term "obscene image" is defined in the act to include a "sexual contact." That term is undefined in the act, though elsewhere in the D.C. Code it is defined as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." This would include, even a simulated image of touching a person's rear end, which would not on its own satisfy the *Miller* obscenity test.

In a constitutional challenge, to the extent the Act regulates non-obscene speech, it would be analyzed as a content-based restriction on speech, and subject to strict scrutiny.[19] In order to be found Constitutional under strict scrutiny, a court would need to find that the FLASH Act is narrowly tailored to serve a compelling government interest.[20] It is unlikely a court would find that the FLASH Act, as currently drafted, satisfies strict scrutiny analysis. Although the CCRC has not found any cases directly on point, it is unclear if protecting adults from unwanted sexual imagery constitute a compelling governmental interest. The Supreme Court has held that "there is a compelling interest in protecting the physical and psychological well-being of minors" and that interest "extends to shielding minors from the influence of literature that is not obscene by adult standards[.]"[21] However, it is unclear if the Court would similarly find a compelling interest in protecting *adults* from such non-obscene speech, especially given the potential breadth of images covered by the FLASH Act.

Even if protecting adults from such unwanted imagery does constitute a compelling governmental interest, the FLASH Act may not be narrowly tailored to achieve that interest. For example, in *R.A.V. v. City of St. Paul, Minn*., the Supreme Court struck down an ordinance that criminalized placing "a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender[.]"[22] The Court agreed that that "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish" constitutes a compelling interest. The Court nonetheless struck down the law, stating that the "danger of censorship presented by a facially content-based statute requires that that weapon be employed only where it is *necessary* to serve the asserted [compelling]

[19] *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[20] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015).
[21] *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989) (holding that protecting *minors* from indecent, though not obscene, messages constitutes a compelling governmental interest).
[22] 505 U.S. 377 at 380 (1992).

interest[.]"[23] If there are less restrictive means of achieving this interest, the FLASH Act would fail under strict scrutiny.[24]

The RCCA included an analogous criminal offense, Distribution of an Obscene Image, and some of the Act's statutory language is substantially similar.[25] However, unlike the Act, the RCCA included a requirement that the image be "obscene",[26] and defined "obscene" to codify the *Miller* test.[27] This was intended to ensure that the offense would *only* criminalize distribution of images that are obscene, and not entitled to full Constitutional protection.

If the Council added a requirement to the Act that the prohibited image satisfy the *Miller* test, it would likely resolve the possible Constitutional issues. It would also address another issue with the Act—its overbreadth. Since the Act doesn't require that the images be "obscene", it includes images that have a legitimate purpose or that are relatively less indecent. For example, screenshots or video clips of a love scene in a movie or a play could qualify as "an actual or simulated sexual act" or "an actual or simulated sexual contact". Lingerie advertisements could constitute a "Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering[.]" Requiring that an image be "obscene" would ensure that the civil penalties do not apply to Constitutionally protected speech.

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[23] *Id.* at 395 (internal citations omitted).

[24] A court could conceivably agree that there is a compelling interest in protecting adults from *some* non-obscene images, though not all. Even if there is a compelling interest in protecting adults from images of sexual intercourse or exposed genitalia, the FLASH Act may not be narrowly tailored to achieve this interest as it also regulates images of touching a buttocks through clothing, or of breasts below the areolas with a translucent covering.

[25] § 22A-2805 (distribution of an obscene image). *See* Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

[26] The obscenity requirement was an element in paragraph (a)(3) of the RCCA distribution of an obscene image offense (§ 22A-2805):

> (a) *Offense.* An actor commits distribution of an obscene image when the actor:
>
> (1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:
>
> (A) Sexual act;
>
> (B) Sadomasochistic abuse;
>
> (C) Masturbation;
>
> (D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
>
> (E) Sexual contact; or
>
> (F) Sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering;
>
> (2) Without the complainant's effective consent; and
>
> *(3) Reckless as to the fact that the image is obscene.*

RCCA § 22A-2805 (emphasis added).

[27] RCCA § 22A-101(87) (defining "obscene" as "(A) Appealing to a prurient interest in sex, under contemporary community standards and considered as a whole; (B) Patently offensive; and (C) Lacking serious literary, artistic, political, or scientific value, considered as a whole.)

IV. Ambiguities in the FLASH Act

The Act as introduced defines the term "obscene image" but does not define several other key terms, such as "sexual act", "sexual contact", and "unsolicited". In addition, the Act does not specify any mental states for the prohibited conduct and it is unclear state of mind the defendant must have, if any, for each element of the civil action.

The clarity of the Act would improve with defining these and other key terms, as well as specifying several culpable mental states. Section A below discusses several of the undefined key terms in the Act. Section B below discusses the lack of mental states.

A. Undefined Terms Under the FLASH Act

"Unsolicited"

The FLASH Act, as introduced, prohibits electronically transmitting an "unsolicited" obscene image to an electronic communication device. The Act, however, doesn't define "unsolicited", which creates ambiguities and possible overbreadth.

The term "unsolicited" is often used to mean "not asked for or requested."[28] This suggests that images that are not specifically asked for or requested could be deemed "unsolicited," even the recipient had expressed willingness to receive such images. For example, A and B are in a romantic relationship, and B makes comments suggesting that they would not mind receiving sexually explicit photos, but also does not explicitly ask for or request such images. If A sends B an "obscene image", was that transmission "unsolicited"?[29]

In contrast to the Act, the analogous Distribution of an Obscene Image under the RCCA requires that the image be distributed without "consent." The RCCA defined "consent" in part as a "word or act" that "indicates, explicitly or implicitly, agreement to particular conduct or a particular result[.]"[30] Although this definition creates an affirmative consent rule, consent can satisfied by any word or action that even implicitly indicates agreement. In the hypothetical above, if B's words or actions implicitly indicate agreement to receive an obscene image, then sending

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[28] https://www.merriam-webster.com/dictionary/unsolicited

[29] Although these hypotheticals are specific to nude images, given the breadth of the definition of "obscene image", discussed in Section [ ], it is possible the FLASH Act could apply to images or video clips that have a legitimate purpose. For example, if Romantic Partner A sends Romantic Partner B a movie trailer that includes a love scene, or a news article accompanied by sexual images, the FLASH Act would arguably apply. It is also possible that individuals who aren't in a romantic relationship would fall under the Act. If Friend A sends Friend B that same movie trailer or news article, the FLASH Act would arguably apply. As is discussed in Section [ ], requiring that the image be "obscene" would alleviate many of these overbreadth concerns.

[30] Under RCCA § 22A-101, "consent' means a word or act that:

(A) Indicates, explicitly or implicitly, agreement to particular conduct or a particular result;

(B) Is not given by a person who:

(i) Is legally unable to authorize the conduct charged to constitute the offense or to the result thereof; or

(ii) Because of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof; and

(C) Has not been withdrawn, explicitly or implicitly, by a subsequent word or act."

the image would still be consensual even if B did not *solicit* or request such images.[31] If courts interpret "unsolicited" to mean "not requested," then there would still be civil liability in these cases, even if the transmission of the obscene image resulted from a good faith misunderstanding over the recipients willingness to receive the images.[32]

"Sexual act" and "sexual contact"

The Act definition of "obscene image" prohibits, in part, an image depicting a "sexual act" or a "sexual contact", but the Act does not define either of those terms. However, these terms are defined elsewhere in the D.C. Code[33] and under the RCCA.[34] Definitions would clarify the types of sexual penetration and sexual touching that qualify as an "obscene image" under the Act.

The revised definitions in the RCCA may warrant extra consideration because they: 1) Resolve several ambiguities in the current Title 22 definitions;[35] 2) Preserve the intent

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[31] In addition, the RCCA's Distribution of an Obscene Image requires that the defendant *knew* (i.e. was practically certain) that the recipient did not consent to receiving the obscene image. Therefore, if the defendant genuinely but *mistakenly* believed that the recipient's words or actions indicated agreement to receive the image, there would be no criminal liability.

[32] Although lawsuits resulting from good faith misunderstanding may ultimately be rare, due to the potential for acrimonious termination of romantic relationships, there is the possibility that spurned lovers could use an overbroad civil action to extract payments from ex-partners who sent "unsolicited" obscene images out of a good-faith misunderstanding.

[33] D.C. Code § 22-3001(8) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph."), 22-3001(9) (defining "sexual contact" as the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[34] The RCCA (§ 22E-101(129) defined "sexual act" as:

> "'Sexual act' means:
> (A) Penetration, however slight, of the anus or vulva of any person by a penis;
> (B) Contact between the mouth of any person and another person's penis, vulva, or anus;
> (C) Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to abuse, humiliate, harass, degrade, or sexually arouse or gratify any person, or at the direction of someone with such a desire; or
> (D) Conduct described in subparagraphs (A)-(C) of this paragraph between a person and an animal."

The RCCA § 22E-101(130) defined "sexual contact" as:

> "'Sexual contact' means:
> (A) Sexual act; or
> (B) Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person:
> (i) With any clothed or unclothed body part or any object, either directly or through the clothing; and
> (ii) With the desire to abuse, humiliate, harass, degrade, or sexually arouse or gratify any person, or at the direction of someone with such a desire."

See Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

[35] The commentaries to the RCCA definitions of "sexual act" and "sexual contact" fully explain the ambiguities in the current D.C. Code definitions and how the RCCA resolved them. *See,* D.C. Crim. Code Reform Comm'n, Report #70,

requirements in the current Title 22 definitions;[36] and 3) Clearly include bestiality as prohibited conduct.

Defining "sexual act" and "sexual contact" would clarify the scope of prohibited images in the Act, but even with these definitions the legislation may still be overly broad. For example, under both the current D.C Code definitions and RCCA definitions, an image of someone consensually touching their partner's buttocks could qualify "sexual contact". The definition of "sexual contact" warrants particular scrutiny because the definitions under both current law and the RCCA include contact with the genitals or buttocks of a person with intent to "abuse, humiliate, [or] harass" regardless of *sexual* intent. For example, an image of a person kicking another person in the crotch or buttocks with intent to "abuse" would constitute an image of a "sexual contact." Images of injurious or annoying conduct, such as swatting on the bottom with the intent to embarrass or pinching the bottom with the intent to harass could also qualify as images of a "sexual contact". If the FLASH Act required that the image be "obscene", as was discussed above in Section III.A, it would likely alleviate these overbreadth concerns.

"Image"

The Act requires that the defendant "transmits an obscene image" but does not define the term "image." Presumably photographs would constitute an "image," but it is unclear of video or other visual media would be included. In contrast, the RCCA defined the term "image" to include "a video, film, photograph, or hologram, whether in print, electronic, magnetic, digital, or other format."[37] If the Committee intends for the civil action under the Act to include transmission of videos or other visual media[38], it would clarify the statute to include a definition of the term "image."

"Simulated"

The FLASH Act definition of "obscene image" prohibits, in part, images depicting specific types of sexual conduct and nude images if they are either real or "simulated." However, the Act doesn't define "simulated", leaving the required degree of realism unclear. For example, would a suggestive love scene in a movie, without any nudity, qualify as a "simulated" sexual act or sexual contact?

Recommendations for the Council and Mayor (Voting Draft), (available at https://ccrc.dc.gov/page/ccrc-documents), the discussion for § 22E-701. For example, subparagraph (A) of the RCCA definition of "sexual act" requires the penetration of the anus or vulva of "any person" by a penis. The current definition of "sexual act" requires the penetration of the anus or vulva "of another" by a penis. The "of another" requirement in the current definition creates ambiguities in the current sexual abuse offenses regarding liability for the defendant engaging in a "sexual act" with the complainant and liability for the involvement of a third party.

[36] The current D.C. Code definitions of "sexual act" and "sexual contact" both prohibit conduct "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." D.C. Code § 22-3001(8)(C), (9). The RCCA initially proposed narrowing these intent requirements to align with most jurisdictions, but, ultimately, the version that the Council passed preserved the intent requirements under current law.

[37] RCCA § 22A-101.

[38] In all likelihood, distribution of obscene images will take the form of photographs of videos. Including "holograms" in the definition of "image" may be unnecessary at this time, though it is difficult to predict how technology will advance in coming years, and what forms of media may be regularly transferred electronically.

The current D.C. Code obscenity offense does not include "simulated" sexual conduct or nudity.[39] However, the RCCA's Distribution of an Obscene Image does include the distribution of "simulated" images.[40] The RCCA defined "simulated" as "feigned or pretended in a way that realistically duplicates the appearance of actual conduct." The commentary to the RCCA definition stated, the term "simulated" "is intended to include highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring, not other portrayals that are clearly staged. The definition excludes highly suggestive sex scenes like one would find in a movie."[41] As the commentary noted, the RCCA definition is supported by Supreme Court case law.[42]

Defining the term "simulated" would improve the clarity of the FLASH Act, and address overbreadth concerns that arise from the distribution of depictions of sexual acts and contacts from film, TV, or other media that are clearly fictional.

"Sadomasochistic abuse"

The FLASH Act definition of "obscene image" prohibits, in part, images depicting real or simulated "sadomasochistic abuse", but does not define this term.

The current D.C. Code obscenity statute has a definition of "sadomasochistic abuse", but it only applies to the provision that is specific to distributing obscenity to minors.[43] The definition may be instructive however: "The term 'sado-masochistic abuse' includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed."[44]

The RCCA defined "sadomasochistic abuse" as "flagellation, torture, or physical restraint by or upon a person as an act of sexual stimulation or gratification." The RCCA largely maintained

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[39] The current D.C. Code sexual performance of a minor statute does prohibit, in part, "actual or simulated sexual intercourse", but does not define the term. D.C. Code § 22-3101(5)(A).

[40] § 22A-2805 (distribution of an obscene image). *See* Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

[41] *See,* D.C. Crim. Code Reform Comm'n, Report #70, Recommendations for the Council and Mayor (Voting Draft), (available at https://ccrc.dc.gov/page/ccrc-documents) (footnotes omitted), the discussion in § 22E-701.

[42] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[43] D.C. Code § 22-2201(b).

[44] D.C. Code § 22-2201(b)(2)(E).

the definition in the current obscenity statute, but omitted the dress requirements of undergarments, a mask, or bizarre costume, and clarified that there must be sexual stimulation or gratification. The RCCA definition clarifies that sado-masochism includes torture for sexual gratification even if the parties involved are not wearing a undergarments, bizarre costumes, or masks.

The Committee may consider defining the term "sadomasochistic abuse" to include or omit specific types of acts, either in accord with the current D.C. Code definition, or the RCCA definition.

B. The Need for Mental States

The FLASH Act, as introduced, does not specify any mental states for the elements of the proposed civil action: 1) Transmitting the image; 2) the image qualifies as an "obscene image"; 3) the recipient is 18 years of age or older; and 4) the image is "unsolicited" (discussed above in Section IV.A).[45] As a result, it is unclear if a recipient of a prohibited image would need to prove that the sender acted purposely, knowingly, negligently, or if strict liability (no mental state), were sufficient. Without culpable mental states specified, there is a risk of inconsistent application of the law in different cases, and that courts will interpret the civil action more narrowly or broadly than the Committee intends.

The Mental State for Transmitting the Image

The FLASH Act, as introduced, prohibits "transmit[ting]" an obscene image by electronic means. However, the Act does not specify any culpable mental state for the transmission, leaving open the question of whether a person must intentionally send the image, or if accidentally sending it would be sufficient. However, subsection (d) of the statute states ""There shall be a presumption that any transmission of an obscene image is *knowing* unless a defendant demonstrates by preponderance of the evidence that the transmission is unknowing or accidental." (emphasis added). This presumption strongly suggests that a knowing mental state for transmission is required.[46]

Even if the Council specifies a "knowingly" culpable mental state for the transmission of the image, that term would still be left undefined under the Act. The RCCA codified a definition of "knowingly" in its General Part that applied to all provisions in the revised criminal code. The current D.C. Code has no such General Part, and there are several offense-specific statutory

[45] The age of the sender (18 years of age or older) and the age of the recipient (18 years of age or older) are additional elements of the offense. Strict liability, meaning no culpable mental state, is likely appropriate, since liability doesn't depend on these ages, but rather on the content of the image and whether the transmission was without the recipient's consent. The RCCA specified strict liability with "in fact", and had several rules of construction for this drafting convention. Although the RCCA is not law, these drafting conventions may still prove useful. The CCRC would be able to assist the Council in specifying strict liability for the ages of the sender and the recipient if the Council is interested in doing so.

[46] The current D.C Code criminal obscenity statute, discussed earlier in this testimony, also specifies a culpable mental state of "knowingly" for the prohibited conduct. D.C. Code § 22–2201. Additionally, similar laws in other states specify a culpable mental state of "knowingly" with regard to the sending of the item.[46] See the Appendix attached to this testimony which includes text of recently passed bills in Virginia, Texas, and California, as well as a bill that is currently pending before the state legislature in New York.

definitions of the term.[47] The current D.C. Code obscenity statute defines "knowingly", but the definition only appears to apply only to the content of the prohibited image.[48] The RCCA defined "knowingly", in relevant part, as being "practically certain that the conduct will cause the result".[49] The CCRC would be able to assist the Council in adapting this definition for the FLASH Act.

The culpable mental state for the content of the image

The Act, as introduced, prohibits electronically transmitting an "obscene image", and defines "obscene image" to include images of certain types of nudity or sexual conduct. The Act, however, doesn't specify a culpable mental state for the content of the image. For example, if the sender e-mails the recipient an image of a person engaging in a sexual act, must the defendant *know* that the image has a sexual act in it? Or is it enough if the defendant sent an image depicting sexual conduct, even if the defendant was entirely unaware of the images' contents?[50] It seems unlikely that the Council intends for strict liability, or no culpable mental state to apply, given the presumption of knowledge in subsection (d)[51] and because strict liability could chill communication and unfairly penalize people who send images with no awareness that the image contained obscene materials.

To clarify this issue, the Council may consider specifying a mental state as to the content of the image. The current D.C Code criminal obscenity statute, discussed earlier in this testimony, requires a "knowingly" culpable mental state as to the content of the image and defines "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation . . . which is reasonably susceptible of examination."[52] The RCCA's Distribution of an Obscene Image offense requires the defendant act "knowingly"[53] as to the contents of the image, and defines "knowingly" as being "practically certain."[54]

Mental State for Transmission Being "Unsolicited"

In addition to lacking a definition for the term "unsolicited" (discussed above in Part IV.A) the Act does not specify any mental state as to this element of the tort. This creates significant

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[47] *E.g.*, D.C. Code § 22-3101. ("'Knowingly' means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both.")

[48] Although the general criminal obscenity offense prohibits, in relevant part, "knowingly" selling or distributing an obscene item, the definition of "knowingly" appears limited to the content of the prohibited item. D.C. Code § 22-2201(a)(2)(B) (defining 'knowingly' for the offense as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[49] RCCA § 22A-206(b).

[50] For example, A intends to send B a non-sexual photograph via email, but when attaching the photo A accidentally attaches an obscene photograph. It is unclear if A should still be civilly liable in this case.

[51] Subsection (d) of the offense states: "There shall be a presumption that any transmission of an obscene image is *knowing* unless a defendant demonstrates by preponderance of the evidence that the transmission is unknowing or accidental." (emphasis added).

[52] D.C. Code § 22-2201(a)(2)(B).

[53] RCC § 22A-2805. Note however, that the RCCA's Distribution of an Obscene Image offense only requires *recklessless* as to whether the image satisfies the *Miller* test requirements.

[54] RCC § 22A-101.

ambiguity in cases in which the image sender is either *uncertain* as to whether the recipient wishes to receive the image, or *mistakenly believes* that the recipient wished to receive the image. In contrast, the RCCA's Distribution of an Obscene Image offense required that the defendant "know" that the distribution or display of an obscene image was without the recipient's consent. Under the RCCA's definition of "knowledge",[55] the offense required that the defendant was "practically certain" that the distribution of the image was without the recipient's consent. Specifying a mental state as to the image being "unsolicited"[56] would clarify whether liability would apply in these cases.

Depending on the Committee's policy preferences, a mental state can be selected to allow liability in both cases, neither case, or one case but not the other. A "knowing" mental state, as defined under the RCCA, would bar liability in both hypothetical cases. That mental state would require that the sender of the image was *practically certain* that the transmission was unsolicited. The mental state would not be satisfied if the sender mistakenly believed that the recipient wanted to receive the image. Even if the sender was merely *uncertain* as to whether the recipient wanted to receive the image, the "knowing" mental state would not be satisfied. If a "reckless" or "negligent" mental state were adopted, liability would be barred if the sender mistakenly believed the recipient wanted to see the image, but there could still be liability if the sender was uncertain. "Recklessness" would require that the defendant *consciously disregarded* a substantial risk that the recipient did not want to receive the image. "Negligence" would require that there was a substantial risk the recipient did not want to see the image, and a *reasonable person* would have been aware of that risk. Under either of these mental states, a person who was uncertain as to whether the recipient wanted to receive the image could still be found liable, depending on the specific facts of the case.

V. Exceptions to Tort Liability

The Act contains some exceptions to liability. However, the Committee may consider making changes to the scope of these exceptions.

A. The Medical Exception

The Act provides that there is no liability if the "obscene image" for a "health care provider that transmits an obscene image for a legitimate medical purpose[.]" If the Act is amended to require that obscene images satisfy the *Miller* obscenity test, this exception may be redundant.

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[55] The RCCA defined "knowingly" as:

> "'Knowingly' or 'intentionally'. A person acts knowingly or intentionally:
>
> (1) As to a result element, when the person is practically certain that the conduct will cause the result; and
>
> (2) As to a circumstance element when the person is practically certain that the circumstance exists."

See Revised Criminal Code Act of 2021, Enacted Version, (available at https://lims.dccouncil.gov/Legislation/B24-0416) for more information.

[56] If the Committee replaces the term "unsolicited" with lack of "consent" as it is defined under the RCCA, the same mental state ambiguity arises.

One prong of the *Miller* test is that the material "taken as a whole, lacks serious literary, artistic, political, or scientific value[.]". An image that was transmitted for a "legitimate medical purpose" would have almost certainly have some scientific value. However, if the Act does not include a *Miller* obscenity requirement, this exception may bar liability in appropriate cases.

B. Exception for Reporting Possible Illegal Activity or Obtaining Legal Advice

The Act does not include exceptions for transferring obscene images in good faith to report possible illegal activity or obtain legal advice. The analogous Distribution of an Obscene Image offense under the RCCA includes an affirmative defense if the defendant distributed the image to a "law enforcement officer, prosecutor, [] attorney . . . teacher, school counselor, [or] school administrator" "with intent exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney[.]"[57] This defense was intended to ensure that transfers of obscenity was not unduly criminalized when the transfer occurred for certain justifiable reasons. The Committee may consider adding an analogous exception for civil liability to the FLASH Act.

VI. Conclusion

To conclude, thank you again Chairperson, Pinto for allowing me to submit my testimony on the FLASH Act. I would reiterate that the CCRC does not take a position on the merits of the Act, or on how ambiguities identified in this testimony should be resolved. However, if the Committee has any further questions regarding my testimony or would like any assistance from the CCRC in making any changes to the FLASH Act, please do not hesitate to contact me.

[57] RCCA § 22A-2805.

APPENDIX – COLLECTION OF COMPARABLE STATUTES ENACTED OR INTRODUCED FROM OTHER JURISDICTIONS, CURRENT D.C. CODE, AND THE REVISED CRIMINAL CODE ACT

1. **States with similar bills**:
   a. Virginia

§ 8.01-46.2. Civil action for dissemination of intimate images to another; penalty.

A. As used in this section:

"Electronic communication device" means the same as that term is defined in § 18.2 -190.1.

"Intimate image" means a photograph, film, video, recording, digital picture, or other visual reproduction of a person 18 years of age or older who is in a state of undress so as to expose the human male or female genitals.

B. Any person 18 years of age or older who knowingly transmits an intimate image by computer or other electronic means to the computer or electronic communication device of another person 18 years of age or older when such other person has not consented to the use of his computer or electronic communication device for the receipt of such material or has expressly forbidden the receipt of such material shall be considered a trespass and shall be liable to the recipient of the intimate image for actual damages or $500, whichever is greater, in addition to reasonable attorney fees and costs. The court may also enjoin and restrain the defendant from committing such further acts. The remedies provided by this section are cumulative and shall not be construed as restricting a remedy that is available under any other law.

C. The provisions of this section shall not apply to:

(i) any Internet service provider, mobile data provider, or operator of an online or mobile application, to the extent that such entity is transmitting, routing, or providing connections for electronic communications initiated by or at the direction of another;

(ii) any service that transmits an intimate image, including an on-demand, subscription, or advertising-supported service;

(iii) a health care provider as defined in § 8.01-581.1 that transmits an intimate image for a legitimate medical purpose; or

(iv) any transmission of commercial electronic mail as defined in § 18.2-152.2.

D. Venue for an action under this section may lie in the jurisdiction where the intimate image is transmitted from or where the intimate image is received or possessed by the plaintiff.

   b. Texas

Sec. 21.19. Unlawful Electronic Transmission of Sexually Explicit Visual Material.

(a) In this section, "intimate parts," "sexual conduct," and "visual material" have the meanings assigned by Section 21.16.

(b) A person commits an offense if the person knowingly transmits by electronic means visual material that:

(1) depicts:

(A) any person engaging in sexual conduct or with the person's intimate parts exposed; or

(B) covered genitals of a male person that are in a discernibly turgid state; and

(2) is not sent at the request of or with the express consent of the recipient.

(c) An offense under this section is a Class C misdemeanor.

(d) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section or the other law.

c. California

1708.88. Unsolicited images.

(a) A private cause of action lies against a person 18 years of age or older who knowingly sends an image, that the person knows or reasonably should know is unsolicited, by electronic means, depicting obscene material.

(b) For purposes of this section, the following terms have the following meanings:

(1) An "image" includes, but is not limited to, a moving visual image.

(2) "Obscene material" means material, including, but not limited to, images depicting a person engaging in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or masturbation, or depicting the exposed genitals or anus of any person, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(3) An image is "unsolicited" if the recipient has not consented to or has expressly forbidden the receipt of the image.

(c) (1) A prevailing plaintiff who suffers harm as a result of receiving an image in violation of subdivision (a) may recover economic and noneconomic damages proximately caused by the receipt of the image, including damages for emotional distress.

(2) A prevailing plaintiff who suffers harm as a result of receiving an image, the receipt of which had been expressly forbidden by the plaintiff, in violation of subdivision (a), may recover the following:

(A) Economic and noneconomic damages proximately caused by the receipt of the image, including damages for emotional distress.

(B) Upon request of the plaintiff at any time before the final judgment is rendered, the plaintiff may, in lieu of those damages specified in subparagraph (A), recover an award of statutory damages of a sum of not less than one thousand five hundred dollars ($1,500) but not more than thirty thousand dollars ($30,000).

(C) Punitive damages.

(3) A prevailing plaintiff described in paragraph (1) or (2) may recover the following:

(A) Reasonable attorney's fees and costs.
(B) Any other available relief, including injunctive relief.

(4) The remedies provided by this section are cumulative and shall not be construed as restricting a remedy that is available under any other law.

(d) This section does not apply to any of the following:

(1) An internet service provider, mobile data provider, or operator of an online or mobile application, to the extent that the entity is transmitting, routing, or providing connections for electronic communications initiated by or at the direction of another person.

(2) Any service that transmits images or audiovisual works, including, without limitation, an on-demand, subscription, or advertising-supported service.

(3) A health care provider transmitting an image for a legitimate medical purpose.

(4) An individual who has not expressly opted-out of receiving sexually explicit images on the service in which the image is transmitted, where such an option is available.

d. New York has twice introduced the bill (once 2019-2020 and once now 2023-2024) and it is currently in committee.

§ 245.12 Unsolicited Disclosure of an Intimate Image.

1. A person is guilty of unsolicited disclosure of an intimate image when, with intent to harass, annoy or alarm another person and which serves no legitimate purpose, he or she sends by electronic device an unsolicited intimate image to such other person.
2. For purposes of this section:
   A. "Intimate body parts" means the genitals, pubic area or anus of any person;
   B. "Intimate image" means a photograph, film, videotape, recording or any other reproduction of an image of an individual with fully or partially exposed intimate body parts or engaged in sexual activity;
   C. "Send by electronic device" means to send using a cellular telephone or any other electronic communication device, including devices capable of sending text messages or e-mails;
   D. "Sexual activity" means "sexual intercourse" as defined in subdivision one of section 130.00 of this chapter, "oral sexual conduct" or "anal sexual conduct" as defined in subdivision two of section 130.00 of this chapter, touching of the intimate body parts of a person for the purpose of gratifying sexual desire, sexual penetration with any object, or the transmission or appearance of semen upon any part of the depicted individual's body.

e. Wisconsin tried to pass a similar bill but it failed in the state senate last year. (2 statutes)

895.437 Sending unsolicited obscene or sexually explicit images; action for.

(1) In this section:

(a) "Image" includes a moving visual image.

(b) "Sexual intercourse" has the meaning given in s. 944.27 (1) (b).

(c) “Unsolicited” has the meaning given in s. 944.27 (1) (c).

(2) A person has a civil cause of action against another person who knowingly sends by electronic means an image depicting a person engaging in an act of sexual intercourse or masturbation or depicting the exposed genitals or anus of any person that the person who sends the image knows or reasonably should know is unsolicited.

(3) (a) A plaintiff who suffers harm as a result of receiving an image in violation of sub. (2) and prevails in an action under this section may recover economic and noneconomic damages proximately caused by the transmittal of the image, including damages for emotional distress.

(b) A plaintiff who suffers harm as a result of receiving an image, the transmittal of which had been expressly forbidden by the plaintiff, in violation of sub. (2), and prevails in an action under this section may recover any of the following:

1. Economic and noneconomic damages proximately caused by the sending of the image, including damages for emotional distress.

2. Upon request of the plaintiff at any time before the final judgment is rendered, in lieu of those damages specified in subd. 1., an award of statutory damages in a sum of not less than $1,500 but not more than $30,000.

3. Punitive damages.

4. Reasonable attorney's fees and costs.

5. Any other available relief, including injunctive relief.

(c) The remedies provided by this section are cumulative and may not be construed as restricting a remedy that is available under any other law.

(d) This section does not apply to any of the following:

1. An Internet service provider, mobile data provider, or operator of an online or mobile application, to the extent that the entity is transmitting, routing, or providing connections for electronic communications initiated by or at the direction of another person.

2. Any service that transmits images or audiovisual works, including an on-demand, subscription, or advertising-supported service.

3. A health care provider transmitting an image for a legitimate medical purpose.

944.27 Sending unsolicited obscene or sexually explicit images.

(1) In this section:

(a) “Image” includes a moving visual image.

(b) “Sexual intercourse” means vulvar penetration as well as cunnilingus, fellatio, or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another person.

(c) “Unsolicited” means that the recipient has not requested the image, has not consented to its transmittal, or has expressly forbidden its transmittal.

(2) Whoever knowingly sends an unsolicited image by electronic means, directed to another person, depicting a person engaging in an act of sexual intercourse or masturbation or depicting the exposed genitals or anus of any person is subject to the following:

(a) Except as provided in par. (b), a forfeiture not to exceed $250 for a first violation, and a forfeiture not to exceed $500 for any subsequent violation.

(b) If the person is under 18 years of age, a written warning for a first violation, and for any subsequent violation before the person is 18 years of age, a forfeiture not to exceed $250.

(3) This section does not apply to any of the following:

(a) An Internet service provider, mobile data provider, or operator of an online or mobile application, to the extent that the entity is transmitting, routing, or providing connections for electronic communications initiated by or at the direction of another person.

(b) Any service that transmits images or audiovisual works, including an on-demand, subscription, or advertising-supported service.

(c) A health care provider transmitting an image for a legitimate medical purpose.

2. Current 22-2201: DC Code's Obscene Acts and Conduct statute

Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception.

(a)(1) It shall be unlawful in the District of Columbia for a person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(B) To present, direct, act in, or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance;

(C) To pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale, any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(D) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute or provide any article, thing, or device which is intended for or represented as being for indecent or immoral use;

(E) To create, buy, procure, or possess any matter described in the preceding subparagraphs of this paragraph with intent to disseminate such matter in violation of this subsection;

(F) To advertise or otherwise promote the sale of any matter described in the preceding subparagraphs of this paragraph; or

(G) To advertise or otherwise promote the sale of material represented or held out by such person to be obscene.

(2)(A) For purposes of subparagraph (E) of paragraph (1) of this subsection, the creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies or the possession of more than 3 copies, of obscene, indecent, or filthy material shall be prima facie evidence of an intent to disseminate such material in violation of this subsection.

(B) For purposes of paragraph (1) of this subsection, the term "knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.

(3) When any person is convicted of a violation of this subsection, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of any materials described in paragraph (1) of this subsection, which were named in the charge against such person and which were found in the possession or under the control of such person at the time of such person's arrest.

(b)(1) It shall be unlawful in the District of Columbia for any person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide to a minor:

(i) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(ii) Any book, magazine, or other printed matter however reproduced or sound recording, which depicts nudity, sexual conduct, or sado-masochistic abuse or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(B) To exhibit to a minor, or to sell or provide to a minor an admission ticket to, or pass to, or to admit a minor to, premises whereon there is exhibited, a motion picture, show, or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

(2) For purposes of paragraph (1) of this subsection:

(A) The term "minor" means any person under the age of 17 years.

(B) The term "nudity" includes the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below

the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(C) The term "sexual conduct" includes acts of sodomy, masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

(D) The term "sexual excitement" includes the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(E) The term "sado-masochistic abuse" includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(F) The term "knowingly" means having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both of:

(i) The character and content of any material described in paragraph (1) of this subsection which is reasonably susceptible of examination by the defendant; and

(ii) The age of the minor.

(c) It shall be an affirmative defense to a charge of violating subsection (a) or (b) of this section that the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material.

(d) Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act.

(e) A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.

3. 22A-2805: RCCA's Distribution of an obscene image.

(a) *Offense.* An actor commits distribution of an obscene image when the actor:

(1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:

(A) Sexual act;

(B) Sadomasochistic abuse;

(C) Masturbation;

(D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;

(E) Sexual contact; or

(F) Sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering;

(2) Without the complainant's effective consent; and
(3) Reckless as to the fact that the image is obscene.

(b) Exclusions from liability.

(1) An actor does not commit an offense under this section when, in fact, the actor is a licensee under 47 U.S.C. § 151 *et seq.* engaged in activities regulated pursuant to 47 U.S.C. § 151 *et seq.*
(2) An actor does not commit an offense under this section when, in fact, the actor is an interactive computer service, as that term is defined in 47 U.S.C. § 230(f)(2), for content provided by another person.
(3) An actor does not commit an offense under this section when, in fact, the actor distributes or displays an image to a complainant in a location open to the general public or in an electronic forum, unless the actor:
    (A) Knowingly distributes or displays the image directly to the complainant; or
    (B) Purposely distributes or displays the image to the complainant.
(4) An actor does not commit an offense under this section when, in fact, the actor reasonably believes that they are distributing the image to:
    (A) A person who is depicted in the image;
    (B) A person who was involved in the creation or distribution of the image; or
    (C) A person with a responsibility under civil law for the health, welfare, or supervision of a person who the actor reasonably believes is:
        (i) Depicted in the image; or
        (ii) Involved in the creation of the image.

(c) *Affirmative defenses*.

(1) It is an affirmative defense to liability under this section that the actor, in fact:
    (A) Is an employee of a school, museum, library, movie theater, or other venue;
    (B) Is acting within the reasonable scope of that role; and
    (C) Has no control over the selection of the image.
(2) It is an affirmative defense to liability under this section, that the actor:
    (A) With intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney;
    (B) In fact, distributes the image to a person whom the actor reasonably believes is:
        (i) A law enforcement officer, prosecutor, or attorney; or
        (ii) A teacher, school counselor, or school administrator of a person that the actor reasonably believes to be depicted in the image or involved in the creation of the image.

(d) *Penalties*. Distribution of an obscene image is a Class C misdemeanor.

(e) *Definitions*. For the purposes of this section, the term "licensee" shall have the same meaning as provided in 47 U.S.C. § 153(30).