

**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

Plaintiffs challenge Arizona Revised Statutes ("A.R.S.") §13-3506.01 (2003)(the "Revised Act"), which imposes severe restrictions on the dissemination of constitutionally-protected speech on the Internet by making it a crime to "intentionally or knowingly transmit or send" by means of "electronic mail, personal messaging or any other direct [I]nternet communication" any "item" that is "harmful to minors," as that term is defined in A.R.S. §13-3501(1).

Plaintiffs contend that the Revised Act is unconstitutional because it effectively bans constitutionally-protected speech, it is not the least restrictive means of accomplishing a compelling governmental purpose and it is substantially over-broad. The Plaintiffs further contend that the Revised Act violates the First, Fifth, and Fourteenth Amendments because it interferes with the rights of minors to access and view material that for them is protected, it violates the right to communicate and access material anonymously, and it is unconstitutionally vague. In addition, Plaintiffs assert the Revised Act unreasonably and unduly burdens interstate and foreign commerce in violation of the Commerce Clause.

In 1970, the Arizona Legislature enacted Ariz. Rev. Stat. §13-3506 to protect minors from material that is harmful to minors. In 2000, the Act was amended to include material distributed over the Internet. The Legislature repealed the "2000" amendments in 2001 and enacted a replacement Internet censorship statute, A.R.S. §13-3506.01 (the "2001 Act"). When the 2001 Act was permanently enjoined on August 16, 2002, Defendants filed an appeal which they dismissed when the Legislature again amended the statute in May of 2003 ("Revised Act"). On October 6, 2003, Plaintiffs filed a Second Amended Complaint claiming that the Revised Act (2003) fails to cure the constitutional defects of the 2001 Act. The Court enjoined the Defendants from enforcing the Revised Act pending further notice from the Court (docket 177). The Parties filed briefs concerning the effects of the 2003 Amendments and a hearing was held on March 1, 2004.

The Court finds as follows:

It is the decision of the Court that Plaintiffs have met the conditions necessary for a permanent injunction and that the Motion for a Permanent Injunction should be granted.

It is ordered that Plaintiffs submit to the Court proposed findings of fact and conclusions of law within 30 days of the date of this order. Defendants shall, within 30 days thereafter, submit proposed objections, amendments, or additions to the findings as they may desire. (Rule 2.17, Rules of Practice of the United States District Court for the District of Arizona).

To aid counsel in preparation of the findings of fact and conclusions of law, the Court makes the following brief findings.

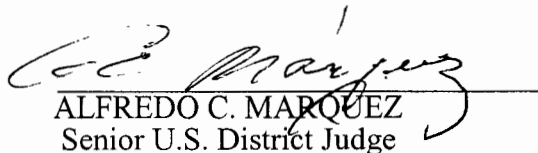
The Court finds that the Revised Act is unconstitutional because there are no reasonable technological means that enable a speaker to ascertain the actual age or location of persons who access their communications. Although the Act attempts to limit only those communications where the sender "knows or believes" that a minor in Arizona will receive them, "[g]iven the size of the potential audience for most messages,...the sender must be charged with knowing that one or more minors will likely view it." *Reno v. ACLU*, 521 U.S. 844, 876, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Consequently, Internet speakers will inevitably limit the range of their speech.

The Court further finds that the Revised Act is unconstitutionally vague because it fails to define terms such as "direct Internet communication" and because it fails to distinguish between "transmit" or "send" and the exempted act of "posting." In certain circumstances, the Court may narrowly construe a statute. The key to application of this principal is that the statute must be readily susceptible to the limitation: the Court should not rewrite a state law to conform it to constitutional requirements. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). Here, Defendants' assertion that "direct [I]nternet communications" are communications where the sender has control over recipients is untenable because the statute does not use these limiting words nor are the words used in the statute susceptible to such a limiting construction.

Additionally, the Act violates the Commerce Clause because there is no reasonable way for Internet speakers to know whether the information they "transmit or send" will be received by someone in Arizona. Therefore, Internet users must comply with Arizona law even if they themselves are located outside of Arizona.

Consequently, the burdens on free speech and on interstate commerce are excessive when compared to the local benefits because the Defendants' own interpretation of the Act renders it so narrow in scope that the actual benefit conferred is extremely small. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

Dated this 8 day of April, 2004.


ALFREDO C. MARQUEZ
Senior U.S. District Judge