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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KATHLEEN MICNHIMER, Petitioner, and THOMAS MICNHIMER, Respondent.	No. FC 2003-070081 BRIEF OF AMICUS CURIAE (ASSIGNED TO THE HONORABLE BILL BROTHERTON)

BACKGROUND

On August 25, 2003, the Honorable Norman J. Davis, Maricopa County Superior Court, entered a Decree of Dissolution of Marriage ("Decree"). In the Decree, the Court stated that "Father has also viewed pornographic web sites in the past during times that the children were in his sole care." Decree, at 2. As a result, the Court ordered "that Father's unsupervised time with the children is specifically conditioned on Father not having an internet access account or any

access to the internet in his home." Decree, at 5.

This aspect of the Decree presents significant constitutional problems. The American Civil Liberties Union of Arizona ("ACLU") is particularly well suited to address these issues and to provide assistance to the Court. The ACLU has litigated issues of speech and the First Amendment for fifty years including the recent successful case on behalf of the seller of anti-war T-shirts in the face of a new Arizona state law. Dan Pochoda is a nationally-recognized civil rights advocate and law professor, and served as Special Master for the Federal District Court of Arizona in three statewide constitutional challenges against the ADOC.

In this instance, Father has expressly asked for the ACLU to assist in the briefing of these important and complicated constitutional issues. Mother misstates the Supreme Court jurisprudence in her Response. Thus, the ACLU respectfully submits this amicus brief to assist the Court in its resolution of the motion to modify the Decree. The brief focuses on that aspect of the Decree that constitutes a categorical and permanent prohibition on Respondent's access to the Internet in his home at all times and whatever the subject matter viewed.

DISCUSSION

As a threshold matter, the First Amendment to the United States Constitution is applicable to the States through the Due Process Clause of the Fourteenth Amendment. See, e.g., Bigelow v. Virginia, 421 U.S. 809, 811 (1975); Schneider v. State, 308 U.S. 147, 160 (1939). It is also well established that the scope of the First Amendment applies equally to any form of governmental action, and not merely to statutes enacted by the legislature. See, e.g., Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

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I. The First Amendment Protects the Public's Constitutional Right of Access to Information and Ideas.

The First Amendment states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The United States Supreme Court has long held that the First Amendment protects the public's right to access information and ideas. Indeed, the Supreme Court in Stanley v. Georgia, which held that the First Amendment prohibits criminalizing private possession of obscene material in the home, explained that "[i]t is now well established that the Constitution protects the right to receive information and ideas." 394 U.S. 447, 564 (1969). The Supreme Court in Stanley further explained that this guarantee includes the "right to receive information and ideas, regardless of their social worth" and "is fundamental to our free society." Id.

The Constitution does not limit this right of access to information to speakers and writers. Rather, the right of access to information extends to consumers and citizens, and protects their interest as recipients of the information disseminated by speakers and writers. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Supreme Court stated that "[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as in the case here, the protection afforded is to the communication, to its source and to its recipients both." 425 U.S. 748, 756 (1976). This protection applies when the "speaker" is on an Internet site.

II. Prior Restraints on First Amendment Freedoms are Presumptively Unconstitutional.

The Decree prohibits the future receipt of any communication, whatever the subject and without knowing what the content will be. As a general rule, "[a]ny system of prior restraints of expressions comes to [the Supreme Court] bearing a heavy presumption against its constitutional validity." Bantam Books,

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Inc. v. Sullivan, 372 U.S. 58, 70 (1963). The Supreme Court in Near v. State of Minnesota ex. Rel. Olson invalidated a statute prohibiting the publication of "obscene, lewd and lascivious" or "malicious, scandalous and defamatory" material as an impermissible prior restraint. 283 U.S. 697, 703 (1931). In support of its decision, the Court noted that "[its] decision rest[ed] upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular [material]." Id. at 723.

The Constitution's aversion to prior restraints of First Amendment freedom also extends to judicial conduct. In New York Times Co. v. United States, the Supreme Court ruled that the Government had not met the necessary burden required to justify an injunction of the Pentagon Papers. 403 U.S. 713, 714 (1971). In his concurrence, Justice Brennan remarked that "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." Id. at 725-26 (Brennan, J., concurring). Broad-based prior restraints on protected First Amendment freedoms, therefore, are presumptively unconstitutional and the government bears a heavy burden of showing justification for any categorical prior restraint.

III. The First Amendment Protects "Pornography," But Not "Obscenity."

As stated by the Court, the underlying concern was the viewing of pornography by the Father; there is no mention or finding about obscenity. The First Amendment does not protect obscene speech, Kois v. Wisconsin, 408 U.S. 229 (1972), or prohibit laws restricting child pornography, New York v. Ferber, 458 U.S. 747 (1982). However, the First Amendment protects pornography when it does not constitute obscenity. See, e.g., Dible v. City of Chandler, No. 05-16577, slip op. at 1655 (9th Cir. 2008) (Canby, J., concurring).[1] Indeed, the

[1] However, laws passed for the protection of minors must not prevent access by adults to material that is

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Supreme Court in United States v. X-Citement Video, Inc. explained that "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." 513 U.S. 64, 72 (1994). There is no finding of any viewing of obscene material here.

The Supreme Court in Miller v. California, 413 U.S. 15 (1973), set out the modern obscenity standard. Material is obscene where (1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) and the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id. at 24. Miller, therefore, sets the standard for material, that is, legally obscene material, that does not receive the protection of the First Amendment. Where pornography does not fall within the scope of the Miller obscenity test, it continues to find protection under the sheltering wings of the First Amendment.[2]

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constitutionally protected, that is, not legally obscene, simply to prevent possible exposure to children. See, e.g., Butler v. Michigan, 352 U.S. 380, 383 (1957). As such, a state may not "quarantin[e] the general reading of public against books not too rugged for grown men and women in order to shield juvenile innocence," for "this is to burn the house to roast the pig." Id.

[2] Petitioner's counsel conflates Supreme Court jurisprudence in this area, citing both Miller and Ashcroft v. ACLU, 535 U.S. 564 (2002). Ashcroft v. ACLU, however, dealt with a very "narrow question of whether the Child Online Protection Act's (COPA or ACT) use of 'community standards' to identify 'material that is harmful to minors' violates the First Amendment." Id. at 566. Although the Supreme Court held that it did not, the Supreme Court explained that "[t]he scope of [its] decision . . . is quite limited." More specifically, the Supreme Court "[did] not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below." Id. at 585-86. Because Ashcroft v. ACLU addressed only the issue of whether obscenity on the Internet is defined by local standards, it has little bearing on the direct issue in this case, that is, whether a categorical prohibition on one's ability to access the Internet in his home violates the First Amendment.

IV. Content-Based Restrictions on Speech Can Only Stand If They Satisfy Strict Scrutiny.

Restrictions based upon content are subject to the "most exacting scrutiny," commonly known in modern constitutional law parlance as strict scrutiny. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994). In other words, "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." Id.

It may be difficult distinguishing between a content-based restriction, subject to strict scrutiny, and a content-neutral restriction, subject to intermediate scrutiny. The Supreme Court in Turner Broadcasting, however, explained that Supreme Court jurisprudence "[has] recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." Turner Broad. Sys., at 645.

While the broad prohibition against access to Internet may seem facially content-neutral, the clear purpose of the ban, as evidenced in the Decree's findings, is to prohibit access to one, specific type of expression. Indeed, the sole concern seems to be that the Respondent would access pornography, itself a protected form of expression under the First Amendment. But for this concern, there would be no categorical prohibition. This categorical prohibition does not represent the least restrictive means to achieve the Government's interest in protecting Respondent and Petitioner's children. Given the current sophistication of technology, a plethora of less restrictive alternatives are available to the Court, including engaging filtering, monitoring, time-limiting, and application blocking software while Respondent's children visit.

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CONCLUSION

Because the Internet access prohibition is extremely broad and a prior restraint, and not narrowly tailored, the Decree interferes with fundamental constitutional rights protected by the First Amendment. As such, the ACLU respectfully submits this brief in order to address, highlight, and clarify the relevant legal backdrop against which this case operates, and to assist the Court as it considers modifications.

DATED this 11th day of February, 2008.

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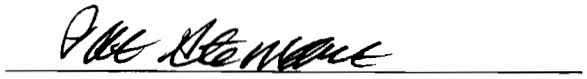

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