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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ANTIGONE BOOKS L.L.C.; INTERGALACTIC, INC.,
D/B/A, BOOKMANS; CHANGING HANDS BOOKSTORE,
INC.; COPPER NEWS BOOK STORE; MOSTLY BOOKS;
VOICE MEDIA GROUP, INC.; AMERICAN
BOOKSELLERS FOUNDATION FOR FREE EXPRESSION;
ASSOCIATION OF AMERICAN PUBLISHERS; FREEDOM
TO READ FOUNDATION; AND NATIONAL PRESS
PHOTOGRAPHERS ASSOCIATION,

Plaintiffs,

-v-

TOM HORNE

1 BRADLEY D. BEAUCHAMP, in his capacity as County
2 Attorney of Gila County; KENNY ANGLE, in his
3 capacity as County Attorney of Graham County;
4 DEREK D. RAPIER, in his capacity as County Attorney
5 of Greenlee County; TONY ROGERS, in his capacity as

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A newspaper and magazine vendor in Arizona offers to sell a magazine which contains images of the abuse of unclothed prisoners at Abu Ghraib.

An educator in Arizona uses images, taken from the Internet, of breast-feeding mothers, in an education program for pregnant women.

A bookseller in Arizona offers for sale the books, *Edward Weston: 125 Photographs* (Ammo Books 2011) or *Imogen Cunningham: On the Body* (Bulfinch 1998), each of which contains nude images.

A librarian in Arizona includes, in the library's collection, the book *Robert Mapplethorpe and the Classical Tradition: Photographs and Mannerist Prints* (Guggenheim Museum Publications 2004), which contains nude images.

A library in Arizona provides computers with Internet access to its patrons and, because no filters could effectively prevent this result, the library patrons are able to access nude or sexual images.

A bookseller or publisher, based outside of Arizona, offers for sale to retailers or consumers within Arizona, or displays to such retailers or consumers, books containing nude but non-obscene images.

Any person in Arizona, having bought one of these books, newspapers, or magazines, or borrowed it from a library, either in Arizona or out-of-state, shows a restricted image to a friend in Arizona.

A mother in Arizona shares with her sister, in the privacy of her home, a nude image of her infant child.

A sexual assault victim in Arizona shows a photograph of the naked assaulter to her mother.

1 Plaintiffs bring this action to have the Act declared unconstitutional, and its enforcement
2 enjoined.

3 2. H.B. 2515 was enacted with the stated goal of combating “revenge porn,” a
4 term popularly understood to describe conduct typified by a person knowingly and
5 maliciously posting an identifiable, private image of an ex-lover online with the intent
6 and effect of harming her reputation and damaging her personal and professional
7 relationships. While the state has a legitimate interest in addressing the real harms of
8 revenge porn, any such law must be narrowly tailored to address that problem.

9 3. The Act, however, is vastly overbroad in its reach. It is not limited to
10 disclosures motivated by revenge; in fact, the motive of the person making the disclosure
11 is irrelevant under the law. Nor is the law limited to pornography or obscene images.
12 And the Act is not limited to digital speech: It equally criminalizes posting another’s
13 private photograph on a widely-accessed Internet site, showing a printed image to one
14 friend, publishing a newsworthy picture in a textbook, and including a nude photograph
15 in an art exhibition.

16 4. The law, quoted in full below, makes it a crime to “intentionally disclose,
17 display, distribute, publish, advertise, or offer a photograph” or other image of “another
18 person in a state of nudity or engaged in specific sexual activities” if the person “knows
19 or should have known” that the person depicted has not consented to “the disclosure.”

20 5. The law requires that consent be specific to *each* disclosure of any
21 restricted image. For example, a museum seeking to hold a photography exhibition
22 including nude images cannot assume from the fact that the photographs were previously
23 published or exhibited at another gallery that the depicted person has consented to “the”
24 disclosure of the photographs in *its* exhibition.

25 6. The Act also creates criminal liability for negligent speech. A person who
26 displays a restricted image risks criminal prosecution based on an allegation that he or
27 she “should have known” that there was no consent. Thus, a person who finds and re-
28 posts a restricted image online could be prosecuted on the grounds that the person

1 “should have known” that the depicted person did not consent; the “re-poster” would
2 have the same criminal liability as a knowing privacy invader who posted the original
3 image without consent.

4 7. To obtain a conviction under the Act, a prosecutor need not prove that any
5 person was harmed by the disclosure. Nor must a prosecutor prove that the person
6 depicted was either recognizable or had a reasonable expectation of privacy in the image.

7 8. The Act has no exception for images related to issues of public concern,
8 including artistic, historical, or newsworthy images depicting nudity or sexuality.

9 9. Plaintiffs include booksellers, book and newspaper publishers, librarians,
10 photographers, content providers, and associations representing them, who offer, display,
11 and sell a broad range of material protected by the First Amendment, including artistic,
12 historical, and newsworthy materials. Plaintiffs (or their members) offer and display
13 nude and sexual images of cultural value and public concern – and do not always seek
14 (and sometimes cannot seek) prior consent before publishing them. Plaintiffs’ readers,
15 customers, patrons, and members include press photographers, users of the web and
16 Internet, and persons who own, borrow, view, and read books and periodicals containing
17 images restricted by the Act. The Act directly infringes the First Amendment rights of
18 Plaintiffs, their members, employees, patrons, and customers, who are among the
19 millions of Arizonans, as well as persons outside of Arizona, whose actions may subject
20 them to felony prosecution under the law.

21 10. Plaintiffs seek declaratory and injunctive relief against enforcement of
22 House Bill 2515, § 1, ARIZ. REV. STAT. 13-1425, on the grounds that: (1) the law is a
23 content-based restriction on constitutionally protected speech, in violation of the First
24 Amendment to the United States Constitution; (2) the Arizona State Legislature failed to
25 tailor the law’s reach to harmful, malicious, harassing, or privacy-invading conduct; (3)
26 the law is overbroad; (4) the law is unconstitutionally vague; and (5) the law violates the
27 Commerce Clause of the United States Constitution.

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1 therapeutic photography for women and whose projects have garnered global attention as
2 body-positive art. Also for sale and on display at Antigone Books are books featuring the
3 photography of Robert Mapplethorpe, regarded as one of the most important artists of the
4 twentieth century. Among those books are *Lady: Lisa Lyon* (Bulfinch Press 1996),
5 *Perfection in Form* (Te Neues Publishing Company 2009), *Robert Mapplethorpe:*
6 *Polaroids* (Prestel Publishing 2013), *Mapplethorpe* (Te Neues Publishing Company 2007),
7 *Robert Mapplethorpe: The Black Book* (Schirmer/Mosel 2010), and *Robert Mapplethorpe*
8 (Skira 2014). Also available for sale on the Antigone Books website are *The Abu Ghraib*
9 *Investigations: The Official Independent Panel and Pentagon Reports on the Shocking*
10 *Prisoner Abuse in Iraq* (Public Affairs 2004), and *Abu Ghraib: The Politics of Torture*
11 (North Atlantic Press 2004). These books contain essays and commentary examining the
12 historical and political context of the Abu Ghraib scandal, excerpts from official reports,
13 presidential memos, and photographs of abused prisoners in a state of nudity. A preview
14 of the pages of *Abu Ghraib: The Politics of Torture* is available on the Antigone Books
15 website; one page shows a fully nude prisoner cowering before a barking dog.

16 17. All of these books contain people in a state of nudity. Antigone Books
17 knows that the individuals depicted in Beall or Mapplethorpe's photography have not
18 consented to Antigone Books' specific display or sale of their images, and Antigone
19 Books does not know the circumstances under which these images were taken, including
20 whether subjects were paid to pose, and whether the images were taken in a public or
21 commercial setting. Antigone Books knows that photographs of torture victims at Abu
22 Ghraib were taken and shared without the subjects' consent. Plaintiff Antigone Books
23 has not secured the consent of any person depicted nude in these images, and in many
24 instances would have no way of doing so.

25 18. Plaintiff INTERGALACTIC, INC. d/b/a BOOKMANS ENTERTAINMENT
26 EXCHANGE ("Bookmans") is the largest used book retailer in Arizona. Bookmans has
27 been buying, selling, and trading books for over 30 years. Bookmans operates a total of
28 six used book stores with locations in Tucson, Phoenix, Mesa, and Flagstaff, Arizona.

1 Bookmans sold approximately 1.4 million books in its stores last year alone; between all
2 six of its stores, Bookmans offers approximately 1.2 million books for sale at any given
3 time. Bookmans also displays and offers around 120,000 titles for sale on its website,
4 <http://www.bookmans.com>, as well as on Amazon Marketplace, AbeBooks, Alibris, and
5 eBay. The vast majority of what each Bookmans store offers for sale is used; the in-store
6 inventory reflects what its customers bring in to trade. Bookmans maintains an entire arts
7 section in each store, often devoting six shelves or more to art or photography books.
8 Bookmans also sells music, movies, magazines, and other media. Some of these books
9 and media contain images of persons engaged in specific sexual activities or in a state of
10 nudity as defined in the Act.

11 19. Bookmans buys and sells many books and publications of great historic and
12 political significance which contain images of nudity where the depicted person
13 consented neither to the taking of the photograph nor to its publication, let alone the
14 specific display or sale of such publication by Bookmans. Among the books for sale in
15 Bookmans' Speedway store in Tucson, Arizona is *Moments: The Pulitzer Prize*
16 *Photographs*. This book includes such iconic images as the Marines raising the U.S. flag
17 in Iwo Jima in 1945, Babe Ruth's final salute to Yankee stadium in 1949, Lee Harvey
18 Oswald wincing in pain as he is shot in 1964, President Ronald Reagan being tackled into
19 his limousine after the 1982 assassination attempt, and the 1972 Pulitzer Prize-winning
20 photograph by Nick Ut of a Vietnamese girl fleeing a village that was being bombed with
21 napalm. The nine-year-old girl in that iconic image, often called "Napalm Girl," appears
22 in what is now called "full frontal nudity." She did not consent to the taking of the
23 photograph, likely did not consent to its initial publication, and did not consent to its sale
24 at Bookmans' Tucson location. Nor was she "voluntarily" nude; according to *Moments*,
25 she tore off her clothes to escape the fire, which had seared her back.

26 20. Plaintiff CHANGING H
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1 second location in Phoenix in May of this year. At both locations, Changing Hands sells
2 books in a variety of genres including fiction, non-fiction, memoirs, history, photography,
3 and self-help books. Changing Hands sends out an e-mail newsletter to individuals that
4 lists titles for sale, events hosted by the bookstore, and staff recommendations, and also
5 operates an Internet site at <http://www.changinghands.com>, which among other things,
6 offers books for sale.

7 21. At its Tempe location, Changing Hands operates a book trade program
8 where customers receive store credit in exchange for gently used books that Changing
9 Hands Bookstore believes it can re-sell. Changing Hands Bookstore also accepts donated
10 books. Much of what Changing Hands Bookstore offers for sale is used; the in-store
11 inventory reflects what its customers bring in to trade. Some of those titles displayed or
12 sold by Changing Hands Bookstore contain photographs of whole or partial nudity, as
13 defined in the Act.

14 22. Among Changing Hands' inventory are several photography books
15 including photographs by Edward Weston. Arizona's Center for Creative Photography
16 houses his archives, and hails Weston as one of the twentieth century's most influential
17 art photographers. Among the books including Weston photographs that Changing
18 Hands offers for sale are *Edward Weston & Harry Callahan: He, She, It* (La
19 Fabrica/Fundacion Banco Santander 2013), *Edward Weston: Nudes* (Aperture 1993), and
20 *Edward Weston's Book of Nudes* (Getty Publications 2007). Each of these books
21 contains photographs of persons "in a state of nudity."

22 23. Changing Hands offers thousands of books for sale. By vetting the
23 publishers, Changing Hands can be confident that all of the books are protected by the
24 First Amendment; that is, that none of the books is obscene. Many reputable publishers
25 publish books containing images that are (or could be) prohibited by the Act but do not
26 vet books according to compliance with Arizona law. Changing Hands cannot review
27 every book to determine whether it contains a nude image, let alone to ascertain whether
28 the person depicted consented to the initial disclosure. It is impossible for many of the

1 persons depicted to have consented to Changing Hands' display or sale of these images,
2 because they passed away before publication of the book and its sale or donation to
3 Changing Hands.

4 24. Plaintiff COPPER NEWS BOOK STORE is a small, independent bookstore in
5 Ajo, Arizona, a town of about 4,000 people in southwestern Arizona, about 120 miles
6 southwest of Phoenix and 130 miles west of Tucson. Ajo was originally a mining town,
7 and is now a retirement community. The bookstore has been in business since 1998, and
8 is affiliated with *Ajo Copper News*, a weekly newspaper which has been published since
9 1916, and is now published in both paper and digital form. Copper News Book Store
10 sells a broad range of books, including art and photography books. About half of the
11 books sold in the store are used books. Copper News Book Store also sells books online,
12 through AbeBooks and Amazon. Copper News Book Store does not routinely review its
13 inventory to determine whether any books in its stock contain images of nudity or sexual
14 activities. . A partial inventory review in response to the Act revealed at least two
15 publications that contain images of nudity restricted by the Act: *Borneo Scene* (Anna
16 Photo Company, Kuching, Malaysia 1979) and *The New Sensual Massage* (Bantam Dell
17 Publishing Group 1994).

18 25. Plaintiff MOSTLY BOOKS is an independent bookstore located in Tucson,
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1 Group, Inc., a responsible third party; there are currently more than 8 million titles for
2 sale on the website. Mostly Books also sells e-books available on its website through
3 Kobo. Mostly Books also runs the Mostly Books Affiliate Program, through which other
4 websites host book ads which drive traffic to Mostly Books' website and often result in
5 sales. Some of the books and e-books available on the Mostly Books website and app, or
6 displayed on the website or affiliate ads, include images of persons engaged in specific
7 sexual activities or in a state of nudity, as defined in the Act.

8 26. Among the books for sale in Mostly Books' inventory are *Moments: The*
9 *Pulitzer Prize Photographs* (Black Dog & Leventhal Publishers 1999), and several
10 photography books including photographs by Modernist artists and contemporaries
11 Imogen Cunningham and Edward Weston. Cunningham, whose work is in the permanent
12 collection at the Museum of Modern Art and the Library of Congress, is renowned as one
13 of the greatest American women photographers. Books including Cunningham and
14 Weston photographs which Mostly Books offers for sale include *Group f.64: Edward*
15 *Weston, Ansel Adams, Imogen Cunningham, and the Community of Artists Who*
16 *Revolutionized American Photography* (Bloomsbury USA 2014), *Imogen Cunningham*
17 *(Zeitgeist Films 2013)*, *Edward Weston* (Taschen 2013), *Imogen Cunningham: Ideas*
18 *without End* (Chronicle Books 1993), *Edward Weston: 125 Photographs* (Ammo Books
19 2011), *Imogen Cunningham: Portraits* (Bulfinch Press 1998), *Edward Weston: Portraits*
20 *(Aperture 2005)*, and *Edward Weston* (Skira 2013). Each of these books contains
21 photographs of persons in a state of nudity.

22 27. In working with established and trusted publishers, Mostly Books knows
23 that that none of the books it displays or offers is obscene or qualify as child
24 pornography. Many reputable publishers screen for images that are not protected by the
25 First Amendment, but publish books containing images that might be prohibited by the
26 Arizona Act. In addition, the particular titles displayed on Mostly Books' website or app
27 are derived from a database maintained by a trusted third party, which ensures that the
28 books are not obscene but does not screen books for compliance with the Act. Mostly

1 Books cannot review every book or website display to determine whether it contains a
2 nude image, or the broad category of “sexual activities.” If it did seek to comply with the
3 Act, it would lose profit by eliminating all books with nude or sexual photographs from
4 its store and online inventories, and would likely lose further business due to its apparent
5 incomplete or inadequate catalogue of books.

6 28. Plaintiff AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION
7 (“ABFFE”) was organized as a non-profit organization by the American Booksellers
8 Association in 1990 to inform and educate booksellers, other members of the book
9 industry, and the public about the dangers of censorship, and to promote and protect the
10 free expression of ideas, particularly freedom in the choice of reading materials. ABFFE
11 is incorporated in Delaware, and has its principal place of business in New York City.
12 Most of ABFFE’s members are bookstores in the United States, including Arizona.
13 ABFFE’s members offer and sell First Amendment-protected books, magazines, and
14 papers, both from their stores and online, some of which contain non-obscene images of
15 persons engaged in specific sexual activities or in a state of nudity, as defined by the Act.
16 ABFFE sues on its own behalf, on behalf of its members (including its Arizona members
17 and its members outside of Arizona that offer and/or sell books and other materials to

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1 taken by Arizona artist and Arizona State University Professor Betsy Schneider of her
2 own children, and included thumbnail images of naked babies from her art exhibition in
3 downtown Phoenix. Maricopa County also considered opening a police investigation
4 into the *New Times*' publications of these images. A Phoenix city attorney told local
5 press that if the photos were found to be illegal, "Everybody who picked up one those
6 issues (of the *New Times*) could be prosecuted for possessing child pornography."¹

7 32. Plaintiff ASSOCIATION OF
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1 example, books about breastfeeding; (c) histories and public affairs books, including
2 images taken at crime scenes, at disaster scenes, and in conflict and war zones; (d) sports
3 books, which may include congratulatory “erotic touching” of the buttocks; (e)
4 photography books, which include artistic nude images; and (f) books about celebrities,
5 which include images of women in swimwear or low-cut gowns that reveal a side or
6 bottom portion of the breast below the areola (even though the areola and nipple are fully
7 covered).

8 34. Plaintiff FREEDOM TO READ F
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1 would be “offering” the images. Moreover, the websites of non-Arizona FTRF member
2 libraries can be accessed, via the Internet, from Arizona. Many of those non-Arizona
3 libraries participate in Interlibrary Loans to Arizona libraries. To comply with the Act,
4 the non-Arizona libraries would have to either (a) set up a restriction on the Interlibrary
5 Loan program to ensure that restricted works were not loaned to Arizona libraries or
6 persons in Arizona, or (b) to maintain a uniform Interlibrary Loan program, remove such
7 restricted works entirely, thus denying libraries in other states the opportunity to borrow
8 such works.

9 36. Plaintiff THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (“NPPA”)
10 is the leading voice advocating for the work of visual journalists in the U.S. today. It is
11 dedicated to the advancement of visual journalism – its creation, practice, training,
12 editing, and distribution – in all news media, and works to promote its role as a vital
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1 regained control of the prison: Hundreds of inmates, ordered to strip naked, stood in the
2 prison yard, surrounded by guards. These images are widely available on the Internet and
3 in publications.

4 38. Defendant TOM HORNE, as the Attorney General of the State of Arizona, is
5 the state's chief law enforcement officer and is sued in his official capacity. Attorney
6 General Horne retains general prosecutorial authority to ensure that the laws of Arizona
7 are faithfully executed and has supervisory authority over county and local prosecutors.
8 Pursuant to ARIZ. REV. STAT. § 41-192, Attorney General Horne "shall have charge of
9 and direct the department of law and shall serve as chief legal officer of the state."

10 39. The following Defendants are the County Attorneys for each of Arizona's
11 counties, and as such are responsible for prosecuting crimes in Arizona pursuant to ARIZ.
12 REV. STAT. § 11-532, and are sued in their official capacities: MICHAEL B. WHITING, in
13 his capacity as County Attorney of Apache County; EDWARD G. RHEINHEIMER, in his
14 capacity as County Attorney of Cochise County; DAVID W. ROZEMA, in his capacity as
15 County Attorney of Coconino County; BRADLEY D. BEAUCHAMP, in his capacity as
16 County Attorney of Gila County; KENNY ANGLE, in his capacity as County Attorney of
17 Graham County; DEREK D. RAPIER, in his capacity as County Attorney of Greenlee
18 County; TONY ROGERS, in his capacity as County Attorney of La Paz County; BILL
19 MONTGOMERY, in his capacity as County Attorney of Maricopa County; MATTHEW J.
20 SMITH, in his capacity as County Attorney of Mohave County; BRAD CARLYON, in his
21 capacity as County Attorney of Navajo County; BARBARA LAWALL, in her capacity as
22 County Attorney of Pima County; LANDO VOYLES, in his capacity as County Attorney of
23 Pinal County; GEORGE SILVA, in his capacity as County Attorney of Santa Cruz County;
24 SHEILA POLK, in her capacity as County Attorney of Yavapai County; and JON R. SMITH,
25 in his capacity as County Attorney of Yuma County.
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14. ... “[S]tate of nudity” means any of the following:

- (a) The appearance of a human anus, genitals or a female breast below a point immediately above the top of the areola.
- (b) A state of dress that fails to opaquely cover a human anus, genitals or a female breast below a point immediately above the top of the areola.

* * *

18. “Specific sexual activities” means any of the following:

- (a) Human genitals in a state of sexual stimulation or arousal.
- (b) Sex acts, normal or perverted, actual or simulated, including acts of human masturbation, sexual intercourse, oral copulation or sodomy.
- (c) Fondling or other erotic touching of the human genitals, pubic region, buttocks, anus or female breast.
- (d) Excretory functions as part of or in connection with any of the activities under subdivision (a), (b) or (c) of this paragraph.

ARIZ. REV. STAT. § 11-811(D)(14), (18). These definitions are borrowed wholesale from Arizona’s code chapter governing “County Planning and Zoning.”

43. If the person depicted is neither identified nor identifiable, a violation of the Act is categorized as a level 5 felony, which carries a presumptive sentence for a first conviction of six months to thirty months’ imprisonment, ARIZ. REV. STAT. § 13-702(D). If the person depicted is “recognizable” in any way, however, the same conduct may be charged as a level 4 felony, which carries a presumptive sentence for a first conviction of one year to three years and nine months’ imprisonment, ARIZ. REV. STAT. § 13-702(D).

44. Whether or not the person depicted is identifiable, violations of the Act are categorized under the section of Arizona code setting forth sexual offenses, and may also constitute crimes of domestic violence depending on the relationship between the

1 discloser and the person pictured. ARIZ. REV. STAT. § 13-3601(A). Section 1 of H.B.
2 2515 amends Chapter 14 of Arizona’s Criminal Code, Relating to Sexual Offenses, by
3 adding the crime of “[u]nlawful distribution of images,” codified at ARIZ. REV. STAT. §
4 13-1425. Thus, a violation of the law may be a felony sex offense.

5 45. ARIZ. REV. STAT. § 13-3821 includes a catch-all provision permitting a
6 judge to require anyone found guilty of any violation of Chapter 14 to register publicly as
7 a sexual offender if the offense involves “a finding of sexual motivation.” Thus, a
8 conviction under the Act may also require registration as a felony sex offender.

9 46. Section 2 of H.B. 2515 amends Chapter 36, Relating to Family Offenses,
10 by including ARIZ. REV. STAT. § 13-1425 among the list of enumerated offenses that
11 qualify in certain circumstances as crimes of domestic violence. *See* ARIZ. REV. STAT. §
12 13-3601(A) (Relating to Domestic Violence: definition; classification; sentencing
13 options; arrest and procedure for violation; and weapon seizure). Thus, under
14 circumstances defined in ARIZ. REV. STAT. § 13-3601(A) of the Arizona Criminal Code,
15 the crime of “[u]nlawful distribution of images” may be investigated, charged, and
16 sentenced as a crime of domestic violence.

17 47. The Act took effect on July 24, 2014.

18 48. Since, under the Act, only specified nude or sexual images require
19 individualized consent before they may legally be offered or shared in any manner, the
20 Act is a content-based criminal restriction on non-obscene speech.

21 49. The Act makes no distinction between images that are published with
22 malice or wrongful intent and those that are not. For example, under the Act, a woman
23 who received an unsolicited photograph of a man’s penis could be convicted of a felony
24 if, alarmed by the communication, she shared the photograph with a friend. Indeed, a
25 rape victim who showed a photograph of the naked rapist to her mother could be
26 convicted of a felony. (The Act might permit her to use the photograph to report the
27 crime, but would make her a felon if she showed the photograph to a relative, or posted
28 the photograph online to seek help identifying her rapist.)

1 50. The Act makes no distinction between images that cause harm to the person
2 or persons pictured and those that do not. Furthermore, the Act imposes criminal liability
3 for the display of images where the person depicted is neither identified nor identifiable
4 (but, as noted above, imposes more severe punishment if the person depicted is
5 recognizable).

6 51. The Act makes no distinction between images in which the person or
7 persons pictured have a reasonable expectation of privacy and those in which they do not.
8 For example, a person could be convicted of a felony for sharing a photograph that no
9 reasonable person would consider private, such as a naked image self-published on a
10 widely-accessible website, or an archival copy of *Life* magazine containing photos of
11 naked victims of the Holocaust.

12 52. The Act has no exceptions for images related to matters of public concern,
13 including those as to which consent was not, or could not be, obtained because of the
14 circumstances of the photograph. For example, a person could be convicted of a felony
15 for sharing the “Napalm Girl” photograph, certain of the Abu Ghraib photographs, or the
16 widely published lewd photo sent out by a (now former) U.S. Congressman.

17 53. The Act has no exceptions for artistic images, including those where
18 consent can no longer be obtained because of the death or unavailability of the person
19 depicted. For example, a person could be convicted of a felony for loaning a copy of
20 innumerable books of great artistic value, such as *Edward Weston: 125 Photographs*
21 (Ammo Books 2011), or *Imogen Cunningham: On the Body* (Bulfinch 1998), or *Robert*
22 *Mapplethorpe and the Classical Tradition: Photographs and Mannerist Prints*
23 (Guggenheim Museum Publications 2004).

24 54. The Act criminalizes any intentional disclosure; “intentional” is defined in
25 Arizona’s criminal code as with an “objective to cause that result or engage in that
26 conduct” – here, disclosure. An intentional act requires no “culpable mental state.” ARIZ.
27 REV. STAT. ANN. § 13-202.
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1 **The Statute’s Consent Provision**

2 60. The Act provides that a person is criminally liable if he or she knew or
3 “should have known” that the depicted individual has not consented “to *the* disclosure.”
4 ARIZ. REV. STAT. § 13-1425(A) (emphasis added).

5 61. The use of the definite article “the” in combination with the noun
6 “disclosure” signifies that consent must be granted for the *discrete act of disclosure*.
7 Under the Act, the fact that the person depicted consented to being photographed, and
8 consented to the prior display or publication of the nude image, is not sufficient to
9 establish that the person depicted consented to any further display, publication, or offer of
10 the image.

11 62. The legislative record of H.B. 2515 confirms this interpretation. The bill’s
12 sponsor, Representative Mesnard, stated during the bill’s hearing in the House Judiciary
13 Committee: “We as a society really have a collective responsibility beyond just the
14 person who initially posts it or we are giving an out to the next person who just passes it
15 along.” Statement of Rep. Mesnard, Arizona State Legislature, Judiciary Committee
16 Hearing (February 6, 2014) at 01:49:45—01:52:12. The language of consent in the bill is
17 essentially unchanged from the version then up for debate, other than the removal of a
18 requirement of *written* consent. Upon information or belief, no other statement in the
19 record or the text of the Act reflects a legislative intent to limit the reach of the law to
20 initial posters or malicious actors.

21 63. Because it appears that consent to the specific disclosure is required, a
22 publisher could be convicted of a felony for including a restricted photograph in a book,
23 even if the publisher knew that the depicted person had previously consented to having
24 the photograph taken, or exhibited in an art gallery, if the depicted person did not
25 specifically consent to the publication of the photograph in the book.

26 64. The Act provides no notice of the nature, form, duration, or scope of the
27 requisite consent.

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1 65. The Act also appears to permit the depicted person to revoke consent to
2 disclosure, even where the image was taken with the understanding or explicit agreement
3 that it would be disclosed, and the image is lawfully possessed by the person making the
4 disclosure. For example, a person who knowingly posed in the nude for a photograph,
5 with the explicit agreement that it would be publicly distributed, but who later regretted
6 the photograph, or sought but was unable to obtain additional compensation for having
7 posed, could revoke consent and turn further exhibition of the photograph into a felony.
8 This is true even when the depicted person has no expectation of privacy in the picture,
9 and where the photographer legally took, possessed, and initially displayed the image.

10 66. The standard by which a finder of fact is to determine whether a person
11 “should have known” that the person depicted did not consent to the disclosure is even
12 more unclear. Plaintiffs worry, but cannot be certain, that the negligence standard
13 imposes a due diligence obligation on a publisher, or bookstore owner, or librarian, to
14 ascertain whether consent was given to an initial or subsequent display of any image.
15 Plaintiffs who publish and sell media, who assume that valid consent has been given by
16 persons depicted, worry that they may be subjected to criminal liability if a finder of fact
17 were to conclude that this assumption was inadequate, and that the publisher should have
18 known that the consents were not given, or were not given validly.

19 67. Further, the Act makes no provision for implied consent to subsequent
20 disclosures based on the manner or medium in which an image is initially disclosed.
21 Instead, anyone who innocently republishes or redisplay a nude or sexual image, either
22 online or by showing it to a friend, risks criminal liability under the Act. For instance,
23 sharing an image of a woman who willingly and intentionally posts her own nude
24 photograph on a public website could lead to criminal charges against anyone who linked
25 to, “advertised,” or re-posted that photograph, if the person did not obtain permission for
26 the subsequent disclosure of the image and “should have known” that the depicted person
27 did not consent to further disclosure.

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1 74. Images prohibited by the law include political and newsworthy images
2 containing information in the public interest, such as evidence of improper conduct by
3 government actors, the brutal consequences of war, war crimes, and torture, and images
4 related to health education. As a result, the Act deprives the public of access to images at
5 the very core of the First Amendment’s protections.

6 **The Act’s Burden on Online Speech**

7 75. The Act’s constitutional deficiencies are further compounded when applied
8 to online activity.

9 76. The Act restricts all speech, including digital content. This means that any
10 image posted or shared on Instagram, Facebook, or Twitter; “offered or advertised” in
11 any online forum; or shared privately in an instant message or email attachment is subject
12 to the Act. The Act’s prior consent requirement creates a vast and vague censorship
13 regime for the web, delegating to private persons – most unknown by the viewer – the
14 power to regulate the speech of others.

15 77. The Internet in general, and the worldwide web in particular, represent the
16 most participatory marketplace of mass speech. The web vastly decreases the cost and
17 difficulty of sharing content, and consequently means that the number of Americans who
18 “disclose, display, distribute, publish, advertise, or offer a photograph, videotape, film or
19 digital recording” online is incredibly vast. As this Act includes no specific intent
20 requirement or is soD56..6 Twula18(x.6(os4n)5.2k, orli)59(anda.6(osany particulao imagh incorv
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1 **The Act's Burden on Interstate Commerce**

2 79. The Act does not define what conduct will subject a person to Arizona's
3 criminal jurisdiction: Whether it is the state citizenship or location of the depicted
4 person, the place where the restricted image was disclosed, or the location of the viewing
5 of a restricted image.

6 80. The Act unjustifiably burdens interstate commerce and regulates conduct
7 that occurs wholly outside the borders of Arizona, thereby causing irreparable harm.
8 Like the nation's railways and highways, the Internet is by its nature an instrument of
9 interstate commerce. Just as goods and services travel over state borders by train and
10 truck, information flows across state (and national) borders on the Internet. The various
11 sites on the Internet can be accessed by anyone in the world; therefore there is no feasible
12 way for speakers to ensure that residents of Arizona will not receive their
13 communications.

14 81. The Act impacts the speech of online speakers across the nation, not just in
15 the State of Arizona, because it is practically and economically unfeasible for most
16 Internet users to determine the geographic location of persons who access their
17 information. Just as a user of the Internet cannot identify the age of another user of the
18 Internet, one also cannot identify where a particular user or speaker resides, or from
19 where a particular user may be accessing or downloading information on the Internet. A
20 website operator or online content provider may not know that its service provider routes
21 data through a server in Arizona or that Arizonans are viewing or downloading the
22 website's content. An online user cannot know if someone in Arizona might receive or
23 view her posting to an online discussion group, an attachment to her or his email mailing
24 list, or the link she uploaded to her website. Consequently, individuals and businesses
25 who transmit images on the Internet must comply with the Act or risk prosecution.
26 Therefore, the Act interferes significantly with the interstate flow of information and with
27 interstate commerce.

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COUNT II
VIOLATION OF RIGHTS PROTECTED UNDER THE FIRST,
FIFTH, AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION—
VAGUENESS AND LACK OF DUE PROCESS

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