

**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

American Civil Liberties Union, et al., )

Plaintiffs, )

v. )

Janet Napolitano, Attorney General of the State of )  
Arizona; et al. )

Defendants. )

CIV 00-505 TUC ACM

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND  
ORDER**

Pursuant to the Court's Order of February 21, 2002, 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. To the extent these Findings of Fact are also deemed to be Conclusions of Law, they are hereby incorporated into the Conclusions of Law that follow.

2. 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.)

3. Plaintiffs communicate over the Internet in a variety of ways, including electronic mail ("e-mail"), chat rooms, mailing lists (or "list servs"), 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, Hr’g Tr. at 59, 62, 70, 75-78; Hearing Exhibit (“Hr’g Ex.”) 56 at ¶¶ 5, 6, 9, 13, 16; Hr’g Ex. 57 at ¶¶ 2, 10, 13-15, 21; Hr’g Ex. 58 at ¶¶ 8, 11, 13, 15; Hr’g Ex. 61 at ¶ 8; Hr’g Ex. 62 at 10; Hr’g Ex. 64 at ¶ 6.)

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

5. Some material may be considered “harmful” to younger minors but not to older minors. (Testimony of Gail Thackery (“Thackery”), Dec. 6 Hr’g Tr. at 188.)

6. 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 Hr’g 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 Hr’g Tr. at 142:9-24 (referring to Pls. Ex. 51); *Id.* at 142:25-143:8 (referring to Pls. Ex. 52); Testimony of Thackeray at 187:10-188:19 (referring to Pls. Ex. 51); *Id.* 188:20-189:18 (referring to Pls. Ex. 50); *Id.* 194:4-195:17 (referring to Def. Ex. 22).

7. The speech that Plaintiffs communicate over the Internet is available to minors, as well as adults. (Testimony of Dr. Klein, Dec. 7 Hr’g Tr. at 11, 14, 22; Hr’g Exs. 24, 27; Testimony of Neff, Dec. 6 Hr’g Tr. at 77, 81, 85; Hr’g Ex. 58 at ¶¶ 22, 29-31.)

8. 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 Hr’g Tr. at 24.)

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

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

11. 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**

12. 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), but 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.

13. 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 again amended A.R.S. § 13-3506 in response to Plaintiffs' lawsuit. On April 11, 2001, Governor Jane Hull signed into law the Act, which 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 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 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.

### **III. THE INTERNET**

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

14. The factual basis of the United States Supreme Court's decision, Reno v. ACLU, 521 U.S. 844 (1977), 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 Hr'g Tr. at 17.) The relevant Internet and online technology have not changed materially since the Reno decision. (Id.)

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

16. 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.)

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

18. 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.**

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

**1. E-mail**

20. E-mail (one to one messaging) 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. Hr'g Tr. at 18.)

21. An e-mail address consists of a mail box 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 the "opus1.com" is the domain name. (Testimony of Dr. Snyder, Dec. 6 Hr'g Tr. at 19.)

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

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

24. Individuals may choose not to reveal their identifies 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.)

25. 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.)

26. Using existing Internet technology, it is not possible to verify the age of an individual before sending them an e-mail. (Id. at 22.)

## **2. Mailing Lists**

27. A mailing list, also called a list serv or mail exploder, is similar to an e-mail. A mailing list is a method of communicating over the Internet where an individual sends a message to one address, and that message is retransmitted to many different recipients. (Id. at 25.)

28. 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. (Id.)

29. When an individual sends an e-mail, they do not have any way of knowing for sure whether the message will go to a single person or to a mailing list. (Id.) When an individual sends an e-mail to a mailing list, they cannot send the message to some people on the list but not others. (Id. at 26.)

30. When an individual sends an e-mail to a mailing list, they have no way of sending that e-mail only to adults but not minors. (Id. at 26.)

## **3. USENET News Groups**

31. 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. (Id.)

32. To send a message to a news group, an individual, using the appropriate software, would write the message and identify the news groups 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. at 27.)

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

34. An individual has no way to know in advance who is going to read a message that is communicated through a news group. (Id.)

35. An individual has no way to allow a news group message to be read only by adults and not minors. (Id.)

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

36. A chat room is an online forum where individuals can type messages and all other participants in the chat room immediately view the message. (Id. at 29.)

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

38. A very large number of individuals can participate in a single chat room. For example, chat rooms sometimes have tens of thousands of participants at one time. Chat rooms cover a wide variety of topics. (Id.) An individual would not usually reveal his or her identity or age before entering a chat room. (Id. at 30.)

39. An individual participating in a chat room generally will not know the identify or ages of other individuals in the chat room. (Id. at 30-31.) There is no way to send a chat message to only adults but not minors participating in the chat room. (Id. at 31.) There is no way to know in advance which chat rooms would be inappropriate for minors. (Id.)

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

40. There is no single commonly accepted definition for the term World Wide Web. (Id. at 31-32.)

41. 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.)

42. Any Internet users 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.)

43. There is no single, well-accepted meaning for the term "Internet Web site." (Testimony of Dr. Snyder, Dec. 6 Hr'g Tr. at 32, 53.)

**C. Verifying The Age And Geographic Location Of Internet Users.**

44. 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**

45. It is impossible for Internet speakers to prevent their speech from reaching minors without also preventing it from reaching adults. (Testimony of Dr. Snyder, Dec. 6 Hr'g Tr. at 31.)

46. Internet speakers using e-mail, chat rooms, mailing lists, USENET newsgroups 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 Hr'g Tr. at 72, 77; Testimony of Dr. Klein, Dec. 7 Hr'g Tr. at 10.)

47. When a person sends an email, using 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 recipient'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**

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

49. 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.)

50. There is no way for an Internet speaker to prevent her speech from reaching listeners in Arizona, without preventing it from reaching listeners everywhere else. (Testimony of Dr. Snyder, Dec. 6 Hr'g Tr. at 34.)

51. 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; Hr'g Ex. 48.)

52. 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 ACT IS INEFFECTIVE, AND THERE ARE EQUALLY OR MORE EFFECTIVE ALTERNATIVES**

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

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

#### **CONCLUSIONS OF LAW**

55. The Act applies to the transmission via the Internet to minors of communications and materials that are "harmful to minors" as that term is defined in A.R.S. § 13-3501(1).

56. The Act does not impose a requirement that the disseminator of such a communication have actual knowledge that a recipient is a minor. The only knowledge requirement that A.R.S. § 13-3506.01 imposes is that the disseminator of a communication have "reason to know" that a minor will receive a "harmful to minors" communication. *See* A.R.S. § 13-3506.01(A); A.R.S. § 13-3506.01(B); A.R.S. § 13-3501(3).

57. 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. Moreover, even if A.R.S. § 13-3506.01 had the strictest possible scienter requirement, it would still be unconstitutional under *ACLU*, 521 U.S. at 880 (. . . most Internet for [a] - including chat rooms, newsgroups, mail exploders, and the Web - are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the 'specific person' requirement . . . cannot save the statute. It would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent

speech who might simply log on and inform the would-be discourse that his 17-year-old child . . . would be present.”)

58. The 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., Reno v. American Civil Liberties Union (“ACLU I”), 521 U.S. 844 (1997), aff’g 929 F. Supp. 824 (E.D. Pa. 1996) (holding federal Communications Decency Act (“CDA”) unconstitutional); ACLU 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); PSINet v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000) (holding Virginia Internet harmful-to-minors statute unconstitutional); American Libraries Ass’n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (holding New York Internet harmful-to-minors statute unconstitutional).

59. The 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.)

60. As a content-based restriction on speech, the 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 Act will materially advance a compelling governmental interest and that the means chosen are the least restrictive means of serving its stated interest. ACLU I, 521 U.S. at 870-72, 879.

61. The Act violates the First and Fourteenth Amendments of the United States Constitution because it is substantially overboard by subjecting a variety of protected speech to potential prosecution. See ACLU I, 521 U.S. At 876-80.

62. Defendants have failed to meet their burden to show that the defenses afforded under the Act are available to online speakers. See generally ACLU I, 521 U.S. 844; Pataki 969 F.Supp. 160.

63. The Act also violates the First and Fourteenth Amendments of the United States constitution because the Act's definition of the term "Internet web site" is unconstitutionally vague. Johnson, 194 F.3d 1149.

64. Section B of the Act violates the Commerce Clause of the United States Constitution because it regulates conduct occurring wholly outside the State of Arizona. See generally Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); Johnson, 194 F.3d at 1161; Pataki, 969 F.Supp. at 171 (concluding that purely intrastate communications over the Internet do not exist).

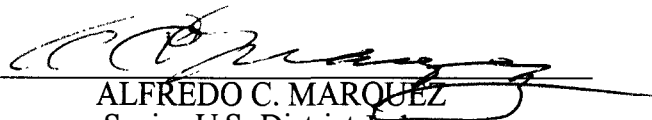
65. The Court may narrowly construe a statute only if the statute is readily susceptible to the limitation. Johnson, 194 F.3d at 1161. The Court should not rewrite a state law to conform it to constitutional requirements. Id. The Act cannot be saved by a narrowing construction. See ACLU I, 521 U.S. at 884-85; Johnson, 194 F.3d at 1159.

66. The Act is not susceptible to Defendants' proposed narrowing construction that would strike the "reason to know" language from the statute and narrowly construe the term "to a minor" so that it applies only where an adult sends an item exclusively to one or more minors. Defendants' proposed narrowing construction would further strike the language in the Act which reads "or should have known." The strike these terms would require this Court to rewrite the Act. Id.

67. Nor is the Act susceptible to Defendants proposed narrowing interpretation that the Act only covers "person-to-person," "one-on-one" "e-mail" and "chat communications" exclusively to a minor and not to any adults. The Act does not contain those terms, and to incorporate them would require this Court to rewrite the Act. Id.

**IT IS FURTHER ORDERED** 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 16 day of June, 2002.

  
ALFREDO C. MARQUEZ  
Senior U.S. District Judge