IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

AMERICAN CIVIL LIBERTIES UNION, et al, Plaintiffs, vs. **JANET NAPOLITANO, et al.,** Defendants.	**No. CV-00-0505-TUC-AM**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND EXPEDITED PRELIMINARY INJUNCTION HEARING

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INTRODUCTION

Plaintiffs challenge ARIZ. REV. STAT. ("A.R.S.") § 13-3506.01 (2001) (the "Act"), which imposes criminal penalties on the 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," as that term is defined in A.R.S. § 13-3501(1). The Act is essentially identical to other state and federal "harmful to minors" Internet statutes that have been uniformly struck down as unconstitutional.

The Act was passed in 2001 in an unsuccessful attempt to remedy the unconstitutionality of a similar law passed in 2000 (Arizona Laws 2000, Ch. 189, § 25) and challenged by the original Complaint in this action. Under the Act, any expression of nudity or sexual conduct can potentially be criminal if communicated on the Internet (other than on the World Wide Web (the "Web"), as discussed below) and accessible in Arizona, or sent from someone in Arizona to someone outside of Arizona. Because all of the speech transmitted over the Internet is accessible in Arizona, regardless of the speaker's geographic location, the Act threatens Internet users nationwide and even worldwide. Due to the unique nature of the Internet, the Act thus limits content available throughout the world via the Internet to a level deemed suitable for minors in Arizona.

The Act is plainly invalid under the United States Constitution. Unless enjoined, the Act threatens to force plaintiffs and millions of other online speakers nationwide to cease engaging in speech that enjoys full constitutional protection or else risk prosecution, and will dramatically curtail the development of electronic commerce

both within Arizona and far beyond its borders. Federal and state statutes regulating materials allegedly "harmful to minors" on the Internet have been consistently struck down by federal courts across the country because they violate the First and Fifth Amendments, and (for the state statutes) the Fourteenth Amendment and the Commerce Clause as well.[1] No "harmful to minors" Internet statute has ever been upheld as constitutional.

Defendants have refused to stay enforcement pending the Court's resolution of the constitutionality of the Act, or to conduct an expedited preliminary injunction hearing. Plaintiffs therefore respectfully request that a temporary restraining order issue enjoining enforcement of the Act, and that an expedited preliminary injunction hearing be ordered.

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[1] *See, e.g., Reno v. American Civil Liberties Union ("ACLU I")*, 521 U.S. 844 (1997), *aff'g* 929 F. Supp. 824 (E.D. Pa. 1996) (holding federal Communications Decency Act ("CDA") unconstitutional); *American Civil Liberties Union v. Reno ("ACLU II")*, 217 F.3d 162 (3rd Cir. 2000), *aff'g* 31 F. Supp. 2d 473 (E.D. Pa. 1999) (holding federal Child Online Protection Act ("COPA") unconstitutional), *cert. granted sub nom. Ashcroft v. ACLU*, No. 00-1293, 2001 U.S. LEXIS 3820 (U.S. May 21, 2001); *Cyberspace Comms., Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000), *aff'g* 55 F. Supp. 2d 737 (E.D. Mich. 1999), *summary judgment granted*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (holding Michigan Internet harmful-to-minors statute unconstitutional); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1999) (holding New Mexico Internet harmful-to-minors statute unconstitutional); *PSINet v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000) (holding Virginia Internet harmful-to-minors statute unconstitutional); *American Libraries Ass'n. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (holding New York Internet harmful-to-minors statute unconstitutional).

STATEMENT OF FACTS

I. PLAINTIFFS AND THEIR SPEECH

Plaintiffs represent a spectrum of individuals and organizations—including online businesses, Internet service providers, organizations representing booksellers, publishers and other media interests, individual artists, and others—that use the Internet to communicate, disseminate, display and access a broad range of speech. Although plaintiffs do not speak with a single voice or on a single issue, they all engage in speech that at times involves adult discussions of sexual matters. Thus, they justifiably fear that their online speech may be considered by some to be "harmful to minors" under the Act, even though it is constitutionally protected for adults. Plaintiffs include speakers and content providers who transmit or send speech online both within and outside of Arizona, and, like all speech on the Internet, all of plaintiffs' speech is accessible both within and outside of Arizona.

Extensive information about the plaintiffs is contained in the Complaint. More specifically, plaintiffs include the following:

- 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 maintains an Internet site at http://www.aclu.org/.
- Plaintiff MARK AMERIKA is a critically acclaimed writer and publisher of ALT-X, a Web site containing original literary works published only online, reviews of new media art and theory, original online art projects, and the GRAMMATRON Project. The site's Internet address is http://www.altx.com/.
- Plaintiff ART ON THE NET ("art.net") is a not-for-profit international artist Internet site, http://www.art.net/, that assists over 125 artists in maintaining online gallery spaces.

- Plaintiff AZGAYS.COM is an Internet directory designed for the lesbian, gay, bisexual and transgendered community of the State of Arizona and for those outside of Arizona looking to visit or move there. Its Internet address is http://www.azgays.com/.
- Plaintiff CHANGING HANDS BOOKSTORE operates an online bookstore at the Internet address http://www.changinghands.com/. Changing Hands Bookstore also sends out a newsletter to approximately 1,800 individuals via e-mail that lists titles for sale, events hosted by the bookstore, and staff recommendations.
- Plaintiff MARTY KLEIN, a Licensed Marriage and Family Therapist, distributes a monthly electronic newsletter and maintains an Internet site, http://www.sexed.org/, both of which provide information on a number of subjects relating to sex and sexuality including birth control, safer sex, and sexual pleasure.
- Plaintiff PEN AMERICAN CENTER is an association of poets, playwrights, essayists, editors, and novelists that seeks to defend free expression of the written word. PEN American Center maintains an Internet site at http://www.pen.org/.
- Plaintiff PSINET, INC. is one of the world's largest providers of Internet-related communications services.
- Plaintiff SEXUAL HEALTH NETWORK ("sexualhealth.com"), located online at the Internet address http://www.sexualhealth.com/, was founded in May 1996 by Mitchell Tepper, and is dedicated to providing online access to sexuality information and education for people with disabilities or other health problems.
- Plaintiff JEFF WALSH is a writer and editor of OASIS MAGAZINE, an online magazine for lesbian, gay, bisexual and questioning youth, located at the Internet address http://www.oasismag.com/.
- Plaintiff WEB DEL SOL, http://webdelsol.com/, is a forum for the collaborative literary efforts of dozens of editors and writers. It hosts a vast array of poems, articles, essays, and photography, maintains a bulletin board and a chat room, and distributes an electronic newsletter about the literary arts.
- Plaintiff WILDCAT PRESS is a Web site, located at the Internet address http://www.wildcatpress.com/, which sells the works of Patricia Nell Warren. All of Ms. Warren's books deal with gay and lesbian issues, as well as youth and AIDS issues.
- Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION ("ABFFE") was organized to inform and educate booksellers and the public about the dangers of censorship and to promote and protect the free expression of ideas.
- Plaintiff ASSOCIATION OF AMERICAN PUBLISHERS, INC. ("AAP") is the national association in the United States of publishers of general books, textbooks,

and educational materials.

- Plaintiff FREEDOM TO READ FOUNDATION, INC. ("FTRF") is a non-profit membership organization pledged to defend First Amendment rights for every citizen.
- Plaintiff MAGAZINE PUBLISHERS OF AMERICA ("MPA") is a national trade association including in its present membership more than 200 publishers of approximately 1,200 consumer interest magazines sold at newsstands, by subscription and online.
- Plaintiff NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS ("NARM") is an international trade association whose more than 1,000 members include recorded entertainment retailers, wholesalers, distributors and manufacturers, many of whom conduct business over the Internet.
- Plaintiff PERIODICAL AND BOOK ASSOCIATION OF AMERICA ("PBAA") is an association of magazine and paperback book publishers who distribute their works through distributors, wholesalers and retailers throughout the United States and Canada.
- Plaintiff PUBLISHERS MARKETING ASSOCIATION ("PMA") is a non-profit trade association representing more than 2,000 publishers across the United States and Canada.
- 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.

II. THE INTERNET

The basic structure and operation of the Internet has been examined by a number of courts, including the Supreme Court in *ACLU I*, the Third Circuit in *ACLU II*, the Sixth Circuit in *Engler*, the Tenth Circuit in *Johnson*, and various federal district courts in *ACLU I*, *ACLU II*, *Engler*, *Johnson*, *PSINet*, and *Pataki*. At this point, many of the basic facts regarding communication on the Internet are well established. *See ACLU I*, *supra*; *ACLU II*, *supra*; *Engler*, *supra*; *Johnson*, *supra*; *PSINet*, *supra*; and *Pataki*, *supra*.

A. The Nature Of The Online Medium

The Internet is a decentralized, global communications medium that links people, institutions, corporations and governments around the world. Amended Complaint ("Am. Compl.") at ¶ 39, admitted in Answer of Defendant Napolitano ("Answer") at ¶ 14. The Internet is distinguishable in important ways from traditional media. Am. Compl. at ¶ 41, admitted in Answer at ¶ 15; *see also PSINet*, 108 F. Supp. 2d at 615; *Engler*, 55 F. Supp. 2d at 741; *ACLU I*, 929 F. Supp. at 843-44. For instance, the Internet is an expansive medium with no centralized control or oversight. Am. Compl. at ¶ 40, admitted in Answer at ¶ 15; *see also ACLU I*, 521 U.S. at 853; *ACLU II*, 217 F.3d at 168; *PSINet*, 108 F. Supp. 2d at 615; *Engler*, 55 F. Supp. 2d at 741. In addition, the Internet is a truly global medium. Am. Compl. at ¶ 39, admitted in Answer at ¶ 14. At least 40% of the content on the Internet originates abroad, and all of the content on the Internet is equally available to all Internet users worldwide. *ACLU I*, 521 U.S. at 850; *Engler*, 55 F. Supp. 2d at 741; *ACLU II*, 31 F. Supp. 2d at 482-84.

The Internet also differs from traditional media in that it provides users with an unprecedented ability to interact with other users and with content. Unlike radio or television, the Internet does not "'invade' an individual's home or appear on one's computer screen unbidden." *PSINet*, 108 F. Supp. 2d at 615; *see also Engler*, 55 F. Supp. 2d at 741; *ACLU I*, 929 F. Supp. at 844. Rather, the receipt of information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial." *ACLU I*, 521 U.S. at 854; *see also PSINet*, 108 F. Supp. 2d at 615; *Engler*, 55 F. Supp. 2d at 741; Am. Compl. at ¶ 63, admitted in Answer at ¶ 33. Because the Internet

presents extremely low entry barriers to publishers and distributors of information, it is an especially attractive method of communicating for non-profit and public interest groups. *Engler*, 55 F. Supp. 2d at 741; *ACLU II*, 31 F. Supp. 2d at 482; *ACLU I*, 929 F. Supp. at 842-43. Unlike radio, television, newspapers and books, the Internet "is not exclusively, or even primarily, a means of commercial communication." *Engler*, 55 F. Supp. 2d at 741-42; *ACLU I*, 929 F. Supp. at 842. In addition, "[u]nlike the newspaper, broadcast station, or cable system, Internet technology gives a speaker a potential worldwide audience." *ACLU II*, 31 F. Supp. 2d at 484. In sum, the Internet is "a unique and wholly new medium of worldwide human communication." *ACLU I*, 521 U.S. at 850. For this reason, the Supreme Court has held that the Internet warrants the highest level of First Amendment protection. *ACLU I*, 521 U.S. at 870.

B. How Individuals Access The Internet

Internet service providers ("ISPs") offer their subscribers modem access to computers or networks maintained by the ISP which are linked directly to the Internet. *See* Am. Compl. at ¶ 44, admitted in Answer at ¶ 17. In addition, individuals may obtain easy access to the Internet through many businesses, educational institutions, libraries and agencies that maintain computer networks linked directly to the Internet and provide account numbers and passwords enabling users to gain access to the network. *See ACLU I*, 521 U.S. at 850; Am. Compl. at ¶¶ 42-43, admitted in Answer at ¶¶ 15-16.

C. Ways Of Communicating And Exchanging Information On The Internet

Most users of the Internet are provided with a username, password and electronic mail (or "e-mail") address that allow them to sign on to the Internet and to communicate with other users. *Engler*, 55 F. Supp. 2d at 742; *Pataki*, 969 F. Supp. at 165; Am. Compl. at ¶ 46, admitted in Answer at ¶ 18. Many usernames are pseudonyms or pen names that often provide users with a distinct online identity and help to preserve their anonymity. Persons communicating with the user will know the user only by her username and e-mail address (unless the user reveals other information about herself through her messages). *Engler*, 55 F. Supp. 2d at 742; *Pataki*, 969 F. Supp. at 165.

Once an individual signs on to the Internet, there are a wide variety of methods for communicating and exchanging information with other users. Am. Compl. at ¶ 47, admitted in Answer at ¶ 19. The primary methods are:

1) *E-mail*, which "enables an individual to send an electronic message—generally akin to a note or letter—to another individual or to a group of addresses." *ACLU I*, 521 U.S. at 851; *see also PSINet*, 108 F. Supp. 2d at 615; *Engler*, 55 F. Supp. 2d at 742; *Pataki*, 969 F. Supp. at 165; Am. Compl. at ¶ 49, admitted in Answer at ¶ 21. E-mail may be sent from person to person, such as when a citizen sends an electronic message to defendant Janet Napolitano through the Arizona attorney general's office's e-mail address ag.inquiries@ag.state.az.us, or from one person to a large group of people, either through regular e-mail or through automatic mailing lists that disseminate information on particular subjects, referred to as "mail exploders" or

"listservs." *See ACLU I,* 521 U.S. at 851. Mail exploders serve as a sort of e-mail group, through which online users can send messages to a common e-mail address, which then forwards the message to other members of that e-mail group. *Id.* Some mail exploders are controlled by a single entity that has the exclusive ability to distribute messages to the e-mail list, while other mail exploders allow any member of the list to distribute messages to the entire list. Am. Compl. at ¶ 53, admitted in Answer at ¶ 24. For example, plaintiff Changing Hands Bookstore uses a mail exploder that it controls to distribute its monthly electronic newsletter to approximately 1,800 individuals. Declaration of Gayle Shanks ("Shanks Decl.") at ¶ 10.[2]

2) *Instant messaging,* which "allows an online user to address and transmit an electronic message to one or more people with little delay between the sending of an instant message and its receipt by the addressees." *PSINet*, 108 F. Supp. 2d at 615.

3) *Online discussion groups*, which have been organized by individuals, institutions, and organizations on many different computer networks and cover virtually every topic imaginable. Am. Compl. at ¶ 51, admitted in Answer at ¶ 22. The discussions that take place in online discussion groups create a new, global version of the village green where people can associate and communicate with others who have common interests. Common forms of online discussion include (i) USENET newsgroups, which are arranged according to subject matter and automatically disseminated "using ad hoc, peer to peer connections between approximately 200,000

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[2] The Shanks Decl., Declaration of Jon R. LoGalbo ("LoGalbo Decl."), and Declaration of Jeff Walsh ("Walsh Decl.") were submitted with Plaintiffs' Motion for Permanent Injunction dated December 22, 2000, in connection with the original Complaint.

computers . . . around the world," *ACLU I*, 929 F. Supp. at 835, *see also* Am. Compl. at ¶ 52, admitted in Answer at ¶ 23, (ii) message boards (also known as bulletin boards or discussion groups), which allow individual Internet users to post messages on Web sites for other users to view, *see ACLU I*, 521 U.S. at 851, and (iii) chat rooms, which allow users to engage in real time dialogue with one or many other users by typing messages and reading the messages typed by others participating in the chat, analogous to a telephone party line, using a computer and keyboard rather than a telephone. *See ACLU I*, 521 U.S. at 851; *Engler*, 55 F. Supp. 2d at 742; *Pataki*, 969 F. Supp. at 165-66; *ACLU I*, 929 F. Supp. at 835; *see also* Am. Compl. at ¶ 54, admitted in Answer at ¶ 25.

4) *The Web*, which allows users to publish "Web pages" that can then be accessed by any other user in the world. *See generally ACLU I*, 521 U.S. at 852; Am. Compl. at ¶ 56, admitted in Answer at ¶ 27. Any Internet user anywhere in the world with the proper software can create her own Web page, view Web pages posted by others, and then read text, look at images and video, and listen to sounds distributed at these sites. *ACLU II*, 217 F.3d at 169; *Engler*, 55 F. Supp. 2d at 743; *Pataki*, 969 F. Supp. at 166; Am. Compl. at ¶ 56, admitted in Answer at ¶ 27. For example, defendant Janet Napolitano maintains her own Internet Web site at http://www.attorney_general.state.az.us/ ("Napolitano Web site"). There are also interactive components of the Web, such as web-based chat rooms. *See ACLU I*, 521 U.S. at 851; *Engler*, 55 F. Supp. 2d at 742; *Pataki*, 969 F. Supp. at 165-66; *ACLU I*, 929 F. Supp. at 835.

5) *Non-Web fora*, which may appear similar to the Web but operate on non-Web protocols. For example, America Online ("AOL"), the nation's largest ISP,

operates a proprietary system using protocols distinct from the Web, and accordingly communications on the AOL system are not in fact on the Web.

D. The Inability Of Speakers To Prevent Their Speech From Reaching Minors

Once an online speaker distributes content over the Internet, it is available to all other Internet users worldwide. *See ACLU II*, 217 F.3d at 169; *ACLU I*, 929 F. Supp. at 844; *Pataki*, 969 F. Supp. at 167; *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 743; *see also* Am. Compl. at ¶ 76, admitted in Answer at ¶ 43. For the vast majority of communications over the Internet, including all communications by e-mail, mail exploders, newsgroups, and chat rooms, it is not technologically possible for a speaker to determine the age of a recipient who is accessing such communications. *See ACLU I*, 521 U.S. at 855 ("[T]here is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms.") (internal quotation marks omitted); *ACLU II*, 31 F. Supp. 2d at 495; *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 742-43; Shanks Decl. at ¶¶ 40-41; Declaration of Lile Elam ("Elam Decl.") submitted herewith at ¶¶ 46, 48-49, 54; Declaration of Mark Amerika ("Amerika Decl.") submitted herewith at ¶¶ 24-27; Declaration of Mitchell S. Tepper ("Tepper Decl.") submitted herewith at ¶¶ 29-31, 40. Thus, these speakers either must make their information available to all users of the Internet, including users who may be minors, or not make it available at all. *See, e.g.*, *Engler*, 55 F. Supp. 2d at 748.

Any attempt to "verify" age, through for example requiring credit card verification or adult access codes, would be ineffective and unreasonably burden speech. Such approaches would not prevent minors from accessing speech, because minors have credit cards, *see ACLU II*, 217 F.3d at 172; *ACLU I*, 521 U.S. at 857, and can borrow someone else's adult access codes. *ACLU II*, 31 F. Supp. 2d at 489; Amerika Decl. at ¶ 27. They would categorically prevent all adults who do not have credit cards from accessing protected speech. *ACLU I*, 521 U.S. at 856; *Johnson*, 4 F. Supp. 2d at 1032. The hassle of going through such a verification system would deter users, *ACLU I*, 521 U.S. at 856, as would the cost to users of credit card verification and obtaining an adult access code. *ACLU II*, 217 F.3d at 171. The loss of anonymity would further deter readers interested in obtaining sensitive information about sexual topics. *See id.*; *Johnson*, 4 F. Supp. 2d at 1032. Moreover, the burden on speakers of attempting to segregate their "harmful" versus "harmless" content, if they could even determine which is which, could be extreme. *ACLU II*, 31 F. Supp. 2d at 490. Finally, anyone hostile to particular content could merely sign on to a chat room, USENET newsgroup or mailing list and claim to be a minor, thereby exercising a "heckler's veto" to force people to stop communicating the disliked content. *See ACLU I*, 521 U.S. at 880. All of this would have the effect of driving constitutionally-protected speech off the Internet. *Id.* at 495.

E. The Availability Of User-Based Filtering Programs

Although there is no way for the vast majority of online speakers to ensure that they are not transmitting or sending their speech to minors, there are a variety of options available to parents and other users who wish to restrict access to online

communications that they might consider unsuitable for minors. *See generally ACLU I*, 521 U.S. at 855-57; *Engler*, 55 F. Supp. 2d at 743-44; Am. Compl. at ¶ 102, admitted in Answer at ¶ 53. First, there are a variety of user-based software products that allow users to block access to sexually-explicit materials on the Internet, to prevent minors 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. *ACLU I*, 521 U.S. at 854-55; *Engler*, 55 F. Supp. 2d at 744; Am. Compl. at ¶ 102, admitted in Answer at ¶ 53. In fact, on her Internet Web site, defendant Janet Napolitano advises parents to "[i]nvest in software that helps keep Internet usage safe for your children," and even suggests that parents visit a particular Web site to learn more about such user-based filtering programs. *See* Napolitano Web site at http://www.attorney_general.state.az.us/cybercrime/kids.html.

Second, large commercial online services such as AOL provide features to prevent minors from accessing chat rooms and to block access to certain newsgroups based on keywords, subject matter, or specific newsgroup. *ACLU I*, 929 F. Supp. at 842; *Engler*, 55 F. Supp. 2d at 744; *ACLU II*, 31 F. Supp. 2d at 492; Am. Compl. at ¶ 101, admitted in Answer at ¶ 53. *See also* http://www.getnetwise.org (link provided through Napolitano Web site at http://www.attorney_general.state.az.us/ cybercrime/kids.html).

Third, these online services also offer screening software that automatically blocks messages containing certain words, tracking and monitoring software to determine which resources a particular online user (e.g., a child) has accessed, and children-only discussion groups that are closely monitored by adults. *Engler*, 55 F. Supp. 2d at 744; *Johnson*, 4 F. Supp. 2d at 1033; *ACLU I*, 929 F. Supp. at 838-42; Am. Compl. at ¶ 101,

admitted in Answer at ¶ 53. *See also* http://www.getnetwise.org (link provided through Napolitano Web site at http://www.attorney_general.state.az.us/cybercrime/kids.html).

Fourth, there are "family" ISPs that parents can select that provide access only to approved newsgroups, chat rooms, message boards, Web sites, and other Internet materials. *Engler*, 55 F. Supp. 2d at 750.

Finally, and perhaps most effectively, a parent can restrict a child's use of the Internet by placing the computer in a family room or other public room and monitoring the child's use of the Internet. Defendant Janet Napolitano herself advises that "children and teens should be supervised while they are online…. Put the computer in the family room or another room where there is a lot of activity so that the child is easier to supervise." *See* Napolitano Web site at http://www.attorney_general.state.az.us/cybercrime/kids.html.

F. The Interstate Nature Of Online Communication

The Internet is wholly insensitive to geographic distinctions, and Internet protocols were designed to ignore rather than document geographic location. *See PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 744; *Johnson*, 4 F. Supp. 2d at 1032; *Pataki*, 969 F. Supp. at 170. While computers on the network do have "addresses," they are digital addresses on the network rather than geographic addresses in real space. *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 744; *Johnson*, 4 F. Supp. 2d at 1032; *Pataki*, 969 F. Supp. at 170. The majority of Internet addresses contain no geographic indicators. *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 744; *Pataki*, 969 F. Supp. at 170. Moreover, the geographic indicators that do exist do not

necessarily indicate the geographic location of the user; for example, a person who obtained an e-mail address from a New Mexico ISP may, in fact, be accessing the Internet while in Arizona.

Like the nation's railways and highways, the Internet is by nature an instrument of interstate commerce. *Engler*, 55 F. Supp. 2d at 744; *Johnson*, 4 F. Supp. 2d at 1032; *Pataki*, 969 F. Supp. at 171. Just as goods and services travel over state borders by truck and train, information flows freely across state borders on the Internet. This characteristic has earned the Internet the nickname "the information superhighway." *Engler*, 55 F. Supp. 2d at 744; *Pataki*, 969 F. Supp. at 161. No aspect of the Internet can feasibly be closed off to users from another state. *ACLU II*, 217 F.3d at 169; *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 744-45; *Johnson*, 4 F. Supp. 2d at 1032; *ACLU II*, 31 F. Supp. 2d at 484; *Pataki*, 969 F. Supp. at 171; Tepper Decl. at ¶ 35; Elam Decl. at ¶ 51.

Internet users who participate in a chat room or discussion group, or send an e-mail to a mail exploder, cannot prevent Arizonans or New Mexicans or New Yorkers from accessing their speech and, indeed, will not even know the state of residency of any Internet user who accesses their speech, unless the information is voluntarily (and accurately) given by that user. *ACLU II*, 217 F.3d at 169; *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 745; *ACLU II*, 31 F. Supp. 2d at 495; *Johnson*, 4 F. Supp. 2d at 1032; *Pataki*, 969 F. Supp. at 171; Tepper Decl. at ¶¶ 31, 35–36; Amerika Decl. at ¶¶ 29, 32-33; Elam Decl. at ¶¶ 49, 51-52; Walsh Decl. at ¶¶ 27-28. Because most e-mail accounts allow users to download their mail from anywhere, it

is impossible for someone who sends an e-mail to know with certainty where the recipient is located geographically (even if the sender generally knows where the receiver lives). *Engler*, 55 F. Supp. 2d at 745; *Johnson*, 4 F. Supp. 2d at 1032; Tepper Decl. at ¶ 40; Amerika Decl. at ¶¶ 26, 31, 33; Elam Decl. at ¶¶ 43, 46, 49, 52. In addition, because the Internet is a redundant series of linked computers over which information often travels randomly, a message from an Internet user sitting at a computer in New York may travel via one or more other states—including Arizona—before reaching a recipient who is also sitting at a computer in New York. *Engler*, 55 F. Supp. 2d at 745; *Johnson*, 4 F. Supp. 2d at 1032; LoGalbo Decl. at ¶ 24. For this reason, it is impossible for an Internet user to prevent his or her message from reaching residents of any particular state. *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 745; *Johnson*, 4 F. Supp. 2d at 1032; *Pataki*, 969 F. Supp. at 171.

III. THE CHALLENGED ACT

On April 11, 2001, Governor Jane Hull signed into law the Act, which provides in relevant part:

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

> C. Posting material on an internet web site does not constitute the act of transmitting or sending an item over the internet.
>
> D. In an action for a violation of this section, proof of any of the following may give rise to an inference that the person knew or should have known that the recipient of a transmission was a minor:
>
> > 1. The name, account, profile, web page or address of the recipient contained indicia that the recipient is a minor.
> >
> > 2. The recipient or another person previously notified the person by any reasonable means that the recipient is a minor.
> >
> > 3. The recipient's electronic mail or web page contains indicia that the address or domain name is the property of, or that the visual depiction ultimately will be stored at, a school as defined in section 13-609.

A.R.S. § 13-3506.01. A violation of the Act is punishable by imprisonment for a mitigated minimum of 1 year up to an aggravated maximum of 3.75 years and a fine of up to $150,000. *Id.*

On its face, Arizona's law thus criminalizes speech in a broad range of Internet fora, including e-mail, instant messaging, USENET newsgroups, and chat rooms. *See* Am. Compl. at ¶ 77, admitted in Answer at ¶ 44 (Act applies regardless of "forum" of transmission or sending if Act's elements are met). The Act criminalizes the transmission of any e-mail messages that are deemed "harmful to minors," including the use of mail exploders. Every time the plaintiffs, their staff or their members send an e-mail, they are at risk of prosecution. For example, the Sexual Health Network experts frequently respond by e-mail to sexually-frank questions on topics such as "I caught my son and our German shepherd doing things in his room. He is 15 years old and after

talking to him about it he says he enjoys the dog licking his penis." Tepper Decl. at ¶ 23. Likewise, the Act covers similar communications via "instant messaging." The Act also covers a wide variety of interactive discussion groups, such as USENET newsgroups and chat rooms. For example, plaintiff Mark Amerika through his site ALT-X hosts live chat room events where users discuss a wide range of issues, including sexually-explicit works of art. Amerika Decl. at ¶ 16.

Moreover, the Act also covers certain communications on the Web. Because the Act uses different verbs to *create* liability under §13-3506.01(A) and (B) ("transmit or send") than to *remove* liability under §13-3506.01(C) ("[p]osting"), the Act still criminalizes certain speech on the Web, *i.e.*, speech that involves sending or transmitting, but not posting. For example, for Web-based message boards, although individual Internet users may be deemed to "post" messages, the Web site itself does not post the messages. The Web site nonetheless could be deemed to "transmit or send" the messages to other Internet users who access the message board. For instance, plaintiff the Sexual Health Network maintains message boards in which Internet users sometimes describe sexual positions for disabled persons, and the Sexual Health Network could be at risk for sending or transmitting these messages to users. Tepper Decl. at ¶¶ 15, 22. In addition, interactive communications, such as plaintiff Mark Amerika's GRAMMATRON Project might not be deemed to be a "posting." Amerika Decl. at ¶ 18. Similarly, ALT-X's downloading of a sexually explicit "E-book" to a reader might be deemed to be a transmission but not a "posting." Amerika Decl. at ¶¶ 6, 18, 25. The Act's failure to define any of these terms exacerbates the problem, as Internet speakers

will have to assume that the Act covers these Internet fora in order to ensure they are not found guilty of a felony. *Id*. at ¶ 18.

In addition, because the Act fails to define the term "internet web site," certain Web-like communications are presumably covered by the Act. For example, as discussed above, some proprietary systems such as AOL use closed, proprietary systems that are not located on the Web. The vast number of sites located on AOL are thus presumably subject to the Act's criminal penalties.

The Act's definition of an "item" explicitly includes written material and recordings in addition to pictures. "Item" is broadly defined 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...

A.R.S. § 13-3501(2).

The term "harmful to minors" is defined under A.R.S. § 13-3501(1), which reads:

> "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.

A.R.S. § 13-3501(1). Significantly, the Act does not distinguish between material that may be deemed "harmful" to very young minors and material that may be deemed "harmful" to older minors.

> "Knowledge of the character" is defined as:
>
> …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 section 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.

A.R.S. § 13-3501(3).

A.R.S. § 13-3501(3)(b) offers the only defense to liability under the Act. It states that, "[i]f relevant," "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." A.R.S. § 13-3501(3)(b). The Act does not attempt to explain when this defense is relevant or what would constitute a "bona fide attempt." It contains no other affirmative defenses or exceptions to prosecution.

The speech at issue in this case does not include obscenity, child pornography, speech used to entice or lure minors into inappropriate activity, or harassing speech. Such communications already were illegal under Arizona law prior to the Act. *See* A.R.S. § 13-3552 (child pornography); A.R.S. § 13-3502 (obscenity); A.R.S. § 13-3554 as amended (WESTLAW 2001) (luring a minor for sexual exploitation); A.R.S. § 13-2921(A)(1) (harassment).

ARGUMENT

I. THE ACT IS UNCONSTITUTIONAL BECAUSE IT BANS CONSTITUTIONALLY-PROTECTED SPEECH

The Act imposes criminal penalties on the dissemination of constitutionally-protected speech over the Internet. Specifically, the Act makes it a crime to "transmit or send over the [I]nternet an item" that is "harmful to minors." The Act is thus essentially identical to Internet censorship statutes that have already been found unconstitutional by the Supreme Court in *ACLU I* and by numerous other federal courts.[3] *No* such harmful-to-minors Internet statute has ever been upheld as constitutional.

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[3] The CDA made it a crime to "knowingly. . . initiate[] the transmission" or "knowingly use[] an interactive computer service to send. . . or. . . to display" to a person under 18 any message that is "obscene or indecent" or "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. . ." 47 U.S.C. §§ 223(a)(1)(B), 223(d)(1) (1994 ed., Supp. II).

A. The Act Is Essentially Identical To Other Harmful-To-Minors Internet Statutes That Have Been Uniformly Struck As Unconstitutional

The Act criminalizes the exact same kind of speech as did the CDA and state Internet statutes: non-obscene, sexually frank speech that is constitutionally protected between adults.[4] The Act, like the CDA and the other state statutes, "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *ACLU I*, 521 U.S. at 874. Like the CDA and the other state statutes, the Act extends to Internet communications concerning "safe sexual practices [and] artistic images that include nude subjects," which constitute constitutionally-protected speech for adults. *See ACLU I*, 521 U.S. at 878. Speech driven off the Internet as a result of this statute would include, for example,

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The New Mexico statute in *Johnson* made it a crime "to knowingly and intentionally initiate or engage in [harmful-to-minors] communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct." N.M. STAT. ANN. § 30-37-3.2(A) (1998).

The New York statute in *Pataki* made it a crime to "intentionally use[] any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in [a harmful-to-minors] communication with a person who is a minor." N.Y. PENAL LAW § 235.21 (1996).

The Michigan statute in *Engler* made it a crime if a person "[k]nowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors" or "[k]nowingly exhibits to a minor a sexually explicit performance that is harmful to minors" by means of a computer, computer program, computer system, or computer network. MICH. COMP. LAWS § 722.671 et seq. (1999).

The Virginia statute in *PSINet* made it a crime to "sell, rent or loan to a juvenile," or to knowingly display for commercial purpose in a manner whereby juveniles may examine, any material that is "harmful to juveniles," by way of a computer. VA. CODE ANN. § 18.2-391 (1999).

[4] While the CDA banned "indecent" speech on the Internet, the laws struck down in *PSINet*, *Engler*, *Johnson* and *Pataki* banned "harmful to minors" speech.

communications by Sexual Health Network experts sent by e-mail and then displayed on message boards about healing after sexual abuse, Tepper Decl. at ¶ 25, and advice in newsletters disseminated by mailing list to use condoms when engaging in sexual intercourse. Walsh Decl. at ¶ 36. All of this speech is constitutionally protected for adults. The Supreme Court has "made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" *ACLU I,* 521 U.S. at 874 (quoting *Sable Communications v. FCC,* 492 U.S. 115, 126 (1989)); *Carey v. Population Servs. Int'l,* 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression").

Because Internet speakers (particularly on non-Web fora) cannot distinguish between minors and adults in their audience, the Act effectively suppresses constitutionally-protected speech among adults on the Internet, just like the CDA and the other state statutes. Because an Internet speaker cannot verify the age of an Internet recipient who receives a message, a speaker must entirely refrain from communicating this constitutionally-protected speech, or risk prosecution under the Act. *See ACLU I*, 521 U.S. at 874; *ACLU II,* 217 F.3d at 180; *Johnson,* 194 F.3d at 1159; *PSINet,* 108 F. Supp. 2d at 624; *Engler,* 55 F. Supp. 2d at 747-48; *ACLU II,* 31 F. Supp. 2d at 495; *ACLU I,* 929 F. Supp. at 854, 879; Tepper Decl. at ¶ 40; Amerika Decl. at ¶ 30; Elam Decl. at ¶ 54; *see also* Statement of Facts ("Facts"), *supra* Section II.D. Like these other statutes, the Act thus effectively suppresses constitutionally-protected speech among

adults, and is thereby per se unconstitutional under the Supreme Court's analysis in *ACLU I. See PSINet, supra; Engler, supra; Johnson, supra; Pataki, supra.*

The Act also covers essentially the same Internet fora as did these other statutes, all of which covered non-Web fora such as e-mail, mail exploders, USENET groups and chat rooms. The only difference between the Act and these other statutes is that the Act exempts (for the most part) a particular Internet forum, the Web. This distinction does not save the Act, however, because these non-Web fora have the same critical characteristic as the Web: there is no reasonable way for a speaker on these fora to determine the age of a listener. As the Supreme Court held, "there is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms." *ACLU I*, 521 U.S. at 855 (internal quotation marks omitted).[5] Thus, a harmful-to-minors statute is at least as problematic when applied to non-Web Internet fora as when applied to the Web. For this reason, the CDA and the other state statutes were struck down in both their Web *and* non-Web Internet applications.[6]

The Act's sole affirmative defense, for a "reasonable bona fide attempt" to determine the recipient's age, is also essentially identical to similar defenses in the CDA and the New Mexico, New York and Virginia statutes. *See* 47 U.S.C. § 223(e)(5)(A);

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[5] Indeed, if anything it is easier for a Web speaker to attempt to verify age, because Web sites are generally at least able to request and receive CGI script, which is a technology for obtaining information from a Web user. *ACLU II*, 31 F. Supp. 2d at 488.

[6] Indeed, the carve-out for Web speech makes the Act more problematic. As discussed below, the carve-out renders the Act even less effective as a means of protecting children, and it creates irrational distinctions between identical speech distributed through different Internet fora.

N.M. STAT. ANN. § 30-37-3.2(C)(1); N.Y. PENAL LAW § 235.23(a), (b); VA. CODE ANN. § 18.2-390(7). Indeed, several of those statutes also contained stronger affirmative defenses, such as specifically enumerated defenses for the use of credit card verification or adult access codes. *See* U.S.C. § 223(e)(5)(B); N.M. STAT. ANN. § 30-37-3.2(C)(2)-(4); N.Y. PENAL LAW § 235.23(c)-(d). Despite these defenses, however, all of these statutes were struck as unconstitutional, because as discussed above there is no reasonable way to verify age on the Internet. *See* Facts, *supra* Section II.D.[7]

The Act thus shares the same essential characteristics, and is unconstitutional for exactly the same reasons, as the other Internet harmful-to-minors statutes.

B. Even If The Supreme Court Had Not Already Held That An Essentially Identical Internet Censorship Statute Was Unconstitutional, The Act Would Fail Strict Scrutiny Because It Is Not Narrowly Tailored To Achieve A Compelling Government Interest

Even if the Supreme Court had not already held that similar Internet censorship statutes are unconstitutional, the Act would fail a strict scrutiny analysis. As a content-based regulation of protected speech, the Act is presumptively invalid. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). Subject only to "narrow and well-understood exceptions, [the First Amendment] does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Content-based regulations of speech will be

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[7] The CDA and the other state statutes also had similar "knowledge" requirements. *See* 47 U.S.C. §§ 223(a)(1)(B), 223(d); MICH. COMP. LAWS § 722.675(1); N.M. STAT. ANN. § 30-37-3.2(A); N.Y. PENAL LAW § 235.21; VA. CODE ANN. §§ 18.2-290(7), 391.

upheld only when they are justified by compelling governmental interests and narrowly tailored to effectuate those interests. *See ACLU I*, 521 U.S. at 879; *ACLU II*, 217 F.3d at 173; *ACLU I*, 929 F. Supp. at 851. Though defendants' interest in protecting children is compelling, the Act is in no way narrowly tailored nor the least restrictive means available to achieve this interest.

1. The Act Suppresses Constitutionally-Protected Speech Between Adults

As discussed above, and as the Supreme Court and other federal courts have held, Internet censorship statutes such as the Act effectively prevent Internet speakers from communicating constitutionally-protected speech even to adults. Since there is no technology that permits an Internet speaker to ensure that a recipient is not a minor, the Act effectively bans protected speech among adults. For this reason, courts have uniformly held that statutes such as the Act are not narrowly tailored. *See, e.g.*, *ACLU I*, 521 U.S. at 879, 882 (". . . we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all").

Even under the guise of protecting children, the government may not justify the suppression of constitutionally-protected speech because to do so would "burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *see also Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 759 (1996) (the government may not "reduc[e] the adult population . . . to . . . only what is fit for children" (quoting *Sable*, 492 U.S. at 128). In striking down the CDA's prohibitions on transmitting indecency to minors by means of the Internet, the Supreme Court noted that while "we have repeatedly recognized the governmental interest in protecting children from harmful

materials . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *ACLU I*, 521 U.S. at 875. Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Supreme Court has *never* upheld a criminal ban on non-obscene communications between adults. *Id.* (internal quotation marks omitted).[8]

2. The Act's Scienter Requirement Does Not Sufficiently Narrow The Act

The Act's scienter requirement in no way narrows the Act enough to salvage its constitutionality. In regard to the defendant's knowledge that the recipient is a minor, the Act apparently requires nothing but mere negligence, *i.e.* that a person has "reason to know" or a "ground for belief" as to a person's age. A.R.S. § 13-3501(3).[9] In the context of the Internet, where it is always possible that a recipient is a minor, *see*

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[8] *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (striking down a ban on mail advertisements for contraceptives); *cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding restriction on the direct commercial sale to minors of material deemed "harmful to minors" because it "does not bar the appellant from stocking the magazines and selling them" to adults); *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (noting that *Ginsberg* did not address the "difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them").

[9] The Act's two other scienter requirements — knowledge that an item is "harmful," and intentional rather than accidental transmission — also fail to narrow the Act. The Act provides that "[i]t 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 that is harmful to minors." A.R.S. § 13-3506(A) (emphasis added). In terms of knowledge that an item is "harmful," "knowledge of the character" is defined as "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…." A.R.S § 13-3501(3) (emphasis added). The scienter requirement for whether an item is "harmful" is thus mere negligence. The terms "intentionally or knowingly" modify the verbs that follow, "transmit or send"; thus, they provide that a person is not liable for accidentally pressing the send or transmit button. Neither of these requirements narrows the Act in any meaningful way.

ACLU I, 521 U.S. at 876, this negligence requirement does not narrow the statute in any way.

Indeed, even if the Act required knowledge as opposed to mere negligence, the Supreme Court has already rejected the argument that such a "knowledge" requirement would render an Internet censorship statute constitutional. In *ACLU I* the Court noted,

> Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be a minor -- and therefore that it would be a crime to send the group an indecent message -- would surely burden communication among adults.

521 U.S. at 876. Because all Internet communications that fall under the Act are available to minors, a speaker could be found knowingly to transmit an item to a minor every time he or she sends or transmits content over the Internet. *See* Facts, *supra* Section II.D. For example, there is no way for a sender of an e-mail or chat message to ascertain a recipient's age; an e-mail address, or the username of a chat participant, does not reveal a person's age. *See id*. The Court in *ACLU I* explicitly rejected the government's reliance on a knowledge requirement in the CDA because it

> ignores the fact that most Internet for[a] -- including chat rooms, newsgroups, mail exploders, and the Web -- are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the 'specific person' requirement . . . cannot save the statute. It would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform

> the would-be discourses that his 17-year-old child -- a 'specific person . . . under 18 years of age' -- would be present.

521 U.S. at 880 (citations omitted); *see also Johnson*, 194 F.3d at 1159 ("virtually all communication on the Internet would meet the statutory definition of 'knowingly' and potentially be subject to liability"). This same analysis applies to the Act, which focuses on the sender's "general knowledge or awareness, or reason to know, or a belief or ground for belief" that a recipient is a minor. A.R.S. § 13-3501(3).

The "indicia" contained in A.R.S. § 13-3506(B)(1)-(3) further exacerbate the Act's unconstitutionality, because they provide an additional way for a prosecutor to prove scienter. The indicia here allow the prosecution to infer the speaker's knowledge based on facts about the recipient, such as an e-mail address or Web page, even if the accused *does not* know that information. Moreover, due to the nature of the Internet, in the vast majority of circumstances it is *impossible* for a speaker to know these facts. *See* Facts, *supra* Section II.D. Likewise, if a speaker sends a sexually frank e-mail to a listserv, the listserv may then send that e-mail to an individual with the e-mail address "sixyearold@aol.com," without the speaker's knowledge. Finally, even if the Act required that the speaker knew these facts, the facts are not rationally connected to the ultimate fact sought to be inferred, knowledge of a recipient's age. For example, merely because a person's e-mail address is from an ".edu" does not mean the person is a minor; college staff and students can have "edu" addresses. Likewise, the e-mail address "sixyearold@aol.com" does not mean the person actually is six years old, and just because a Web page discusses Britney Spears and Nintendo does not mean that the author

is a minor.[10] The fact that a speaker knows that a recipient is a minor is not "more likely than not" to flow from these ill-defined and poorly chosen indicia. The irrationality of these indicia provide a further ground for finding the Act unconstitutional. *See State v. Cole,* 153 Ariz. 86, 89 (1987) ("An inference is irrational, and therefore unconstitutional, if it cannot at least be said with substantial assurance that the inferred fact is more likely than not to flow from the proved fact on which it depends.").

3. The Act's "Reasonable Bona Fide Attempt" Affirmative Defense Does Not Sufficiently Narrow The Act

The Act's sole affirmative defense is a confusing "reasonable bona fide attempt" defense in the definition of "knowledge of the character." A.R.S. § 13-3501(3)(b). That section provides that, if "relevant to a prosecution" under A.R.S. § 13-3506, then "an honest mistake shall constitute an excuse from liability . . . if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor." *Id.*

This defense provides no safe harbor to speakers because, as discussed above, there is no way for speakers to ascertain an Internet user's age. *See* Facts, *supra* Section II.D. Certainly, the Act does not describe what actions by the speaker would qualify as a "reasonable bona fide attempt to ascertain the true age of [the] minor." A.R.S. § 13-3501(3)(b). Therefore, the defense fails to provide any additional means for speakers to comply with the Act. *See ACLU I,* 521 U.S. at 881 (holding that similar

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[10] Indeed, it is unclear what this indicia means, i.e., if an Internet speaker receives an e-mail which contains a link to a Web page, is an Internet speaker required to scour the Web page for "indicia" before responding? If so, the burden on the free exchange of speech is obvious.

defense in § 223(e)(5)(B) of the CDA failed to provide any additional means for speakers to comply with the act). For the reasons discussed above, online speakers have no way to make a "reasonable, bona fide attempt" to prevent a minor from accessing their site. Thus, they must "choose between silence and the risk of prosecution." *ACLU I*, 929 F. Supp. at 849. Moreover, even if it were possible to make a "reasonable bona fide attempt," this would only constitute an affirmative defense, which a defendant would have to prove at trial; the risk of prosecution, even if ultimately unsuccessful, would still chill speech. *See Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997).

4. The Act Is An Ineffective Method For Achieving The Government's Interest, And Less Restrictive, More Effective Alternatives Are Available

The Act is also a strikingly ineffective method for addressing the government's asserted interest. Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The government bears the burden of showing that its scheme will in fact alleviate the alleged "harms in a direct and material way." *Turner Broad.*, 512 U.S. at 624. Here, the defendants cannot meet this burden. As Justice Scalia wrote in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring).

Under the Act, "[p]osting material on an internet web site does not constitute the act of transmitting or sending an item over the internet." A.R.S. § 13-3506.01(C). The Act will thus still allow minors freely to access any of the countless Web sites with "harmful" material. Thus the government's interest in protecting minors from "harmful material" is left unachieved by the Act since Web sites are exempted under the Act.

Moreover, it is technically possible to re-route many non-Web based communication applications through a Web site. Sophisticated Internet users can set up chat rooms and e-mail accounts that operate through the Web rather than through non-Web protocols. *See* Facts, *supra* Section II.C. Indeed, even novice users could, for example, send e-mail messages through a Web-based site such as Yahoo! or Hotmail rather than through a non-Web based protocol such as Outlook. Thus, the Act's Web carve-out may in fact swallow the whole, or at least allow sophisticated Internet speakers—such as the commercial pornographers the Act is supposedly trying to reach—to circumvent the Act.[11]

Furthermore, because of the global nature of the online medium, even a total ban on "harmful to minors" Internet speech throughout the United States would fail to eliminate such speech from the Internet. The Internet is a global medium, and material

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[11] The Act's Web carve-out also creates irrational distinctions between identical speech sent through different Internet fora. For example, a "harmful" message sent in a chat room or on a mail exploder would subject the speaker to imprisonment under the Act, while the exact same message posted on a Web message board would not. Likewise, a "harmful" e-mail sent using a Web-based service such as Yahoo could be exempt while the same e-mail sent using a non-Web based e-mail program like Outlook would violate the Act.

posted on a computer overseas is just as available as information posted next door. *See* Facts, *supra* Section II.C. Thus, the Act will not prevent minors from accessing the large percentage of "harmful" material that originates abroad. *See PSINet*, 108 F. Supp. 2d at 625; *ACLU II*, 31 F. Supp. 2d at 497; *ACLU I*, 929 F. Supp. at 848 (finding that "a large percentage, perhaps 40% or more, of content on the Internet originates [abroad]"). As the *ACLU I* trial court concluded:

> [T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

929 F. Supp. at 882-83. In addition, adult-oriented content providers in the United States could circumvent the Act simply by moving their content to sites located outside of the country. *Id*. at 883 n.22. Thus, the Act is unconstitutional because it fails to alleviate the alleged "harms in a direct and material way." *Turner Broad.*, 512 U.S. at 624.

Moreover, the Act is not the least restrictive means of achieving the government's asserted interest. *See ACLU I*, 521 U.S. at 874 ("That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"). Had the Arizona Legislature held hearings on various ways to restrict minors' access to indecent communications, it would have learned of a variety of user-based filtering programs and other options that enable parents to limit the information their children receive online.

See id. at 877; *see also* Facts, *supra* Section II.E. Unlike the Act, these options allow users to prevent sexually oriented material originating abroad from reaching minors. They are also notably less restrictive than the Act's total ban.[12] For example, several commercial online service providers, such as AOL, Prodigy, and Microsoft Network, provide Internet access while offering parental control options to their members. *See* Facts, *supra* Section II.E. In particular, AOL maintains a parental control feature that allows parents to establish a separate account for their children and to choose a predefined limit for e-mail, chat room capabilities, and Web access such as "Kids Only" (geared toward children ages 12 and under), "Young Teens" (ages 13-15), and "Mature Teens" (ages 16-17). *See Engler*, 55 F. Supp. 2d at 744; *ACLU I*, 929 F. Supp. at 842; *see also ACLU I*, 521 U.S. at 854-55, 877. In addition, user-based filtering programs such as CyberPatrol, SurfWatch, and NetNanny maintain lists of sites known to contain sexually explicit material. *See* Facts, *supra* Section II.E. When installed, this software blocks access to sites containing sexually explicit material, and blocks Internet searches including words such as "sex" or character patterns such as "xxx." *PSINet*, 108 F. Supp. 2d at 625; *ACLU I*, 929 F. Supp. at 838-42. The Act is thus not the least restrictive alternative. *See ACLU I*, 521 U.S. at 854-55, 876-77 (finding that less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes and

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[12] *See United States v. Playboy Entertainment Group*, 529 U.S. 803, 815 (2000) (requiring cable operators upon subscriber's request to scramble or block any unwanted channel was a less restrictive alternative than forcing operators to scramble channels as a default); *Denver Area*, 518 U.S. at 758-59 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material).

citing to the district court's findings that parents can prevent their children from accessing material).

C. The Act Is Unconstitutionally Overbroad

Even if the Act did not fail strict scrutiny as a ban on constitutionally-protected speech, it would be unconstitutionally overbroad in at least three ways. First, the Act is overbroad because its ban on adult communications "sweeps too broadly." *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992); *see also City of Houston v. Hill*, 482 U.S. 451, 458 (1987). Under the substantial overbreadth doctrine, a law must be struck down as facially invalid if it would "'penalize a substantial amount of speech that is constitutionally protected' . . . even if some applications would be 'constitutionally unobjectionable.'" *ACLU I*, 929 F. Supp. at 867 (quoting *Forsyth County*, 505 U.S. at 129-30). As discussed above, the Act effectively suppresses speech between adults that is not obscene and is thus protected by the First Amendment.

Second, the Act is overbroad because it chills speech wholly outside of Arizona. The Act at issue defines "harmful to minors" according to the "contemporary state standards" of Arizona. As discussed above, since online speakers cannot restrict their messages to persons in a particular geographic area, each Internet speaker in the United States must censor her message to meet the community standards of Arizona, even if the message would be constitutionally protected in her own community. *See, e.g., ACLU II*, 217 F.3d at 175-76; *PSINet*, 108 F. Supp. 2d at 616; *Engler*, 55 F. Supp. 2d at 745; *ACLU II*, 31 F. Supp. 2d at 495; *Johnson*, 4 F. Supp. 2d at 1032; *Pataki*, 969 F. Supp. at 171. Thus, the "contemporary state standards" language of the Act prohibits

speakers in communities outside of Arizona from engaging in speech that is protected in their communities, and contributes to the Act's substantial overbreadth. The Act is unconstitutionally overbroad for this reason alone. *See ACLU II*, 217 F.3d at 175-76 (holding that community standards renders Internet harmful-to-minors statute unconstitutionally overbroad).

Finally, the Act is unconstitutionally overbroad because it proscribes speech that may be "harmful" to younger minors but that unquestionably is constitutionally protected for older minors. The Supreme Court has ruled in many contexts that the First Amendment protects minors as well as adults, and that minors have the constitutional right to speak and to receive the information and ideas necessary for their intellectual development and their participation as citizens in a democracy,[13] including information about reproduction and sexuality. *See Carey*, 431 U.S. at 693. For example, the Act would prevent older minors, such as readers of and contributors to plaintiff Oasis Magazine, from learning about and discussing safe sex and coming to terms with their sexual self-identity. *See* Walsh Decl. at ¶¶ 6, 9, 12, 15**.** With only narrow exceptions, it is unconstitutional for the government to restrict in this way minors' participation in the marketplace of ideas. *Engler*, 55 F. Supp. 2d at 749.

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[13] *See Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975); *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

II. THE ACT VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

In addition, the Act violates the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, in three separate ways: (i) it imposes restrictions on communications occurring wholly outside the State of Arizona; (ii) it effects an impermissible burden on interstate commerce; and (iii) it subjects online speakers to inconsistent state obligations. Any of these three Commerce Clause violations is alone a sufficient ground for striking down the Act.

A. The Act Is *Per Se* Invalid Because It Regulates Commerce Entirely Outside Of The State Of Arizona

A state statute having "the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Healy v. The Beer Institute*, 491 U.S. 324, 332 (1989); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) ("The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."). The Act's criminal ban on protected speech extends to a wide range of online communications that occur entirely outside of the State of Arizona, a per se violation of the Commerce Clause. The Act's two liability provisions—Sections (A) and (B) of § 13-3506.01—both regulate commerce entirely outside of the State of Arizona, in different but related ways.

Section (A) of the Act regulates 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. Because Internet users cannot identify the age, residence, or location from which another user may be accessing communications sent over the Internet, the Act will have the practical effect of regulating protected speech between adults throughout the world. *See* Facts, *supra* Section II.F.

Internet speakers who are located outside of Arizona, such as plaintiffs art.net, the Sexual Health Network and Mark Amerika, have no feasible way of knowing whether the information they "transmit or send" over the Internet will be received by someone residing in Arizona, or by a non-Arizonan who is temporarily accessing the Internet from Arizona. *See* Facts, *supra* Section II.F. Due to the realities of transmitting and sending information over the Internet, non-Arizonans will be forced to censor their speech on the Internet if they wish to comply with the Act. If they do not, they risk the possibility that a minor from Arizona will receive this information and that the speaker will be subjected to prosecution in Arizona. Thus, any Internet speaker anywhere in the United States—including those plaintiffs who are not residents of Arizona—must either refrain from transmitting over the Internet speech involving "nudity" or "sexual conduct" considered "harmful to minors" in Arizona, or risk prosecution under the Act in Arizona. *See generally Johnson*, 194 F.3d at 1161; *PSINet*, 108 F. Supp. 2d at 626-27; *Engler*, 142 F. Supp. 2d at 830-31; *Pataki*, 969 F. Supp. at 173-77.

Specifically, the Act restricts almost all online communications that take place around the world through e-mail and in newsgroups, mail exploders, and chat

rooms on the Internet, because public messages sent in these fora from anywhere in the world could be received by users in Arizona.[14] If, for example, plaintiff Marty Klein sits at a computer in California and responds by e-mail to a question, or composes and distributes a newsletter to a mailing list, the newsletter may be received by minors in Arizona. Because Dr. Klein has no way to know whether the subscribers to his newsletter are located in Arizona, the distribution of his newsletter may subject him to prosecution in Arizona under the Act. As discussed above, it is not technologically possible for Dr. Klein to ensure that no person located in Arizona will read his message. *See* Facts, *supra* Section II.F. To avoid the risk of prosecution, Dr. Klein must self-censor his speech of all material that could be considered "harmful to minors" in Arizona, thus depriving Internet users across the United States from accessing this speech.

This inability to restrict geographically where Internet speech will be heard is the fundamental reason that the courts in *PSINet, Engler, Johnson* and *Pataki* held that similar state Internet statutes impermissibly impacted commerce occurring outside of the state. For example, the *Pataki* court held:

> [C]onduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy - perhaps favoring freedom of expression over a more protective stance - to New York's local concerns. . . . New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net. . . . This encroachment upon the authority which the

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[14] For example, the Phoenix International Airport has publicly-available kiosks where travelers can access the Internet, check their e-mail, and participate in online discussions while waiting to board their flights. Thus, it is likely that non-Arizonan Internet users will receive communications in Arizona on a daily basis.

> Constitution specifically confers upon the federal government and upon the sovereignty of New York's sister states is per se violative of the Commerce Clause.

Pataki, 969 F. Supp. at 177 (citations omitted); *see also Johnson*, 194 F.3d at 1161 ("We therefore agree with the district court that section 30-37-3.2(A) represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause."); *PSINet*, 108 F. Supp. 2d at 626-27; *Engler*, 142 F. Supp. 2d at 831. As the Supreme Court has noted, such a *per se* violation of the Commerce Clause should be "struck down . . . without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935); *Healy*, 491 U.S. at 336; *Edgar*, 457 U.S. at 642-43; *Pataki*, 969 F. Supp. at 169.

Section (B) even more obviously regulates commerce entirely outside of Arizona. The Act prohibits "*any person in this state*. . . [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). The Act thus bans Arizonans from sending speech across state lines to non-Arizonans, and thus directly regulates what speech will occur outside of Arizona. This is true even if the speech is perfectly acceptable under the community standards of the receiving state. State statutes that prevent the distribution of speech outside of the state have been routinely struck down as unconstitutional. *See, e.g., Knoll Pharmaceutical Co. v. Sherman et al.*, 57 F. Supp. 2d 615, 623 (N.D. Ill. 1999) (ban on pharmaceutical advertising in Illinois which had the

effect of banning advertising "in nationally and regionally distributed newspapers and magazines and on cable television and the internet" has unconstitutional extraterritorial reach); *Lorillard Tobacco Co. et al v. Reilly*, 218 F.3d 30, 55-57 (1st Cir. 2000), *rev'd in part on other grounds*, 121 S. Ct. 2404 (2001) (ban on tobacco advertising in Massachusetts which had the effect of banning advertising in nationally and regionally distributed magazines and the Internet unconstitutionally regulated commerce outside of the state). The extraterritorial reach here is even clearer than in *Knoll* and *Lorillard*, because in *Knoll* and *Lorillard* "the extraterritorial reach was unintended," *Knoll*, 57 F. Supp. 2d at 623, whereas here the Arizona legislature explicitly intended an extraterritorial reach. *See also Lorillard*, 218 F.3d at 56. 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.

B. The Act Is Invalid Because The Burdens It Imposes Upon Interstate Commerce Exceed Any Local Benefit

"Even if the Act were not a per se violation of the Commerce Clause by virtue of its extraterritorial effects, the Act would nonetheless be an invalid indirect regulation of interstate commerce, because the burdens it imposes on interstate commerce are excessive in relation to the local benefits it confers." *Pataki*, 969 F. Supp. at 177. The Act will be wholly ineffective in achieving any local benefit because it generally does not affect communications on the Web, or any communications from outside of the United States, and therefore fails to achieve Arizona's goal of protecting minors. *See*

Argument, *supra* Section I.B.4. For example, if plaintiff Web Del Sol were to stop distributing its monthly electronic newsletter that includes poems, articles, essays and photography from a wide variety of authors, minors in Arizona could still access literally thousands of Web sites across the world that contain "harmful to minors" materials, including Web Del Sol's own Web site, without implicating the Act. The Act will not eliminate, or even appreciably decrease, the ability of Arizonan minors to receive "harmful to minors" materials. *See Johnson*, 194 F.3d at 1162; *Pataki*, 969 F. Supp. at 178-79. Indeed, Section (B) provides literally no local benefit, as it only aims to protect minors *outside* of Arizona. Arizona has no interest in "protecting" non-residents from speech that Arizona deems to be harmful. *See Edgar*, 457 U.S. at 644 (state has "no legitimate interest in protecting nonresident shareholders").

Balanced against the minimal or non-existent local benefits of Sections (A) and (B) "is an extreme burden on interstate commerce." *Johnson*, 194 F.3d at 1162 (quoting *Pataki*, 969 F. Supp. at 179). The Act, like the other state statutes found unconstitutional, "casts its net worldwide; moreover, the chilling effect that it produces is bound to exceed the actual cases that are likely to be prosecuted, as Internet users will steer clear of the Act by significant margin." *Pataki*, 969 F. Supp. at 179. The Act deprives residents from other states of speech that they are entitled to receive. *See Knoll*, 57 F. Supp. 2d at 623-24 ("Enforcement of the Illinois ban would preclude the general public in most states from receiving accurate, non-misleading information about an FDA-approved prescription drug."). Arizona "may not impose its policy choices on other states." *Id.* at 624. For these reasons, "[t]he severe burden on interstate commerce"

resulting from Arizona's Act "is not justifiable in light of the attenuated local benefits arising from it." *Pataki*, 969 F. Supp. at 181.

For this reason, federal courts have routinely struck state Internet censorship statutes as undue burdens on interstate commerce. *See Pataki*, 969 F. Supp. at 177-81; *Johnson*, 194 F.3d at 1161-62 ("We further agree, for the reasons outlined in *Pataki*, that section 30-37-3.2(A) is an invalid indirect regulation of interstate commerce because. . . the burdens on interstate commerce imposed by section 30-37-3.2(A) exceed any local benefits conferred by the statute."); *PSINet*, 108 F. Supp. 2d at 626-27; *Engler*, 55 F. Supp. 2d at 751-52. This uniform conclusion that state Internet censorship statutes unduly burden interstate commerce is consistent with a long line of Supreme Court jurisprudence. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (fruit-packing statute invalid because the burden it imposed on interstate commerce was "clearly excessive in relation to the putative local benefits"); *Edgar*, 457 U.S. at 643-44 (state interests in protecting shareholders and regulating state corporations failed to outweigh burden of allowing state official to block tender offers).

C. The Act Violates The Commerce Clause Because It Subjects Interstate Use Of The Internet To Inconsistent Regulations

Finally, the Act violates the Commerce Clause because it subjects interstate use of the Internet to inconsistent regulations. The Supreme Court has long held that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level under the Commerce Clause. Thus, the Supreme Court has forbidden states from imposing burdensome regulations on the nation's

railroads and highways. *See, e.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (Illinois statute that required the use of contour mudguards on trucks in Illinois found to violate Commerce Clause); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (Arizona regulation of train length impeded the flow of interstate commerce); *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (railroad rates exempt from state regulation).

Interstate and international computer communications networks—just like the nation's railroads—constitute an area of the economy and society that particularly demands uniform rules and regulations. It is clear that "[t]he Internet is an instrument of interstate commerce." *Johnson*, 4 F. Supp. 2d at 1032. Indeed, "the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether." *Pataki*, 969 F. Supp. at 169; *see also Johnson,* 194 F.3d. at 1162 ("As we observed, *supra*, certain types of commerce have been recognized as requiring national regulation. The Internet is surely such a medium . . . .") (citations omitted). If each state implements its own regulations regarding what information can be legally distributed via this new technology, as Arizona has done, interstate commerce will be disrupted as speakers around the country are faced with inconsistent state regulations, each of which will have nationwide effect given the nature of the Internet.[15]

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[15] Moreover, this is not a merely theoretical danger; as noted above, many states have already passed Internet censorship laws which each adopt their own local community standards.

As noted above, Internet users cannot tailor their speech to the laws of different regions in order to comply with differing state requirements. *See* Facts, *supra* Section II.F.; *see also Pataki*, 969 F. Supp. at 183 ("[A]n Internet user cannot . . . send differing versions of her communication to different jurisdictions"). In fact,

> the Internet user is in a worse position than the truck driver or train engineer who can steer around Illinois or Arizona, or change the mudguard or train configuration at the state line; the Internet user has no ability to bypass any particular state. The user must thus comply with the regulation imposed by the state with the most stringent standard or forego Internet communication of the message that might or might not subject her to prosecution.

Id. Thus, the practical effect of the combination of fifty conflicting state laws regulating content on the Internet would be to "create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. For this reason, every court that has examined this issue has determined that similar state statutes are unconstitutional. *See Pataki*, 969 F. Supp. at 183; *PSINet*, 108 F. Supp. 2d at 627; *Engler*, 55 F. Supp. 2d at 752; *Johnson*, 194 F.3d at 1162.

III. INJUNCTIVE RELIEF IS APPROPRIATE

The requirements for the issuance of an injunction, whether a temporary restraining order, preliminary injunction or permanent injunction, are "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996) (quoting *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066-67 (9th Cir. 1995)). Plaintiffs easily satisfy these requirements.

As the Supreme Court has held, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also S.O.C., Inc. v. Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (same); *ACLU I*, 929 F. Supp. at 851 ("Subjecting speakers to criminal penalties for speech that is constitutionally protected in itself raises the spectre of irreparable harm"). Plaintiffs who choose not to self-censor will face the risk of criminal prosecution if the Act is not enjoined. Thus, the Act has already caused irreparable injury by creating a chilling effect on free expression in violation of the First Amendment. *ACLU I*, 521 U.S. at 872; *PSINet*, 108 F. Supp. 2d at 622; *Engler*, 55 F. Supp. 2d at 754; *Pataki*, 969 F. Supp. at 179. Likewise, deprivation of constitutional rights under the Commerce Clause constitutes irreparable injury. *See Munoz v. County of Imperial*, 667 F.2d 811 (9th Cir. 1982) (affirming District Court opinion that violation of Commerce Clause caused irreparable injury).

A remedy at law would also be inadequate. Where state conduct threatens First Amendment rights, "[n]o remedy at law would be adequate to provide such protection." *Allee v. Medrano*, 416 U.S. 802, 815 (1974) (affirming injunction against intimidation of union organizers). Injunctive relief is thus appropriate here.

IV. A TEMPORARY RESTRAINING ORDER AND AN EXPEDITED PRELIMINARY INJUNCTION HEARING ARE NECESSARY

Plaintiffs have tried diligently to avoid the need to seek a temporary restraining order, but defendants' refusal to agree to stay enforcement or to conduct an expedited preliminary injunction hearing has left plaintiffs with little alternative. Before

filing the Amended Complaint, plaintiffs sought to negotiate a stay of enforcement of the Act pending this Court's resolution of the constitutionality of the Act. *See* Harris Decl. at ¶ 2. Defendants had previously agreed to such a stay of the original statute challenged in the original Complaint. The day after filing the Amended Complaint, plaintiffs learned that defendants would not agree to such a stay. *See* Harris Decl. at ¶ 3.

Plaintiffs then sought to reach agreement with the defendants on an expedited schedule for a preliminary injunction hearing, again to avoid the need for a temporary restraining order motion. Plaintiffs understood they had reached an agreement with defendants to conduct such a hearing the week of October 8th, 2001. *See* Harris Decl. at ¶ 4. Plaintiffs have recently learned that defendants will not agree to conduct a hearing that week, but instead seek to delay a hearing until November 2001. *See* Harris Decl. at ¶¶ 5, 6. Such a schedule would mean that the Act, which became effective on August 8th, 2001, would have been effective for three months before this Court even had an opportunity to consider whether an injunction is appropriate. In addition to the risk that defendants will attempt to enforce this unconstitutional Act, even if the Act is not enforced it risks chilling speech as long as enforcement remains possible. As noted above, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Other courts have granted temporary restraining orders in similar circumstances. *See ACLU II*, 1998 WL813423, at *5 (E.D. Pa. 1998). Accordingly, plaintiffs request that a temporary restraining order issue immediately.

Plaintiffs also request an expedited preliminary injunction hearing. If a temporary restraining order is granted, it may expire within twenty days of its issuance (ten days plus an additional ten days if the Court so orders), unless the defendants agree otherwise. *See* Fed. R. Civ. P. 65(b). Plaintiffs therefore request that a preliminary injunction hearing take place before the expiration of any temporary restraining order. If a temporary restraining order does not issue, then the need for an expedited preliminary injunction hearing is even greater. Plaintiffs expect that their case will take two days or less. All of plaintiffs' witnesses are available to testify the week of October 8. To expedite the briefing, plaintiffs consent to having this memorandum of law serve as their memorandum of law in support of a preliminary injunction.

CONCLUSION

For the above reasons, plaintiffs respectfully request that a temporary restraining order issue enjoining the enforcement of the Act, and that an expedited preliminary injunction hearing be scheduled.

Respectfully submitted,

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