UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

American Civil Liberties Union; et al., Plaintiffs, vs. Terry Goddard, Attorney General of the State of Arizona; et al., Defendants.	No. CV-00-0505-TUC-ACM **DEFENDANT ATTORNEY GENERAL'S OPENING BRIEF CONCERNING THE EFFECT OF THE 2003 AMENDMENT TO A.R.S. § 13-3506.01**

On August 16, 2002, the Court issued an Amended Judgment declaring A.R.S. § 13-3506.01 unconstitutional on the grounds that the statute violates the First and Fourteenth Amendments and the Commerce Clause. While an appeal was pending, the Arizona Legislature amended the statute (hereafter the "2003 Amendment") and significantly altered the provisions that formed the basis for plaintiffs' complaint and this Court's judgment. *See* 2003 Ariz. Sess. Laws, Ch. 222, § 1.[1] The parties stipulated to dismissal of the appeal and a remand to this Court for consideration of the implications of the 2003 Amendment on this Court's August 16, 2002 Judgment.

[1] A copy of the statute, as amended in 2003, is attached hereto for the Court's reference as Exhibit A. A copy of the "redlined" version of the 2003 amendment, designated Senate Bill 1352 and approved by the Governor on May 14, 2003, is attached for the Court's

Because the 2003 Amendment eliminates any constitutional infirmities present in the pre-amendment version of A.R.S. § 13-3506.01, the Court's injunction should be dissolved and plaintiffs' claims dismissed.

ARGUMENT

I. ARIZONA'S INTERNET HARMFUL-TO-MINORS STATUTE PROMOTES A COMPELLING INTEREST AND IS NARROWLY TAILORED.

There is no dispute in this case that Arizona's internet harmful-to-minors statute promotes a compelling government interest. *See Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *see also Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *see also New York v. Ferber*, 458 U.S. 747, 756-57 (1968). Rather, this case turns on whether the 2003 Amendment is "narrowly tailored" in its promotion of a compelling government interest. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

As explained below, the 2003 Amendment is singularly narrow as compared to its predecessor statute or to other internet harmful-to-minors statutes that have been subject to judicial review. Drafted with particular attention to avoiding the constitutional pitfalls that have plagued other internet harmful-to-minors statutes, the 2003 Amendment passes constitutional muster under the narrow tailoring standard.

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reference as Exhibit B. A copy of the unamended version of the statute is attached for the Court's reference as Exhibit C.

A. Arizona's Internet Harmful-to-Minors Statute is Uniquely Narrow.

The 2003 Amendment expressly limited the proscriptive scope and geographic reach of Arizona's internet harmful-to-minors statute, which now reads as follows:

> It is unlawful for any person, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send to a minor **by means of electronic mail, personal messaging or any other direct internet communication** an item that is harmful to minors when the person knows or believes at the time of the transmission that a minor in this state will receive the item.

A.R.S. § 13-3506.01(A) (emphasis added).

This provision, and the subsections that follow, distinguish Arizona's statute from all other internet harmful-to-minors statutes that have been the subject of published judicial opinions to date. First, as the bolded text above suggests, Arizona's statute is unique in that it narrowly applies only to those forms of "direct internet communication," such as e-mail and personal messaging, that allow the sender to control the intended recipient of the communication. *Id.* Second, Arizona's statute is unique because it is the only such statute that specifically excludes from its scope those forms of internet communication, such as internet web sites, bulletin boards, newsgroups, and mailing lists or list servs, that preclude the sender from having direct knowledge of the recipient(s) of the communication. A.R.S. § 13-3506.01(B). The control that is vested in the sender of an internet communication under these tandem limitations results in a third unique characteristic of the Arizona statute: it applies only to a sender who actually knows or believes at the time of transmission that a minor will receive the communication.

A.R.S. § 13-3506.01(A). Finally, the statute is geographically limited in that it only prohibits communications directed toward a minor known or believed to reside in Arizona. *Id.*

As set forth more fully below, these unique characteristics of the 2003 Amendment result in a narrowly tailored statute that not only distinguishes it from other such statutes that have been held unconstitutional, but also remedies the three constitutional infirmities identified by this Court in its August 16, 2002 Amended Judgment, namely: (1) the statute is overbroad (Findings of Fact and Conclusions of Law and Order ["Findings"] ¶¶ 56-57, 59, 61, 65-67); (2) the statute is vague (*id.* ¶ 63); and (3) the statute impermissibly regulates conduct occurring outside of Arizona in violation of the Commerce Clause (*id.* ¶¶ 58, 64).

B. The 2003 Amendment Is Narrowly Limited to Direct Communications with Minors.

1. The Court's Concern with Overbreadth and Its Chilling Effect.

This Court's judgment enjoining enforcement of the prior version of A.R.S. § 13-3506.01 (hereafter the "2001 Statute") was based, in part, on the conclusion that the statute was "substantially overbroad" because it "effectively bans speech that is constitutionally protected for adults." (Findings ¶¶59, 61.) The 2001 Statute expressly excluded from its reach the posting of material on an internet web site. (*See* Exhibit C, 2001 Statute, subsection (C).) Nevertheless, a literal reading of the statute permitted a construction that the statute covered other forms of internet communication (*i.e.*, list servs, mailing lists,

bulletin boards, and newsgroups) that may be indiscriminately accessed by minors and adults alike. Because these forms of internet communication provide speakers with little or no control over the recipients of their speech, the Court concluded that speakers could not prevent minors from receiving the proscribed speech, while still permitting adults to receive protected speech. (Findings ¶¶ 30, 34-35, 39, 45-47.) In other words, the Court concluded that the 2001 Statute, by extending its reach to list servs, bulletin boards, and newsgroups, chilled protected speech among adults because the speaker could be deemed to have "reason to know" that the communication would be received by a minor.

In addition, because the 2001 statute prohibited otherwise protected communication whenever the sender "has knowledge or reason to know" that a minor would receive the communication, the Court concluded that protected speech could be impermissibly chilled by "censorship in the form of a 'heckler's veto,'" wherein a self-identified minor could, for example, log into a chat room, announce that a minor is present, and thereby "censor" otherwise protected speech among adults. (Findings ¶¶ 56-57) (citing *Reno v. ACLU*, 521 U.S. 844, 880 (1997)).

In support of the 2001 Statute, Defendants argued that the Court's concerns regarding overbreadth could be remedied via "narrowing constructions" that would limit the terms "reason to know" and "to a minor" so that they would apply only where an adult, with actual knowledge, sends an item exclusively to one or more minors. (*See* Defendants' Post Trial Memorandum at 5-8.) The Court, however, rejected these narrowing constructions, concluding that the 2001 Statute was not susceptible to the

proffered constructions and that incorporating such constructions would require the Court to rewrite the statute. (Findings ¶¶ 65-67.)

2. The 2003 Amendment Remedies the Court's First Amendment Concerns.

By enacting the 2003 Amendment, the Arizona Legislature remedied the Court's concerns by explicitly limiting the scope of the statute to exclude protected expression.

The 2003 Amendment successfully eliminates any overbreadth concern by making three key changes to the statute. First, the 2003 Amendment specifically limits its reach to communications sent to a minor "by means of electronic mail, personal messaging or any other *direct internet communication.*" A.R.S. § 13-3506.01(A) (emphasis added). Unlike the 2001 Statute or any other internet harmful-to-minor statutes that have been held unconstitutional, this amendment clarifies that the statute only applies when the speaker knowingly directs prohibited communication to one or more Arizona minors. This unique limitation is critical because it effectively narrows the scope of prohibited behavior to instances in which the sender is capable of actually knowing or believing that harmful-to-minors material will be received by one or more minors in Arizona – in other words, to wholly unprotected speech.

Second, to further confirm the limited scope of the statute, the 2003 Amendment specifically excludes all forms of internet communication that are likely to involve multiple recipients and that may be indiscriminately accessed by minors and adults alike (*i.e.*, posting internet websites, bulletin boards, newsgroups, and mailing lists or listservs).

[2] A.R.S. § 15-3506.01(B). Excluding these forms of internet communication further reinforces that the statute is limited to direct internet communication in which the sender knows or believes that the recipient is a minor. It also avoids the "heckler's veto" problem by excluding those types of internet fora where the "heckler's veto" problem could occur. For example, by liming the statute to e-mail, personal messaging and other forms of one-on-one internet communication, there is no risk that the speaker would be chilled from directing harmful-to-minor materials to other adults. To avoid prosecution, the speaker would simply be required to direct his communications to adults, not known minors.

Third, the 2003 Amendment deletes the provisions permitting prosecution on the basis that the potential violator had "reason to know" or "should have known" that a minor would receive the item. (*See* Exhibit B, 2003 redline, subsection (A), (B).) The related provisions permitting an inference of scienter were eliminated as well. (*See id.*, subsection (D).) Thus, the 2003 Amendment subjects a person to prosecution only if the person actually knows or believes that the transmission will be received by a minor in the state.[3] A.R.S. § 13-3506.01(A). Because the statutory prohibition is limited to direct internet

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[2] The exclusion relating to mailing lists or listservs applies unless the mailing list or listserv is "administered by the sender." A.R.S. § 13-3506.01(B)(2). This caveat is appropriate because, like e-mail and other direct internet communication, a mailing list or listserv administrator is capable of controlling the recipients of the communication and thus can limit the list of recipients to exclude minors.

[3] Because the 2003 Amendment's actual knowledge or belief scienter requirement is coupled with the statute's limitation to direct internet communications in which speakers are capable of actually knowing or believing that the recipient is a minor, the 2003 Amendment is distinguishable from the Communications Decency Act at issue in *Reno v. ACLU*, 521 U.S. 844, 880 (1997), which this Court cited in its Findings, and in which the Supreme Court concluded that "[e]ven the strongest 'specific person' requirement could not save the CDA." (Findings ¶ 57.)

communications in which the sender has actual knowledge or belief that the recipient is a minor in this state, the statute is narrowly tailored to exclude from its sweep activities that would otherwise be entitled to First Amendment protection. *See Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996) (concluding that statute banning sale of harmful matter in unsupervised sidewalk vending machines was narrowly tailored and noting that the statute "goes to great lengths to spell out ways that will keep children out of the materials in question, while still allowing access to adults").

3. The 2003 Amendment Avoids the First Amendment Problems That Plagued Other Internet Harmful-To-Minors Statutes

Integral to each of the decisions striking down other internet harmful-to-minors statutes on First Amendment grounds is that the statutes, as written, provided "no way for Internet speakers to prevent their communications from reaching minors without also denying adults access to the material." *PSINet Inc. v. Chapman*, 108 F. Supp. 2d 611, 626 (W.D. Va. 2000), *questions certified to state court in pending review*, 317 F.3d 413 (4th Cir. 2003); *see also ACLU v. Reno*, 521 U.S. 844, 874 (1997) ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2nd Cir. 2003) (stating that "restrictions aimed at minors may not limit non-obscene expression among adults"); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 747-48 (E.D. Mich. 1999) (noting that the communicant is faced with a "Hobson's choice of shutting down

their website (or whatever vehicle of information exchange) or risk prosecution for exercising protected speech" and concluding that "[t]o comply with the Act, a communicant must speak only in language suitable for children.").

Unlike the statutes at issue in the above-cited cases, the 2003 Amendment does not present internet speakers with such a "Hobson's choice" between self-censoring and criminal prosecution. Rather, the 2003 Amendment permissibly regulates prohibited speech directed to minors in Arizona without infringing on the rights of adults to communicate with other adults.

II. THE AMENDED STATUTE SPECIFICALLY DEFINES ALL TERMS PREVIOUSLY ALLEGED TO BE VAGUE.

The Court struck down the 2001 Statute for the additional reason that the term "internet web site" was "unconstitutionally vague." (Findings ¶ 63.) A statute is unconstitutionally vague if the conduct forbidden is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). This Court, in reviewing the 2001 Statute, found that "[t]here is no single, well-accepted meaning for the term 'Internet Web site.'" (Findings ¶ 43.) Accordingly, the Court concluded that the statute was unconstitutionally vague.

In contrast to the 2001 Statute, the 2003 Amendment specifically defines the term "internet web site" as "a location where material placed in a computer server-based file archive is publicly accessible, over the internet, using hypertext transfer protocol or any

successor protocol." A.R.S. § 13-3506.01(G). This definition is modeled after a definition used by Congress in the Child Online Protection Act, 47 U.S.C. § 231(e)(1). By providing an express definition, the 2003 Amendment cures any earlier vagueness problems. The 2003 Amendment also provides explicit definitions for other relevant terms. A.R.S. § 13-3506.01(B)(2), (F) (defining the terms "mailing list or list serv" and "internet").

The definitions provided in the 2003 Amendment clarify what conduct is and is not prohibited. Thus, the 2003 Amendment is no longer subject to challenge on vagueness grounds. *See Connally*, 269 U.S. at 391.

III. THE AMENDED STATUTE RESOLVES ANY COMMERCE CLAUSE VIOLATION BY REGULATING ONLY COMMUNICATIONS TO MINORS IN ARIZONA.

The final basis upon which the Court held the 2001 Statute unconstitutional was that, as written, the 2001 Statute "violates the Commerce Clause of the United States Constitution because it regulates conduct occurring wholly outside the State of Arizona." (Findings ¶ 58, 64.) Subsection (B) of the 2001 Statute prohibited communications sent from Arizona to minors outside of Arizona. (*See* Exhibit C, 2001 Statute, subsection (B).) The 2003 Amendment eliminates this provision in its entirety, thus mooting Plaintiffs' Commerce Clause challenge. (*See* Exhibit B, 2003 redline, subsection (B).) In addition, as set forth above, the 2003 Amendment explicitly requires that the potential violator have actual knowledge or belief that the recipient is a minor in Arizona. A.R.S. § 13-3506.01(A). Thus, a clear nexus to Arizona is required. Finally, the specific exclusions

for posting material on a website, bulletin board, or newsgroup, or for sending material via a mailing list or listserv not administered by the sender, along with the added definitions for "internet," "internet web site," and "mailing list or listserv," clarify that, to be prohibited, the conduct must directly target a minor in Arizona. Thus, the 2003 Amendment only regulates conduct that the potential violator actually knows or believes is directed to a minor in Arizona. As such, the law does not run afoul of the Commerce Clause. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also People v. Hsu*, 82 Cal. App. 4th 976, 985 (Cal. Ct. App. 2000) (concluding that California's internet seduction statute does not violate the Commerce Clause because "California prosecutes only those criminal acts that occur wholly or partially within the state").

CONCLUSION

Unlike the 2001 Statute and other internet harmful-to-minors statutes previously stricken down upon judicial review, the 2003 Amendment is narrowly tailored to apply only to those forms of direct internet communication, such as e-mail and personal messaging, that provide the sender with control over the intended recipient of the communication. As a corollary, the 2003 Amendment specifically excludes from its prohibition communications that are posted on an internet web site, bulletin board, or newsgroup, or that are sent via mailing list or listserv not administered by the sender. These limiting provisions narrow the scope of the statute so as to penalize only direct internet communications in which the sender has actual knowledge or belief that the prohibited communication will be received by a minor in Arizona. So limited, the 2003

Amendment does not suffer from the First Amendment infirmities identified by this Court in its August 16, 2002, Judgment, or by other courts in analyzing other internet harmful-to-minor statutes. Moreover, because the 2003 Amendment explicitly limits its geographic reach to communications directed towards minors in this state, the 2003 Amendment likewise survives challenge under the Commerce Clause.

For the foregoing reasons, Defendants request that the injunction previously entered by the Court with respect to the 2001 Statute be dissolved and that Plaintiffs' complaint be dismissed.

RESPECTFULLY SUBMITTED this 6th day of October 2003.

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EXHIBIT A

2003 AMENDMENT

(A.R.S. § 13-3506.01, As Amended in 2003)
(2003 Ariz. Sess. Laws, Ch. 222, § 1)

13-3506.01. Furnishing harmful items to minors; internet activity; classification; definitions

A. It is unlawful for any person, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send to a minor by means of electronic mail, personal messaging or any other direct internet communication an item that is harmful to minors when the person knows or believes at the time of the transmission that a minor in this state will receive the item.

B. This section does not apply to:

1. Posting material on an internet web site, bulletin board or newsgroup.

2. Sending material via a mailing list or listserv that is not administered by the sender. A mailing list or listserv is a method of internet communication where a message is sent to an internet address and then is retransmitted to one or more subscribers to the mailing list or listserv.

C. It is not a defense to a prosecution for a violation of this section that the recipient of the transmission was a peace officer posing as a minor.

D. A violation of this section is a class 4 felony.

E. Failure to report a violation of this section is a class 6 felony as prescribed by section 13-3620.

F. The term "internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the transmission control protocol or internet protocol or any successor protocol to transmit information.

G. The term "internet web site" means a location where material placed in a computer server-based file archive is publicly accessible, over the internet, using hypertext transfer protocol or any successor protocol.

EXHIBIT B

2003 AMENDMENT—REDLINE[1]

(A.R.S. § 13-3506.01, Redlined Version of 2003 Amendment)

13-3506.01. Furnishing harmful items to minors; internet activity; classification

A. It is unlawful for any person, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send ~~over the internet an item to a minor that is harmful to minors when the person has knowledge or reason to know~~ TO A MINOR BY MEANS OF ELECTRONIC MAIL, PERSONAL MESSAGING OR ANY OTHER DIRECT INTERNET COMMUNICATION AN ITEM THAT IS HARMFUL TO MINORS WHEN THE PERSON KNOWS OR BELIEVES at the time of the transmission that a minor in this state will receive the item.

B. ~~It is unlawful for any person in this state, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send over the internet an item to a minor that is harmful to minors when the person has knowledge or reason to know at the time of the transmission that a minor will receive the item.~~ THIS SECTION DOES NOT APPLY TO:

~~C.~~ 1. Posting material on an internet web site ~~does not constitute the act of transmitting or sending an item over the internet~~, BULLETIN BOARD OR NEWSGROUP.

2. SENDING MATERIAL VIA A MAILING LIST OR LISTSERV THAT IS NOT ADMINISTERED BY THE SENDER. A MAILING LIST OR LISTSERV IS A METHOD OF INTERNET COMMUNICATION WHERE A MESSAGE IS SENT TO AN INTERNET ADDRESS AND THEN IS RETRANSMITTED TO ONE OR MORE SUBSCRIBERS TO THE MAILING LIST OR LISTSERV.

C. It is not a defense to a prosecution for a violation of this section that the recipient of the transmission was a peace officer posing as a minor.

D. A violation of this section is a class 4 felony.

E. FAILURE TO REPORT A VIOLATION OF THIS SECTION IS A CLASS 6 FELONY AS PRESCRIBED BY SECTION 13-3620.

F. THE TERM "INTERNET" MEANS THE COMBINATION OF COMPUTER FACILITIES AND ELECTROMAGNETIC TRANSMISSION MEDIA, AND RELATED EQUIPMENT AND SOFTWARE, COMPRISING THE INTERCONNECTED WORLDWIDE NETWORK OF COMPUTER NETWORKS THAT EMPLOY THE TRANSMISSION CONTROL PROTOCOL OR INTERNET PROTOCOL OR ANY SUCCESSOR PROTOCOL TO TRANSMIT INFORMATION.

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[1] Additions in ALL CAPS; deletions ~~stricken through~~. Note: The subsections ultimately codified as (C), (D), and (E), were listed, respectively, as subsections (E), (F), and (G) in the House Engrossed Senate Bill. For convenience of reference, the redline version has been arranged to mirror the statutory arrangement, as codified.

~~D. In an action for a violation of this section, proof of any of the following may give rise to an inference that the person knew or should have known that the recipient of a transmission was a minor:~~

~~1. The name, account, profile, web page or address of the recipient contained indicia that the recipient is a minor.~~

~~2. The recipient or another person previously notified the person by any reasonable means that the recipient is a minor.~~

~~3. The recipient's electronic mail or web page contains indicia that the address or domain name is the property of, or that the visual depiction ultimately will be stored at, a school as defined in section 13-609.~~

G. THE TERM "INTERNET WEB SITE" MEANS A LOCATION WHERE MATERIAL PLACED IN A COMPUTER SERVER-BASED FILE ARCHIVE IS PUBLICLY ACCESSIBLE, OVER THE INTERNET, USING HYPERTEXT TRANSFER PROTOCOL OR ANY SUCCESSOR PROTOCOL.

EXHIBIT C

2001 STATUTE

(A.R.S. § 13-3506.01, Pre-2003 Amendment)

13-3506.01 . Furnishing harmful items to minors; internet activity; classification

A. It is unlawful for any person, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send over the internet an item to a minor that is harmful to minors when the person has knowledge or reason to know at the time of the transmission that a minor in this state will receive the item.

B. It is unlawful for any person in this state, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send over the internet an item to a minor that is harmful to minors when the person has knowledge or reason to know at the time of the transmission that a minor will receive the item.

C. Posting material on an internet web site does not constitute the act of transmitting or sending an item over the internet.

D. In an action for a violation of this section, proof of any of the following may give rise to an inference that the person knew or should have known that the recipient of a transmission was a minor:

1. The name, account, profile, web page or address of the recipient contained indicia that the recipient is a minor.

2. The recipient or another person previously notified the person by any reasonable means that the recipient is a minor.

3. The recipient's electronic mail or web page contains indicia that the address or domain name is the property of, or that the visual depiction ultimately will be stored at, a school as defined in § 13-609.

E. It is not a defense to a prosecution for a violation of this section that the recipient of the transmission was a peace officer posing as a minor.

F. A violation of this section is a class 4 felony.