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2 **I. FACTS**

3 Plaintiff Dan Frazier and his wife live in Flagstaff, Arizona. (See Affidavit of Dan  
4 Frazier attached as “Exhibit A”, at ¶ 1). Mr. Frazier is a peace activist who owns and  
5 operates CarryaBigSticker.com, a website on which he sells t-shirts and other items  
6 which contain expressions of his political views and beliefs. (Id. at ¶ 2-3). Plaintiff seeks,  
7 among other things, to change the policies of the Bush administration relating to the Iraq  
8 war. (Id. at ¶ 4). Among the items for sale on Plaintiff’s website are t-shirts which  
9 contain the words “BUSH LIED – THEY DIED”. (Id. at ¶ 5). The statement “BUSH  
10 LIED” is printed on the front of the t-shirt and the statement “THEY DIED” is printed on  
11 the back of the t-shirt in large capital and bold letters. (Id.)(See photograph of t-shirt  
12 attached as Exhibit “B”). The “BUSH LIED – THEY DIED” is printed over a  
13 background of the names of the American soldiers who have died in the Iraq war. (Id.)  
14 Mr. Frazier markets two similar t-shirts which contain the names of the deceased soldiers  
15 and the statements “SUPPORT OUR REMAINING TROOPS – BRING THE REST  
16 HOME ALIVE” and “IF ANY QUESTION WHY WE DIED, TELL THEM, BECAUSE  
17 OUR FATHERS LIED.” (Exhibit “A”, at ¶ 6).

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20 The t-shirts are used to prominently display an anti-war message and to include  
21 this message in the public debate over the occupation of Iraq by the United States. (Id. at  
22 ¶ 7). The t-shirt includes the names of soldiers killed in Iraq to underscore and symbolize  
23 the significant loss of American lives and the need to end the war. (Id.) The names of the  
24 soldiers killed in Iraq are matters of public record and can be accessed by private citizens  
25 in numerous ways. (Id.). The use of the names of soldiers in both anti-war and pro-war

1 messages including political cartoons, newspapers, magazines, and books that are sold is  
2 widespread. (Id. at ¶ 8).

3 Mr. Frazier sold his t-shirts on his website prior to the enactment of the Bill on  
4 May 24, 2007. (Id. at ¶ 9). Mr. Frazier continued to sell his t-shirts in Arizona and  
5 elsewhere since the law was enacted. (Id.). Plaintiff has received protests about the sale  
6 of his t-shirts from some family members of soldiers killed in Iraq. (Id.) Mr. Frazier  
7 maintains that the First Amendment to the United States Constitution guarantees him the  
8 right of free speech and expression, including the right to continue to disseminate his  
9 beliefs about the war in Iraq printed on the t-shirts which contain information which is  
10 both accurate and readily available to the public. (Id. at ¶ 10).

13 Individuals complained to the Arizona Governor's Office and the Arizona State  
14 Legislature in an effort to stop Mr. Frazier from marketing the "BUSH LIED - THEY  
15 DIED" and other similar t-shirts. (Id. at ¶ 11). Edward Flinn, Director of the Arizona  
16 Department of Emergency and Military Affairs ("DEMA") testified before the Arizona  
17 Legislature that the Governor, through his office, asked Representative Nelson to sponsor  
18 Senate Bill 1014 in the Arizona Legislature. Flinn testified that Mr. Frazier's website  
19 sells t-shirts with the deceased soldiers' names on them and that SB 1014 would apply to  
20 the sale of those t-shirts. (Id. at ¶ 12).

22 Margy Bons, a mother of a soldier killed in Iraq, testified in support of the Bill and  
23 that she had previously complained directly to Plaintiff as had family members of other  
24 deceased soldiers. (Id. at ¶ 13). Ms. Bons stated that she was appearing in support of the  
25 SB 1014 because of the message on Mr. Frazier's t-shirts, "BUSH LIED – THEY

1 DIED.” (Id.). Ms. Bons stated that she did not object to the use of her son’s name in  
2 other public offerings, including books for sale. (Id.). Ms. Bons told the media that if  
3 the Bill passed, she would see “Dan Frazier in court”. (Id.).  
4

5 At the same legislative hearing, a letter was read from Terri Shaw, the mother of  
6 another soldier killed in Iraq, in support of the Bill. (Id. at ¶ 14). The letter stated that her  
7 deceased son served in the Iraq war and that she objected to the appearance of his name  
8 on Mr. Frazier’s t-shirts in connection with his expression of anti-war sentiment. (Id.).  
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10 Senate Bill 1014 was passed by the legislature without dissent as an “emergency  
11 measure that is necessary to preserve the public peace, health or safety and is operative  
12 immediately as provided by law.” (See Senate Bill 1014 attached as Exhibit “C”). The  
13 Bill was signed into law by Governor Janet Napolitano on Thursday, May 24, 2007.  
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15 (Id.).

16 Plaintiff can now be prosecuted by Defendants, Boomsma, Hance and Goddard for  
17 a violation of the criminal provisions of the Bill if any of the acts constituting the alleged  
18 crime occurred in that prosecutor’s jurisdiction. Mr. Frazier now faces criminal  
19 prosecutions in any Arizona county where the t-shirts have been sold. Since passage of  
20 the Bill, Plaintiff has been contacted by officers from the Flagstaff Police Department to  
21 confirm that Plaintiff was aware that the recently enacted legislation had been signed into  
22 law by the Governor, making it a crime to continue to market his anti-war t-shirts. (Id. at  
23 ¶ 19) . Plaintiff was advised by the officers of the Flagstaff Police Department that they  
24 were preparing a report to be submitted to the Flagstaff City Attorney’s Office which  
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1 could result in the filing of criminal charges against Plaintiff. On information and belief,  
2 no criminal complaint has to date been filed.

3 Plaintiff can also be sued by multiple persons in multiple courts throughout  
4 Arizona who seek to enforce the civil penalty provisions of the Bill. To date more than  
5 3,600 American soldiers have died in the Iraq war which exposes Mr. Frazier to civil  
6 lawsuits authorized by SB 1014 by the family members and/or legal representatives of  
7 each of those soldiers. Numerous individuals claiming to be family members of soldiers  
8 killed in Iraq have in fact threatened to sue Mr. Frazier. (Exhibit A at ¶ 9). Mr. Frazier  
9 reasonably believes he will be the target of litigation by persons who have been provided  
10 a private right of action in SB 1014. (Id.). Mr. Frazier has received specific threats of  
11 being sued by at least a dozen persons including threats to use the law to “tie him up in  
12 court for some time to come,” to put him out of business, to sue him or “any democrat”  
13 who publishes the names of the deceased soldiers for any purpose” and to file a class  
14 action against him on behalf of the families of the deceased soldiers. (Id. at ¶ 9). On  
15 information and belief, no civil actions have to date been filed pursuant to SB 1014.  
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19 Plaintiff does not have the resources to defend against such lawsuits and his  
20 livelihood and well-being and that of his family will be greatly threatened merely by the  
21 need to engage in such a defense. (Id. at ¶ 17-18). Mr. Frazier’s adjusted gross income  
22 for 2006 was \$23,500 and the cost of defending against even one SB 1014 lawsuit will  
23 cause Mr. Frazier to suffer serious financial hardship. (Id.). The enforcement of SB  
24 1014 will cause Plaintiff to suffer irreparable injury in that his right of free speech and  
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1 expression will be infringed upon and, in addition, his primary source of income will be  
2 lost which will likely force him out of business and further into debt. (Id.).

## 3 **II. ARGUMENT**

4 A preliminary injunction will be granted upon a showing of either (1) a  
5 combination of probable success on the merits and the possibility of irreparable harm; or  
6 (2) serious questions regarding the merits and that the balance of hardships tips sharply in  
7 favor of the moving party. Sony Computer Entertainment, Inc. v. Connectix Corp., 203  
8 F.3d 596, 602 (9<sup>th</sup> Cir. 2000); Cadence Design systems, Inc., v. Avant. Corp., 125 F.3d  
9 824, 928 (9<sup>th</sup> Cir. 1997).  
10

### 11 **A. Plaintiff Has Demonstrated Serious Questions Regarding, and Probable** 12 **Success on, the Merits.**

13 Plaintiff submits that the recently enacted SB 1014, which criminalizes the sale of  
14 his anti-war t-shirts and exposes him to civil liability, violates his First and Fourteenth  
15 Amendment rights. Specifically, the Bill prohibits Mr. Frazier from using the name of  
16 any soldier, alive or deceased, on his t-shirts or any item for sale without the permission  
17 of the soldier or their legal representative.  
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19 The fact that Mr. Frazier sells his t-shirts in no way transforms his anti-war  
20 expressions into less protected commercial speech. In Gaudiya Vaishnava Society v.  
21 City of San Francisco, 952 F. 2d 1059 (1991), the Ninth Circuit reached this conclusion  
22 when it addressed a very similar set of circumstances. In Gaudiya, the plaintiffs  
23 challenged the constitutionality of an ordinance which regulated the sale of t-shirts and  
24 other merchandise on public sidewalks by political or religious groups. The district court  
25 concluded that the ordinance violated the plaintiffs' First Amendment rights and enjoined

1 its enforcement in so far as it prohibited the sale of merchandise constituting or making a  
2 statement carrying a political, religious, philosophical or ideological message. Gaudiya  
3 at 1060. In Gaudiya, the plaintiffs sold various message-bearing merchandise such as t-  
4 shirts, books, buttons, stuffed animals, jewelry and bumper stickers. Gaudiya at 1060.  
5 The ordinance at issue prohibited the sale of this type of message bearing merchandise  
6 within certain areas of San Francisco without a commercial peddlers' permit. Id. at 1060-  
7 1061. The penalty for violation of the ordinance was a fine of \$50-\$500 or imprisonment  
8 for repeated violations. Id. at 1061.

10 In support of the ordinance, the city argued that because items such as “t-shirts,  
11 jewelry and stuffed animals have intrinsic value beyond the message they convey, ... the  
12 sale of such items constitutes a commercial transaction and is not constitutionally  
13 protected.” Id. at 1063. In rejecting the city’s commercial speech argument, the Ninth  
14 Circuit observed that the Supreme Court has held that “an expressive item does not lose  
15 its constitutional protections because it is sold rather than given away.” Id. at 1063  
16 (Citing City of Lakewood v. Plain Dealer Publishing Co. , 108 S.Ct. 2138, 2143, n.5  
17 (1988); Heffron v. Int’l Society for Creshna Consciousness, 452 U.S. 640, 647 (1981);  
18 Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633 (1980)).

21 The Ninth Circuit further observed that in attempting to distinguish between the  
22 less protected commercial speech and speech which is fully protected, the Supreme Court  
23 in Schaumburg held that when a transaction “does more than inform private economic  
24 decisions and is not primarily concerned with providing information about the  
25 characteristics and costs of goods and services, it [is not treated as] a variety of purely

1 commercial speech.” Id.; Schaumber, 444 U.S. at 632. Therefore, the Supreme Court  
2 held in Schaumberg that where a commercial transaction is “intertwined with informative  
3 and perhaps persuasive speech seeking support for particular causes or for particular  
4 views on economic, political or social issues,” it must be treated as a fully protected  
5 activity under the First Amendment. Gaudiya, 952 F.2d at 1063-1064.  
6

7 In Gaudiya, the Ninth Circuit found that the plaintiffs sold their merchandise “in  
8 connection with other activities in order to disseminate the organizations’ message.”  
9 Gaudiya at 1064. Further, the plaintiffs informed individuals of their causes through  
10 distributing their literature, engaging in persuasive speech, and selling merchandise with  
11 messages affixed to the product. Id. The Ninth Circuit therefore found:  
12

13 “This ‘informative and perhaps persuasive speech seeking support for  
14 particular causes or for particular views on economic, political, or social  
15 issues’ is fully protected speech.” Schaumberg, 444 U.S. at 633.

16 952 F.2d at 1064.

17 Where the pure speech and commercial speech “is inextricably intertwined, the  
18 entirety must be classified as noncommercial and we must apply the test for fully  
19 protected speech. Accordingly, the district court correctly found that the San Francisco  
20 ordinance impermissibly regulates protected speech in a public forum.” Gaudiya at  
21 1064-1065 (citation and footnote omitted).

22 The message-bearing merchandise that Plaintiff sells is no different than the  
23 merchandise sold in Gaudiya. Because the commercial and pure elements of speech are  
24 inextricably intertwined when Mr. Frazier sells his anti-war t-shirts, the entirety must be  
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1 classified as noncommercial speech and Mr. Frazier must be afforded the same  
2 constitutional protections that were afforded to the plaintiffs in Gaudiya.

3         The First Amendment plainly protects Mr. Frazier’s expressions of his beliefs  
4 about the Iraq war. “[S]peech concerning public affairs is more than self-expression; it  
5 is the essence of self-government.” Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).  
6 See also New York Times Co. v. Sullivan, 376 U.S. 254, II L.Ed 2d 686, 84 S.Ct. 710  
7 (1964); Roth v. United States, 476, 484, I L. Ed 2d 1498, 77 S. Ct. 1304 (1957). These  
8 cases all relied on what the Supreme Court recognized as our “profound national  
9 commitment to the principal that debate on public issues should be uninhibited, robust  
10 and wide-open.” New York Times, 376 U.S. at 270. It is the overriding importance of  
11 this commitment that supported the Supreme Court’s holding that neither factual error  
12 nor defamatory content, nor a combination of the two, suffice to remove the First  
13 Amendment shield from criticism of official conduct. Bridges v. California, 314 U.S.  
14 252, 273. In the instant case, there is no issue of factual error or defamatory content.  
15 Instead, Plaintiff faces the imminent threat of criminal prosecution and civil liability for  
16 accurately including the names of U.S. soldiers who have died in Iraq on his anti-war t-  
17 shirts. The names of the deceased soldiers are a matter of public record and are essential  
18 to Plaintiff’s efforts to communicate the gravity of the Iraq war by identifying the  
19 individual soldiers who have died as a result of the current U.S. government in Iraq.  
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23         The proponents of SB 1014 do not dispute the accuracy of the names or the  
24 number of the dead soldiers but rather seek to silence Mr. Frazier in the name of the dead  
25 soldiers’ “right of publicity.” The enforcement of SB 1014, as a means of silencing Mr.

1 Frazier, however, implicates the core purposes of the First Amendment because it  
2 imposes sanctions on the dissemination of truthful information of public concern.

3 Bartnicki v. Vopper, 532 U.S. 514, 533-534, 121 S.Ct. 1753, 149 L.Ed. 2d 787 (2001).

4 In Bartnicki, which involved the disclosure of the contents of cellular telephone  
5 conversations which had been illegally obtained by a third party, the Supreme Court held  
6 that absent exceptional circumstances privacy concerns of individuals must give way  
7 when balanced against the freedom of expression and the other core purposes of the First  
8 Amendment:  
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11 “In this case, privacy concerns give way when balanced against the interest  
12 in publishing matters of public importance. As Warren and Brandeis stated in  
13 their classic law review article: “The right of privacy does not prohibit any  
14 publication of matter which is of public or general interest.” The Right to Privacy,  
15 4 Harv. L. Rev. 193, 214 (1890). One of the costs associated with participation in  
16 public affairs is an attendant loss of privacy.

17 “Exposure of the self to others in varying degrees is a concomitant of life in  
18 a civilized community. The risk of this exposure is an essential incident of life in  
19 a society which places a primary value on freedom of speech and of press.  
20 ‘Freedom of discussion, if it would fulfill its historic function in this nation, must  
21 embrace all issues about which information is needed or appropriate to enable the  
22 members of society to cope with the exigencies of their period.’” Time, Inc. v.  
23 Hill, 385 U.S. at 388 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 84 L. Ed.  
24 1093, 60 S. Ct. 736 (1940)). n21.

25 Bartnicki, 532 U.S. 514, 534.

The Court went on to emphasize that “our decisions establish that absent  
exceptional circumstances, reputational interests alone cannot justify the proscription of  
truthful speech. Bartnicki, 532 U.S. at 534 n.21 (citation omitted).

The First Amendment protects the publication of lawfully obtained truthful  
information about a matter of public significance even when that publication invades the  
privacy of certain individuals. Florida Star v. B.J.F., 491 U.S. 109, S.Ct. 2603, 105

1 L.Ed.2d 443 (1989). In Florida Star, the Supreme Court reversed the judgment of a  
2 Florida court which had imposed civil damages on a newspaper pursuant to a Florida  
3 statute, which prohibited the publication of the names of rape victims, after finding that  
4 the statute violated the First Amendment. The Court found that the news article  
5 contained lawfully obtained, truthful information about a matter of public significance  
6 which was a matter of public record and concluded that “punishment may lawfully be  
7 imposed, if at all, only when narrowly tailored to a state interest of the highest order, and  
8 that no such interest is satisfactorily served by imposing liability under [the statute] to  
9 appellant under the facts of this case.” 491 U.S. at 542.  
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11  
12 In the instant case, the names of the soldiers killed in the Iraq war is a matter of  
13 public record. The names are published regularly in newspapers, magazines and books,  
14 all of which are sold to the public. In addition, the Bill itself creates numerous exceptions  
15 to the prohibition on the use of the names of the deceased soldiers. Under these  
16 circumstances, Mr. Frazier’s use of the names as part of the expression of his anti-war  
17 beliefs is clearly protected by the First Amendment. As the Supreme Court observed in  
18

19 Florida Star:

20 “We also recognized that privacy interests fade once information already  
21 appears on the public record, 420 U.S. at 494-495, and that making public records  
22 generally available to the media while allowing their publication to be punished if  
23 offensive would invite ‘self-censorship’ and very likely lead to the suppression of  
24 many items that ... should be made available to the public. Id., at 496.

25 491 U.S. 524 at 532.

1           **B. Plaintiff Will Suffer Irreparable Injury if the Defendants are Not Enjoined**  
2           **and The Balance of Hardships Tips Sharply in Favor of the First Amendment**  
3           **Rights of the Plaintiff.**

4           It is well established that irreparable injury exists when the First Amendment  
5           rights of individuals are lost. Elrod v. Burns, 427 U.S. 347, 373 (1976) (“the loss of First  
6           Amendment freedoms, for even minimal periods of time, unquestionably constitutes  
7           irreparable injury”); 11A Charles A. Wright, Arthur R. Miller and Mary Kane, Federal  
8           Practice and Procedure, § 2948.1 at 161 (2d ed. 1995) (“When an alleged deprivation of a  
9           constitutional right is involved, most courts hold that no further showing of irreparable  
10          injury is necessary”). In Elrod, the plaintiffs were public employees who alleged that  
11          they were discharged or threatened with discharge solely because of their partisan  
12          political affiliation. 427 U.S. at 349. In affirming the lower court’s decision the Supreme  
13          Court observed:

15                    “It is clear, therefore, that the First Amendment interests were either  
16                    threatened or in fact being impaired at the time relief was sought. The loss  
17                    of First Amendment freedoms, for even minimal periods of time,  
                          unquestionably constitutes irreparable injury.”

18           Elrod v. Burns, 427 U.S. 347, 373 (1976). See also New York Times Co. v.  
19           United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L. Ed. 822 (1971).

20           The balance of hardships in the instant case also tips sharply in favor of Mr.  
21           Frazier. If the balance of hardships sufficiently favors the moving party, a preliminary  
22           injunction is appropriate even if the questions raised are only considered “serious enough  
23           to require litigation” and not yet likely to succeed on the merits. Arcamuzi v. Continental  
24           Airlines, 819 F.2d 935, 937 (9<sup>th</sup> Cir. 1987).

1 If Mr. Frazier is forced to stop selling his anti-war t-shirts he will lose, at a  
2 minimum, a significant source of his income. If he is prosecuted or sued for selling his t-  
3 shirts he will also be forced to defend himself in court which will quickly deplete his  
4 limited income and resources. In either event he will likely be forced out of business in  
5 addition to being denied the right to freely express his opposition to the Iraq war. The  
6 Defendants, on the other hand, will suffer no financial hardship or other serious injury if  
7 temporarily enjoined. No criminal charges or civil lawsuits have to date been filed. The  
8 status quo is simply preserved until this Court can rule on the merits of Plaintiff's  
9 constitutional claims. Under similar circumstances, the courts have recognized that the  
10 balance of hardships tips in favor of preserving the status quo by the issuance of a  
11 preliminary injunction.  
12

13  
14 For example, in Ebel v. City of Corona, 698 F.2d 390 (9<sup>th</sup> Cir. 1983), the Ninth  
15 Circuit vacated the district court's denial of the preliminary injunction allowing appellant,  
16 adult bookstore owner, to keep her store open while her civil suit concerning the  
17 constitutionality of a zoning ordinance was pending. The court held that the appellant  
18 would suffer financial hardship if she was forced to close her store or was unable to sell  
19 her merchandise. Id. at 393. In addition to the monetary loss, the loss of freedom of  
20 expression constituted irreparable injury. Id.  
21

22 In Ebel, the Ninth Circuit found that, like in the instant case, testimony at public  
23 hearings was specifically aimed against the plaintiff's business, plaintiff had the only  
24 business in the jurisdiction which would be impacted by the new law, and officials stated  
25



1 I hereby certify that on July 23, 2007, I electronically transmitted the foregoing  
2 document to the Clerk's Office using the CM/ECF System for filing. A hard copy was  
3 been mailed via U.S. Postal Service to the following:

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