

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

**AMERICAN CIVIL LIBERTIES UNION; MARK AMERIKA;
ART ON THE NET; AZGAYS.COM; CHANGING HANDS
BOOKSTORE; MARTY KLEIN; PEN AMERICAN CENTER;
THE SEXUAL HEALTH NETWORK, INC.; JEFF WALSH;
WEB DEL SOL; WILDCAT PRESS; AMERICAN
BOOKSELLERS FOUNDATION FOR FREE EXPRESSION;
ASSOCIATION OF AMERICAN PUBLISHERS, INC.;
FREEDOM TO READ FOUNDATION, INC.; MAGAZINE
PUBLISHERS OF AMERICA; NATIONAL ASSOCIATION OF
RECORDING MERCHANDISERS; PERIODICAL AND BOOK
ASSOCIATION OF AMERICA; PUBLISHERS MARKETING
ASSOCIATION; and RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.,**

Plaintiffs,

vs.

**TERRY GODDARD, ATTORNEY GENERAL OF THE STATE
OF ARIZONA; STEPHEN G. UDALL, APACHE COUNTY
ATTORNEY; CHRIS M. ROLL, COCHISE COUNTY
ATTORNEY; TERENCE C. HANCE, COCONINO COUNTY
ATTORNEY; JERRY DeROSE, GILA COUNTY ATTORNEY;
JACK M. WILLIAMS, GRAHAM COUNTY ATTORNEY;
DEREK D. RAPIER, GREENLEE COUNTY ATTORNEY; R.
GLENN BECKELEW, LA PAZ COUNTY ATTORNEY;
RICHARD ROMLEY, MARICOPA COUNTY ATTORNEY;
WILLIAM J. EKSTROM, JR., MOHAVE COUNTY
ATTORNEY; MELVIN R. BOWERS, JR., NAVAJO COUNTY
ATTORNEY; BARBARA LAWALL, PIMA COUNTY
ATTORNEY; ROBERT CARTER OLSON, PINAL COUNTY
ATTORNEY; MARTHA S. CHASE, SANTA CRUZ COUNTY
ATTORNEY; CHARLES R. HASTINGS, YAVAPAI COUNTY
ATTORNEY; and PATRICIA A. OROZCO, YUMA COUNTY
ATTORNEY,**

Defendants.

No. CV-00-0505-TUC-AM

**SECOND AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

PRELIMINARY STATEMENT

1. In 1970, the Arizona Legislature enacted ARIZ. REV. STAT. § 13-3506 to protect minors from sexually explicit and obscene materials. In 2000, the Legislature enacted sweeping changes to the statute to include any material distributed over the Internet that may be deemed “harmful to minors” in Arizona (the “2000 Amendments”). The original Complaint in this action challenged the 2000 Amendments’ unconstitutional restrictions on speech communicated over the Internet.
2. On April 11, 2001, Governor Jane Hull signed into law H.B. 2289 entitled “Harmful items to minors; internet” (2001 ARIZ. SESS. LAWS, Ch. 189, § 25), which amended A.R.S. § 13-3506 and added a new section, § 13-3506.01. Section 13-3506.01 was further amended by H.B. 2223, signed into law by Governor Hull on May 4, 2001. The amendments to § 13-3506 effectively repealed the 2000 Amendments and provided that § 13-3506 did not apply to “the transmission or sending of items over the Internet.” A.R.S. § 13-3506(B).
3. While repealing the 2000 Amendments, however, H.B. 2289 and H.B. 2223 also enacted a replacement Internet censorship statute, A.R.S. § 13-3506.01 (the “2001 Act”), that is unconstitutional for precisely the same reasons that the 2000 Amendments were unconstitutional. After a two-day permanent injunction hearing, the District Court concluded that the 2001 Act on its face and as applied to Plaintiffs violated the First and

Fourteenth Amendments and the Commerce Clause of the United States Constitution. The District Court issued its Findings of Fact and Conclusions of Law and Order (the “Findings”) on June 14, 2002. The 2001 Act was permanently enjoined on August 16, 2002.

4. On May 14, 2003, Governor Janet Napolitano (who served as Arizona Attorney General when this case was first filed) signed into law S.B. 1352 entitled “Children and Family Offenses” (Laws 2003, Ch. 222, § 1) (the “Revised Act”), which amends the 2001 Act but fails to cure its constitutional defects. Exhibit A attached hereto is a copy of the Revised Act. Exhibit B attached hereto is a copy of A.R.S. § 13-3501, which contains definitions that are relevant to portions of the Revised Act.

5. The Revised Act imposes severe restrictions on the dissemination of constitutionally-protected speech on the Internet by making it a crime to “intentionally or knowingly transmit or send” by means of “electronic mail, personal messaging or any other direct [I]nternet communication” any “item” that is “harmful to minors,” as that term is defined in A.R.S. § 13-3501(1). A.R.S. § 13-3506.01(A). The United States Supreme Court invalidated a similar federal law on First Amendment grounds in *Reno v. ACLU*, 521 U.S. 844 (1997) (“ACLU I”), and the Third Circuit invalidated a second similar federal law on First Amendment grounds in *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff’d*, 217 F.3d 162 (3d Cir. 2000), *vacated and remanded sub nom Ashcroft v. ACLU*, 535 U.S. 564 (2002), *aff’d*, 322 F.3d 240 (3d Cir. 2003). In addition,

six similar state laws have now been struck down as unconstitutional. *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002); *PSINet, Inc. v Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001); *State v. Weidner*, 611 N.W.2d 684 (Wisc. Sup. Ct. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (New Mexico); *American Library Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

6. The Revised Act will take effect on September 18, 2003.

7. Under the Revised Act, any nudity or sexual conduct can potentially be criminal if communicated on the Internet, sent in a manner in which the user, at a minimum, believes the recipient to be a minor in Arizona and the content is found to be “harmful to minors” under the Revised Act’s broad definition. Because all speech on the Internet is accessible in Arizona, regardless of the geographical location of the person who communicated it, the Revised Act threatens Internet users nationwide and even worldwide. This action seeks to have the Revised Act declared facially unconstitutional and void, and to have the State enjoined from enforcing the Revised Act, by reason of the First, Fifth, and Fourteenth Amendments and the Commerce Clause of the U.S. Constitution.

8. Because of the way the Internet works, the Revised Act’s prohibition on “intentionally or knowingly transmit[ting] or send[ing]” material that may be harmful to minors, when the “person knows or believes” a minor in Arizona to be the recipient,

would effectively ban those same communications among adults. Although the Revised Act attempts to limit only those communications where the sender “knows or believes” that a minor in Arizona will receive the content, due to the anonymity of users on the Internet, this “belief” standard applies no limitation to the reach of the Revised Act.

9. As a result, the Revised Act targets speech that is constitutionally protected for adults, including, for example, valuable works of literature and art, safer sex information, examples of popular culture, and a wide range of robust human discourse about current issues and personal matters that may include provocative or sexually-oriented language and images. Because the “belief” language is so broad and there are no reasonable technological means that enable speakers on the Internet to ascertain the actual age of persons who access their communications, or specifically to restrict or prevent access by minors to certain content, the Revised Act inevitably will mean that Internet content providers will limit the range of their speech. Consequently, the Revised Act will reduce adult speakers and users in cyberspace to reading and communicating only material that is suitable for young children.

10. In addition, the Revised Act prohibits speech that is valuable and constitutionally protected for minors, especially older minors.

11. The speech at issue in this case does not include obscenity, child pornography, speech used to entice or lure minors into inappropriate activity, or harassing speech.

Such communications already were illegal under Arizona law prior to the Revised Act. (See Laws 2000, Ch. 189, § 25.)

12. Plaintiffs represent a broad range of individuals and entities who are speakers, content providers, and access providers on the Internet. Plaintiffs distribute and discuss content including resources on AIDS prevention and sexual health; visual art, literature, and poetry; and books and resources for gay and lesbian youth. The Revised Act directly violates the First Amendment rights of plaintiffs, their members, their users, and tens of millions of other speakers and users of the Internet.

13. In addition, the Revised Act violates the Commerce Clause of the U.S. Constitution because it regulates commerce occurring wholly outside of the State of Arizona, because it imposes an impermissible burden on interstate and foreign commerce, and because it subjects interstate use of the Internet to inconsistent state regulations. An online user outside of Arizona cannot know whether someone in Arizona might receive messages he or she communicated in an online chat room or discussion group, or via an e-mail mailing list. Due to the anonymity of Internet identity, any time a user sends out an Internet communication, the user must arguably “believe” that a minor in Arizona may likely receive said communication. Furthermore, although the Revised Act purports to exempt Web postings, bulletin boards, and newsgroups, the vague and inconsistent language of this carve-out undermines its effectiveness. *See discussion, infra*. Consequently, users of e-mail, chat rooms, discussion groups, mailing lists, Web communications, bulletin

boards, newsgroups, and other Internet fora must comply with Arizona law—even if they themselves are located outside of Arizona—or face the threat of criminal prosecution.

A.R.S. § 13-3506.01(A) (2003).

JURISDICTION AND VENUE

14. This case arises under the U.S. Constitution and the laws of the United States and presents a federal question within this Court’s jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). This action is brought pursuant to 42 U.S.C. § 1983.

15. The Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.

16. The Court has the authority to award costs and attorneys’ fees under 42 U.S.C. § 1988.

17. Venue is proper in this district under 28 U.S.C. § 1391(b).

THE PARTIES

18. Plaintiff AMERICAN CIVIL LIBERTIES UNION (“ACLU”) is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU is incorporated in the District of Columbia and has its principal place of business in New York City. The ACLU sues on its own behalf, on behalf of others who use its online

computer communications systems, and on behalf of its members who use online computer communications systems. The ACLU maintains a Web site at <http://www.aclu.org>.

19. Plaintiff MARK AMERIKA is a critically-acclaimed writer and publisher of ALT-X, a site containing original literary works published only online, reviews of new media art and theory, original online art projects, and the GRAMMATRON Project (a “public domain narrative environment” developed by Mr. Amerika in conjunction with the Brown University Graduate Creative Writing Program and the National Science Foundation’s (NSF) Graphics and Visualization Center). The site’s Internet address is <http://www.altx.com>. ALT-X has been called “the literary publishing model of the future.” Mr. Amerika resides in Boulder, Colorado. Mr. Amerika sues on his own behalf and on behalf of users of ALT-X.

20. Plaintiff ART ON THE NET (“art.net”) is a not-for-profit international artist site at the Internet address <http://www.art.net>. Based in Menlo Park, California, art.net assists close to 500 artists in maintaining online studio or gallery spaces. In addition, art.net hosts mailing lists for member artists regarding relevant issues and events and communicates information about art events and artist shows. Some of the artistic work featured in art.net’s online galleries contain sexual content. Art.net sues on its own behalf, on behalf of the artists who utilize its services, and on behalf of Internet users who visit its site.

21. Plaintiff AZ GAYS.COM is an Internet directory and online forum designed for the lesbian, gay, bisexual, and transgendered community of the State of Arizona and for those outside of Arizona looking to visit or move here. AZ Gays.com maintains a Web site at <http://www.azgays.com>. AZ Gays.com is maintained, operated, and designed by Mark S. Süever. AZ Gays.com sues on its own behalf and on behalf of those who use AZ Gays.com Internet services.

22. Plaintiff CHANGING HANDS BOOKSTORE operates a bookstore that has been physically located in and around Tempe, Arizona for the last 30 years. Changing Hands Bookstore sells old, rare, used, and new books. Changing Hands Bookstore sends out an e-mail newsletter to 1,500 to 2,000 individuals that lists titles for sale, events hosted by the bookstore, and staff recommendations, and also operates an Internet site at <http://www.changinghands.com>.

23. Plaintiff MARTY KLEIN is a Licensed Marriage and Family Therapist in Palo Alto, California. In addition to his practice as a therapist working with individuals and couples, Dr. Klein is also the author of numerous books and articles about human sexuality. Dr. Klein distributes by e-mail, to over 7,000 people worldwide who have subscribed to his mailing list, a monthly newsletter regarding sexual health and popular culture, the media, and politics. In addition, he has maintained a Web site, located at <http://www.sexed.org>, for almost seven years on which he has provided advice and information on a number of subjects relating to sex and sexuality including birth control,

safer sex, sexual communication, marital problems, intimacy, and sexual pleasure. Dr. Klein sues on his own behalf and on behalf of those who use his Internet services.

24. Plaintiff PEN AMERICAN CENTER is a non-profit association of poets, playwrights, essayists, editors, and novelists with 2,700 members. Its mission is to advance the cause of literature and defend free expression of the written word. To achieve this, PEN American Center sponsors public literary events, literary awards, outreach projects to encourage reading, and international and domestic human rights campaigns on behalf of the many writers, editors, and journalists censored, persecuted, or imprisoned because of their writing. PEN American Center is incorporated in New York and has its principal place of business in New York City. PEN American Center maintains a Web site at <http://www.pen.org>. PEN American Center sues on its own behalf, on behalf of its members who use computer communications systems, and on behalf of the readers of its members' publications.

25. Plaintiff THE SEXUAL HEALTH NETWORK, INC. is a small, Internet-based company incorporated in the State of Delaware which owns and operates [sexualhealth.com](http://www.sexualhealth.com). Its Internet address is <http://www.sexualhealth.com>. The Sexual Health Network, Inc. was founded in May 1996 by Mitchell Tepper, when he was working on his doctorate at the University of Pennsylvania Program in Human Sexuality Education. He also has a Master's degree in Public Health from the Yale University School of Medicine. Dr. Tepper is currently the President of The Sexual Health

Network, Inc. The Sexual Health Network, Inc. is dedicated to providing easy access to sexuality information, education, and other sexuality resources for people with disability, chronic illness, or other health-related problems.

26. Plaintiff JEFF WALSH is the owner and operator of OASIS MAGAZINE (“Oasis”), a Web site geared toward free and open exchange among lesbian, gay, bisexual, and questioning youth, with the Internet address <http://www.oasismag.com>. Oasis functions as an interactive community to share issues and experiences, and to give and receive support. Oasis features a “Private Messaging” system similar to e-mail, where registered users can anonymously e-mail other registered users on the site. Mr. Walsh has plans to expand Oasis’s online features during the upcoming months to allow users the ability to develop and share with others personalized pages on [oasismag.com](http://www.oasismag.com). Mr. Walsh resides in San Francisco, California.

27. Plaintiff WEB DEL SOL is a voluntary association which functions as a dynamic, literary arts complex on the Internet. Its Internet address is: <http://www.webdelsol.com>. Web Del Sol was founded as a forum for the collaborative literary efforts of dozens of editors and writers, and hosts a vast array of poems, articles, essays, and photography, as well as a bulletin board and a chat room. Web Del Sol also hosts and publishes over 25 national Internet literary magazines and literary Internet sites, as well as a monthly electronic newsletter, the Electronic Literary Arts Newsletter (ELAN). Web Del Sol’s purpose is to make high quality contemporary literary art freely available and easily

accessible on the Internet. Plaintiff Web Del Sol does not have a principal place of business, except in cyberspace. It does not operate out of any one facility; instead, its approximately twenty volunteer editors have access to an Internet host site, to which they connect from their own homes and offices. Some of the poems, articles, fiction, and photographs distributed on Web Del Sol's Internet site or referred to in its electronic newsletter explicitly refer to or depict sex, sex organs, and sexual activity. Web Del Sol sues on its own behalf, and on behalf of users of its Internet content.

28. Plaintiff WILDCAT PRESS is a site that sells the works of Patricia Nell Warren, a former Reader's Digest editor and the author of eight novels, four books of poetry, and numerous articles, poems, and essays. Ms. Warren is also an educator, having served as commissioner on the Gay and Lesbian Education Commission and the Human Relations Education Commission of the Los Angeles Unified School District. Wildcat Press's Web site, which is located at <http://www.wildcatintl.com>, sells Ms. Warren's books online, and includes reviews of and excerpts from Ms. Warren's books, as well as archives of her editorials and articles. The content of the book excerpts and articles by Ms. Warren generally deal with gay and lesbian issues, as well as youth and AIDS issues. Links to the Wildcat Press Web site and Ms. Warren's works are sometimes included in various electronic newsletters, such as those sponsored by gaywired.com and lesbianation.com. Wildcat Press sues on its own behalf and on behalf of those who use the Wildcat Press site.

29. Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION (“ABFFE”) was organized as a not-for-profit organization by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABFFE is incorporated in Delaware, and has its principal place of business in New York City. ABFFE, most of whose members are bookstores in the United States, sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the patrons of its member bookstores.

30. Plaintiff ASSOCIATION OF AMERICAN PUBLISHERS, INC. (“AAP”) is the national association in the United States of publishers of general books, textbooks, and educational materials. Its approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP’s members publish a substantial portion of the general, educational, and religious books produced in the United States and are active in all facets of the electronic media, including publishing a wide range of electronic products and services. AAP is incorporated in New York, and has its principal places of business in New York City and in the District of Columbia. AAP sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the readers of its members’ books.

31. Plaintiff FREEDOM TO READ FOUNDATION, INC. (“FTRF”) is a non-profit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens. FTRF is incorporated in Illinois and has its principal place of business in Chicago. FTRF sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of the patrons of its member libraries.

32. Plaintiff MAGAZINE PUBLISHERS OF AMERICA (“MPA”) is a national trade association including in its present membership more than 240 publishers of approximately 1,200 consumer interest magazines sold at newsstands and by subscription. MPA member publications provide broad coverage of domestic and international news, literature, religion, law, politics, science, agriculture, business and industry, and many other interests, avocations, and pastimes of the American people. Many MPA members operate Internet sites and other forms of computer communications systems. MPA sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of their readers.

33. Plaintiff NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS (“NARM”) is an international trade association whose more than 1,000 members include

recorded entertainment retailers, wholesalers, distributors, and manufacturers, many of whom conduct business over the Internet. NARM sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of their consumers.

34. Plaintiff PERIODICAL AND BOOK ASSOCIATION OF AMERICA (“PBAA”) is an association of magazine and paperback book publishers who distribute magazines and books through independent national distributors, wholesalers, and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands. PBAA is incorporated in New York and has its principal office in New York City. PBAA sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of readers of its members’ publications.

35. Plaintiff PUBLISHERS MARKETING ASSOCIATION (“PMA”) is a nonprofit trade association representing more than 3,400 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade. PMA is incorporated in California, and has its principal office in Manhattan Beach, California. PMA sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of readers of its members’ publications.

36. Plaintiff RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

("RIAA") is a trade association whose member companies produce, manufacture, and distribute over 90% of the sound recordings sold in the United States. RIAA is committed to protecting the free expression rights of its member companies. RIAA is incorporated in New York and has its principal office in the District of Columbia. RIAA sues on its own behalf, on behalf of its members who use computer communications systems, and on behalf of listeners to its members' recordings.

37. Defendant TERRY GODDARD is the Attorney General of the State of Arizona and is the chief law enforcement officer of the State of Arizona. Terry Goddard retains general prosecutorial authority to ensure that the laws are faithfully executed and has supervisory authority over county and local prosecutors. Pursuant to A.R.S. § 41-192, defendant Goddard "shall have charge of and direct the department of law and shall serve as chief legal officer of the state."

38. Defendants STEPHEN G. UDALL, CHRIS M. ROLL, TERENCE C. HANCE, JERRY DeROSE, JACK M. WILLIAMS, DEREK D. RAPIER, R. GLENN BECKELEW, RICHARD ROMLEY, WILLIAM J. EKSTROM, JR., MELVIN R. BOWERS, JR., BARBARA LAWALL, ROBERT CARTER OLSON, MARTHA S. CHASE, CHARLES R. HASTINGS, and PATRICIA A. OROZCO are County Attorneys for all of the counties in Arizona, and as such are responsible for prosecuting felonies in Arizona.

FACTS

The Internet Generally

39. The Internet is a decentralized, global medium of communication that links people, institutions, corporations, and governments around the world. (*See* this Court's Findings of Fact and Conclusions of Law and Order, dated June 14, 2002 ("Findings") ¶ 15.) It is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers. While estimates are difficult due to its constant and rapid growth, the Internet is currently believed to connect more than 159 countries and close to 322 million users worldwide. Analysts estimated that there were 605.6 million Internet users worldwide as of September 2002.

40. Because the Internet merely links together numerous individual computers and computer networks, no single entity or group of entities controls the material made available on the Internet or limits the ability of others to access such materials. Rather, the range of digital information available to Internet users—which includes text, images, sound, and video—is individually created, maintained, controlled, and located on millions of separate individual computers around the world.

41. Because the Internet presents extremely low barriers to entry to publishers and distributors of information, it is an attractive method of communicating for non-profit and public interest groups. (Findings ¶ 16.) Internet technology gives a speaker a potential worldwide audience. (Findings ¶ 17.)

How People Access and Exchange Information on the Internet

42. Individuals have several easy means of gaining access to computer communications systems in general, and to the Internet in particular. Many educational institutions, libraries, businesses, and local communities maintain a computer network linked directly to the Internet and enable users to easily gain access to the network.

43. Internet service providers (“ISPs”) allow subscribers to dial onto the Internet by using a modem and a personal computer to access computer networks that are linked directly to the Internet. Some ISPs charge a monthly fee ranging from \$15-50, but some provide their users with free or very low-cost Internet access. National “commercial online services,” such as America Online, serve as ISPs and also provide subscribers with additional services, including access to extensive content within their own proprietary networks.

44. Most Internet users select user names or e-mail addresses or both that allow them to log on to the Internet and to communicate with other users. An e-mail address generally reveals nothing about the identity or personal characteristics of the owner. (Findings ¶ 22.) It is common for individuals using the Internet to use aliases or pseudonyms that do not reveal their true identity. (Findings ¶ 23.) The user name and e-mail address are the only indicators of the user’s identity; that is, persons communicating with the user will only know the user by the user’s user name and e-mail address (unless the user chooses to

reveal other personal information).

45. Once an individual signs on to the Internet, there are a wide variety of methods for communicating and exchanging information with other users on the Internet, including e-mail, online discussion groups, and the Web. (Findings ¶ 19.) When a person sends an e-mail, participates in a listserv or chat room, posts a bulletin board message, or engages in other forms of Internet communication, it is generally impossible for the sender to know the age or geographic location of any recipient, unless a sender is specifically informed of the recipient's age or geographic location by the recipient or another. (Findings ¶ 47.)

E-Mail

46. The simplest and perhaps most widely used method of communication on the Internet is via electronic mail, commonly referred to as "e-mail." E-mail is a way of sending messages electronically from one individual to another individual or group of addresses over the Internet. (Findings ¶ 20.) Analysts project that the total number of e-mail messages sent daily will exceed 60 billion worldwide by 2006, as compared to the 31 billion sent daily during 2002.

47. Using one of dozens of available "mailers"—software capable of reading and writing an e-mail—a user is able to address and transmit, via computer, a message to a specific individual or group of individuals who have e-mail addresses.

48. Individuals may choose not to reveal their identities in their e-mail addresses for a variety of reasons. (Findings ¶ 24.) A large percentage of Internet users would refuse to reveal their identity on the Internet, even if requested to do so in an e-mail sent by another Internet user. (Findings ¶ 25.) Moreover, using existing Internet technology, it is not possible to verify the age of an individual before sending them an e-mail. (Findings ¶ 26.)

49. In addition, organizations that maintain sites on the World Wide Web (as discussed below), including many of the plaintiffs, are increasingly making similar content available by periodic e-mail distributions, such as by e-mailing a Web page itself (a “Web mailer”) to online recipients. This is a useful way for such organizations to maintain and attract repeat visitors to their Web sites, and to communicate their speech.

Mailing Lists

50. A mailing list, also called a listserv or mail exploder, is similar to an e-mail. A mailing list is a method of communicating over the Internet where an individual sends a message to one address, and that message is retransmitted to many different recipients. (Findings ¶ 27.) Some mailing lists distribute messages automatically, while others require the list administrator to be the initial recipient of the message and to subsequently forward the message to other subscribers on that list.

51. When an individual sends an e-mail, they do not have any way of knowing for sure

whether the message will go to a single person or to a mailing list. When an individual sends an e-mail to a mailing list, they cannot send the message to some people on the list but not others, nor do they have any way of sending that e-mail only to adults but not minors. (Findings ¶¶ 29-30.)

52. Many online organizations, including several of the plaintiffs, use mailing lists as a means of allowing their members to communicate with each other *en mass* or as a means of distributing important notices or newsletters to all mailing list subscribers at the same time. Consequently, some mailing list messages (such as newsletters or notices about the mailing list) may be sent by the administrator of the mailing list, while other messages are sent to the group by individual subscribers. In addition, some individuals may send their message to the administrator for subsequent distribution to the mailing list, instead of themselves distributing the message directly to the mailing list.

Chat Rooms

53. A chat room is an online forum where individuals can type messages and all other participants in the chat room immediately view the message, allowing all users to engage in simultaneous conversation. (Findings ¶ 36.) Chat rooms are available on the Internet and on commercial online services. Although chat rooms are often set up by particular organizations or networks, any individual user can start an online “chat” covering a wide variety of topics.

54. A very large number of individuals can participate in a single chat room. (Findings ¶ 38.) An individual would not usually reveal his or her identity or age before entering a chat room. *Id.*

55. Generally, an individual participating in a chat room will not know the identity or ages of other individuals in the chat room. (Findings ¶ 39.) There is no way to send a chat message to only adults but not minors participating in the chat room. *Id.* In addition, there is no way to know in advance which chat rooms would be inappropriate for minors. *Id.*

Instant Messaging

56. “Instant messaging,” like chat rooms, allows the user to engage in simultaneous conversations with another user by typing messages and reading the messages in real time. Instant messaging is available both on the Internet and through commercial online services. Instant messaging is available to Internet users who have signed up with an instant messaging service, a relatively simple and often cost-free procedure. The user is then able to send an instant message to any user who has also signed up for the messaging service.

Discussion Groups

57. Online discussion groups are another popular form of communication via computer network. Discussion groups allow users of computer networks to communicate messages

onto a public computerized bulletin board and to read and respond to messages communicated by others in the discussion group. Discussion groups have been organized on many different computer networks and cover virtually every topic imaginable. Discussion groups can be formed by individuals, institutions or organizations, or by particular computer networks.

The World Wide Web and Similar Forms of Internet Communication

58. The World Wide Web (the “Web”) is another popular way to provide and retrieve information on the Internet. There is no single commonly accepted definition for the term World Wide Web. (Findings ¶ 40.) In general, the Web is a network of computers on the Internet that allows users to publish “Web pages” that can then be accessed by other users anywhere in the world. (Findings ¶ 41.) Web pages may contain “links”—short sections of text or image that refer and link to another document or Web page—which may take the user from the original Web site to another Web site on a different computer connected to the Internet. There are also many systems (such as America Online) which host sites that, while to the outside observer look like Web sites, in fact are located on closed systems using distinct Internet protocols and thus are not located on the Web.

The Range of Content Available on the Internet

59. As can be seen from the various ways that people can exchange information and

communicate via this new technology, the Internet is “interactive” in ways that distinguish it from traditional communication media. For instance, users are not passive receivers of information as with television and radio; rather, a user can easily respond to the material he or she receives or views online. In addition, “interactivity” means that Internet users must actively seek out with specificity the information they wish to retrieve and the kinds of communications in which they wish to engage. For example, a chat room user wishing to hear others’ views on a particular subject must select the relevant chat room, sign in with whatever name he or she chooses, and then engage in conversation with the other participants. Similarly, to gain access to material on the Web, which may not be exempted under the Revised Statute’s purported carve-out, a user must know and type the address of a relevant site into the address bar of a Web browser or find the site by typing a relevant search string in one of several available search engines or by activating a Web site link.

60. It is impossible for Internet speakers to prevent their speech from reaching minors without also preventing it from reaching adults. (Findings ¶ 45.) Internet speakers cannot verify the age of any person(s) who receives their online material and communications. (Findings ¶ 46.)

61. The information made available on the Internet is as diverse as human thought. Content on the Internet is provided by the millions of Internet users worldwide, and the content ranges from academic writings, to humor, to art, to literature, to medical

information, to music, to news, and to human sexuality. At any one time, the Internet serves as the communication medium for literally hundreds of thousands of global conversations, political debates, and social dialogues.

62. Although the overwhelming majority of the information on the Internet does not involve nudity or sexual activity, such material is available on the Internet. For example, an Internet user can exchange e-mails on how to practice safer sex; participate in a question and answer forum on methods for enhancing sexual experiences, sponsored by plaintiff The Sexual Health Network, Inc.; read online poetry and short stories made available by plaintiff Web Del Sol; and view the digital photography of Diane Fenster in an online gallery sponsored by plaintiff art.net. Much of this material is similar, if not identical, to material that is routinely discussed in cafés and on street corners, and that is distributed through libraries, bookstores, record stores, and newsstands.

63. Much of the material communicated on the Internet that may be considered “harmful to minors” comes from the Web. (Findings ¶ 54.) Further, much of the material communicated on the Internet that may be considered “harmful to minors” comes from outside of the United States. (Findings ¶ 53.)

The Statutory Language at Issue

64. The Revised Act provides as follows:

§ 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 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. 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.
- D. 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.
- 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.
- G. Failure to report a violation of this section is a class 6 felony as prescribed by Section 13-3620.

65. The term “harmful to minors” is defined under A.R.S. § 13-3501(1), which provides:

“Harmful to minors” means that quality of any description or representation, in whatever form, of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse, when both:

- (a) To the average adult applying contemporary state standards with respect to what is suitable for minors, it both:
 - (i) Appeals to the prurient interest, when taken as a whole. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.
 - (ii) Portrays the description or representation in a patently offensive way.
- (b) Taken as a whole does not have serious literary, artistic, political, or scientific value for minors.

66. Arizona law has broadly defined the material that may be “harmful to minors.” For example, “*nudity*” is defined as “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 fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.” A.R.S. § 13-3501(4). Another example is the expansive definition of “*sexual conduct*” which is defined as “acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.” A.R.S. § 13-3501(7). It appears that a mere kiss between two women, or a person placing a hand on a clothed buttock, constitutes “sexual conduct”; accordingly, sending an e-mail or instant message discussing such conduct, or

mentioning such conduct in a chat room, could constitute a felony under the Revised Act.

67. The Revised Act expressly applies to written material as well as graphic images.

Under A.R.S. § 13-3501(2), “item” is broadly defined as

...any material or performance which depicts or describes sexual activity and includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription, live or recorded telephone message or other similar items whether tangible or intangible and including any performance, exhibition, transmission or dissemination of any of the above. An item also includes a live performance or exhibition which depicts sexual activity to the public or an audience of one or more persons.

68. A.R.S. § 13-3501 defines “knowledge of the character” as

having general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant both:

- (a) That the item contains, depicts or describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse, whichever is applicable, whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.
- (b) If relevant to a prosecution for violating § 13-3506, 13-3506.01 or 13-3507, the age of the minor, provided that an honest mistake shall constitute an excuse from liability under this chapter if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

69. A.R.S. § 13-3501(3)(b) attempts to provide a defense to liability under the Revised Act. It states that “an honest mistake shall constitute an excuse from liability under [§ 13-3506.01] if the defendant made a reasonable bona fide attempt to ascertain the true

age of such minor.” Because there is no way for online speakers to ascertain the age of persons who access their content, however, this provision provides no defense for prosecutions under the Revised Act.

70. Violation of the Revised Act is punishable by imprisonment for a mitigated minimum of 1 year up to an aggravated maximum of 3.75 years and a fine of up to \$150,000.

The Revised Act’s Impact on Internet Speech

71. Because of the nature of the Internet, the Revised Act will ban certain constitutionally-protected speech among adults.

72. Speech on the Internet is generally available to anyone with access to this technology. Because minors have access to various Internet fora such as e-mail, chat rooms, mailing lists, and instant messaging, any communication in these fora could be punishable under the Revised Act: a prosecutor could prove that a person “intentionally or knowingly” transmitted a message to a minor by showing—as would inevitably be the case—that the speaker was “aware or believe[d] that his or her conduct [was] of that nature” such that the message would be received by a minor, even if the speaker had no knowledge of the unlawfulness of his or her conduct. *See generally* A.R.S. § 13-105(9)(b) (defining the mental state “knowingly”). Due to the very nature of the Internet, virtually every communication on the Internet is “of that nature” such that a minor may

receive it.

E-mail

73. The Revised Act expressly covers e-mail sent to minors in Arizona. A.R.S. § 13-3506.01(A). E-mail is one of the most common ways in which Internet users regularly engage in online speech and may be sent by and among many types of individuals, including from friend to friend, parent to child, or teacher to student.

Instant Messaging

74. The Revised Act also expressly covers “personal messaging,” often referred to as instant messaging. A.R.S. § 13-3506.01(A). Like e-mail, instant messaging is a very easy and common way in which Internet users regularly communicate online.

Chat Rooms

75. Chat rooms are also covered by the Revised Act, which extends to “any other direct [I]nternet communication” besides e-mail and instant messages. A.R.S. § 13-3506.01(A). Thus, sending a message directly to an Internet chat room believing that a minor in Arizona is among the chat participants may subject the sender to criminal sanctions, depending on the content of the message.

Mailing Lists

76. The Revised Act also applies to those individuals who “transmit or send” material to

minors through mailing lists and listservs, another form of “direct [I]nternet communication.” A.R.S. § 13-3506.01(A). Although the Revised Act attempts to exempt the “[s]ending” of material via a mailing list or listserv that is not administered by the sender, it fails to exempt non-administrators who “transmit” materials through such means. A.R.S. § 13-3506.01(B)(2). More importantly, the Revised Act still applies to the administrators of mailing lists and listservs, such as plaintiffs Mark Amerika, art.net, Marty Klein, The Sexual Health Network, Inc., and Web Del Sol.

Web Sites

77. The Revised Act apparently still criminalizes some forms of Web or Web-like communications. Although § 13-3506.01(A) imposes liability for “transmit[ing] or send[ing],” the Revised Act’s purported exemption concerns only the “[p]osting” of material on the Web. A.R.S. § 13-3506.01(B). Having revised the statute twice, the Arizona Legislature has, for the second time, chosen to exempt only the “posting” of material on the Web, which is not synonymous with “transmitting” or “sending” material via the Web. The Legislature’s deliberate choice of dissimilar and undefined verbs to describe the actions criminalized and the actions exempted effectively creates a large category of Web or Web-like communications for which individuals may still be liable under the Revised Act. The Legislature has again rendered the purported exemptions of § 13-3506.01 meaningless, and, at the very least, the Legislature’s decision to use again differing terminology in creating and removing liability results in unconstitutional

vagueness as discussed below.

Closed Systems

78. The Revised Act only vaguely defines “internet web site,” leaving open the possibility that sites on closed systems such as America Online, which operate on a completely different set of Internet protocols and are not “publicly accessible,” are not subject to the “internet web site” exemption and thus could provide grounds for prosecution under the Revised Act.

Bulletin Boards and other Online Discussion Groups

79. Bulletin boards and other types of online discussion groups are also covered by the Revised Act. As with its purported exemption for Web communications, the Revised Act’s carve-out for “posting” material on a bulletin board or newsgroup does not counteract the liability it imposes for “transmitting” or “sending” such material. Thus, communications transmitted or sent (but not posted) through fora such as sexualhealth.com’s discussion fora or Web Del Sol’s “Writer’s Block” bulletin board may still be criminalized under the Revised Act.

The Revised Act’s Burden on Free Speech

80. The Revised Act’s burden on free speech fundamentally results from the lack of any feasible method, in the vast majority of circumstances, to screen for the age of a recipient of speech on the Internet. Given the technology of the Internet, there are no reasonable

means for Internet speakers to ascertain the age of persons who access their messages, or for restricting or preventing access by minors to certain content. Users who communicate via mailing lists, chat rooms or discussion groups have no way to determine the ages of other users. For this reason, if even one of ten thousand members of a mailing list is a minor, the remaining adults all must be deprived of the speech in order to ensure compliance with the Revised Act. Likewise, content providers on the Web (or Web-like fora) have no reasonable way to verify the age of persons who access their sites. For these reasons, there is no practical way for content providers to withhold material that may be “harmful to minors”—as prohibited by the Revised Act—from people younger than 18 years old. Speech on the Internet generally must be accessible to both adults and minors, or not accessible at all.

81. Indeed, the Revised Act would even prevent parents from sending communications to their children over the Internet. For example, parents sending sexual health information to their 17-year-old college freshman at the University of Arizona could be guilty of a felony under the Revised Act.

82. The Revised Act’s requirement that “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), does not limit the statute in any way. As the Supreme Court noted in *ACLU I*, an Internet speaker always has reason to know that a minor may receive the item. Moreover, “knowledge of the character” requires that the speaker know the age of the minor only

“[i]f relevant to a prosecution for violating section . . . 13-3506.01.” A.R.S. § 13-3501(3)(b) (emphasis added). This suggests that sometimes knowledge of the recipient’s age is *not* required for prosecution under the Revised Act.

83. In addition, any person who disagrees with or objects to content on the Internet could cause a speaker to be prosecuted under the Revised Act by having a minor view the online speech, resulting in a “heckler’s veto” of Internet speech. Further, any person who disagrees with content on the Internet could cause a speaker to fear prosecution under the Revised Act by claiming to be a minor, or by identifying someone else as a minor, whether or not the person actually is one.

84. The Revised Act’s overbreadth is widened by the lack of any reliable method to screen for the geographic location of a recipient of speech on the Internet. Anyone throughout the country who sends an e-mail or instant message or participates in a chat room or discussion group must comply with the Revised Act because his or her communication might be accessed by a minor in the State of Arizona. For example, an Internet speaker communicating in a chat room hosted by or accessed through AZ Gays.com would reasonably believe that the communication could be received by a minor in Arizona. Therefore, such an online speaker must be willing to make his or her public communications on the Internet available to all users of the Internet, both within and outside of Arizona, or to none at all. Messages communicated in the chat room are automatically displayed to every participating member of the chat room, so the speaker

has no ability to control whether that communication will be transmitted to a minor in Arizona.

85. Because Internet speakers have no means to restrict minors in Arizona from accessing their communications and, in many circumstances, the user would “know or believe” that a minor in Arizona could access the materials, the Revised Act effectively would require much discourse on the Internet—whether among citizens of Arizona or among users anywhere in the world—to be at a level suitable for young children. The Revised Act therefore would ban an entire category of constitutionally-protected speech in many fora between and among adults on the Internet throughout the country.

86. The Revised Act also prohibits older minors from communicating and accessing protected speech. Even if some depictions or discussions of nudity and sexual conduct may be considered by some to be inappropriate or “harmful” for younger minors, many depictions and discussions—including safer-sex resources, books such as *Madame Bovary*, and paintings by Botticelli—are valuable for older minors.

87. Even if there were means by which speakers on the Internet could ascertain or verify the age of persons who receive their content (and there are no such means), requiring users to identify themselves and to disclose personal information in order to allow verification of age would prevent Internet users from maintaining their privacy and anonymity on the Internet.

88. Because many of the terms in the Revised Act are vague and overbroad, the Revised Act will further chill the speech of online speakers. For example, the Revised Act fails to distinguish between material that is “harmful” for older as opposed to younger minors. Further, the reference to “contemporary state standards” in A.R.S. § 13-3501(1)(a) is overbroad because, due to the borderless nature of the Internet, it would effectively impose Arizona’s standards on content providers and users in all other states even if other states had more liberal standards regarding what is considered “harmful to minors.” Indeed, the Revised Act explicitly imposes Arizona’s standards on users in other states by criminalizing the communication of “harmful” materials by persons outside of Arizona if made available to persons in many states, if only one of the recipients is a person in Arizona. A.R.S. §13-3506.01(A). Likewise, as noted above, the Revised Act’s varying and inconsistent terminology makes it difficult to tell what communications over the Web are criminalized. Because Internet speakers will be unable to understand these terms, they will likely err on the side of caution and not communicate ideas via the Internet that they otherwise would. In this way, the Revised Act will chill online speech.

The Revised Act’s Burden on Interstate Commerce

89. The Revised Act will unjustifiably burden interstate commerce and regulate conduct that occurs wholly outside the State of Arizona. By making it unlawful for “*any person* ... 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 ... that *a minor in this state* will receive the item,” A.R.S. § 13-3506.01(A) (emphasis added), the Revised Act reaches across state borders to impose its restrictions on Internet users in other states.

90. The Internet is insensitive to geographic distinctions, and information flows freely across state borders on the Internet. (Findings ¶ 48.) It is impossible for Internet users to determine the geographic location of persons who receive their information. There is no way for an Internet speaker to prevent her speech from reaching listeners in Arizona, without preventing it from reaching listeners everywhere else. (Findings ¶ 50.)

91. Because the Internet is a redundant series of linked computers over which information often travels randomly, a message from an Internet user sitting at a computer in New York may travel via one or more other states—including Arizona—before reaching a recipient who is also sitting at a computer in New York. For this reason, it is impossible for an Internet user to prevent his or her message from reaching residents of any particular state. Furthermore, even if it were possible to determine the location of the Internet server which ultimately transmitted the message (which it is not), that information would not reveal the identity, location, or age of the sender of the message. (*See, e.g.*, Findings ¶ 52.)

92. An Internet user has no way to determine whether information distributed to discussion groups, chat rooms, mailing lists, e-mail and instant message recipients, or on

the Web will be accessed by persons residing in the State of Arizona. The various sites on the Internet can be accessed by anyone in the world; there is no way for speakers to prevent residents of Arizona from receiving their communications. Internet content providers that are located outside of Arizona, such as plaintiffs The Sexual Health Network, Inc. and Dr. Marty Klein, as well as people participating in chat rooms, newsgroups, or mail exploders, have no feasible way to determine whether their information will be accessed or downloaded by someone who is located in Arizona. Just as a user of the Internet cannot identify the age of another user of the Internet, one also cannot identify where a particular user or speaker resides, or from where a particular user may be accessing or downloading information on the Internet.

93. As discussed above, a person outside of Arizona will thus *always* have reason to know or believe that a person in Arizona may receive his or her online communications. Due to the nature of the technology, a non-Arizonan, even if he or she has no desire to reach anyone in Arizona, will be forced to self-censor his or her speech on the Internet in order to comply with the Revised Act and avoid the possibility that a minor from Arizona will gain access to this information, thereby subjecting the speaker to prosecution in Arizona.

94. The interstate reach of the Revised Act is underscored by the focus on the recipient. For example, an Internet user in New York who communicates a message to an online chat room may face prosecution in Arizona if a minor “recipient” in Arizona reads the

message. The putative local benefit in Arizona of such a situation is completely overwhelmed by the burden imposed on interstate commerce and conduct.

95. Moreover, interstate and international computer communications networks—like the nation’s railroads—constitute an area of the economy and society that particularly demands uniform rules and regulations. Like the nation’s railways and highways, the Internet is by its nature an instrument of interstate commerce. Just as goods and services travel over state borders by train and truck, information flows across state (and national) borders on the Internet. Other states’ Internet content regulations have been enjoined on Commerce Clause grounds because of the inconsistent obligations imposed on online speakers across the country. *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001); *American Booksellers Found for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002); *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001); *State v. Weidner*, 611 N.W.2d 684 (Wisc. Sup. Ct. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (New Mexico); *American Library Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

96. Because the definition of “harmful to minors” in A.R.S. § 13-3501(1) depends in part upon “contemporary state standards,” the Revised Act effectively imposes regulations on interstate speech that will be in conflict with the community standards of other States and their local communities. If each state implements its own regulations, as Arizona has done, regarding what information can be legally distributed via this new

technology, interstate commerce will be greatly inhibited and disrupted as persons around the world try to discern what can and cannot be communicated in the many different jurisdictions connected to these networks.

The Ineffectiveness of the Revised Act and the Effectiveness of Alternative Means

97. Because of the global nature of the Internet, defendants cannot demonstrate that the Revised Act is likely to reduce the availability in Arizona of material that may be “harmful to minors” on the Internet.

98. It has been estimated that approximately 40% of the content provided on the Internet originates abroad. All of the content on the global Internet is equally available to all Internet users worldwide and may be accessed as easily and as cheaply as content that originates locally. Because it is not technologically possible to prevent content from abroad from being sent to Internet recipients in the State of Arizona, the Revised Act will not accomplish its purported purpose of keeping inappropriate content from minors in Arizona.

99. In addition, to the extent that the Revised Act exempts Web, bulletin board, and newsgroup communications from coverage, it is utterly ineffective in preventing harmful-to-minors materials from reaching minors in Arizona because a great deal of harmful-to-minors communications on the Internet are distributed through those fora.

100. Conversely, there are many alternative means that are more effective at assisting

parents in limiting a minor's access to certain material if desired.

101. Commercial online services like America Online provide features that subscribers may use to prevent children from accessing chat rooms and to block access to news groups, chat rooms, and Web sites based on keywords, subject matter, or specific newsgroup. These services also offer screening software that blocks messages containing certain words, and tracking and monitoring software to determine which resources a particular online user, such as a child, has accessed. They also offer children-only discussion groups that are closely monitored by adults.

102. Online users also can purchase special software applications, known as user-based blocking programs, that enable them to control access to online resources. These applications allow users to block access to certain resources, to prevent children from giving personal information to strangers by e-mail or in chat rooms, and to keep a log of all online activity that occurs on the home computer.

103. User-based blocking programs are not perfect, both because they fail to screen all inappropriate material and because they inadvertently block valuable Internet communications. However, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than the Revised Act's imposition of criminal penalties for protected speech. Such user-based blocking programs are currently required on Internet accessible computers in any federally funded

school or library.

The Revised Act's Impact on the Plaintiffs

104. Plaintiffs interact with and use the Internet in a wide variety of ways, including as content providers, access providers, and users. The Revised Act burdens plaintiffs in all of these capacities. Plaintiffs who are users and content providers are subject to the Revised Act. These plaintiffs fear prosecution under the Revised Act for communicating, sending, or otherwise transmitting material that possibly meets the definition of “harmful to minors” under the Revised Act. They also fear liability for material sent or transmitted by others to their online discussion groups, chat rooms, mailing lists, and Web sites. Plaintiffs have no way to avoid prosecution under the Revised Act and are left with two equally untenable alternatives: (i) risk prosecution under the Revised Act, or (ii) attempt to engage in self-censorship and thereby deny adults and older minors access to constitutionally-protected material.

American Civil Liberties Union (“ACLU”)

105. In addition to its legal advocacy to uphold the Bill of Rights, plaintiff ACLU has long devoted considerable resources to public education about civil liberties. Since 1993, the ACLU’s public education efforts have included extensive online resources that offer electronic copies of ACLU publications, reports, court briefs, news releases, and other material related to the ACLU’s legal, legislative, educational, and advocacy work.

106. The ACLU hosts unmoderated online discussion groups that allow citizens to discuss and debate a variety of civil liberties issues. These services allow online users to express their uncensored views on civil liberties issues and to interact with ACLU staff or featured speakers. Many of the communications in the ACLU's discussion groups have included and will continue to include sexual content, such as a discussion of teen pregnancy and teen parenthood; a discussion of sexual privacy and state laws on criminal sodomy; and a discussion of the defense of pornography and other erotic expression under the First Amendment.

107. The ACLU also uses mailing lists in a variety of ways. Members of the public and press may receive periodic updates describing ACLU activities including cases involving Gay Rights and Reproductive Freedom. One such service is called ACLU Online. Another service allows exchange of information on cases among staff and volunteers. Some of the content could be considered to fall under the terms of the Revised Act.

108. The ACLU also maintains extensive online resources on the Web, which may still be covered under the Revised Act. Some of the ACLU's online resources contain sexual subject matter or nudity. Examples include copies of ACLU court briefs in cases involving arts censorship, obscenity, and discrimination against gays and lesbians. This material is often the subject matter of the ACLU's online discussion groups and mailing list messages.

109. The ACLU does not moderate its computer communications systems because such editing or censorship would be antithetical to the ACLU's belief in freedom of speech. Furthermore, the ACLU considers minors to be an important audience for its online resources. The ability of minors to participate in chat rooms or discussion groups with other minors and with adults is a vital part of their education. It is particularly important that minors be able to access information about their rights and to learn about and debate controversial issues.

110. In addition to its own online resources, ACLU staff and members use other online services such as e-mail, outside discussion groups, and online mailing lists as an important low-cost method of communicating and sharing documents and information with each other and with those outside of the ACLU. Some of this material also discusses nudity or sexual conduct, such as descriptions of the human body or human reproduction.

111. If the Revised Act is not enjoined, the ACLU would be compelled either to refrain from offering constitutionally-protected civil liberties materials and from sponsoring constitutionally-protected political debates or face potential criminal prosecution.

Mark Amerika of ALT-X

112. Plaintiff Mark Amerika of ALT-X is the author of two novels as well as the founder and publisher of ALT-X, a critically-acclaimed Internet-based clearinghouse for

progressive and experimental writing. Since 1993, ALT-X has provided an online forum for fiction and criticism; interviews and dialogues between artists, activists, and correspondents; and new forms of art in the emerging culture of the Internet.

113. Some of the materials made available through ALT-X contain nudity or sexual conduct. For example, Adrienne Eisen's "Six Sex Scenes" is a contemporary work of fiction that touches on, among other things, oral sex and masturbation. In addition, the site contains information about Mr. Amerika's novels *The Kafka Chronicles* and *Sexual Blood*. Finally, the GRAMMATRON Project is one of the first novel-length works of fiction to be published on the Internet. Containing over 1,000 screens of text woven together with 1,700 links, some of the scenes contain sexual conduct.

114. Alt-X also operates an e-mail feature through which it solicits and receives feedback on the wide variety of topics on the Alt-X site, including the adult topics discussed above. These e-mails, and the adult discussions contained therein, could be deemed "harmful to minors," even though Alt-X has no way to determine the age of the recipients of these e-mails.

115. If the Revised Act is not enjoined, Mr. Amerika would be forced either to risk criminal prosecution for providing constitutionally-protected expression on ALT-X, or to remove all of the art and literature on the site that contains nudity or sexual content.

Art.net

116. Plaintiff art.net believes that the Internet provides a unique and low-cost opportunity for artists to exhibit their work to the world. Close to 500 international artists curate and maintain their own online studio or gallery spaces, or show their art in a gallery on art.net. Member artists pay a small annual membership fee and commit to donate one piece of their art to the site. Approximately 3,500 to 6,500 people access art.net 200,000 to 250,000 times a day. This often leads to art purchases or to off-line shows and exhibits for member artists.

117. Some of the art exhibited through art.net's website, which may not be exempted under the Legislature's wording of the Revised Act, depicts nude and sexual images. Currently, at least twenty percent of the artists on art.net work with the human form and display works that involve nudity. Most of the art hosted by art.net is fine art, and the nude figure is commonly found in works of fine art. Many of these images and works of art are the subject of discussion on e-mail and mailing list communications supported by art.net.

118. Michael Betancourt's online studio located on art.net includes a series of photographs that use assemblages of male and female body parts, including nude images, sexual organs and graphic sexual activity, to create abstract landscapes (related to the work of Salvador Dali and Hans Bellmer). In a discussion of the images on a USENET

newsgroup, some Internet users found Betancourt's photographs to be "pornographic." Diane Fenster also maintains a studio of digital photography on the art.net site featuring "Two Running Rails of Mercury," and other paintings that depict close-ups of supine nude women blending into railroad tracks against the background of a small town. "Two Running Rails of Mercury" was removed from a Baltimore corporate exhibit because it contained images that were perceived to be sexually graphic. In addition, Arabella Decker is a sculptor on art.net who is currently showing "The Adam and Eve (From A Snake's Viewpoint)" series of prints which depict nude figures. Her sculptured works, such as the "People Becoming Political Symbols" series, also show human nudity.

119. Artist Rebecca Alzofon also hosts a virtual life drawing class in her studio on art.net, in addition to displaying her own artwork. The class uses an animation of posing nude models. The models allow users to see how the human body twists and flexes and how that influences the surface appearance of the body.

120. Art.net also features some poets who use sexual themes in their poetry. Sylvia Chong's poetry has sexually-oriented themes and metaphors, and Michael West's poetry section entitled "Raw" consists of works that explicitly refer to oral sex.

121. Art.net also mailing lists which can contain discussions of sexually-themed art that could be considered "harmful to minors."

122. In addition, the artists on art.net can use the e-mail features of art.net to e-mail

samples of their works to prospective buyers. Since there is no way to determine the age of an e-mail recipient, the artists would have to forego using e-mail to distribute their speech and advance their commerce.

123. Because of the size and constantly changing nature of its site, art.net cannot self-censor the artists' content on the site by continually reviewing it in order to remove potentially illegal material under the Revised Act. Thus, if the Revised Act is not enjoined, art.net would have to shut down its Internet communications entirely, or risk criminal prosecution for sending or transmitting constitutionally-protected artistic expression.

AZ Gays.com

124. Plaintiff AZ Gays.com is an Internet-based directory of gay, lesbian, bisexual, and transgender related businesses, events, and organizations in the Arizona area. It is designed to operate as a community guide for gay, lesbian, bisexual, and transgender individuals in the state of Arizona and for those who are planning to move to or visit Arizona.

125. AZ Gays.com provides links to personal and classified advertisements and chat rooms. AZ Gays.com also contains directories in the following categories: Business, Computers, Food & Fun, Society & Culture, News & Media and Health & Fitness.

126. AZ Gays.com fears that its content could be considered "harmful to minors" in

some communities, making it vulnerable to prosecution under the Revised Act. First, AZ Gays.com fears that many of its Internet communications could be deemed “harmful to minors” merely because they discuss gay and lesbian issues, even though they contain no sexually explicit content. Discrimination against gays and lesbians is still commonplace, and many people, including law makers, are openly hostile to gays and lesbians.

127. Second, AZ Gays.com fears prosecution for comments made in the chat rooms it links to and for the materials displayed on its site which are sexually oriented and might be considered “harmful to minors.” For example, AZ Gays.com links to a chat room which has featured messages describing the speaker’s preferred sexual activities, which some may consider “harmful to minors.”

128. AZ Gays.com believes that both adults and youths have an interest in the material it publishes. AZ Gays.com believes that its ability to maintain a virtual community center for gays, lesbians, bisexual, and transgender people in Arizona is particularly important because it provides an opportunity for individuals who have not publicly revealed their sexuality to participate in the community without embarrassment. Therefore, AZ Gays.com does not intend to self-censor any of its content and, as a result, fears prosecution under the Revised Act.

Changing Hands Bookstore

129. Changing Hands Bookstore operates a bookstore in Tempe, Arizona. The bookstore

has been in its present 13,000 square foot location for the last four and a half years, but was located in downtown Tempe, Arizona for the prior 26 years. Changing Hands Bookstore is a general bookstore that sells children's books, used books, remainders, works of fiction, non-fiction, literature, poetry, photography, art, and other works. Changing Hands Bookstore also has erotica and sexuality sections, and carries gay and lesbian fiction and non-fiction titles.

130. Changing Hands Bookstore currently sends out a newsletter via e-mail to approximately 4,500 customers each month advertising new titles at the bookstore and listing events at the bookstore, such as the monthly meetings of the Lesbian Book Discussion Group. Some of the titles and events that are advertised in those newsletters may include content that might be considered "harmful to minors" in Arizona.

131. Changing Hands Bookstore also runs an online bookstore available on the Internet at <http://www.changinghands.com>. This online bookstore contains a catalog from which an Internet user can order whatever title he or she likes. This catalog includes erotica, gay and lesbian fiction and non-fiction, photography collections, and other titles that may have sexually explicit or otherwise adult material that may be considered "harmful to minors" in Arizona.

132. In addition, Changing Hands Bookstore's Web site includes a list of recommended books. For example, one of the recent recommendations was the book *The Whore's*

Child: Stories by Richard Russo. Some people may consider this and other recommended books with sexual content to be “harmful to minors” in Arizona.

133. Changing Hands Bookstore fears prosecution under the Revised Act for its Internet communications. Changing Hands Bookstore is afraid that it will face criminal prosecution for discussing in its e-mail newsletter a book or event with sexually explicit or otherwise adult content. Changing Hands Bookstore believes that the Internet presents a new economic opportunity and does not plan to self-censor the content of its Internet communications, therefore causing it to fear prosecution under the Revised Act.

Dr. Marty Klein

134. Plaintiff Marty Klein has a Ph.D. in Human Sexuality and has been a Licensed Marriage and Family Therapist in the state of California for approximately twenty years. In addition to his practice as a therapist and counselor to individuals and couples, Dr. Klein spends a considerable amount of time educating organizations and the public about sexuality and the need to recognize healthy sexual expression and practices.

135. Dr. Klein has authored chapters in several professional texts, such as *The Handbook of Clinical Child Psychology*, (Wiley, 1992) and *Treating Sexual Disorders*, (Jossey-Bass, 1996). Dr. Klein has also authored several books for popular audiences including *Your Sexual Secrets: When to Keep Them, When & How to Tell* (Dutton, 1988; Berkely, paperback, 1990), and *Ask Me Anything: A Sex Therapist Answers the Most*

Important Questions for the 90s, (Simon & Schuster, 1992). In addition to writing books, Dr. Klein has authored approximately 170 articles in various publications including *The New Physician*, *Journal of Sex Research*, *Playboy*, *New Women*, and *McCalls*.

136. Dr. Klein conducts numerous professional trainings which have been attended by thousands of doctors, nurses, social workers, and clergy on subjects that involve sex and sexuality. Dr. Klein has served as a national board member for the Society for the Scientific Study of Sexuality and has taught at Stanford Medical School. Dr. Klein is also an Associate Editor for the Electronic Journal of Human Sexuality, which is available at <http://www.ejhs.org>.

137. Dr. Klein publishes a monthly electronic newsletter concerning sexual education which is distributed to a mailing list of approximately 5,000 subscribers. It can contain frank discussions of topics such as masturbation, oral sex, anal sex, cross-dressing, and female orgasm.

138. Dr. Klein also has maintained his Web site, located at <http://www.sexed.org>, for approximately seven years and uses the site as a forum for public education about human sexuality. Dr. Klein's Web site is free to anyone with Internet access and contains periodic articles by Dr. Klein, a question and answer forum to which people may submit questions, and links to other sexuality-related Web sites. Dr. Klein's Web site may be covered by the Revised Act and is representative of the material discussed in his

electronic newsletter.

139. While Dr. Klein believes that the information he distributes over the Internet provides valuable information on sexuality, much of the material frankly discusses sex and describes sexual acts. Dr. Klein also believes that it is important for older minors to have access to his Internet resources. Dr. Klein understands that the Revised Act makes it a crime to “intentionally or knowingly transmit or send” material that may be “harmful to minors” and fears that some prosecutors and communities may find the material he provides to be “harmful to minors.”

140. If the Revised Act is not enjoined, Dr. Klein will be put in the position of having to risk criminal prosecution or to self-censor the information about sexuality that he provides on the Internet.

PEN American Center (“PEN”)

141. Plaintiff PEN is a membership association of prominent literary writers and editors. As a major voice of the literary community, the organization seeks to defend the freedom of expression wherever it may be threatened, and to promote and encourage the recognition and reading of contemporary literature. PEN, which draws its name from its membership of Poets, Playwrights, Essayists, Editors, and Novelists, has 2,700 members.

142. In addition to its program and membership activities, PEN maintains an Internet site devoted to public education and information about free expression and literature. Its site

gives visibility and exposure to PEN activities, including its Freedom-to-Write appeals against literary censorship. Some of these cases have involved writing that contains literary treatment of sexuality, sexual conduct, or sexual themes. For example, one of PEN's members, A.E. Homes, encountered censorship problems in Europe with her novel *The End of Alice* which deals with pedophilia. An appeal on her behalf would likely include sexually descriptive references and excerpts from the novel. PEN also uses the Internet to publicize events such as a previous panel discussion on *Intolerance in Sex* (February 1998), a May 1999 event called *Blasphemy: What You Can't Say Today in America*, a potential screening of the film *Quills* or an event on the history of violence in art. Any of these promotional announcements over the Internet are likely to include descriptive content.

143. In addition to its own Internet site, PEN staff and members use other online services such as e-mail, outside discussion groups, and online mailing lists as an important low-cost method of communicating and sharing documents and information with each other and with those outside of PEN. Some of this material might contain depictions of nudity or sexual conduct, such as the descriptions of censored art in the Jock Sturges photography book. Furthermore, PEN members are the authors, editors, and translators of some of the most acclaimed literary works of the century, many of which may include sexually descriptive content. Among those whose works include sexually descriptive material are such high profile members as Norman Mailer, Philip Roth, Mary Gordon,

Maya Angelou, John Updike, Anne Rice, John Cunningham, John Berant, and countless others. PEN's members also have their own Internet sites on which they may communicate information that may be considered "harmful to minors" by some communities. As a membership organization, PEN serves to protect its members' rights to communicate their writing, through print and electronic means.

144. If the Revised Act is not enjoined, PEN and its members would be compelled either to refrain from offering constitutionally-protected literature and free speech material and engaging in professional discussion and advocacy planning with colleagues, or to face potential criminal prosecution.

The Sexual Health Network, Inc.

145. The Sexual Health Network, Inc. is a small Internet-based company dedicated to providing easy access to sexuality information, education, and other sexuality resources for people with disability, chronic illness, or other health-related problems. The Sexual Health Network, Inc. owns and operates sexualhealth.com, an Internet site run by Dr. Mitchell Tepper, President. Volunteer content contributors include a number of the world's leading experts on sexuality and disability, chronic illness, and women's and men's general sexual health.

146. The Sexual Health Network, Inc. fears prosecution under the Revised Act because its Internet content on sexualhealth.com, by its nature, necessarily contains explicit

descriptions of sexual acts and practices. All information from The Sexual Health Network, Inc. is available to all users for free, including minors.

147. The Sexual Health Network, Inc. distributes a free electronic newsletter that addresses urgent sexual issues and maintains a message board where Sexual Health experts frequently answer questions. In addition, The Sexual Health Network, Inc. formerly offered a “Chat Room,” where individuals—including minors—were able to discuss issues relating to sexuality openly and frankly, and may offer similar Internet “chat” opportunities again in the future on a limited basis. The Sexual Health Network, Inc. did not, and will not, attempt to monitor whether conversations in the chat room include material that could be deemed to be “harmful to minors.”

148. The Sexual Health Network, Inc. also operates a Web site, sexualhealth.com, that includes specific advice on how to deal with a wide variety of health problems that directly affect sexuality, as well as articles relating to sexuality more generally and suggestions for physical positions to facilitate sex for disabled persons. For example, sexualhealth.com provides information about masturbation techniques for individuals who cannot move their arms and information about the pros and cons of sexual surrogates. The act of “transmit[ting] or send[ing]” such material on sexualhealth.com is covered by the Revised Act. In addition, the material found on this Web site is often the topic of newsletters and other online communications hosted by The Sexual Health Network, Inc.

149. Unless the Revised Act is enjoined, The Sexual Health Network, Inc. will be forced to choose between not offering information that might be alleged to be “harmful to minors” or risking prosecution under the Revised Act.

Jeff Walsh of Oasis Magazine

150. Plaintiff Jeff Walsh is the owner and operator of Oasis Magazine, a Web site geared toward free and open exchange among lesbian, gay, bisexual, and questioning youth.

151. Oasis is largely an interactive community where users can express their thoughts, concerns, comments, and experiences. Oasis also features a “Private Messaging” system where registered users can e-mail other registered users on the oasismag.com site.

Registration is free and registered users are not asked their age or geographic location.

152. Registered users can create profiles on oasismag.com in which they can make available to others information such as their instant messaging address. For example, Mr. Walsh’s AOL instant messaging address is identified in his profile and other users of Oasis have communicated with him through instant messaging as a result. Mr. Walsh does not know the age or location of many of those he communicates with via e-mail and instant messaging, but since Oasis is geared toward lesbian, gay, bisexual, and questioning youth, he believes that many are minors. In addition, Oasis is planning to update the site to allow users to create and maintain personal Web pages on the site.

153. Oasis fears that its content could be considered “harmful to minors” in some

communities, because all of the communications discuss gay and lesbian issues, even if they contain no sexually explicit content. In particular, all of the content in Oasis is designed for minors who are gay, bisexual, and questioning, which some people may find “harmful to minors” because they will “entice” minors into exploring gay life. For example, some of the discussion topics started by registered users have included “Gay Siblings,” “The Transition from High School to College,” and “Early Gay Moments.”

154. Oasis also fears prosecution for the materials available on its Web site that are sexually oriented and may be considered “harmful to minors.” Almost all material on the Oasis site is “transmit[ted] or sen[t]” over the Internet, and is not exempted by the Revised Act. In addition, it is representative of the subject matter contained in Private Messages and instant messages sent and received by Jeff Walsh and other users of Oasis.

155. Oasis’s mission is to provide an online community for gay, bisexual, and questioning youth, many of whom are undergoing intense feelings of isolation and loneliness and would have no other source of contact with other gay, bisexual, and questioning youth were it not for the Internet.

156. Because Oasis believes that all of its content is vital to gay, bisexual, and questioning youths, Oasis does not intend to self-censor any of its online communications as a result of the Revised Act, and so fears prosecution or civil penalties under the Revised Act.

Web Del Sol

157. Plaintiff Web Del Sol is a free online resource for writers, although it also caters to the art and film community. Its varied offerings include poems, articles, essays, fiction, and photography as well as links to real audio and real video Internet sites.

158. Web Del Sol offers a bulletin board, called “The Writers’ Block,” which is open to all users at all times for comments on and criticism of the works available on its Web site. Web Del Sol also runs a chat room, called “Solchat,” where any user can set up a meeting to be conducted in real time, and a guest book where any user can display a note about anything. Material which is “transmit[ted] or sen[t]” but not “post[ed]” on The Writers’ Block or the Web Del Sol Web site is covered by the Revised Act.

159. While Web Del Sol believes that its Internet content is literary and artistic, this content includes material such as poems, articles, fiction, and photographs that refer explicitly to sex, sex organs, and sexual activity which could be considered “harmful to minors” by some people. For example, Web Del Sol circulates an electronic newsletter that provides news clips and Internet links to poetry such as “words of my dreaming pussy” by Nin. Likewise, a series of photographs entitled “*Au Dela Du Paraitre*” by Jean Vallette displays different portions of the female anatomy in black and white, and stories like “Lentils in Paradise” by Moris Farhi and “Wrong Husband” by Flaminia Ocampo describe sexual conduct. “Anywhere” by Ingrid Ankerson exists as an audio feed reciting

a poem that touches on infidelity and sex while different black and white images of a nude woman float by in the background. In addition, Web Del Sol currently sends Web mailers- Web page content sent via e-mail- to some Internet users and plans to begin sending its electronic newsletter to all recipients via Web mailer in the future.

160. Web Del Sol does not know whether such material would be considered “harmful to minors” in Arizona, and therefore must either risk prosecution under the Revised Act or attempt to censor material which possibly could violate the Revised Act.

Wildcat Press

161. Wildcat Press is a site dedicated to promoting the works of Patricia Nell Warren. Ms. Warren is a former *Reader's Digest* editor and the author of eight novels, four books of poetry and numerous articles, poems, and essays. Ms. Warren is also an educator, having served as commissioner on the Gay and Lesbian Education Commission and the Human Relations Education Commission of the Los Angeles Unified School District. Ms. Warren's novel *The Front Runner* was on The New York Times best-seller list and continues to be one of the best-selling gay novels of all time.

162. Wildcat Press fears prosecution under the Revised Act because some of the information it communicates over the Internet may be considered “harmful to minors.” First, some of the material in Wildcat Press's publications, all of which are sold on Wildcat Press's Web site (and which may be covered under the Revised Act), may be

deemed “harmful to minors.” In addition, Wildcat Press’s Web site contains excerpts of Ms. Warren’s books. The content of these excerpts may be considered “harmful to minors” in some communities.

163. More specifically, the content of the book excerpts on Wildcat Press’s Web site generally deal with gay and lesbian issues, as well as youth and AIDS issues. In Wildcat Press’s experience, there are many people in society who are openly hostile to and discriminate against homosexuals. Indeed, there have been repeated attempts to ban Wildcat Press’s books at libraries. Wildcat Press fears that material that discusses gay and lesbian issues, as well as youth and AIDS issues, will be found to be “harmful to minors” in Arizona, even if it does not contain sexually explicit material.

164. The excerpt from the novel *Billy’s Boy* that is included on the Web site frankly discusses gay and lesbian youth dating and sexual feelings. The novel, which is sold online, is targeted to an audience that includes teenagers. In Wildcat Press’s experience, many people would find any discussion of young people exploring their homosexuality to be “harmful to minors.”

165. Wildcat Press also has an e-mail feature through which it solicits and receives comments from visitors to its Web site and can send comments in return. These communications can include excerpts from and summaries of the content on its Web site, as well as discussions of these subject matters, and are thus similarly at risk of being

deemed “harmful to minors.”

166. In addition, various electronic newsletters, such as those sponsored by gaywired.com and lesbianation.com, may include links to the Wildcat Press Web site or discussions of Ms. Warren’s works.

167. Because Wildcat Press believes that the speech it provides through the Internet is socially, educationally, and politically valuable, and because Wildcat Press believes it has a right to sell and discuss Ms. Warren’s books online, it does not currently plan to self-censor its Internet communications. Thus, Wildcat Press fears that it could face criminal penalties for its Internet communications. In addition, Wildcat Press fears that the expense of defending against even an unfounded prosecution brought under the Revised Act would force Wildcat Press out of business.

168. If the Revised Act is not enjoined, Wildcat Press would be forced either to risk criminal prosecution for providing constitutionally-protected expression over the Internet, or to remove all of the content on its site that contains nudity, sexual themes, or discusses homosexual issues and to stop selling books online.

American Booksellers Foundation for Free Expression (“ABFFE”)

169. Plaintiff ABFFE has hundreds of bookseller members from coast to coast, as well as in the State of Arizona, many of whom sell materials that contain nudity or descriptions of the nude human body, and which deal frankly with the subject of human sexuality.

ABFFE's members are not "adult bookstores." Most member bookstores use the Internet and electronic communications to obtain information and excerpts of books from publishers. For example, member booksellers may review popular titles such as *Nymph* by Francesa Lia Block, *Pictures & Passion: A History of Homosexuality in the Visual Arts* by James W. Saslow, and *American Pastoral* by Philip Roth, which include passages or images describing nudity and sexual conduct. Some member bookstores also have their own Internet sites, often without a "www" prefix, that discuss the contents of books sold in stores.

170. ABFFE members' right to learn about, acquire, and distribute material containing nudity and sexual conduct, and their patrons' right to purchase such materials, would be seriously infringed by the Revised Act if it is not enjoined because ABFFE members and the publishers with which they transact business would be forced to self-censor or risk prosecution under the Revised Act.

Association of American Publishers, Inc. ("AAP")

171. Plaintiff AAP sues on behalf of its members who are content providers and users of the Internet. Although their business is primarily based on print publishing, AAP's members are very actively involved in the Internet. AAP's members create electronic products to accompany and supplement their printed books and journals; create custom educational material on the Internet; communicate with authors and others, receiving

manuscripts, and editing, typesetting, and designing books electronically; transmit finished product to licensed end-user customers; communicate with bookstores and other wholesale and retail accounts; and promote authors and titles online.

172. Many of AAP's members provide information to the world through the Internet. Some of the content provided by AAP's members contains nudity or sexual conduct. Many of the efforts to ban books in various communities have been directed at books published by AAP's members, and AAP fears that the Revised Act will spawn similar efforts directed at AAP's online publishing. If the Revised Act is not enjoined, AAP members would be forced either to risk criminal liability or stop providing online access to constitutionally-protected books and other related materials.

Freedom to Read Foundation, Inc ("FTRF")

173. Plaintiff FTRF's library members serve as both access and content providers for the Internet. Because the Internet offers their patrons a unique opportunity to access information for free, many libraries provide their patrons with facilities that patrons can use to access the Internet. Many libraries use the Internet to provide card catalogues, communicate information about current events, provide textual information or art, and distribute online versions of materials from their library collections. Patrons also can join one or more of 150 electronic mailing lists organized by topic and circulated by the American Library Association.

174. Some of the materials provided or made available by libraries contain nudity or sexual conduct. For example, FTRF member libraries' online card catalogues include such works as *Forever* by Judy Blume, *Women on Top* by Nancy Friday, *Changing Bodies*, *Changing Lives* by Ruth Bell, *Our Bodies*, *Our Selves* by the Boston Women's Health Collective and *It's Perfectly Normal* by Robie Harris. The electronic mailing lists accommodate a broad range of topics including a Women's Studies Section, a Gay Lesbian Bisexual and Transgendered Round Table, and an Adult Books for Young Adults Task Force.

175. If the Revised Act is not enjoined, libraries would be inhibited from distributing, circulating, and providing access to materials on the Internet that contain nudity or sexual content. Adult library patrons and Internet users would thus be deprived of access to these constitutionally-protected library materials. Given the global and unrestricted nature of the Internet and the past attempts by persons to ban literature and reference items from library collections, many of FTRF's members may choose not to communicate a substantial amount of expressive material at all—material that many adults might consider useful for themselves or their own children—rather than risk prosecution for communicating material that might be illegal in Arizona.

Magazine Publishers of America (“MPA”)

176. Members of plaintiff MPA actively publish a substantial volume of content on the

Internet and utilize the Internet in a variety of ways, including marketing of print and online publications to advertisers and agencies, promoting events, and sharing information with other publishers. Some MPA members publish electronic versions or excerpts from their magazines that might in some communities be deemed “harmful to minors.” Thus, if the Revised Act is not enjoined, MPA members would be forced to self-censor or risk prosecution under the Revised Act.

The National Association of Recording Merchandisers (“NARM”)

177. Some of plaintiff NARM’s members are online music retailers who market their recordings by permitting Internet users to download music samples before making a purchase with their credit cards. Permitting users to sample music before identifying themselves is an important feature of this marketing strategy. NARM members are concerned that they may be exposed to criminal liability under the Revised Act simply for misjudging what may be deemed “harmful to minors” under an ambiguous standard.

Periodical and Book Association of America (“PBAA”)

178. Members of plaintiff PBAA are publishers of magazines and paperback books, some of which contain nudity and sexually frank materials. Although the business of most PBAA members is primarily based on print publishing, some of their books and magazines (or portions thereof) are now or soon will be published in electronic formats available to the public on the Internet.

179. Some PBAA members are concerned that the Revised Act will require them to censor the online version of their print editions. For this reason, PBAA believes that the Revised Act imposes unconstitutional press censorship that will substantially limit the Internet's potential to enhance the diversity, availability, timeliness, quality, and utility of magazines and paperback books online by creating a powerful disincentive for publication through the use of interactive media technologies.

180. If the Revised Act is not enjoined, PBAA members could be criminally liable for content that contains sexual conduct or nudity if they do not self-censor.

Publishers Marketing Association ("PMA")

181. Members of plaintiff PMA are publishers of books, some of which contain nudity and sexually frank materials. Although PMA members' business is primarily based on print publishing, some of the books (or portions thereof) are now or soon will be published in electronic formats available to the public on the Internet.

182. Some PMA members are concerned that the Revised Act will require them to censor the online version of their print editions. For this reason, PMA believes that the Revised Act imposes unconstitutional press censorship that will substantially limit the Internet's potential to enhance the diversity, availability, timeliness, quality, and utility of books online by creating a powerful disincentive for publication through the use of interactive media technologies.

183. If the Revised Act is not enjoined, PMA members could be criminally liable for content that contains sexual conduct or nudity if they do not self-censor.

Recording Industry Association of America, Inc. (“RIAA”)

184. Members of plaintiff RIAA produce the vast majority of sound recordings in the United States. Some of these recordings (or portions thereof) are available to the public on the Internet.

185. RIAA members are concerned that the Revised Act will require them to censor the online version of their recordings. For this reason, RIAA believes that the Revised Act imposes unconstitutional press censorship that will substantially limit the Internet’s potential to enhance the diversity, availability, timeliness, quality, and utility of music online by creating a powerful disincentive for the use of interactive media technologies.

186. If the Revised Act is not enjoined, RIAA members might be criminally liable for content that contains descriptions of sexual conduct or nudity if they do not self-censor.

CAUSES OF ACTION

COUNT I

**Violation of Adults’ Rights Under the First and Fourteenth
Amendments of the United States Constitution**

187. Plaintiffs repeat and re-allege paragraphs 1-186.

188. The Revised Act violates the First and Fourteenth Amendments of the United States

Constitution on its face and as applied because it effectively bans constitutionally-protected speech by and between adults.

189. The Revised Act violates the First and Fourteenth Amendments because it is not the least restrictive means of accomplishing any compelling governmental purpose.

190. The Revised Act violates the First and Fourteenth Amendments because it is substantially overbroad.

COUNT II

Violation of Minors' Rights Under the First and Fourteenth Amendments of the United States Constitution

191. Plaintiffs repeat and re-allege paragraphs 1-190.

192. The Revised Act violates the First and Fourteenth Amendments of the United States Constitution because it interferes with the rights of minors to access and view material that for them is protected by the First Amendment.

193. The Revised Act is unconstitutional because it prohibits the dissemination to all minors of any material that is deemed “harmful to minors” of any age, despite the fact that some of the material has value for older minors.

COUNT III

Violation of the Right to Communicate and Access Information Anonymously Under the First and Fourteenth Amendments of the United States Constitution

194. Plaintiffs repeat and re-allege paragraphs 1-193.

195. The Revised Act violates the First and Fourteenth Amendment right to communicate and access information anonymously, insofar as it requires Internet users to identify themselves in order to gain access to constitutionally-protected speech.

COUNT IV

Vagueness in Violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution

196. Plaintiffs repeat and re-allege paragraphs 1-195.

197. The Revised Act is unconstitutionally vague, in violation of the First, Fifth, and Fourteenth Amendments. Among other flaws, the Revised Act fails to define the terms “direct internet communication,” “knows or believes,” “personal messaging,” and “newsgroup.” In addition, the Revised Act fails to distinguish between the criminal acts of “transmit[ting] or send[ing]” and the exempted act of “posting,” a distinction made by the Arizona Legislature for the second time in the Revised Act.

COUNT V

Violation of the Commerce Clause of the United States Constitution

198. Plaintiffs repeat and re-allege paragraphs 1-197.

199. The Revised Act violates the Commerce Clause because it regulates communications that take place wholly outside of the State of Arizona.

200. The Revised Act violates the Commerce Clause because it constitutes an unreasonable and undue burden on interstate and foreign commerce.

201. The Revised Act violates the Commerce Clause because it subjects interstate use of the Internet to inconsistent regulations.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

- A. Declare that the Revised Act violates the First, Fifth, and Fourteenth Amendments and the Commerce Clause of the United States Constitution;
- B. Preliminarily and permanently enjoin defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the injunction, from enforcing the Revised Act;

C. Award plaintiffs their reasonable costs and fees pursuant to 42

U.S.C. § 1988; and

D. Grant plaintiffs such other and further relief as the Court deems just
and proper.

Respectfully submitted,

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Dated: September __, 2003

EXHIBIT A

ARIZ. REV. STAT. § 13-3506.01

§ 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 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. 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.

D. 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.

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.

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

EXHIBIT B

ARIZONA STATUTES ANNOTATED
TITLE 13. CRIMINAL CODE
CHAPTER 35. OBSCENITY

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Current through legislation effective June 11, 2003

§ 13-3501. Definitions

In this chapter, unless the context otherwise requires:

1. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse, when both:
 - (a) To the average adult applying contemporary state standards with respect to what is suitable for minors, it both:
 - (i) Appeals to the prurient interest, when taken as a whole. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.
 - (ii) Portrays the description or representation in a patently offensive way.
 - (b) Taken as a whole does not have serious literary, artistic, political, or scientific value for minors.
2. "Item" means any material or performance which depicts or describes sexual activity and includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription, live or recorded telephone message or other similar items whether tangible or intangible and including any performance, exhibition, transmission or dissemination of any of the above. An item also includes a live performance or exhibition which depicts sexual activity to the public or an audience

of one or more persons. An item is obscene within the meaning of this chapter when all of the following apply:

- (a) The average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.
 - (b) The average person, applying contemporary state standards, would find that the item depicts or describes, in a patently offensive way, sexual activity as that term is described in this section.
 - (c) The item, taken as a whole, lacks serious literary, artistic, political or scientific value.
3. “Knowledge of the character” means having general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant both:
- (a) That the item contains, depicts or describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse, whichever is applicable, whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.
 - (b) If relevant to a prosecution for violating § 13-3506, 13-3506.01 or 13- 3507, the age of the minor, provided that an honest mistake shall constitute an excuse from liability under this chapter if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.
4. “Nudity” means 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 fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
5. “Sadomasochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed, for the purpose or in the context of sexual gratification or abuse.

6. "Sexual activity" means:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

7. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

8. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

9. "Ultimate sexual acts" means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.