

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;
PSINET, INC.; SEXUAL HEALTH NETWORK; 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; RECORDING INDUSTRY ASSOCIATION OF
AMERICA, INC.; and VIDEO SOFTWARE DEALERS
ASSOCIATION,

Plaintiffs,

vs.

JANE HULL, GOVERNOR OF THE STATE OF ARIZONA;
JANET NAPOLITANO, 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. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

1. The State of Arizona has enacted a broad censorship law that imposes severe restrictions on the availability, display and dissemination of constitutionally-protected speech on the Internet by making it a crime to “recklessly transmit” any “item” that is “harmful to minors.” H.B. 2426 §25. The United States Supreme Court invalidated a similar federal law on First Amendment grounds in *ACLU v. Reno*, 117 S. Ct. 2329 (1997) (“ACLU I”), and the Third Circuit invalidated a second federal law on First Amendment grounds in *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff’d*, 2000 LEXIS 14419 (3rd Cir. June 22, 2000) (“ACLU II”). In addition, four similar state laws have now been struck down as unconstitutional. *PSINET, Inc. v. Warner D. Chapman, et al.*, Civil Action No. 3:99 CV 0011 (W.D. Va. August 2000); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *appeal pending* (6th Cir.); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (New Mexico); *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

2. Despite its obvious unconstitutionality, on April 7, 2000, defendant Governor Jane Hull signed into law H.B. 2428 entitled “COMPUTER CRIMES” (Laws 2000, Ch. 189, §25), which, in Section 25—the portion relevant to this complaint—amends A.R.S. §13-3506. The H.B. 2428 “Computer Crimes” amendments in Section 25 are referred to in this Complaint as “the Act.” Exhibit A attached hereto is a copy of the relevant portion

of the Act. Exhibit B attached hereto is a copy of A.R.S. §13-3501 which contains definitions that are relevant to portions of the Act.

3. The Act took effect on July 7, 2000.

4. Under the Act, any nudity or sexual conduct—including Michael Betancourt’s avant garde artistic imagery displayed on plaintiff Art On The Net’s Web site, or a detailed description of sexual activity contained on Dr. Marty Klein’s sex education site, SexEd.org—can potentially be criminal if communicated on the Internet and accessible in Arizona, so long as someone finds it to be “harmful to minors” under the Act’s broad definition. Even advertisements of “harmful to minors” material, not themselves sexually explicit, are criminalized. Because all of the speech on the Internet is accessible in Arizona, regardless of the geographical location of the person who posted it, the Act threatens Internet users nationwide and even worldwide. This action seeks to have the Act declared facially unconstitutional and void, and to have the State enjoined from enforcing the Act, by reason of the First, Fifth and Fourteenth Amendments to and the Commerce Clause of the U.S. Constitution.

5. The Act regulates speech on the Internet. The Internet represents the most participatory marketplace of mass speech yet developed—it is in many ways a far more speech-enhancing medium than radio or television, print, the mails, or even the village green. Hundreds of millions of people can now engage in interactive communication on a national and global scale via computer networks that are connected to the Internet. The

Internet enables average citizens, with a few simple tools and at a very low cost, to participate in local or worldwide conversations, publish an online newspaper, distribute an electronic pamphlet, and communicate with a broader audience than ever before possible. The Internet also provides millions of users with access to a vast range of information and resources. Internet users are far from passive listeners—rather, they are empowered by the Internet to seek out exactly the information they need and to respond with their own communication if desired.

6. Because of the way the Internet works, the Act’s prohibition on “recklessly transmit[ing]” or “mak[ing] available” material that may be harmful to minors would effectively ban those same communications among adults. The 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 there are no reasonable technological means that enable users of the Internet to ascertain the age of persons who access their communications, or to restrict or prevent access by minors to certain content, the Act inevitably will mean that Internet content providers will limit the range of their speech. Consequently, the Act will reduce adult speakers and users in cyberspace to reading and communicating only material that is suitable for young children.

7. In addition, the Act prohibits speech that is valuable and constitutionally protected

for minors, especially older minors.

8. 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 Act.

9. Plaintiffs represent a broad range of individuals and entities who are speakers, content providers and access providers on the Internet. Plaintiffs post 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 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.

10. In addition, the 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 download his or her content posted on the Web; consequently, the user must comply with Arizona law or face the threat of criminal prosecution.

JURISDICTION AND VENUE

11. 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.

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

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

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

THE PARTIES

15. 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>.

16. Plaintiff MARK AMERIKA is a critically-acclaimed writer and publisher of ALT-X, a Web 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 Web 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 the ALT-X Web site.

17. Plaintiff ART ON THE NET ("art.net") is a not-for-profit international artist Web site at the Internet address <http://www.art.net>. Based in Menlo Park, California, art.net assists over 125 artists in maintaining online studio or gallery spaces. In addition, art.net hosts mailing lists for artistic communities regarding relevant issues and events and posts information about art events and artist shows. Some of the artistic work posted in art.net's online galleries contains 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.

18. Plaintiff AZGAYS.COM is an Internet directory 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. AZGays.com maintains a Web site at <http://www.azgays.com>. AZGays.com is maintained, operated and designed by Mark S. Süever. AZ Gays sues on its own behalf and on behalf of those that use AzGays.com

Web site.

19. Plaintiff CHANGING HANDS BOOKSTORE operates a bookstore that has been physically located in and around Tempe, AZ for the last 28 years. Changing Hands Bookstore sells old, rare, used and new books. At present, Changing Hands Bookstores sends out a newsletter to 1,500 –2,000 individuals via email that lists titles for sale in the bookstore. In addition, Changing Hands Bookstore has developed a Web site that will be fully operational on or before September 10, 2000 that will provide information about and offer for sale online Changing Hand Bookstore's vast collection of books online.

20. 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 has maintained a Web site, located at: <http://www.sexed.org>, for almost three years on which he has provided advice and information on a number of subjects relating to sex and sexuality including birth control, safer sex, and sexual pleasure. Dr. Klein sues on his own behalf and on behalf of those who use his Web site.

21. 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.

22. Plaintiff PSINET INC. is one of the world's largest providers of Internet-related communications services for business. PSINet's services include the retail provision of Internet access to business and consumer markets, the wholesale provision of dial-up and dedicated, high-speed Internet access to other Internet service providers and telecommunications carriers, Web hosting and application services (such as electronic mail and Internet faxing), electronic commerce solutions, voice-over-IP, live audio / video, and other Internet Protocol-based applications. These services are used by tens of thousands of commercial accounts worldwide including a broad range of small, medium-sized, and Fortune 500 businesses, as well as government agencies, non-profit organizations, and educational institutions. PSINet sues on its own behalf and on behalf of its customers.

23. Plaintiff SEXUAL HEALTH NETWORK is a small, Internet-based company incorporated in the State of Connecticut. Its Internet address is <http://www.sexualhealth.com>. The Sexual Health Network 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 in Public Health degree from the Yale University School of Medicine. Dr. Tepper is currently the Managing Member of the Sexual Health Network. The Sexual Health Network 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.

24. Plaintiff JEFF WALSH is a writer and editor of OASIS MAGAZINE, a monthly online magazine for lesbian, gay, bisexual and questioning youth with the Internet address <http://www.oasismag.com>. Oasis Magazine includes news, book and cultural reviews, and safer sex advice columns written by and for gay and lesbian youth. Mr. Walsh resides in San Francisco, California.

25. Plaintiff WEB DEL SOL is a voluntary association which functions as a dynamic, literary arts complex on the Internet. Its Web 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 provides links to Internet literary magazines and literary Web sites. Its 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 posted on Web Del Sol's Internet site 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 Web site.

26. Plaintiff WILDCAT PRESS is a Web site that sells the works of Patricia Nell Warren, a former Reader's Digest editor and the author of seven novels, four books of poetry and numerous articles, poems and essays. Ms. Warren is also an educator, having served as commissioner on 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.wildcatpress.com>, sells Ms. Warren's books online, and includes reviews of and excerpts from Ms. Warren's books, as well as archive 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. Wildcat Press sues on its own behalf and on behalf of those that use Wildcat Press Web site.

27. 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 their member bookstores.

28. 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 270 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.

29. Plaintiff FREEDOM TO READ FOUNDATION, INC. ("FTRF") is a non-profit membership organization established in 1969 by the America 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.

30. Plaintiff MAGAZINE PUBLISHERS OF AMERICA (“MPA”) is a national trade association including in its present membership more than 200 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 Web 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

31. 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.

32. 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.

33. Plaintiff PUBLISHERS MARKETING ASSOCIATION ("PMA") is a nonprofit trade association representing more than 2,000 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.

34. 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. The 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.

35. Plaintiff VIDEO SOFTWARE DEALERS ASSOCIATION (“VSDA”) is the trade association for the home video entertainment industry. It represents more than 3,000 member-companies in North America and 22 countries worldwide, including small, independently-owned video retailers as well as large video chains. It also includes the home video divisions of all the major and independent motion picture studios, and the other associated businesses that comprise the home video industry. VSDA appears as a plaintiff herein on behalf of its members who use online computer communications systems, and on behalf of viewers of video recordings sold or rented by its members online.

36. Defendant JANE HULL is the Governor of the State of Arizona and is vested with the executive power of the State of Arizona and has the duty to ensure that the laws of the State of Arizona are faithfully executed. Pursuant to this executive power, Jane Hull signed the Act into law on April 7, 2000.

37. Defendant JANET NAPOLITANO is the Attorney General of the State of Arizona, and is the chief law enforcement officer of the State of Arizona. Janet Napolitano 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 Napolitano “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. 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 project that the Internet will grow to 490 million users by the year 2002. In addition, approximately 84% of all Internet users use email. In 1998, 3.4 trillion email messages were sent in the U.S—over 9.3 billion messages a day.

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. The Internet presents extremely low entry barriers to anyone who wishes to provide or distribute information or gain access to it. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides the average citizen with an affordable means for communicating with, accessing and posting content to a worldwide audience.

How People Access 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, businesses, and local communities maintain a computer network linked directly to the Internet and enable users to easily gain access to the network.

43. Many libraries provide their patrons with free access to the Internet through computers located at the library; some libraries also host online discussion groups and chat rooms. Many libraries also post their card catalogs and online versions of material from their collections.

44. 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 monthly,

but some provide their users with free or very low-cost Internet access.

45. 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.

Ways of Exchanging Information on the Internet

46. 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. Many user names are pseudonyms or pen names that often provide users with a distinct online identity and help to preserve their anonymity and privacy. America Online allows every subscriber to use up to six different “screen names,” which may be used for different family members or for separate pseudonyms by an individual. 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 them by their user name and e-mail address (unless the user chooses to reveal other personal information).

47. Once an individual signs on to the Internet, there are a wide variety of methods for communicating and exchanging information with other users.

E-Mail

48. The simplest and perhaps most widely used method of communication on the Internet is via electronic mail, commonly referred to as “e-mail.” 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.

Discussion Groups, Mailing Lists, and Chat Rooms

49. Online discussion groups are another of the most popular forms of communication via computer network. Discussion groups allow users of computer networks to post messages onto a public computerized bulletin board and to read and respond to messages posted 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.

50. “USENET” news groups are a very popular set of bulletin board discussion groups available on the Internet and other networks. Currently, there are USENET news groups on more than 30,000 different subjects, and over 100,000 new messages are posted to these groups each day.

51. Similarly, users also can communicate within a group by subscribing to automated electronic mailing lists that allow any subscriber to a mailing list to post a particular message that is then automatically distributed to all of the other subscribers on that list. These lists are sometimes called “mail exploders.”

52. “Chat rooms” also allow users to engage in simultaneous conversations with another user or group of users by typing messages and reading the messages typed by others participating in the “chat.” 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.”

53. Online discussion groups, mailing lists, and chat rooms create an entirely new global public forum—a cyberspace village green—where people can associate and communicate with others who have common interests, and engage in discussion or debate on every imaginable topic.

The World Wide Web

54. The World Wide Web (the “Web”) is the most popular way to provide and retrieve information on the Internet. Anyone with access to the Internet and proper software can create “Web pages” or “home pages” which may contain many different types of digital information—text, images, sound, and even video. The Web comprises millions of separate “Web sites” that display content provided by particular persons or organizations. Any Internet user anywhere in the world with the proper software can create her own Web page, view Web pages posted by others, and then read text, look at images and video, and listen to sounds posted at these sites.

55. The Web serves in part as a global, online repository of knowledge, containing information from a diverse array of sources, which is easily accessible to Internet users

around the world. Though information on the Web is contained on individual computers, each of these computers is connected to the Internet through Web protocols that allow the information on the Web to become part of a single body of knowledge accessible by all Web users.

56. Many large corporations, banks, brokerage houses, newspapers and magazines now provide online editions of their publications and reports on the Web or operate independent Web sites. Many government agencies and courts also use the Web to disseminate information to the public. For example, defendants Jane Hull and Janet Napolitano have posted Internet Web sites containing information available to the public, which allow for communication to them by users through e-mail. In addition, many individual users and small community organizations have established individualized home pages on the Web that provide information of interest to members of the particular organization, communities, and to other individuals.

57. To gain access to the information available on the Web, a person generally uses a Web “browser”—software such as Netscape Navigator or Internet Explorer—to display, print and download documents that are formatted in the standard Web formatting language. Each document on the Web has an address that allows users to find and retrieve it.

58. Most Web documents also contain “links.” These are short sections of text or image that refer and link to another document. Typically the linked text is blue or

underlined when displayed, and when selected by the user on her computer screen, the referenced document is automatically displayed, wherever in the world it actually is stored. Links, for example, are used to lead from overview documents to more detailed documents on the same Web site, from tables of contents to particular pages, and from text to cross-references, footnotes, and other forms of information. For example, plaintiff ACLU's Web page provides links to several other Web pages also offered by the ACLU, including issue pages such as "Immigrants" and "Lesbian and Gay Rights," as well as advocacy pages such as "In Congress" and "In the Courts."

59. Links may also take the user from the original Web site to another Web site on a different computer connected to the Internet. For example, plaintiff ACLU has a Web page about its Reproductive Freedom Project which also includes links to similar resources elsewhere on the Web, including the Web pages of Planned Parenthood and the National Organization of Women. While linking to these Web sites from the ACLU Web site appears seamless from the user's point of view, in fact these Web sites are each located on entirely separate computers that are not maintained or controlled by the ACLU.

60. Through the use of these links from one computer to another, from one document to another, the Web for the first time unifies the diverse and voluminous information made available by millions of users on the Internet into a single body of knowledge that can be searched and accessed.

61. A number of “search engines” and directories—such as Yahoo, Alta Vista, WebCrawler, and Lycos—are available free of charge to help users navigate the World Wide Web. Once a user has accessed the search service, he or she simply types a word or string of words as a search request and the search engine provides a list of sites that match the search string.

62. 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 user wishing to read articles posted to a newsgroup must log on to the Internet and then connect to a USENET server, select the relevant group, review the relevant header lines—which provide brief content descriptions—for each message, and then access a particular message to read its content. Similarly, to gain access to material on the World Wide Web, a user must know and type the address of a relevant site or find the site by typing a relevant search string in one of several available search engines or by activating a Web site link.

The Range of Content Available on the Internet

63. 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. For example, on the Internet one can view the full text of the Bible, all of the works of Shakespeare, and numerous other classic works of literature. One can browse through paintings from museums around the world, view in detail images of the ceiling of the Sistine Chapel, or hear selections from the latest rap music albums. At any one time, the Internet serves as the communication medium for literally hundreds of thousands of global conversations, political debates, and social dialogues.

64. 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 read online John Cleland's eighteenth-century novel *Fanny Hill: Memoirs of a Woman of Pleasure*; view the digital photography of Diane Fenster; receive instructions on how to practice safer sex; participate in a question and answer forum on methods for enhancing sexual experiences; and exchange e-mail about a popular new rap music lyric. 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.

The Statutory Language at Issue

65. On April 7, 2000, defendant Governor Jane Hull signed into law H.B. 2428 §25 (Laws 2000, Ch. 189, §25) (referred to in this Complaint as “the Act”), effective July 7, 2000, amending A.R.S. §13-3506.

66. The Act provides as follows:

§ 13-3506. Obscene or harmful items; minors; classification

It is unlawful for any person, with knowledge of the character of the item involved, to recklessly transmit, furnish, present, provide, make available, give, lend, show, advertise, offer or distribute to minors any item that is harmful to minors.

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

1. The name, account, profile, web page or address of the recipient contained indicia that the recipient is a minor.
2. The recipient or another person previously notified the person by any reasonable means that the recipient is a minor.
3. The recipient's electronic mail or web page contains indicia that the address or domain name is the property of, or that the visual depiction ultimately will be stored at, a school as defined in section 13-609.

A violation of this section is a class 4 felony.

67. Under A.R.S. §13-609(D)(1), “school” means “any public or nonpublic kindergarten program, common school or high school.”

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

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.

69. 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.” 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.” It appears that a mere kiss between two women, or a person placing a hand on a clothed buttock, constitutes “sexual conduct” making available a picture of this type could

constitute a felony under the Act.

70. The Act expressly applies to written material as well as graphic images. Under A.R.S. §13-3501(2), “Item” is defined broadly 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. ... ”

71. Additionally, the Act makes it unlawful to “advertise, offer or distribute... any item that is harmful to minors.” It, therefore, criminalizes an enormous amount of speech on the Web that advertises any item that might be considered “harmful to minors,” even if the advertisement itself is not harmful to minors. Thus an online bookseller or video seller offering only one item which might be deemed “harmful to minors” is threatened with criminal liability.

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

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 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.

73. A.R.S. §13-3501(3)(b) attempts to provide a defense to liability under the Act. It states that “an honest mistake shall constitute an excuse from liability under [A.R.S. §13-3506] 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 Act.

74. In addition, the “indicia” in A.R.S. §13-3506 act as presumptions that shift the burden of proof to the accused and away from the prosecution, because they relieve the prosecution of the obligation of proving knowledge or intent on the part of the accused.

75. Violation of the 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 Act's Impact on Internet Speech

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

77. Speech on the Internet is generally available to anyone with access to this technology. Anyone who posts content to the Web, chat rooms, mailing lists, and

discussion groups makes it automatically available to all users worldwide, including minors. Because minors have access to all of these forums, any communication in these forums could be punishable under the Act: a prosecutor could prove that a person “recklessly” transmitted a message to a minor by showing—as would inevitably be the case—that the speaker was “aware of and consciously disregard[ed] a substantial and unjustifiable risk” that the message would be received by a minor. See generally A.R.S. §13-105(9)(c). Due to the very nature of the Internet, virtually every communication on the Internet entails a “substantial risk” that a minor may receive it.

78. Because many of the terms in the Act are vague and overbroad, the Act will further chill the speech of content providers on the Web. For example, the 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.” In addition, under A.R.S. §13-3506(2) the phrase “any reasonable means” is practically limitless and offers the plaintiffs no guidance as to where they should look for notice that a recipient is a minor. Because content providers and users of the Web will be unable to understand these terms, they will likely err on the side of caution and not post content on the Web that they would otherwise have posted. In this way, the Act will chill speech on

the Web.

79. Most of the millions of users on the Internet are speakers and content providers subject to the Act. Anyone who sends an e-mail, participates in a discussion group or chat room, or maintains a home page on the Web is subject to the Act because his or her communication might be accessed by a minor in the State of Arizona. Given the technology of the Internet, there are no reasonable means for these speakers to ascertain the age of persons who access their messages, or for restricting or preventing access by minors to certain content. From the perspective of these speakers, the information that they make available on the public spaces of the Internet either must be made available to all users of the Internet, including users who may be minors, or it will not be made available at all.

80. For instance, when a user posts a message to a USENET discussion group, it is automatically distributed to hundreds of thousands of computers around the world, and the speaker has no ability to control who will access his or her message from those computers. Similarly, users who communicate on mailing lists have no way to determine the ages of other subscribers to the list. Finally, content providers on the Web have no reasonable way to verify the age of persons who access their Web 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 Act—from people younger than 18 years old.

81. Moreover, the Act is overbroad because it could allow prosecution even if the

sender had no knowledge or reason to know of the recipient's age. Specifically, the Act requires that the speaker know or have reason to know the age of the minor only "[i]f relevant to the prosecution for violating §13-3506." This suggests that sometimes knowledge or reason to know of the recipient's age is not required to be prosecuted under the Act.

82. The inference language contained in §13-3506 of the Act only exacerbates its overbreadth. The Act creates an inference that an online speaker had knowledge of the age of its recipient if the "name, account, profile . . . electronic mail or web page" of the recipient contains "indicia" that the recipient is a minor. This "inference" is flawed because there is no way for the vast majority of online speakers to learn the "name, account, profile . . . electronic mail or web page" of all their recipients. Yet, according to the statute, if such information contained "indicia" that a recipient is a minor, the speaker could be prosecuted *even if* the online speaker did not know the "name, account, profile . . . electronic mail or web page." In addition, there is no definition of what "indicia" would qualify as establishing that the person is a minor. For example, would content on a recipient's Web page about Pokemon establish that the recipient was a minor for the purposes of prosecution under the Act?

83. Because Internet speakers have no means to restrict minors in Arizona from accessing their communications, the Act effectively would require almost all 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 Act therefore would ban an entire category of constitutionally-protected speech between and among adults on the Internet.

84. In addition, especially given the inferences created by the Act, any person who disagrees with or objects to content on the Internet could cause a speaker to be prosecuted under the 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 Act by claiming to be a minor, whether or not the person actually is one.

85. The 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, at least for older minors.

86. 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.

The Act's Burden on Interstate Commerce

87. The Act will impact the speech of online speakers across the nation—not just in the State of Arizona—because it is impossible for Internet users to determine the geographic location of persons who access their information. An Internet user has no way to determine whether information posted to the Web, discussion groups or chat rooms 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; therefore, there is no way for speakers to ensure that residents of Arizona will not receive their communications. Thus, all users, even if they do not reside in Arizona or intend to communicate with residents of Arizona, must comply with the Act.

88. The Act will unjustifiably burden interstate commerce and regulate conduct that occurs wholly outside the State of Arizona. The Act will chill speakers outside of Arizona and curtail speech that occurs wholly outside the borders of Arizona. 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. Internet content providers which are located outside of Arizona, such as plaintiffs art.net, Sexual Health Network, 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. 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 Act and avoid the possibility that a minor from Arizona will gain access to this information, thereby subjecting the speaker to prosecution in Arizona. Therefore, the Act will interfere significantly with the interstate flow of information and with interstate commerce.

89. The interstate reach of the Act is underscored by the inferences outlined by A.R.S 13-3506 (B)(1-3) and their focus on the “recipient.” Thus, for example, an Internet user in New York who posts a message to an online discussion group may face prosecution in Arizona, if a minor “recipient” in Arizona reads the message.

90. 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. The states of New York, New Mexico, Virginia and Michigan previously enacted laws similar to the Act, which were enjoined on Commerce Clause grounds because of the inconsistent obligations imposed on online speakers across the country. *PSINET, Inc. v. Warner D. Chapman, et al.*, Civil Action No. 3:99 CV 0011 (W.D. Va. August 2000); *Cyberspace Communications, Inc. v. Engler*,

55 F. Supp. 2d 737 (E.D. Mich. 1999), *appeal pending* (6th Cir.); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (New Mexico); *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *see also ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 2000 LEXIS 14419 (3rd Cir. June 22, 2000) (declaring federal Child On Line Protection Act unconstitutional on the ground that it was impossible to determine “community standards” for the Internet).

91. Because the definition of “harmful to minors” in A.R.S. §13-3501(1) depends in part upon “contemporary state standards,” the 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 Act and the Effectiveness of Alternative Means

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

93. It is 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 posted abroad from being available to Internet users in the State of Arizona, the Act will not accomplish its purported purpose of keeping inappropriate content from minors in Arizona.

94. Conversely, there are many alternative means that are more effective at assisting parents in limiting a minor's access to certain material if desired.

95. Commercial online services like America Online provide features that subscribers may use to prevent children from accessing chat rooms and to block access to Web sites and news groups 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.

96. 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.

97. User-based blocking programs are not perfect, both because they fail to screen all inappropriate material and because they inadvertently block valuable Internet sites. However, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than the Act's imposition of criminal penalties for protected speech.

The Act's Impact on the Plaintiffs

98. Plaintiffs interact with and use the Internet in a wide variety of ways, including as content providers, access providers, and users. The Act burdens plaintiffs in all of these capacities. Plaintiffs who are users and content providers are subject to the Act. These plaintiffs fear prosecution under the Act for communicating, sending, displaying, or distributing material that possibly meets the definition of "harmful to minors" under the Act. They also fear liability for material posted by others to their online discussion groups, chat rooms, mailing lists, and Web sites. Plaintiffs have no way to avoid prosecution under the Act and are left with two equally untenable alternatives: (i) risk prosecution under the 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")

99. 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.

100. The ACLU maintains its extensive online resources on the Internet's World Wide Web. 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.

101. The ACLU also 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.

102. 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.

103. 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.

104. If the 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

105. 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 Web.

106. 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.

107. If the 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

108. Plaintiff art.net believes that the Web provides a unique and low-cost opportunity for artists to exhibit their work to the world. Over 125 international artists curate and maintain their own online studio or gallery spaces on the art.net Web site; the site contains over 60,000 separate files. Member artists pay a small annual membership fee and commit to donate one piece of their art to the site. Art.net is accessed 130,000 to 190,000 times a day by 4,000 to 5,000 people. This often leads to art purchases or to off-line shows and exhibits for member artists.

109. Some of the art exhibited through art.net 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.

110. For example, Michael Betancourt's online studio posted 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," "We Took the Train Together to My Apartment," "I Waited for Hours," 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 one of three works from Fenster's "A Ritual of Abandonment" series that were removed from a Baltimore corporate exhibit because they 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 "People Becoming Political Symbols" series, also show human nudity.

111. 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.

112. 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.

113. 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 Act. Thus, if the Act is not enjoined, art.net would have to shut down its site on the Internet entirely, or risk criminal prosecution for displaying constitutionally-protected artistic expression. Art.net is concerned that artists will be deterred from using its Web site as a means of displaying their work out of fear of being prosecuted in Arizona, thereby defeating its purpose of providing a low cost and effective means of exhibiting and viewing works of art.

AZ Gays.com

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

115. AZ Gays.com contains directories in the following categories: Business, Computers, Food & Fun, Society & Culture, News & Media, Health & Fitness, Regional Resources and Not Necessarily, a directory of Web sites not necessarily related to the Arizona gay community. Each category contains further sub-categories and each

subcategory contains a listing of Web sites relevant to that category. AZ Gays also has personal and classified advertisements and maintains a Message Board and a Chat Room.

116. AZ Gays.com fears that its content could be considered “harmful to minors” in some communities, making it vulnerable to prosecution under the Act. First, AZ Gays.com fears that many communications on its Web site 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 what they call the “gay lifestyle.”

117. Second, AZ Gays.com fears prosecution for the materials posted on its site that are sexually oriented and might be considered “harmful to minors.” For example, AZ Gays contains a message board that features some messages that may be considered “harmful to minors,” including messages describing the speaker’s preferred sexual activities.

118. AZGays.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 transgendered 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 does not intend to self-censor any of its content and, as a result, fears prosecution under the Act.

Changing Hands Bookstore

119. Changing Hands Bookstore operates a bookstore in Tempe, Arizona. The bookstore has been in its present 13,000 square foot location for the last two and a half years, but was located in downtown Tempe, AZ 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 an erotica section, a sexuality section and carries gay and lesbian fiction and non-fiction titles.
120. Changing Hands Bookstore currently sends out a newsletter via email to between 1,500 and 2,000 customers each day advertising new titles at the bookstore and listing events at the bookstore. Some of the titles that are advertised in those newsletters may include content that might be considered "harmful to minors" in Arizona.
121. Changing Hands Bookstore plans to open an online bookstore which will be available on the Internet on or before September 10, 2000. The online bookstore will contain a catalog from which a Web user can order whatever title it likes. This catalog will include erotica, gay and lesbian fiction and non-fiction, photography collections and other titles that may have sexual explicit or otherwise adult material that may be considered "harmful to minors" in Arizona.
122. In addition, Changing Hands Bookstore will include a list of books recommended

by Changing Hands Bookstore staff members. Some of the recommended books may have sexual content that may be considered “harmful to minors” in Arizona.

123. Changing Hands Bookstore fears prosecution under the Act for its newsletter that is distributed via email. The Act makes it unlawful to “advertise....an item that is harmful to minors,” and Changing Hands bookstore is afraid that it will face criminal prosecution for advertising in its newsletter a book with sexually-explicit or otherwise adult content.

124. Changing Hand Bookstore also fears prosecution under the Act for its Web site to be launched on or before September 10, 2000. Changing Hands Bookstore believes that the Web presents a new economic opportunity for the bookstore and does not plan to self-censor the content of its Web site. Therefore, Changing Hands Bookstore fears prosecution under the Act once its Web site is established.

Dr. Marty Klein

125. 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 almost 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.

126. 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*.

127. 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 also 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>.

128. Dr. Klein has maintained his Web site, located at: www.Sexed.org, for approximately three years and uses the site as 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. Specifically, Dr. Klein's Web site include a question and answer column in which Dr. Klein answers questions about

masturbation, oral sex, anal sex, cross-dressing and female orgasm.

129. While Dr. Klein believes that the information on his Web site 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 the resources on his Web site. Dr. Klein understands that the Act makes it a crime to “recklessly transmit” 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."

130. If the 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 his Web site.

PEN American Center (“PEN”)

131. The PEN American Center 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. The PEN American Center, which draws its name from its membership of Poets, Playwrights, Essayists, Editors, and Novelists, has 2,700 members.

132. In addition to its program and membership activities, PEN maintains a Web 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 its Web site 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* (later 2000) or a forthcoming event on the history of Violence in Art (late 2000). Any of these promotional announcements on the PEN Web site are likely to include descriptive content.

133. In addition to its own Web 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 the PEN. Some of this material might contain depictions of nudity or sexual conduct, as in the descriptions of censored art such as 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 work includes 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 Web 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.

134. If the Act is not enjoined, PEN 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.

PSINet, Inc.

135. Plaintiff PSINet is a commercial Internet service provider and currently operates one of the world's largest and most advanced global Internet Protocol ("IP") data communications networks. Headquartered in Ashburn, Virginia, with more than 900 points of presence ("POPs") around the world, PSINet delivers a wide variety of Internet-related functions to over 100,000 business accounts on five continents, including dedicated, dial-up, wireless, and digital subscriber line access to the Internet, hosting of Web sites, e-mail and other managed applications, and electronic commerce solutions.

136. PSINet's clients include a broad variety of businesses, from Fortune 500 companies to sole proprietorships, as well as government agencies, non-profit

organizations, and educational institutions. PSINet also provides wholesale and private label Internet access services to telecommunications carriers and other Internet service providers for resale to their own customers, including both business and individual (“residential” or “consumer”) customers. Through these telecommunications carriers and ISPs, as well as its own subsidiaries, PSINet serves millions of consumer accounts (in addition to its business accounts) worldwide.

137. PSINet fears that it could be alleged to “offer” or “transmit” materials that are “harmful to minors” within the meaning of the Act, primarily through the activities of its customers as both content providers and as “users” of content provided by others over the Internet.

138. A major component of PSINet’s business is to provide Web hosting services to thousands of companies in the United States and around the world. PSINet’s Web servers are located throughout the globe, including its major hosting centers in Herndon, Virginia; New York City; Los Angeles, California; Atlanta, Georgia; Toronto, Ontario; London, England; Geneva, Switzerland; Amsterdam, the Netherlands; and Tokyo, Japan. Any one of PSINet’s Web hosting customers could, at any time, upload material allegedly “harmful to minors” to its account on one of PSINet’s Web servers, thereby making that material available to “transmit” over the global Internet.

139. Even assuming that PSINet could do so consistently with its customers’ legitimate expectations to post lawful content on PSINet’s Web servers, it would be impossible for

PSINet somehow to block access to all such content for Arizona residents, in order to prevent it from being accessed by an Arizona minor. Any such blocking attempts could cause severe disruptions to the functioning of the PSINet's global network, and the costs would likely be prohibitive.

140. Additionally, PSINet fears that it could be alleged to "transmit" materials that are "harmful to minors" within the meaning of the Act by providing e-mail and other application services that are used both by PSINet's direct customers and by the customers of those ISPs and telecommunications carriers who resell PSINet's Internet access services. The use of PSINet's network facilities to send an e-mail message, for example, that contains images or words allegedly "harmful to minors" could thus subject PSINet to prosecution under the Act. PSINet could also be alleged to fall within the prohibitions of the Act when those using PSINet's global network facilities – including juveniles in the households of its several million residential customers – access sexually explicit materials online.

141. If the Act is not enjoined, PSINet will be placed in a situation where it must choose between risking criminal prosecution, and pursuing its legitimate and socially beneficial business as a provider of Internet services.

Sexual Health Network

142. The Sexual Health Network 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 site is run by Dr. Mitchell Tepper, Managing Member, and 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.

143. The Sexual Health Network fears prosecution under the Act because its Web site, by its nature, necessarily contains explicit descriptions of sexual acts and practices. All information on the Web site is available to all users for free, including juveniles. The Web site 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. Specifically, the Sexual Health Network provides information about masturbation techniques for individuals who cannot move their arms and information about the pros and cons of sexual surrogates. In addition, the Web site formerly offered a "Chat Room," where individuals – including juveniles – are able to discuss issues relating to sexuality openly and frankly and Dr. Tepper plans to open the chat room again in the future. The Sexual Health Network did not attempt to monitor and will not attempt to monitor whether conversations in the chat room include material that could be deemed to be "harmful to minors."

144. Unless the Act is enjoined, the Sexual Health Network will be forced to choose between not offering information that might be alleged to be "harmful to minors" or

risking prosecution under the Act.

Jeff Walsh of Oasis Magazine

145. Plaintiff Jeff Walsh is the writer and editor of Oasis Magazine, a monthly online magazine for lesbian, gay, bisexual and questioning youth.

146. Oasis Magazine includes book reviews, news events, feature columns written by young gay, bisexual and questioning youth, a column called “Profiles in Courage” that tells the stories of particularly courageous individuals who have faced discrimination because of their sexual preference and a section devoted to the creative writings of Oasis Magazine readers.

147. Oasis Magazine fears that its content could be considered “harmful to minors” in some communities, because all of the communications discuss gay and lesbian issues, even though they contain no sexually explicit content. In particular, all of the content in Oasis Magazine 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, the August 2000 edition of Oasis Magazine has a Features section that includes columns written by youths, including Douglas, a 14 year old from Washington, and Bethany a self-described “17 year old lesbian from Washington.”

148. Oasis Magazine also fears prosecution for the materials posted on its site that are

sexually oriented and may be considered “harmful to minors.” For example *My Island with Kyle 2: Part 7* and *Untitled*, a story and a poem, respectively, from the August 2000 edition of Oasis Magazine both contain sexual content.

149. Oasis Magazine’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.

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

Web Del Sol

151. 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 and essays, fiction, and photography as well as links to real audio and real video Web sites. 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; 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 post a note about anything. Web Del Sol posts fiction, poetry, visual arts, essays, and links to real audio, real video, and other literary sites on its

Web site. While Web Del Sol believes that the content of its interactive fora and Web site is literary and artistic, it includes matters such as poems, articles, fiction, and photographs that refer explicitly to sex, sex organs, and sexual activity and which could be considered "harmful to minors" by some people. For example, a series of photographs entitled "*Au Dela Du Paraitre*" by Jean Vallette display different portions of the female anatomy in black and white, and stories like "Lentils in Paradise" by Moris Farhi and "Wrong Husband" by Flaminia Ocampon describe sexual conduct. 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 Act or attempt to remove material which possibly could violate the Act from its Web site.

Wildcat Press

152. Wildcat Press is a Web site dedicated to promoting the works of Patricia Nell Warren. Ms. Warren is a former *Reader's Digest* editor and the author of seven 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.

153. Wildcat Press fears prosecution under the act because some of the information contained on the Web site may be considered "harmful to minors". First, some of the

material in Wildcat Press' publications, all of which are sold on Wildcat Press' Web site, is material that may be deemed "harmful to minors." In addition, Wildcat Press' Web site contains editorials and excerpts of Ms. Warren's books. The content of these editorials may be considered "harmful to minors" in some communities.

154. More specifically, the content of the book excerpts and articles on Wildcat Press' Web site generally deal with gay and lesbian issues, as well as youth and AIDS issues. In Wildcat Press' 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' 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.

155. Also, some of the excerpts and articles on Wildcat Press such as "Looking for Mr. Goodbar . . . Gay Style," frankly discuss gay and lesbian sex. Other articles, such as "Screaming Headlines" and "Long Shadows of Prison Walls," frankly discuss AIDS and youth issues like teen sexuality and prison rape. Further, 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' experience, many people would find any discussion of young people exploring their homosexuality to be "harmful to minors."

156. Because Wildcat Press believes that the speech provided on its Web site is

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

157. If the Act is not enjoined, Wildcat Press would be forced either to risk criminal prosecution for providing constitutionally-protected expression on its Web site, or to remove all of the art and literature on the site that contains nudity or sexual content and to stop selling books online.

American Booksellers Foundation for Free Expression ("ABFFE")

158. 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 current 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 Web pages that discuss the contents of books sold in stores.

159. 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 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 Act.

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

160. 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.

161. Many of AAP's members have Web pages and provide information to the world on 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 Act will spawn

similar efforts directed at AAP's online publishing. If the 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")

162. Plaintiff FTRF and its library members serve as both access and content providers on 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 also have their own Web sites on the Internet and use the Internet to post card catalogues, post information about current events, sponsor chat rooms, provide textual information or art, or post online versions of materials from their library collections. Patrons can, for example, access the Web site of certain libraries from anywhere in the country to peruse the libraries' card catalogues, review an encyclopedia reference, or check a definition in the dictionary.

163. 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.

164. If the Act is not enjoined, libraries would be inhibited from both posting and providing access to materials on the Internet that contain nudity or sexual conduct. 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 post 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 posting material that might be illegal in Arizona.

Magazine Publishers of America (“MPA”)

165. Members of MPA actively publish a substantial volume of content on the Internet and utilize the Internet in a variety of ways, including solicitation via Web sites of subscriptions for their publications, 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 Act is not enjoined, MPA members would be forced to self-censor or risk prosecution under the Act.

The National Association of Recording Merchandisers (“NARM”)

166. Some of 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 Act simply for misjudging what may be deemed “harmful to minors” under an ambiguous standard.

Periodical and Book Association of America (“PBAA”)

167. 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.

168. Some PBAA members are concerned that the Act will require them to censor the online version of their print editions. For this reason, PBAA believes that the 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.

169. If the 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”)

170. 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

171. Some PMA members are concerned that the Act will require them to censor the online version of their print editions. For this reason, PMA believes that the 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.

172. If the 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")

173. Members of Plaintiff RIAA produce the vast majority of sound recordings in the United States, some of which include sexually frank lyrics. Some of these recordings (or portions thereof) are available to the public on the Internet.

174. RIAA members are concerned that the Act will require them to censor the online version of their recordings. For this reason, RIAA believes that the 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.

175. If the 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.

Video Software Dealers Association (“VSDA”)

176. The members of VSDA are small, independently-owned video retailers, as well as large video chains and home video divisions of all the major and independent motion picture studios. VSDA members advertise and offer for rent or sale on the Internet, among others, video recordings containing nudity or sexual conduct.

177. If the Act is not enjoined, VSDA members doing business on the Internet would be forced to self-censor or risk prosecution under the Act.

CAUSES OF ACTION

COUNT I

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

178. Plaintiffs repeat and re-allege paragraphs 1-177.

179. The 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.

180. The Act violates the First and Fourteenth Amendments because it is not the least

restrictive means of accomplishing any compelling governmental purpose.

181. The 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

182. Plaintiffs repeat and re-allege paragraphs 1-181.

183. The 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 to them is protected by the First Amendment.

184. The 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

185. Plaintiffs repeat and re-allege paragraphs 1-184.

186. The 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

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

188. The Act is unconstitutionally vague, in violation of the First, Fifth, and Fourteenth Amendments. Among other flaws, the Act fails to distinguish between material that is “harmful” for older as opposed to younger minors, and the Act fails to define “any reasonable means” by which a recipient of content might notify a speaker of her age, thus subjecting the speaker to prosecution. Additionally, the “indicia” designed to ascertain whether the recipient is a minor are vague and ambiguous.

COUNT V

Violation of the Commerce Clause of the United States Constitution

189. Plaintiffs repeat and re-allege paragraphs 1-188.

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

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

192. The 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 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 that provision;
- 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: August 31, 2000

EXHIBIT A

AZ LEGIS 189 (2000)

2000 Ariz. Legis. Serv. Ch. 189 (H.B. 2428) (WEST)

ARIZONA 2000 LEGISLATIVE SERVICE
Second Regular Session of the Forty-Fourth Legislature

Additions are indicated by <<+ Text +>>; deletions by
<<- Text ->>. Changes in tables are made but not highlighted.

CHAPTER 189
H.B. 2428
COMPUTER CRIMES

AN ACT AMENDING SECTIONS 12-731, 12-741, 13-1801, 13-1802, 13-2001, 13-2002, 13-2003 AND 13-2301, ARIZONA REVISED STATUTES; TRANSFERRING AND RENUMBERING SECTION 13-2708, ARIZONA REVISED STATUTES, FOR PLACEMENT IN TITLE 13, CHAPTER 20, ARIZONA REVISED STATUTES, AS SECTION 13-2008; AMENDING SECTION 13-2008, ARIZONA REVISED STATUTES, AS TRANSFERRED AND RENUMBERED BY THIS ACT; AMENDING SECTION 13-2316, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 23, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 13-2316.01 AND 13- 2316.02; REPEALING SECTIONS 13-2912, 13-2913 AND 13-2914, ARIZONA REVISED STATUTES; RENUMBERING SECTION 13-3004, ARIZONA REVISED STATUTES, AS SECTION 13-3001; RENUMBERING SECTION 13-3001, ARIZONA REVISED STATUTES, AS SECTION 13-3004; AMENDING SECTION 13-3001, ARIZONA REVISED STATUTES, AS RENUMBERED BY THIS ACT; AMENDING SECTIONS 13-3008, 13-3010, 13-3011, 13-3012, 13-3013 AND 13-3016, ARIZONA REVISED STATUTES; RENUMBERING SECTION 13-3018, ARIZONA REVISED STATUTES, AS SECTION 13-3019; AMENDING TITLE 13, CHAPTER 30, ARIZONA REVISED STATUTES, BY ADDING A NEW SECTION 13-3018; AMENDING SECTION 13-3019, AS RENUMBERED BY THIS ACT; AMENDING SECTIONS 13-3417, 13-3506, 13-3551 AND 13-3553, ARIZONA REVISED STATUTES; REPEALING SECTION 13-3508, ARIZONA REVISED STATUTES; RENUMBERING SECTIONS 13-3554, 13-3555 AND 13-3556, ARIZONA REVISED STATUTES, AS SECTIONS 13-3555, 13-3556 AND 13-3558, RESPECTIVELY; AMENDING TITLE 13, CHAPTER 35.1, ARIZONA REVISED STATUTES, BY ADDING A NEW SECTION 13-3554; AMENDING TITLE 13, CHAPTER 35.1, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 13-3557 AND 13-3559; AMENDING SECTIONS 13-3707,

13-4801, 21-422, 31-281 AND 44-405, ARIZONA REVISED STATUTES; RELATING TO TECHNOLOGY CRIMES.

Be it enacted by the Legislature of the State of Arizona:

...

§ 13-3506. Obscene or harmful items; minors; classification

A. It is unlawful for any person, with knowledge of the character of the item involved, to recklessly <<+transmit, +>>furnish, present, provide, make available, give, lend, show, advertise<<+, offer+>> or distribute to minors any item <<-which->> <<+that +>>is harmful to minors.

<<+**B.** In an action for a violation of this section, proof of any of the following may give rise to an inference that the person knew or should have known that the recipient of an advertisement or offer was a minor:+>>

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

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

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

<<-**B.** ->><<+**C.**+>> A violation of <<-any provision of->> this section is a class 4 felony.

...

Approved by the Governor, April 7, 2000.

Filed in the Office of the Secretary of State, April 7, 2000.

AZ LEGIS 189 (2000)

END OF DOCUMENT

EXHIBIT B

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

Current through End of 1999 1st Regular Session and
the 2nd Special Session.

§ 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 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.