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**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 MERCHANTISERS; 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. \_\_\_\_\_

**AMENDED  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**PRELIMINARY STATEMENT**

1. In 1970, the Arizona Legislature enacted A.R.S. § 13-3506 to protect minors from harmful and obscene materials. In 2000, the Legislature enacted sweeping changes to the statute to include any material distributed over the Internet that any person may deem “harmful to minors” in Arizona (the "2000 Amendments"). The original Complaint in this actin challenged the 2000 Amendments’ unconstitutional restrictions on speech communicated over the Internet.

2. On April 11, 2001 defendant Governor Jane Hull signed into law H.B. 2289 entitled “Harmful items to minors; internet” (Laws 2001, Ch. 189, § 25), which amends A.R.S. § 13-3506 and adds a new section, § 13-3506.01. Section 13-3501.01 was further amended by H.B. 2223, signed into law by Governor Hull on May 4, 2001. The amendments to § 13-3506 effectively repeal the 2000 Amendments and provide that § 13-3506 does not apply to “the transmission or sending of items over the Internet.” § 13-3506(B).

3. While repealing the 2000 Amendments, however, H.B. 2289 and H.B. 2223 also enacted a replacement Internet censorship statute, § 13-3506.01 (the “Act”), that is unconstitutional for precisely the same reasons that the 2000 Amendments were unconstitutional. Exhibit A attached hereto is a copy of the Act. Exhibit B attached

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

4. The Act imposes severe restrictions on the availability, display and dissemination of constitutionally-protected speech on the Internet by making it a crime to “intentionally or knowingly transmit or send” any “item” that is “harmful to minors.” A.R.S. § 13-3506.01. 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 similar federal law on First Amendment grounds in *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff’d*, 217 F.3d 162 (3<sup>rd</sup> Cir. 2000), *cert. granted sub nom. Ashcroft v. ACLU*, No. 00-1293, 2001 U.S. LEXIS 3820 (U.S. May 21, 2001) (“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), *aff’d*, 238 F.3d 420 (6<sup>th</sup> Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999) (New Mexico); *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

5. The Act will take effect on August 9, 2001.

6. Under the Act, any nudity or sexual conduct can potentially be criminal if

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communicated on the Internet and accessible in Arizona, or sent from someone in Arizona to someone outside of Arizona, so long as it is found to be “harmful to minors” under the Act’s broad definition. Because all of the speech on the Internet is accessible in Arizona, regardless of the geographical location of the person who communicated it, the Act threatens Internet users nationwide and even worldwide. Indeed, the Act explicitly applies to speech communicated entirely outside of Arizona by a person in Arizona. § 13-3506.01(B). 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 and the Commerce Clause of the U.S. Constitution.

7. 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.

8. Because of the way the Internet works, the Act’s prohibition on “intentionally or knowingly transmit[ting]” or “send[ing]” 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 speakers on 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.

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

10. The speech at issue in this case does not include obscenity, child pornography,

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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. (See Laws 2000, Ch. 189, § 25.)

11. Plaintiffs represent a broad range of individuals and entities who are speakers, content providers and access providers on the Internet. Plaintiffs distribute and discuss content including resources on AIDS prevention and sexual health; visual art, literature, and poetry; and books and resources for gay and lesbian youth. The 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.

12. 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 receive messages he or she communicated in an online chat room or discussion group, or via an e-mail mailing list, or might download his or her content communicated on the Web (which is still covered at least in part by the Act). Consequently, the user must comply with Arizona law or face the threat of criminal prosecution. § 13-3506.01(A). Moreover, the Act

explicitly cover communications directed to persons entirely outside of Arizona. *See* § 13-3506.01(B).

### **JURISDICTION AND VENUE**

13. 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.

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

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

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

### **THE PARTIES**

17. 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>.

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

19. Plaintiff ART ON THE NET (“art.net”) is a not-for-profit international artist site at the Internet address <http://www.art.net>. Based in Menlo Park, California, art.net assists 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 communicates information about art events and artist shows. Some of the artistic work

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featured 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.

20. Plaintiff AZGAYS.COM is an Internet directory and online forum designed for the lesbian, gay, bisexual and transgendered community of the State of Arizona and for those outside of Arizona looking to visit or move here. 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 Internet services.

21. 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. Changing Hands Bookstores sends out an e-mail newsletter to 1,500 to 2,000 individuals that lists titles for sale in the bookstore.

22. Plaintiff MARTY KLEIN is a Licensed Marriage and Family Therapist in Palo Alto, California. In addition to his practice as a therapist working with individuals and couples, Dr. Klein is also the author of numerous books and articles about human sexuality. Dr. Klein distributes by e-mail a monthly newsletter regarding sexual health to those who have subscribed to his mailing list. In addition, he has maintained a Web site,

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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 Internet services.

23. 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.

24. 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

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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.

25. 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's degree in Public Health 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.

26. Plaintiff JEFF WALSH is a writer and editor of OASIS MAGAZINE, a monthly

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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 and Oasis Magazine use Oasis Magazine's e-mail feature to send and receive content for the magazine and comments on that content. Mr. Walsh resides in San Francisco, California.

27. Plaintiff WEB DEL SOL is a voluntary association which functions as a dynamic, literary arts complex on the Internet. Its Internet address is: <http://www.webdelsol.com>. Web Del Sol was founded as a forum for the collaborative literary efforts of dozens of editors and writers, and hosts a vast array of poems, articles, essays, and photography, as well as a bulletin board and a chat room. Web Del Sol also provides links to Internet literary magazines and literary Internet 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 distributed 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 Internet content.

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28. Plaintiff WILDCAT PRESS is a site that sells the works of Patricia Nell Warren, a former Reader's Digest editor and the author of eight novels, four books of poetry and numerous articles, poems and essays. Ms. Warren is also an educator, having served as commissioner on 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 the Wildcat Press site.

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

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

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

systems, and on behalf of the patrons of its member libraries.

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

33. Plaintiff NATIONAL ASSOCIATION OF RECORDING MERCHANTISERS (“NARM”) is an international trade association whose more than 1,000 members include recorded entertainment retailers, wholesalers, distributors and manufacturers, many of whom conduct business over the Internet. NARM sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of their consumers.

34. Plaintiff PERIODICAL AND BOOK ASSOCIATION OF AMERICA (“PBAA”) is an association of magazine and paperback book publishers who distribute magazines

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and books through independent national distributors, wholesalers and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands.

PBAA is incorporated in New York, and has its principal office in New York City.

PBAA sues on its own behalf, on behalf of its members who use online computer communications systems, and on behalf of readers of its members' publications.

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

36. Plaintiff RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. 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.

37. Plaintiff VIDEO SOFTWARE DEALERS ASSOCIATION (“VSDA”) is the trade association for the home video entertainment industry. It represents more than 2,600 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.

38. 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 11, 2001.

39. 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.”

40. 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**

41. 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.

42. 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.

43. 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 distributing content to a worldwide audience.

#### **How People Access the Internet**

44. 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.

45. 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 provide their card catalogs and online versions of material from their collections.

46. 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.

47. 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**

48. 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. For example, America Online allows every subscriber to use up to seven 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 the user by the user’s user name and e-mail address (unless the

user chooses to reveals other personal information).

49. 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**

50. The simplest and perhaps most widely used method of communication on the Internet is via electronic mail, commonly referred to as “e-mail.” Approximately 84% of all Internet users use e-mail. In 1998, 3.4 trillion e-mail messages were sent in the U.S.—over 9.3 billion messages a day.

51. 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.

52. In addition, organizations that maintain sites on the World Wide Web (as discussed below), including many of the plaintiffs, are increasingly making similar content available by periodic email distributions. This is a useful way for such organizations to maintain and attract repeat visitors to the Web sites, and to communicate their speech.

### **Discussion Groups, Mailing Lists, and Chat Rooms**

53. Online discussion groups are another popular form of communication via computer network. Discussion groups allow users of computer networks to communicate messages onto a public computerized bulletin board and to read and respond to messages communicated by others in the discussion group. Discussion groups have been organized on many different computer networks and cover virtually every topic imaginable. Discussion groups can be formed by individuals, institutions or organizations, or by particular computer networks.

54. “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 distributed to these groups each day.

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

56. “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.”

57. 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 And Similar Forms Of Internet Communication**

58. The World Wide Web (the “Web”) is another popular way to provide and retrieve information on the Internet. 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,” beginning with the prefix “www,” 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 provided by others, and then read text, look at images and video, and listen to sounds distributed at these sites.

59. 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.

60. 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.

61. Most Web documents also contain “links.” These are short sections of text or image that refer and link to another document. 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 and 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.

62. 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 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.

63. In addition to such sites located on the Web, many systems such as AOL host sites that, while to the outside observer look like Web sites, in fact are located on closed systems using distinct Internet protocols, and thus are not located on the Web.

64. Likewise, much of the Internet content that is often considered to be on the Web is located on Internet addresses that do not begin with the “www” prefix and thus may not in fact be located on the Web, depending on the definition used.

### **The Range of Content Available on the Internet**

65. 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

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wishing to read articles provided 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 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.

66. The information made available on the Internet is as diverse as human thought. Content on the Internet is provided by the millions of Internet users worldwide, and the content ranges from academic writings, to humor, to art, to literature, to medical information, to music, to news, and to human sexuality. At any one time, the Internet serves as the communication medium for literally hundreds of thousands of global conversations, political debates, and social dialogues.

67. Although the overwhelming majority of the information on the Internet does not involve nudity or sexual activity, such material is available on the Internet. For example, an Internet user can exchange e-mails on how to practice safer sex; participate in a question and answer forum on methods for enhancing sexual experiences; listen to a popular new rap music lyric; read online John Cleland’s eighteenth-century novel *Fanny Hill: Memoirs of a Woman of Pleasure*; and view the digital photography of Diane

Fenster. 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**

68. The Act provides as follows:

§ 13-3506.01. Furnishing harmful items to minors; internet activity; classification

- A. It is unlawful for any person, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send 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.

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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.

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

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

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

70. 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.

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71. 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”; accordingly, sending an e-mail discussing such conduct, or mentioning such conduct in a chat room, could constitute a felony under the Act.

72. 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. ...”

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73. 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, 13-3506.01 or 13-3507, the age of the minor, provided that an honest mistake shall constitute an excuse from liability under this chapter if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

74. 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. § 13-3506.01] if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.” Because there is no way for online speakers to ascertain the age of persons who access their content, however, this provision provides no defense for prosecutions under the Act.

75. In addition, the “indicia” in A.R.S. § 13-3506.01 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.

76. 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**

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

78. Speech on the Internet is generally available to anyone with access to this technology. Anyone who communicates speech to chat rooms, mailing lists, discussion groups or the Web 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 “intentionally or knowingly” transmitted a message to a minor by showing—as would inevitably be the case—that the speaker was “aware or believe[d] that his or her conduct [was] of that nature” such that the message would be received by a minor, even if the speaker had no knowledge of the unlawfulness of his or her conduct. See generally A.R.S. § 13-105(9)(b). Due to the very nature of the Internet, virtually every communication on the Internet is “of that nature” such that a minor may receive it.

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79. The Act clearly criminalizes non-Web communications over the Internet. For example, online discussion groups via USENET and other bulletin board services, as well as mailing lists and chat rooms, are common ways in which users regularly engage in online speech. Even simple e-mail messages fall within the Act. Individuals who “intentionally or knowingly” transmit messages using any of these forums are subject to criminal liability under § 13-3506.01.

80. Moreover, the Act apparently still criminalizes some forms of Web or Web-like communications. Section 13-3506.01(c) only carves out “[p]osting material on an internet web site” from liability under § 13-3506.01. “Posting” is not synonymous with “transmit[ting]” or “send[ing],” the verbs that the Legislature used to impose liability under § 13-3601.01(a). Thus, a person could “transmit” or “send” materials over the Web but not “post[]” them, and therefore still be subject to liability under the Act. For example, the limited carve-out for “posting” may not exempt interactive communications, such as discussion boards and interactive “books” like as plaintiff Mark Amerika’s GRAMMATRON Project. At the very least, the Legislature’s choice of differing terminology creates an unconstitutional vagueness as discussed below. Second, the Act does not define the term “internet web site,” leaving open the possibility that sites on closed systems such as AOL, which operate on a completely different set of Internet protocols, or sites that do not begin with the “www” prefix, are not subject to the

“internet web site” exemption and thus could provide grounds for prosecution under the Act.

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

82. Indeed, the Act would even prevent parents from sending communications to their children over the Internet. For example, a parent sending sexual health information to

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their 17-year-old college freshman could be guilty of a felony under the Act.

83. The Act's requirement that “the person has knowledge or reason to know at the time of the transmission that a minor will receive the item,” § 13-3506.01(B), see also § 13-3506.01(A), does not limit the statute in any way. As the Supreme Court noted in *ACLU I*, an Internet speaker always has reason to know that a minor may receive the item. Moreover, the Act requires that the speaker know or have reason to know the age of the minor only “[i]f relevant to a prosecution for violating section . . . 13-3506.01.” § 13-3501(3)(b) (emphasis added). This suggests that sometimes knowledge or reason to know of the recipient’s age is not required for prosecution under the Act.

84. The inferences created in § 13-3506.01(D) further exacerbate the Act's overbreadth. The Act creates an inference that an online speaker had knowledge of the age of the recipient if the “name, account, profile. . . electronic mail or web page” of the recipient contains “indicia” that the recipient is a minor or that the address or domain name is the property of, or that the image ultimately will be stored at, a school. This “inference” is flawed for two reasons. First, 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

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know the “name, account, profile, web page or address.” In addition, there is no definition of what “indicia” would qualify as establishing that the person is a minor. For example, would a recipient’s chat room communication about Pokemon create an inference that the defendant should have known that the recipient was a minor for the purposes of prosecution under the Act? Furthermore, many teachers access the Internet at school, and thus these adults will be prevented from receiving such speech as a result of these inferences.

85. 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, or by identifying someone else as a minor, whether or not the person actually is one.

86. The Act's overbreadth is widened by the lack of any reliable method to screen for the geographic location of a recipient of speech on the Internet. Anyone throughout the country who sends an e-mail or participates in a discussion group or chat room must comply with the Act because his or her communication might be accessed by a minor in the State of Arizona. 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, both within and outside of Arizona, or not be made available at all. For instance, when a user communicates 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.

87. 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 throughout the country.

88. 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.

89. Even if there were means by which speakers on the Internet could ascertain or

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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.

90. Because many of the terms in the Act are vague and overbroad, the Act will further chill the speech of online speakers. 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.” Indeed, the Act explicitly imposes Arizona’s standards on users in other states by criminalizing the communication of “harmful” materials to persons outside of Arizona by persons in Arizona. *See* §13-3506.01(B). Likewise, as noted above the Act’s varying and inconsistent terminology makes it difficult to tell what communications over the Web are criminalized. Because Internet speakers will be unable to understand these terms, they will likely err on the side of caution and not communicate ideas via the Internet that they otherwise would. In this way, the Act will chill online speech.

**The Act’s Burden on Interstate Commerce**

91. The Act’s two liability provisions – Sections A and B of 13-3506.1 – both burden interstate commerce in different but related ways.

92. Section (A) of the Act will unjustifiably burden interstate commerce and regulate conduct that occurs wholly outside the State of Arizona. By making it unlawful for “any person . . . to intentionally or knowingly transmit or send over the Internet an item to a minor that is harmful to minors when the person has knowledge or reason to know. . . that a minor in this state will receive the item,” § 13-3506.01(A) (emphasis added), the Act reaches across state borders to impose its restrictions on Internet users in other states.

93. 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 distributed to discussion groups, chat rooms or the Web will be accessed by persons residing in the State of Arizona. The various sites on the Internet can be accessed by anyone in the world; there is no way for speakers to prevent residents of Arizona from receiving their communications. Internet content providers that are located outside of Arizona, such as plaintiffs 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

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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.

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

95. The interstate reach of Section (A) of the Act is underscored by the inferences outlined by § 13-3506.01(D)(1)-(3) and their focus on the “recipient.” For example, an Internet user in New York who communicates a message to an online discussion group may face prosecution in Arizona if a minor “recipient” in Arizona reads the message. The putative local benefit in Arizona of such a situation is completely overwhelmed by the burden imposed on interstate commerce and conduct.

96. Similarly, Section (B) the Act will inhibit communications by residents of Arizona directed entirely to persons outside the state. The Act prohibits “any person in this state. .

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. [from] intentionally or knowingly transmit[ting] or send[ing] over the Internet an item to a minor that is harmful to minors when the person has knowledge or reason to know. . . . that a minor will receive the item.” § 13-3506.01(B) (emphasis added). By failing to limit its reach to communications received in Arizona, the Act creates a penalty on citizens in Arizona for transmissions made to non-Arizona residents, which have no effect on Arizona. Citizens in Arizona will be forced to self-censor their online speech directed to people in other states despite the fact that such speech has nothing to do with and no effect in Arizona. This is true even if the speech is perfectly acceptable under the community standards of the receiving state. The Act thus in effect imposes Arizona's community standards on communications directed entirely at other states, and interferes significantly with the interstate flow of information and with interstate commerce.

97. Moreover, interstate and international computer communications networks – like the nation’s railroads—constitute an area of the economy and society that particularly demands uniform rules and regulations. Like the nation’s railways and highways, the Internet is by its nature an instrument of interstate commerce. Just as goods and services travel over state borders by train and truck, information flows across state (and national) borders on the Internet. Other states’ Internet content regulations have been enjoined on Commerce Clause grounds because of the inconsistent obligations imposed on online speakers across the country. *PSINET, Inc. v. Warner D. Chapman, et al.*, Civil Action

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No. 3:99 CV 0011 (W.D. Va. August 2000); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6<sup>th</sup> Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10<sup>th</sup> 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*, 217 F.3d 162 (3<sup>rd</sup> Cir. 2000), *cert. granted sub nom. Ashcroft v. ACLU*, No. 00-1293, 2001 U.S. LEXIS 3820 (U.S. May 21, 2001) (declaring federal Child On Line Protection Act unconstitutional on the ground that it was impossible to determine “community standards” for the Internet).

98. 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**

99. 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.

100. 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 from 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.

101. In addition, to the extent that the Act exempts Web communications from coverage, it is utterly ineffective in preventing "harmful-to-minors" materials from reaching minors in Arizona because a great deal of the "harmful-to-minors" communications on the Internet are distributed through the Web.

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

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

groups, chat rooms, and Web sites based on keywords, subject matter, or specific newsgroup. These services also offer screening software that blocks messages containing certain words, and tracking and monitoring software to determine which resources a particular online user, such as a child, has accessed. They also offer children-only discussion groups that are closely monitored by adults.

104. 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.

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

### **The Act's Impact on the Plaintiffs**

106. 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 provided 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”)**

107. 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.

108. The ACLU hosts unmoderated online discussion groups that allow citizens to discuss and debate a variety of civil liberties issues. These services allow online users to express their uncensored views on civil liberties issues and to interact with ACLU staff or featured speakers. Many of the communications in the ACLU’s discussion groups have

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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.

109. The ACLU also uses mailing lists in a variety of ways. Members of the public and press may receive periodic updates describing ACLU activities including cases involving Gay Rights and Reproductive Freedom. One such service is called ACLU Online.

Another service allows exchange of information on cases among staff and volunteers. Some of the content could be considered to fall under the terms of the Act. For example, the ACLU is currently litigating a case involving the rights of adults in Alabama to use sex toys.

110. The ACLU also maintains extensive online resources on the 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.

111. 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.

112. 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.

113. 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**

114. Plaintiff Mark Amerika of ALT-X is the author of two novels as well as the founder and publisher of ALT-X, a critically-acclaimed Internet-based clearinghouse for progressive and experimental writing. Since 1993, ALT-X has provided an online forum for fiction and criticism; interviews and dialogues between artists, activists and

correspondents; and new forms of art in the emerging culture of the Internet.

115. 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.

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

117. 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**

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118. Plaintiff art.net believes that the Internet 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.

119. Some of the art exhibited through on 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.

120. For example, Michael Betancourt's online studio located on art.net includes a series of photographs that use assemblages of male and female body parts, including nude images, sexual organs and graphic sexual activity, to create abstract landscapes (related to the work of Salvador Dali and Hans Bellmer). In a discussion of the images on a USENET newsgroup, some Internet users found Betancourt's photographs to be "pornographic." Diane Fenster also maintains a studio of digital photography on the art.net site featuring "Two Running Rails of Mercury," "We Took the Train Together to

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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.

121. 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.

122. 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.

123. Much of the art on art.net is located in galleries that are not in fact on the Web but rather are located on sites with prefixes other than “www.”

124. Art.net also hosts non-Web based mailing lists such as [artists@art.net](mailto:artists@art.net), which can contain discussions of sexually-themed art that could be considered "harmful to minors."

125. In addition, the artists on art.net can use the e-mail features of art.net to e-mail samples of their works to prospective buyers. Since there is no way to determine the age of an e-mail recipient, the artists would have to forego using e-mail to distribute their speech and advance their commerce.

126. 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 Internet communications entirely, or risk criminal prosecution for displaying constitutionally-protected artistic expression. Art.net is concerned that artists will be deterred from using its Internet services 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**

127. 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.

128. AZ Gays provides personal and classified advertisements, maintains a Message Board and a Chat Room, and offers free e-mail under its domain name. AZ Gays also 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.

129. 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 of its Internet communications could be deemed “harmful to minors” merely because they discuss gay and lesbian issues, even though they contain no sexually explicit content. Discrimination against gays and lesbians is still commonplace, and many people, including law makers, are openly hostile to gays and lesbians.

130. Second, AZ Gays.com fears prosecution for comments made on its message board or chat room and for the materials displayed on its site that are sexually oriented and might be considered “harmful to minors.” For example, AZ Gays.com’s message board

features some messages that describe the speaker’s preferred sexual activities, and may be considered “harmful to minors.”

131. AZ Gays.com believes that both adults and youths have an interest in the material it publishes. AZ Gays.com believes that its ability to maintain a virtual community center for gays, lesbians, bisexual and 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**

132. 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 erotica and sexuality sections, and carries gay and lesbian fiction and non-fiction titles.

133. Changing Hands Bookstore currently sends out a newsletter via e-mail to between

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1,500 and 2,000 customers each day advertising new titles at the bookstore and listing events at the bookstore. Some of the titles and events that are advertised in those newsletters may include content that might be considered “harmful to minors” in Arizona.

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

135. In addition, Changing Hands Bookstore’s electronic newsletter, as well as its online bookstore, includes a list of books recommended by staff members. For example, one of the staff selections for December 2000, discussed in the newsletter and sold at a 25% discount that month, was *The Vagina Monologues* by Eve Ensler. Thus, some of the recommended books may have sexual content that may be considered “harmful to minors” in Arizona.

136. Changing Hands Bookstore fears prosecution under the Act for its Internet communications. Changing Hands Bookstore is afraid that it will face criminal

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

**Dr. Marty Klein**

137. 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.

138. 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*.

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139. 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>.

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

141. Dr. Klein also has maintained his Web site, located at <http://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.

142. While Dr. Klein believes that the information he distributes over the Internet provides valuable information on sexuality, much of the material frankly discusses sex and describes sexual acts. Dr. Klein also believes that it is important for older minors to have access to his Internet resources. Dr. Klein understands that the Act makes it a crime

to “intentionally or knowingly 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.”

143. 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 the Internet.

**PEN American Center (“PEN”)**

144. 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.

145. In addition to its program and membership activities, PEN maintains an Internet site devoted to public education and information about free expression and literature. Its site gives visibility and exposure to PEN activities, including its Freedom-to-Write appeals against literary censorship. Some of these cases have involved writing that contains literary treatment of sexuality, sexual conduct or sexual themes. For example,

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one of PEN's members, A.E. Homes, encountered censorship problems in Europe with her novel *The End of Alice* which deals with pedophilia. An appeal on her behalf would likely include sexually descriptive references and excerpts from the novel. PEN also uses the Internet to publicize events such as a previous panel discussion on *Intolerance in Sex* (February 1998), a May 1999 event called *Blasphemy: What You Can't Say Today in America*, a potential screening of the film *Quills* or an event on the history of Violence in Art. Any of these promotional announcements over the Internet are likely to include descriptive content.

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

communicate information that may be considered “harmful to minors” by some communities. As a membership organization, PEN serves to protect its members’ rights to communicate their writing, through print and electronic means.

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

**PSINet, Inc.**

148. 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.

149. 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.

150. PSINet fears that it could be alleged to “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.

151. 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.

152. Even assuming that PSINet could do so consistently with its customers’ legitimate expectations to distribute 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 PSINet’s global network, and the costs would likely be prohibitive.

153. 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.

154. 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**

155. 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.

156. The Sexual Health Network fears prosecution under the Act because its Internet content, by its nature, necessarily contains explicit descriptions of sexual acts and practices. All information from the Sexual Health Network is available to all users for free, including juveniles.

157. The Sexual Health Network distributes a free newsletter that addresses urgent sexual issues and maintains a message board where Sexual Health experts frequently answer questions. In addition, the Sexual Health Network formerly offered a "Chat Room," where individuals – including juveniles – were 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."

158. The Sexual Health Network also operates a Web site that includes specific advice on how to deal with a wide variety of health problems that directly affect sexuality, as well as articles relating to sexuality more generally and suggestions for physical positions to facilitate sex for disabled persons. For example, the Sexual Health Network Web site provides information about masturbation techniques for individuals who cannot move their arms and information about the pros and cons of sexual surrogates.

159. 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**

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

161. 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.

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162. Mr. Walsh and Oasis Magazine also use Oasis Magazine’s e-mail feature to send and receive content for the magazine and comments on that content.

163. 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 if 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 Lauren, a 13 year old high school student in Delaware, and Bethany a self-described “17 year old lesbian from Western Massachusetts.”

164. Oasis Magazine also fears prosecution for the materials distributed on its site that are sexually oriented and may be considered “harmful to minors.” For example *My Gay Life: Meeting Jared*, and *As Queer as I Can Be*; a story and a poem, respectively, from the May 2001 edition of Oasis Magazine both contain sexual content.

165. 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.

166. 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**

167. 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 Internet sites.

168. 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 display a note about anything. Web Del Sol also distributes fiction, poetry, visual arts, essays, and links to real audio, real video, and other literary sites on its Web site.

169. While Web Del Sol believes that its Internet content is literary and artistic, this content includes matters such as poems, articles, fiction, and photographs that refer

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explicitly to sex, sex organs, and sexual activity which could be considered “harmful to minors” by some people. For example, Web Del Sol also circulates an electronic newsletter that provides news clips and internet links to poetry picks like “words of my dreaming pussy” by Nin. Likewise, 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 Ocampo describe sexual conduct. “Anywhere” by Ingrid exists as an audio feed reciting a poem that touches on infidelity and sex while different black and white images of a nude woman float by in the background.

170. 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 and newsletter.

**Wildcat Press**

171. Wildcat Press is a site dedicated to promoting the works of Patricia Nell Warren. Ms. Warren is a former *Reader’s Digest* editor and the author of eight novels, four books of poetry and numerous articles, poems and essays. Ms. Warren is also an educator, having served as commissioner on the Gay and Lesbian Education Commission and the Human Relations Education Commission of the Los Angeles Unified School District.

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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.

172. Wildcat Press fears prosecution under the act because some of the information it communicates over the Internet may be considered "harmful to minors." First, some of the material in Wildcat Press' publications, all of which are sold on Wildcat Press' Web site, 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 and excerpts may be considered "harmful to minors" in some communities.

173. 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.

174. 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."

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

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

177. If the Act is not enjoined, Wildcat Press would be forced either to risk criminal

prosecution for providing constitutionally-protected expression over the Internet, or to remove all of the 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”)**

178. 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 Internet sites, often without a “www” prefix, that discuss the contents of books sold in stores.

179. 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”)**

180. 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.

181. Many of AAP’s members provide information to the world through the Internet. Some of the content provided by AAP’s members contains nudity or sexual conduct. Many of the efforts to ban books in various communities have been directed at books published by AAP’s members, and AAP fears that the 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”)**

182. 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 use the Internet to provide card catalogues, communicate information about current events, sponsor chat rooms, provide textual information or art, or distribute online versions of materials from their library collections. Patrons can also join one of 150 electronic mailing lists organized by topic and circulated by the American Library Association.

183. Some of the materials provided or made available by libraries contain nudity or sexual conduct. For example, FTRF member libraries’ online card catalogues include such works as *Forever* by Judy Blume, *Women on Top* by Nancy Friday, *Changing Bodies*, *Changing Lives* by Ruth Bell, *Our Bodies, Our Selves* by the Boston Women’s Health Collective and *It’s Perfectly Normal* by Robie Harris. The electronic mailing lists accommodate a broad range of topics including a Women’s Studies Section, a Gay Lesbian Bisexual and Transgendered Round Table, and an Adult Books for Young Adults Task Force. [NEED APPROVAL BY MODERATOR TO BE INCLUDED IN MAILING LISTS; SHOULD WE INCLUDE THESE AS EXAMPLES?]

184. If the Act is not enjoined, libraries would be inhibited from distributing, circulating 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 communicate a substantial amount of expressive material at all – material that many adults might consider useful for themselves or their own children – rather than risk prosecution for communicating material that might be illegal in Arizona.

**Magazine Publishers of America (“MPA”)**

185. Members of MPA actively publish a substantial volume of content on the Internet and utilize the Internet in a variety of ways, including marketing of print and online publications to advertisers and agencies, promoting events, and sharing information with other publishers. Some MPA members publish electronic versions or excerpts from their magazines that might in some communities be deemed “harmful to minors.” Thus, if the 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”)**

186. 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")**

187. 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.

188. 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.

189. 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”)**

190. 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

191. 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.

192. 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”)**

193. 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.

194. 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.

195. 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”)**

196. 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.

197. 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**

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

199. 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.

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

201. 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**

202. Plaintiffs repeat and re-allege paragraphs 1-199.

203. 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 for them is protected by the First Amendment.

204. 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**

205. Plaintiffs repeat and re-allege paragraphs 1-202.

206. 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**

207. Plaintiffs repeat and re-allege paragraphs 1-204.

208. 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**

**Lack of Due Process in Violation of the Fifth, and Fourteenth  
Amendments of the United States Constitution**

209. Plaintiffs repeat and re-allege paragraphs 1-206.

210. The Act deprives plaintiffs of due process of law because the inferences improperly shift the burden of proof and are not rational.

**COUNT VI**

**Violation of the Commerce Clause  
of the United States Constitution**

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

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

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

214. 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.

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Respectfully submitted,

By: \_\_\_\_\_

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Dated: May \_\_, 2001

EXHIBIT A

**AZ ST § 13-3506.01**

§ 13-3506.01. Furnishing harmful items to minors; internet activity; classification

A. It is unlawful for any person, with knowledge of the character of the item involved, to intentionally or knowingly transmit or send 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.

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

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

**EXHIBIT B**

[STATUTE HAS NOT BEEN UPDATED ON WESTLAW YET. REPLACE WHEN AVAILABLE]

AZ ST s 13-3501  
A.R.S. § 13-3501

**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.

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