

HOUSE No. 3818

The Commonwealth of Massachusetts

PRESENTED BY:

Manny Cruz and Judith A. Garcia

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act preventing rampant online technological exploitation and criminal trafficking.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Manny Cruz</i>	<i>7th Essex</i>	<i>1/20/2023</i>
<i>Judith A. Garcia</i>	<i>11th Suffolk</i>	<i>7/5/2023</i>

HOUSE No. 3818

By Representative Cruz of Salem, a petition (accompanied by bill, House, No. 3818) of Manny Cruz relative to preventing rampant online technological exploitation and criminal trafficking and establishing a special commission (including members of the General Court) to examine sentencing for criminal online technological exploitation. The Judiciary.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

An Act preventing rampant online technological exploitation and criminal trafficking.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to provide forthwith certain civil and criminal liability for online technological sexual exploitation, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public health.

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

1 SECTION 1. The General Laws are hereby amended by inserting after chapter 93L the
2 following chapter:-

3 CHAPTER 93M. ONLINE TECHNOLOGICAL EXPLOITATION

4 Section 1. As used in this chapter and in section 61 of chapter 265, the following terms
5 shall, unless the context clearly requires otherwise, have the following meanings:

6 “Coerced consent”, the purported consent obtained from a person: (1) through fraud,
7 duress, misrepresentation, undue influence, or nondisclosure; (2) who lacks capacity; or (3)

8 through exploiting or leveraging the person’s immigration status, pregnancy, disability,
9 addiction, juvenile status or economic circumstances.

10 “Computer”, an electronic, magnetic, optical, electrochemical, or other high speed data
11 processing device performing logical, arithmetic, or storage functions, and includes any data
12 storage facility or communications facility directly related to or operating in conjunction with
13 such device, but such term does not include an automated typewriter or typesetter, a portable
14 hand held calculator, or other similar device.

15 “Consent”, an agreement that is informed and thorough and does not include coerced
16 consent.

17 “Covered platform”, an interactive computer service that hosts or makes available to the
18 general public pornographic images. For purposes of this definition, the availability of
19 pornographic images to a group of subscribers shall be considered available to the general public
20 if any member of the general public, subject to reasonable limitations, can obtain a subscription.

21 “Covered platform operator”, a provider of a covered platform.

22 “Information content provider”, any person or entity that is responsible, in whole or in
23 part, for the creation or development of information provided through the Internet or any other
24 interactive computer service.

25 “Interactive computer service”, any information service, system, or access software
26 provider that provides or enables computer access by multiple users to a computer server,
27 including specifically a service or system that provides access to the Internet and such systems
28 operated or services offered by libraries or educational institutions.

29 “Intimate visual depiction”, any visual depiction: (1) of an individual who is reasonably
30 identifiable from the visual depiction itself or information displayed in connection with the
31 visual depiction, including through (i) facial recognition, (ii) an identifying marking on the
32 individual, including a birthmark or piercing, (iii) an identifying feature of the background of the
33 visual depiction, (iv) voice matching, or (v) written confirmation from an individual who is
34 responsible, in whole or in part, for the creation or development of the visual depiction; and (2)
35 in which (i) the individual depicted is engaging in sexually explicit conduct, or (ii) the naked
36 genitals, anus, pubic area, or post-pubescent female nipple of the individual depicted are visible.

37 “Pornographic image”, any visual depiction of actual or feigned sexually explicit conduct
38 or any intimate visual depiction.

39 “Sexually explicit conduct”, actual or simulated: (i) sexual intercourse, including genital-
40 genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite
41 sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious
42 exhibition of the anus, genitals, or pubic area of any person;

43 “User”, an individual who is an information content provider or, with respect to a covered
44 platform, an individual who is an information content provider who is responsible, in whole or in
45 part, for the creation or development of pornographic images hosted or made available by the
46 covered platform.

47 “Visual depiction”, a photograph, film, video, or modified photograph, film, or video,
48 whether made or produced by electronic, mechanical, or other means.

49 Section 2. (a) (1) A covered platform operator may not upload or allow a user to upload a
50 pornographic image to the covered platform unless the operator has verified, in accordance with
51 paragraph (2):

52 (i) the identity of the user; and

53 (ii) that the user is not less than 18 years old.

54 (2) In carrying out paragraph (1), a covered platform operator shall verify the identity and
55 age of a user by:

56 (i) requiring use of an adult access code or adult personal identification number;

57 (ii) accepting a digital certificate that verifies age; or

58 (iii) using any other reasonable measure of age verification that the attorney general has
59 determined to be feasible with available technology.

60 (3) Merely requiring a user to confirm that the user is not less than 18 years of age,
61 without independent means of verification, shall not satisfy the age requirement under paragraph
62 (1).

63 (b) (1) A covered platform operator may not upload or allow a user to upload a
64 pornographic image to the covered platform unless the operator has verified, in accordance with
65 paragraph (2), that each individual appearing in the pornographic image:

66 (i) was not less than 18 years of age when the pornographic image was created;

67 (ii) has provided explicit written evidence of consent for each sex act in which the
68 individual engaged during the creation of the pornographic image; and

69 (iii) has provided explicit written consent for the distribution of the specific pornographic
70 image.

71 (2) (A) Consent described in clause (ii) of paragraph (1) does not imply or constitute
72 evidence of consent described in clause (iii) of paragraph (1).

73 (B) Consent described in clause (iii) of paragraph (1) does not imply or constitute
74 evidence of consent described in subparagraph (ii) of paragraph (1).

75 (3) In carrying out paragraph (1), a covered platform operator shall obtain, either from the
76 user seeking to upload the pornographic image or through other means:

77 (A) a consent form created or approved by the attorney general under paragraph (4) from
78 each individual appearing in the pornographic image that includes:

79 (i) the name, date of birth, and signature of the individual;

80 (ii) a statement that the individual is not less than 18 years of age, unless no reasonable
81 person could conclude that the individual is less than 30 years of age;

82 (iii) a statement that the consent is for distribution of the specific pornographic image;

83 (iv) the geographic area and medium, meaning online, print, or other distribution method,
84 for which the individual provides consent to distribution of the pornographic image;

85 (v) the duration of time for which the individual provides consent to distribution of the
86 pornographic image;

87 (vi) a list of the specific sex acts that the person agrees to engage in for the pornographic
88 image; and

89 (vii) a statement that explains coerced consent and that the individual has the right to
90 withdraw the individual's consent at any time; and

91 (B) not less than 1 form of valid identification for each individual appearing in the
92 pornographic image:

93 (i) that was issued by an agency of the United States or of a state, local, or foreign
94 government and contains the name, date of birth, signature, and photograph of the individual;
95 and

96 (ii) on which the name, date of birth, and signature of the individual match the name, date
97 of birth, and signature of the individual on the consent form required under clause (A).

98 (4) (A) (i) The attorney general shall create and make available to the public a consent
99 form for purposes of clause (A) of paragraph (3).

100 (ii) A covered platform operator shall make the consent form created under clause (i)
101 available to users in both written and electronic format.

102 (B) For purposes of clause (A) of paragraph (3), a user may submit to a covered platform
103 an alternative consent form created by a user or covered platform operator if the alternative
104 consent form has been approved by the attorney general.

105 (c) Nothing in this section shall be construed to affect any obligation of a covered
106 platform under any other general or special law or impact or otherwise limit the criminal liability
107 of a user or other individual under any other law.

108 Section 3. (a) As used in this section, the following terms shall, unless the context clearly
109 requires otherwise, have the following meanings:

110 “Authorized representative”, a person authorized, pursuant to applicable law, in writing
111 by the individual to act on behalf of the individual with regard to the matter in question; or, in the
112 case of an individual under the age of 18, a parent or legal guardian of the individual.

113 “Eligible person”, with respect to a pornographic image uploaded to a covered platform,
114 an eligible person is: (i) an individual who appears in the pornographic image and has not
115 provided consent to, or has withdrawn consent in compliance with this chapter, the distribution
116 of the pornographic image; (ii) an authorized representative of an individual described in clause
117 (i); or (iii) a law enforcement officer acting pursuant to a valid court order.

118 (b) A covered platform operator shall establish a procedure for removing a pornographic
119 image from the covered platform at the request of a person and designate 1 or more employees of
120 the operator to be responsible for handling requests for removal of pornographic images.

121 (c) A covered platform operator shall display a prominently visible notice on the website
122 or mobile application of the covered platform that provides instructions on how a person can
123 request the removal of a pornographic image.

124 (d) (1) If a covered platform operator receives a request from an eligible person, through
125 any request mechanism offered by the operator under subsection (b), to remove a pornographic
126 image that is being hosted by the covered platform without the consent of an individual who

127 appears in the pornographic image, the operator shall remove the pornographic image as
128 quickly as possible, but not later than 72 hours after receiving the request.

129 (2) If a covered platform operator receives a request from a person other than an eligible
130 person, through any request mechanism offered by the operator under subsection (b), to remove a

131 pornographic image that is being hosted by the covered platform without the consent of an
132 individual who appears in the pornographic image, not later than 72 hours after receiving the
133 request the operator shall review the records of the operator with respect to the pornographic
134 image to determine whether the pornographic image was uploaded to the platform in accordance
135 with the verification requirements under subsections (a) and (b) of section 2. If the operator
136 determines that the pornographic image was not uploaded to the platform in accordance with the
137 verification requirements under said subsections (a) and (b) of said section 2, the operator shall
138 remove the pornographic image.

139 (e) In the case of a pornographic image that has been removed from a covered platform in
140 accordance with this section, the covered platform operator shall block the pornographic image,
141 and any altered or edited version of the pornographic image, from being uploaded to the covered
142 platform again.

143 Section 4. (a) A user of a covered platform may not upload a pornographic image of an
144 individual to the covered platform without the consent of the individual.

145 (b) For purposes of subsection (a), whether an individual has provided consent to the
146 uploading of an image shall be determined in accordance with this chapter and any other
147 applicable law.

148 Section 5. (a) (1) The attorney general may impose a civil penalty on any covered
149 platform operator that violates subsection (a) of section 2 in an amount of not more than \$10,000
150 for each day during which a pornographic image remains on the covered platform in violation of
151 said subsection (a) of section 2, beginning 24 hours after the attorney general provides notice of

152 the violation to the operator. A civil penalty under this paragraph shall accrue on a per-day and
153 per-image basis.

154 (2) If a covered platform operator violates subsection (b) of section 2 with respect to a
155 pornographic image, any person aggrieved by the violation may bring a civil action against the
156 covered platform operator in the superior court for damages in an amount equal to the greater of:
157 (i) \$10,000 for each day during which a pornographic image remains on the covered platform in
158 violation of said subsection (b) of said section 2, calculated on a per-day and per-image basis; or
159 (ii) actual damages.

160 (b) (1) The attorney general may impose a civil penalty on any covered platform operator
161 that violates subsection (b) of section 3 in an amount of not more than \$10,000 for each day
162 during which the covered platform remains in violation of said subsection (b) of said section 3,
163 beginning 24 hours after the attorney general provides notice of the violation to the operator.

164 (2) The attorney general may impose a civil penalty on any covered platform operator
165 that violates subsection (c) of section 3 in an amount of not more than \$5,000 for each day
166 during which the covered platform remains in violation of said subsection (c) of said section 3,
167 beginning 24 hours after the attorney general provides notice of the violation to the operator.

168 (3) (A) If a covered platform operator violates subsection (d) of section 3 with respect to
169 a pornographic image, any person aggrieved by the violation may bring a civil action against the
170 covered platform operator in the superior court for damages in an amount equal to the greater of:
171 (i) \$10,000 for each day during which the pornographic image remains on the covered platform
172 in violation of said subsection (d) of said section 3, calculated on a per-day and per-image basis;
173 or (ii) actual damages.

174 (B) A covered platform operator shall not be liable under subparagraph (A) for a
175 violation of section said subsection (d) of said section 3 if, in allowing the upload of a
176 pornographic image to the covered platform, the operator reasonably relied on verification
177 materials, in accordance with paragraph (3) of subsection (b) of section 2, that were later found
178 to be fraudulent, provided that the operator removes the pornographic image not later than 24
179 hours after discovering that the verification materials are fraudulent. If a covered platform
180 operator fails to remove a pornographic image within 24 hours of discovering that the
181 verification materials are fraudulent, damages under clause (i) of subparagraph (A) shall be
182 calculated with respect to each day on or after the date on which that 24-hour period expires.

183 (4) If a covered platform operator violates subsection (e) of section 3 with respect to a
184 pornographic image, any person aggrieved by the violation may bring a civil action against the
185 covered platform operator in the superior court for damages in an amount equal to the greater of:
186 (i) \$10,000 for each day during which the pornographic image remains on the covered platform
187 in violation of said subsection (e) of said section 3; or (ii) actual damages.

188 (c) If a user of a covered platform violates section 4 with respect to a pornographic
189 image, any person aggrieved by the violation may bring a civil action against the user in the
190 superior court for damages in an amount equal to the greater of: (i) \$10,000 for each day during
191 which the pornographic image remains on the covered platform in violation of said section 4,
192 calculated on a per-day and per-image basis; or (ii) actual damages.

193 SECTION 2. Chapter 265 of the General Laws is hereby amended by adding the
194 following section:-

195 Section 61. (a) The definitions set forth in section 1 of chapter 93M shall, unless the
196 context clearly requires otherwise, apply to this section.

197 (b) Except as provided in subsection (d), it shall be unlawful for any information content
198 provider to knowingly use any interactive computer service to publish an intimate visual
199 depiction of an individual with knowledge of or reckless disregard for: (1) the lack of consent of
200 the individual to the publication; and (2) the reasonable expectation of the individual that the
201 depiction would not be published through an interactive computer service without the
202 individual's consent.

203 (c) Any person who violates subsection (b) shall be punished by a fine of not more than
204 \$10,000 or by imprisonment in a state prison for not more than 5 years, or both.

205 (d) Subsection (b) shall not: (i) prohibit any lawful law enforcement, correctional, or
206 intelligence activity; (ii) apply to an individual acting in good faith to report unlawful activity or
207 in pursuance of a legal or other lawful obligation; or (iii) apply to a document production or
208 filing associated with a legal proceeding.

209 SECTION 3. (a) There shall be a special legislative commission established, pursuant to
210 section 2A of chapter 4 of the General Laws, to examine sentencing for criminal online
211 technological exploitation, pursuant to section 2 of chapter 265 of the General Laws. The
212 commission shall recommend: (i) sentencing guidelines for such crimes, including potential
213 legislative amendments to subsection (c) of said section 2 of said chapter 265; (ii) guidance to
214 help consumers prevent and report criminal online technological exploitation; and (iii) further
215 action, including legislative action, to protect survivors from criminal online technological
216 exploitation.

217 (b) The commission shall consist of: (i) the chairs of the joint committee on the judiciary,
218 who shall serve as co-chairs of the commission; (ii) 1 member to be appointed by the speaker of
219 the house of representatives; (iii) 1 member to be appointed by the president of the senate; (iv) 1
220 member to be appointed by the minority leader of the house of representatives; (v) 1 member to
221 be appointed by the minority leader of the senate; (vi) 2 members to be appointed by the
222 governor; (vii) 2 members to be appointed by the attorney general; (viii) 2 members to be
223 appointed by the Supreme Judicial Court; (ix) 1 member to be appointed by the American Bar
224 Association - Massachusetts office; (x) 1 member to be appointed the Citizens for Juvenile
225 Justice, Inc.; (xi) 1 member to be appointed by the Committee for Public Counsel Services; (xii)
226 1 member to be appointed by the Massachusetts District Attorneys Association; (xiii) 1 member
227 to be appointed by Jane Doe Inc.: The Massachusetts Coalition Against Sexual Assault and
228 Domestic Violence; and (xiv) 1 member to be appointed by YW Boston, Inc.

229 (c) The commission shall commence no later than 90 days after the effective date of this
230 act.

231 (d) No later than December 31, 2025, the commission shall file a report of its findings
232 and recommendations, including any draft legislation, with the clerks of the house of
233 representatives and the senate and the chairs of the joint committee on the judiciary.

234 SECTION 4. The attorney general shall create the consent form required pursuant to
235 clause (i) of subparagraph (A) of paragraph (4) of subsection (b) of section 2 of chapter 93M of
236 the General Laws within 60 days after passage of this act.

237 SECTION 5. Subsection (e) of section 3 of chapter 93M of the General Laws shall take
238 effect 180 days after passage of this act.

239 SECTION 6. Except as set forth in sections 4 and 5, this act shall take effect 90 days after
240 its passage.