

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

American Civil Liberties Union, et al.,  
Plaintiff,  
v.  
Terry Goddard, Attorney General of the State of  
Arizona, et al.  
Defendants.

No. CIV 00-505 TUC ACM

**ORDER**

Pursuant to the Court's Order of April 23, 2004, the parties have filed proposed Findings of Fact and Conclusions of Law, Proposed Objections, Amendments, or additions to the Findings. The Court hereby makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. Plaintiffs represent a broad range of individuals and entities who are speakers, content providers, and access providers on the Internet. Plaintiffs include a licensed marriage and family therapist who communicates sexually-related information and education over the Internet, (Testimony of Dr. Marty Klein ("Dr. Klein"), December 7 Hearing Transcript ("Dec. 7 H'rg Tr.") at 4-10), and the executive director of an artistic website that communicates artistic and sexually themed adult speech over the Internet. (Testimony of Michael Neff ("Neff"), December 6 Hearing Transcript ("Dec. 6 H'rg Tr.") at 58-60.)

2. Plaintiffs communicate over the Internet in a variety of ways, including electronic mail ("e-mail"), chat rooms, mailing lists (or "listservs") USENET newsgroups, and the World Wide Web (the "Web"). (E.g., Testimony of Dr. Klein, Dec. 7 H'rg Tr. at 9-11, 16; Testimony of Neff,

H'rg Tr. at 59, 62, 70, 75-78; Hearing Exhibit ("H'rg Ex.") 56 at ¶¶ 5,6,9,13,16; H'rg Ex. 57 at ¶¶ 2,10,13-15, 21; H'rg Ex. 58 at ¶¶ 8,11,13,15; H'rg Ex. 61 at ¶ 8; H'rg Ex. 62 at ¶10; H'rg Ex. 64 at ¶6.)

3. Some of the speech that Plaintiffs communicate over the Internet is sexually explicit. (E.g., Testimony of Dr. Klein, Dec. 7 H'rg Tr. at 8-9, 11-14, 18-21; Testimony of Neff, Dec. 6 H'rg Tr. at 62-67, 69, 74, 75-79; H'rg Exs. 3-9, 11, 24-28, 29-31, 45.)

4. Some materials may be considered "harmful" to younger minors but not to older minors. (Testimony of Gail Thackery ("Thackery"), Dec. 6 H'rg Tr. at 188.)

5. Plaintiffs communicate speech over the Internet that in some contexts could be considered "harmful to minors" in Arizona. (See Testimony of Thomas Kulesa ("Kulesa"), Dec. 6 H'rg Tr. at 127:6-128:14 (referring to Pls. Ex. 49); *Id.* at 128:15-129:1 (referring to Pls. Ex. 50); *Id.* at 129:2-130:11 (referring to Pls. Ex. 24); Testimony of James Mills ("Mills"), Dec. 6 H'rg Tr. 142:9-24 (referring to Pls. Ex. 51); *Id.* at 142:25-143:8 (referring to Pls. Ex. 52); Testimony of Thackery at 187:10-188:19 (referring to Pls. Ex. 51); *Id.* at 188:20-189:18 (referring to Pls. Ex. 50); *Id.* 194:4-195:17 (referring to Def. Ex. 22).

6. The speech that Plaintiffs communicate over the Internet is available to minors, as well as adults. (Testimony of Dr. Klein, Dec. 7 H'rg Tr. at 11, 14, 22; H'rg Exs. 24, 27; Testimony of Neff, Dec. 6 H'rg Tr. at 77, 81, 85; H'rg Ex. 58 at ¶¶ 22.29-31.)

7. Plaintiff Dr. Klein is reasonably concerned that people might conclude that the sexual health information that he communicates over the Internet could desensitize minors to sexual issues. (Testimony of Dr. Klein, Dec. 7 H'rg Tr. at 24.)

8. Plaintiffs reasonably believe that they could be prosecuted under the Act for some of the speech that they communicate over the Internet. (Testimony of Dr. Klein, Dec. 7 H'rg Tr. at 22; Testimony of Neff, Dec. 6 H'rg Tr. at 79, 82, 86; Pls Ex. 56 at ¶¶17-23; Pls. Ex. 57 at ¶¶ 41-44; Pls. Ex. 58 at ¶¶ 22-28.)

9. In order to avoid possible prosecution under the Act, Plaintiffs would have to stop communicating speech over the Internet that could potentially be covered under the Act. (Testimony of Dr. Klein, Dec. 7 H'rg Tr. at 24; Testimony of Neff, Dec. 6 H'rg Tr. at 88-89.)

10. Plaintiffs do not challenge the Act's application to obscenity, child pornography, speech used to entice or lure minors into inappropriate activity or harassing speech. Plaintiffs do not challenge the state's general harmful to minors regulation, A.R.S. § 13-3506.

## **II. THE PROCEDURAL HISTORY OF THE ACT**

11. In 1970, the Arizona Legislature enacted A.R.S. § 13-3506. The law was amended several times over the years (see historical notes to A.R.S. §13-3506), and as of 1999, the law provided:

### § 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 furnish, present, provide, make available, give, lend, show, advertise or distribute to minors any item which is harmful to minors.

B. A violation of any provision of this section is a class 4 felony.

12. In 2000, the Arizona Legislature amended A.R.S. § 13-3506 so that it could be more readily applied to cases involving material transmitted or offered to minors over the Internet. 2000 Ariz. Sess. Laws Ch. 189, §25. The law, with the year 2000 changes, provided:

### § 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 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.

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

13. In 2001 the Arizona Legislature amended A.R.S. §13-3506 in response to Plaintiff's lawsuit. On April 11, 2001, Governor Jane Hull signed into law revised A.R.S. § 13-3506 which provided in relevant part:

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

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

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

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

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

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

3. The recipient's electronic mail or web page

contains indicia that the address or domain name is the property of, or that the visual depiction ultimately will be stored at, a school as defined in section 13-609.

A.R.S. § 13-3506.01. A violation of the Act was 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. Id.

14. On June 14, 2002, this Court issued Findings of Fact and Conclusions of Law and Order ("June 14, 2002 Order"). In the Order, this Court concluded that the Act violated the First and Fourteenth Amendments of the United States Constitution because the Act effectively banned speech that is constitutionally protected for adults (June 14, 2002 Order at ¶ 59). This Court further held that the Act was substantially overbroad by subjecting a variety of speech to criminal prosecution (Id. at ¶61). In addition, this Court determined that the Act's definition of the term "Internet web site" was unconstitutionally vague (Id. at ¶ 63). Finally, this Court also concluded that Section B of the Act violated the Commerce Clause by regulating conduct occurring wholly outside the State of Arizona (id. at ¶ 64). On August 16, 2002, this Court permanently enjoined Defendants from enforcing A.R.S. § 13-3506.01.

15. On September 13, 2002, Defendants filed a notice of appeal. However, the Parties jointly requested that the appeal be dismissed and the case remanded to the district court for further proceedings in light of an intervening amendment to A.R.S. § 13-3506.01 described below.

16. On May 14, 2003, Governor Janet Napolitano signed into law S.B. 1352 entitled "Children and Family Offenses", amending A.R.S. § 13-3506.01. The Revised Act, currently before the Court, provides in relevant part:

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

B. This Section does not apply to:

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

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

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

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

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

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

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

A.R.S. § 13-3506.01. Violation of the Revised Act is punishable by imprisonment for a mitigated minimum of 1 year up to an aggravated maximum of 3.75 years and a fine of up to \$150,000. (Id. See, also, A.R.S. §§ 13-702.01 (A)-(B); A.R.S. §13-801(A).)

### **III. THE INTERNET**

#### **A. The Nature of the Online Medium.**

17. The factual basis of the United States Supreme Court's decision, *Reno v. ACLU* ("ACLU I"), 521 U.S. 844 (1997), which struck down the Communications Decency Act, 47 U.S.C. §223(a,d), as unconstitutional, is still accurate today. (Testimony of Dr. Joel Snyder ("Dr. Snyder"), Dec. 6 H'rg Tr. at 17.) The relevant Internet and online technology have not changed materially since *ACLU I*. (Id.)

18. The Internet is a decentralized, global communications medium that links people, institutions, corporations and governments around the world. (Proposed Joint Pretrial Order, Uncontested Facts and Stipulation ("Joint Stipulation") at ¶ 6.)

19. Because the Internet presents extremely low entry barriers to publishers and distributors of information, it is an attractive method of communicating for non-profit and public interest groups. (Joint Stipulation at ¶ 7.)

20. Internet technology gives a speaker a potential worldwide audience. (Joint Stipulation at ¶ 9.)

21. Once a provider posts content on the Internet, it is available to other Internet users of all ages worldwide. (Joint Stipulation at ¶ 10.)

**B. Methods of Communicating And Exchanging Information On The Internet.**

22. There are wide variety of methods for communicating and exchanging information with other users on the Internet, including e-mail, online discussion groups, and the Web. (Joint Stipulation at ¶ 16; Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 18.)

**1. E-mail**

23. E-mail is a way of sending messages electronically from one individual to another individual or group of addresses over the Internet. (Joint Stipulation at ¶ 17; Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 18.)

24. An e-mail address consists of a mailbox and a domain name, which is the name of the server where the mail will be delivered. For example, in the e-mail address "jms@opus1.com," "jms" is the mailbox name, and "opus1.com" is the domain name. (Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 19.)

25. An e-mail address generally reveals nothing about the identity or personal characteristics of the owner. (Id. at 19-20.)

26. It is common for individuals using the Internet to use aliases or pseudonyms that do not reveal their true identity. (Id. at 19.)

27. Individuals may choose not to reveal their identities in their e-mail addresses for a variety of reasons. For example, many people are very concerned about privacy on the Internet. (Id. at 20.)

28. A large percentage of Internet users would refuse to reveal their identity on the Internet, even if requested to do so in an e-mail sent by another Internet user. (Id. at 20.)

29. There are no reasonable technological means that enable individuals to ascertain the actual age of persons who will access their e-mail communications. (Id. at 22.)

30. There are no reasonable technological means that enable individuals to ascertain the geographical location of persons who will access their e-mail communications. (Id. at 32.)

## **2. Mailing Lists**

31. "A mailing list or listserv is a method of internet communication where a message is sent to an internet address and then is retransmitted to one or more subscribers to the mailing list or listserv." A.R.S. 13-3506.01(B)(2).

32. An indefinite number of people may receive a single message sent to a mailing list. For example, certain mailing lists used by commercial airlines have hundreds of thousands of recipients. (Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 25.)

33. When individuals send an e-mail, they cannot ascertain whether the message will go to a single person or to a mailing list. (Id. at 25-26.)

34. When individuals send an e-mail to a mailing list, they cannot send the message to some people on the list but not to others. (Id. at 26.)

35. There are no reasonable technological means that enable individuals to ascertain the actual age of persons who will access communications that are retransmitted to many different recipients through a mailing list. (Id. at 26.)

36. There are no reasonable technological means that enable individuals to ascertain the geographical location of persons who will access communications that are retransmitted to many different recipients through a mailing list. (Id. at 34.)

## **3. USENET New Groups**

37. USENET news groups are an online forum where people can communicate messages that may be read by anyone in the world who has the software to connect to the newsgroup. (Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 27.)



38. To send a message to a news group, an individual, using the appropriate software, would write the message and identify the news group that he or she wanted to communicate the message to; the message then would be flooded throughout the Internet to any server that accessed that news group. (Id.)

39. There are thousands of different news groups that cover a wide range of topics. (Id.)

40. There are no reasonable technological means than enable individuals to know who will read a message that is communicated through a news group. (Id.)

41. There are no reasonable technological means that enable individuals to allow news group messages to be read only by adults and not by minors. (Id. at 28.)

42. There are no reasonable technological means that enable individuals to ascertain the geographical location of persons who will access messages that are communicated through a news group. (Id. at 34.)

#### **4. Chat Rooms**

43. A chat room is an online forum where individuals can type messages and all other participants in the chat room immediately view the message. (Testimony of Dr. Snyder, Dec.6 H'rg Tr. at 29.)

44. To join a chat room, an individual would use a chat software program. (Id. at 30.)

45. A very large number of individuals can participate in a single chat room at any given time. For example, chat rooms sometimes have tens of thousands of participants at one time. (Id. at 29.)

46. Chat rooms cover a wide variety of topics. (Id.)

47. An individual would not usually reveal his or her identity or age before entering a chat room. (Id. at 30.)

48. There are no reasonable technological means that enable individuals to know the identity or age of other individuals in the chat room. (Id. at 30-31.)

49. There are no reasonable technological means that enable individuals to send chat messages to only adults but not minors participating in the chat room. (Id. at 31.)

50. There are no reasonable technological means that enable individuals to know in advance which chat rooms would be inappropriate for minors. (Id.)

51. There are no reasonable technological means that enable individuals to ascertain the geographical location of persons who will access messages that are communicated through a chat room. (Id. at 34.)

## **5. The World Wide Web**

52. There is no single, commonly accepted definition for the term "World Wide Web." (Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 31-32.)

53. In general, the Web is a network of computers on the Internet that allows users to publish "Web pages" that can then be accessed by other users anywhere in the world. (Id. at 32; Joint Stipulation at ¶ 23.)

54. The Revised Act defines the term "internet web site" as "a location where material placed in a computer server-based file archive is publicly accessible, over the internet, using hypertext transfer protocol or any successor protocol." A.R.S. §13-3506.01 (D).

55. Any Internet user anywhere in the world with the proper software can create her own Web page (with the use of a host), view Web pages posted by others, and then read text, look at images and video, and listen to sounds posted at these sites. (Joint Stipulation at ¶24.)

### **C. Verifying The Age And Geographic Location of Internet Users.**

56. It is not possible through computer technology to verify the age (Joint Stipulation at ¶ 26) or geographic location (Id. at ¶37) of an Internet user.

#### **1. Age Verification**

57. It is impossible for Internet speakers to prevent their speech from reaching minors without also preventing it from reaching adults, regardless of the geographic location of the recipient. (Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 31.)

58. Internet speakers using e-mail, chat rooms, mailing lists, USENET news groups or the Web cannot verify the age of person(s) who receive or access their online material and

communications. (*Id.*; Testimony of Neff, Dec. 6 H'rg Tr. at 72, 77; Testimony of Dr. Klein, Dec. 7 H'rg Tr. at 10.)

59. When a person sends an e-mail, uses a listserv, posts a bulletin board message, or engages in other forms of Internet communication, it is generally impossible for the sender to know the age or geographic location of any recipient, unless a sender is specifically informed of the recipients's age or geographic location by the recipient or another. (See RT 12/6/01 at 48-50, 90-91, 94-95.)

## **2. Geographic Verification**

60. The Internet is insensitive to geographic distinctions, and information flows freely across state borders on the Internet. (Joint Stipulation at ¶¶ 34, 38.)

61. Because the Internet is a redundant series of linked computers over which information often travels randomly, a message from an Internet user sitting at a computer in New York may travel via one or more other states—including Arizona—before reaching a recipient who is also sitting at a computer in New York. (*Id.* at ¶42.)

62. There are no reasonable technological means that enable an Internet speaker to prevent her speech from reaching listeners in Arizona, without preventing it from reaching listeners everywhere else. (Testimony of Dr. Snyder, Dec. 6 H'rg Tr. at 34.)

63. It is not usually possible to use a domain name in an e-mail address to determine the geographic location of the owner of an e-mail address. (*Id.* at 21-22.) For example, even an expert on the technology and functioning of the Internet, using software designed to trace the location of an Internet server (i.e., trace route software), cannot determine the location or identity of an Internet user through the user's domain name. (*Id.* at 36-44; H'rg Ex. 48.)

64. Even if it were possible to determine the location of an Internet server using software designed to trace the location of an Internet server (which it is not), that information would not reveal the identity, location or age of the owner of an e-mail address. (*Id.* at 32, 45.)

## **IV. THE REVISED ACT COVERS A RANGE OF INTERNET COMMUNICATIONS**

65. The Revised Act does not define the term "direct internet communication." A.R.S. §13-3506.01(A).

66. There is no single, commonly accepted definition for the term "direct internet communication."

67. The term "direct internet communication" covers a range of communications, including multiple-recipient communications.

68. The Revised Act applies to e-mail, instant messages, chat room communications, communications from hosts of chat rooms who transmit or send chat room communications, and communications from mailing list administrators who transmit or send communications via their own mailing list. A.R.S. § 13-3506.01(A),(B)(2).

69. A.R.S. § 13-3506.01(A) criminalizes both transmitting and sending communications that are harmful to minors. A.R.S. § 13-3506.01(B)(2) only exempts "sending" harmful communications via a mailing list. The Revised Act applies to speakers who "transmit" communications via a mailing list.

70. A.R.S. § 13-3506.01(A) criminalizes both transmitting and sending communications that are harmful to minors. A.R.S. § 13-3506.01(B)(1) only exempts "posting" material on an Internet web site. The Revised Act applies to speakers who "send" or "transmit" harmful material via an Internet web site.

71. A.R.S. § 13-3506.01(B)(1) exempts posting material on an Internet web site. § 13-3506.01(D) defines the term "internet web site" as "a location where material placed in a computer server-based file archive is publicly accessible, over the internet, using hypertext transfer protocol or any successor protocol." The Revised Act applies to Web pages posted, transmitted or sent via closed systems or via systems that do not use hypertext transfer protocol (or any successor protocol). A.R.S. § 13-3506.01(B)(1),(D).

72. Communications on America Online are covered by the Revised Act because they are not posted, transmitted or sent using hypertext transfer protocol or any successor protocol. A.R.S. § 13-3506.01(B)(1),(D).

73. Communications on America Online are covered by the Revised Act because they are not publicly accessible. A.R.S. § 13-3506.01(B)(1),(D).

V. **THE REVISED ACT IS INEFFECTIVE, AND THERE ARE EQUALLY OR MORE EFFECTIVE ALTERNATIVES**

74. Much of the material communicated on the Internet that may be considered "harmful to minors" comes from outside the United States. (Testimony of Thackery, Dec. 6 H'rg Tr. at 185.)

75. Much of the material communicated on the Internet that may be considered "harmful to minors" comes from the Web.

76. User installed software would be more effective than the Revised Act in achieving Arizona's legitimate interest of restricting access by minors to indecent communications.

**CONCLUSIONS OF LAW**

77. The Revised Act on its face and as applied to Plaintiffs violates the First and Fourteenth Amendments, and the Commerce Clause of the United States Constitution. See, e.g., ACLU I, aff'g 929 F. Supp. 824 (E.D. Pa. 1996) (holding federal Communications Decency Act ("CDA") unconstitutional); PSINET, Inc. v. Chapman, 362 F.3d 227 (4<sup>th</sup> Cir. 2004) aff'g 167 F. Supp.2d 878 (W.D. Va. 2001) (holding Virginia Internet harmful-to-minors statute unconstitutional); Am. Booksellers Found. v. Dean, 342 F.2d 96 (2d Cir. 2003) aff'g in part and modifying in part 202 F.Supp. 2d 300 (D. Vt. 2002) (holding Vermont Internet harmful-to-minors statute unconstitutional); Cyberspace Communications, Inc. v. Engler, 238 F.3d 420 (6<sup>th</sup> Cir. 2000) aff'g per curiam 55 F. Supp.2d 737 (E.D. Mich. 1999) (holding Michigan Internet harmful-to-minors statute unconstitutional); Am. Civil Liberties Union v. Johnson, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999), aff'g 4 F.Supp. 2d 1029 (D.N.M. 1999) (holding New Mexico Internet harmful-to-minors statute unconstitutional); Am. Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997) (holding New York Internet harmful-to-minors statute unconstitutional).

78. The Revised Act applies to the transmission or sending by means of electronic mail, personal messaging or any other direct internet communication of an item that is "harmful to minors" as that term is defined in A.R.S. § 13-3501(1).

79. As a content-based restriction on speech, the Revised Act is subject to a strict scrutiny standard of review which requires that government regulations of protected speech be stricken unless the government proves that the Revised Act will materially advance a compelling governmental interest and that the means chosen are the least restrictive means serving this stated interest. ACLU I, 521 U.S. at 870-72, 879. See also PSINet, 362 F.3d at 233; Johnson, 194 F.3d at 1156.

80. The Revised Act violates the First and Fourteenth Amendments of the United States Constitution because it effectively bans speech that is constitutionally protected for adults. See ACLU I, 521 U.S. at 874 (holding that the CDA "effectively suppresses a large amount of speech that adults have a constitutional right to receive" in order to deny minors access to potentially harmful speech). See also PSINet, 362 F.3d at 239; Dean, 342 F.2d at 102; Johnson, 194 F.3d at 1160.

81. The Revised Act is substantially overbroad by subjecting a variety of protected speech to potential prosecution. See ACLU I, 521 U.S. at 876-80. See also PSINet, 362 F.3d at 234; Johnson, 194 F.3d at 1160.

82. The Revised Act does not impose a requirement that senders of harmful to minor communications have actual knowledge that a recipient is a minor. The only knowledge requirement that A.R.S. §13-3506.01 imposes is that the sender "knows or believes" that a minor will receive a "harmful to minors" communication. See A.R.S. §13-3506.01(A); A.R.S. § 13-3501(3).

83. Thus, A.R.S. §13-3506.01 has the same or weaker "knowledge" requirement as other Internet "harmful to minors" statutes that have been uniformly struck down as unconstitutional. As noted by the Supreme Court in ACLU I "[g]iven the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it." ACLU I, 521 U.S. at 876. See also Dean, 342 F.2d at 100; Johnson, 194 F.3d at 1159.

84. Internet speakers will therefore inevitably limit the range of their speech in order to avoid prosecution by the State of Arizona.

85. In addition, the Revised Act does not impose a requirement that senders of harmful to minors communications have actual knowledge that a recipient is located in Arizona. The only knowledge requirement that A.R.S. § 13-3506.01 imposes is that a sender "knows or believes" that a minor located in Arizona will receive a "harmful to minors" communication. See A.R.S. § 13-3506.01(A); A.R.S. § 13-3501(3).

86. In the absence of a viable location verification process, a sender must be charged with knowing or believing that one or more minors in Arizona will likely receive the communication.

87. Internet speakers will therefore inevitably limit the range of their speech in order to avoid prosecution by the State of Arizona.

88. The Court may narrowly construe a statute only if the statute is readily susceptible to the limitation. PSINet, 362 F.3d at 236; Johnson, 194 F.3d at 1159. The Court should not rewrite a state law to conform it to constitutional requirements. PSINet, 362 F.3d at 236; Johnson, 194 F.3d at 1159. The Revised Act cannot be saved by narrowing constructions. See also ACLU, 521 U.S. at 884-85; Johnson, 194 F.3d at 1159.

89. The Revised Act is not susceptible to Defendants' proposed narrowing construction that would limit criminalized speech to communications where the sender has control over the recipients. The statute does not use these limiting words, nor are the words that are used in the statute susceptible to such a limiting construction. Id.

90. Nor is the Revised Act susceptible to Defendants' proposed narrowing interpretation that the Revised Act only covers communication that "directly targets" minors for purposes of sending speech that is harmful to minors. The Revised Act does not contain those terms, and to incorporate them would require this Court to rewrite the Revised Act. Id.

91. The Revised Act also violates the First and Fourteenth Amendments of the United States Constitution because it is unconstitutionally vague.

92. The Revised Act fails to define the operative and open-ended term "direct internet communication."

93. Furthermore, the Revised Act criminalizes sending or transmitting harmful materials to minors while failing to define the exempted act of "posting" such communication on an Internet web site, bulletin board or new group. A.R.S. § 13-3506.01(A)-(B).

94. In addition to violating the First and Fourteenth Amendment, the Revised Act also violates the Commerce Clause of the United States Constitution.

95. There are currently no reasonable technological means to enable an Internet speaker to prevent her speech from reaching listeners in Arizona, without preventing it from reaching listeners everywhere else.

96. There are currently no reasonable technological means to enable an Internet speaker to know if her speech will be received by someone in Arizona.

97. Speakers on the Internet must comply with Arizona law even if they themselves are located outside of Arizona.

98. The Revised Act represents an attempt to regulate interstate conduct occurring outside Arizona's borders, and is accordingly a violation of the Commerce Clause. Johnson, 194 F.3d at 1161 (finding that "the nature of the Internet forecloses the argument that a statute such as [the New Mexico statute] applies only to intrastate communications").

99. The Revised Act subjects speakers on the Internet to haphazard, uncoordinated, and inconsistent regulation by a state that speakers never intended to reach and possibly were unaware were being accessed. PSINet, 362 F.3d at 240, quoting Pataki, 969 F. Supp. at 168. See also Dean, 342 F.2d at 104; Johnson, 194 F.3d at 1162.

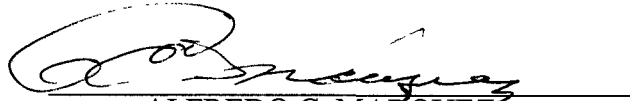
100. Defendant's interpretation of the Revised Act renders it so narrow in scope that actual benefits conferred are extremely limited. PSINet, 362 F.3d at 240 (finding that "[i]f the Commonwealth is capable of limiting its Internet regulation as not to directly offend the Commerce Clause, then it will have no local benefit given the vast number of other communication options available to a juvenile seeking them"). See also Johnson, 194 F.3d at 1162.

101. The Revised Act's burdens on free speech are excessive when compared to the extremely limited local benefits achieved. PSINet, 362 F.3d at 240; Johnson, 194 F.3d at 1162.



**IT IS FURTHER ORDERED** that Counsel for the Plaintiffs shall file a proposed judgment for the Court's signature. Defendants shall have 10 days to file any objections to the proposed judgment.

Dated this 15 day of July, 2004.

  
ALFREDO C. MARQUEZ  
Senior U.S. District Judge