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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

FREE SPEECH COALITION, INC., A California Not-For-Profit Trade Association On Its Own Behalf and On Behalf of Its Members, Plaintiff, v. MARK SHURTLEFF, in His Official Capacity as Attorney General for the State of Utah, et al., Defendants.	Case No. 2:05-cv-00949 STATEMENT OF INTEREST OF THE UNITED STATES PURSUANT TO 28 U.S.C. § 517 Judge Dale A. Kimball

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INTRODUCTION

Pursuant to 28 U.S.C. § 517, the United States submits the following Statement of Interest in connection with plaintiff's pending motion for preliminary injunction.[1] With this statement, the United States seeks to ensure that the preemption provision in the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act") is interpreted correctly so as to provide due regard for the traditional police power of the states, without depriving the preemption provision of its intended effect. Contrary to plaintiff's position, the CAN-SPAM Act does not preempt the Utah Child Protection Registry Act ("UCPR"). More specifically, the CAN-SPAM Act's preemption provision (15 U.S.C. § 7707(b)(1)) – which applies only to laws governing "the use of electronic mail to send commercial messages" – does not preempt the UCPR's application to communications "containing material harmful to minors." Further, while section 7707(b)(1) does apply to the provision of the UCPR governing the advertisement of such material, section 7707(b)(2)(B) exempts that provision from the CAN-SPAM Act's preemptive ambit as a law "related to computer crime."

The United States also submits this statement to address plaintiff's claim that Utah has violated the First Amendment by prohibiting the communication of sexually-oriented material to registered personal e-mail addresses accessible by minors, against the express wishes of their parents. This claim, if successful, would unjustifiably favor the dubious "right" to send

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[1] 28 U.S.C. § 517 provides that the "Solicitor General, or any officer of the United States, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

unsolicited sexually-oriented material directly and indiscriminately to personal e-mail addresses, heedless of whether they belong to adults or children, and regardless of the expressed wishes of the owner of the addresses, over (1) the fundamental right of individuals to decline to receive unwanted material (sexually-oriented and otherwise) and (2) the right of parents to direct the rearing of their children – a right that the Supreme Court has recognized to be "basic in the structure of our society."[2] *Ginsberg v. State of New York*, 390 U.S. 629, 639 (1968).

I. THE CAN-SPAM ACT DOES NOT PREEMPT THE UCPR

The CAN-SPAM Act imposes various restrictions on the sending of unsolicited commercial e-mail messages. *See* 15 U.S.C. § 7701, *et seq*. The Act also expressly preempts state statutes, regulations, or rules that "expressly regulate[] the use of electronic mail to send commercial messages," except where the provision at issue prohibits fraud, is not "specific to electronic mail," or relates to "acts of fraud or computer crime." *See* 15 U.S.C. § 7707(b)(1), (2)(A)-(B). The UCPR prohibits the sending to registered "contact points" of communications that: (1) contain material that is harmful to minors; (2) have the primary purpose of advertising or promoting material that is harmful to minors; or (3) have the primary purpose of advertising or promoting products or services that a minor is prohibited by law from purchasing. *See* Utah St. § 13-39-202(1). Plaintiff asserts that the CAN-SPAM Act – specifically, 15 U.S.C. § 7707(b) – preempts the UCPR *in toto*. *See* Memorandum of Points and Authorities in Support of Motion

[2] The United States does not address plaintiff's claim under the Dormant Commerce Clause, which does not even potentially implicate the authority of the federal government. This brief also does not address the portion of the UCPR that governs advertisements for products or services that minors are prohibited from purchasing. As discussed in the next footnote, that provision is not even arguably at issue in this case.

for Preliminary Injunction ("Pl. Mem.") at 10-17. As explained *infra*, for various reasons, the CAN-SPAM Act does not preempt the UCPR.[3]

A. THE CAN-SPAM ACT'S PREEMPTION PROVISION (15 U.S.C. § 7707(b)(1)) DOES NOT APPLY TO THAT PORTION OF THE UCPR GOVERNING COMMUNICATIONS THAT "CONTAIN" MATERIAL THAT IS "HARMFUL TO MINORS"

Because the CAN-SPAM Act's preemption provision applies only to state laws that "expressly regulate[] the use of electronic mail to send commercial messages," 15 U.S.C. § 7707(b)(1), it does not preempt the UCPR's prohibition on sending material that "contains. . . material that is harmful to minors" to registered e-mail addresses. Utah St. § 13-39-202(1). That

[3] Defendants correctly observe that certain aspects of plaintiff's challenge do not appear to be properly before the Court because plaintiff has not established its standing to raise those arguments. On the one hand, plaintiff appears to have standing to raise a preemption and facial First Amendment challenge to the provision of the UCPR governing advertising of material that is harmful to minors. *See*, *e.g.*, Second Amended Complaint for Declaratory and Injunctive Relief ("2d Am. Compl.") at ¶ 10. At the same time, plaintiff has not established its standing to challenge the portions of the UCPR governing advertisement of products that minors are prohibited from purchasing, or communications "containing" (but not advertising) material that is harmful to minors. With respect to the former, Utah law does not appear to prohibit minors from purchasing pornographic materials, and plaintiff does not allege that its members sell products that minors *are* prohibited from purchasing such as alcohol or tobacco. *See* Ut. St. §§ 32A-12-209, 76-10-105 (prohibiting the purchase of, respectively, alcohol and tobacco); 2d Am. Compl. ¶ 5. With respect to the latter, plaintiff FSC does not appear to have established that its members send material to e-mail addresses that contains but does not advertise or promote material that is harmful to minors. *See* 2d Am. Compl. at ¶ 10 (stating that "most of FSC's members email expression" consists of advertisements). The closest plaintiff comes is the assertion that "some of FSC's members' e-mail messages which are directed solely to adults are sexually oriented but non-obscene, though they may be legally obscene as to (*i.e.*, 'harmful to') minors in Utah." *See* 2d Am. Compl. ¶ 10; *see also* Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss Complaint for Lack of Standing at 4-7 (summarizing jurisdictional allegations). This allegation is inadequate to establish standing to challenge the "containing material harm to minors" portion of the statute because (1) the use of the word "may" fails to establish the real and immediate threat of injury that the standing doctrine requires, and (2) the context of the sentence makes clear that the referenced e-mails are advertisements. Nonetheless, for the same of completeness, the United States addresses plaintiff's challenge to the application of the UCPR both to communications that contain, and communications that have the primary purpose of advertising or promoting, material that is harmful to minors.

provision does not expressly refer to advertisements of any kind. Nor does the preemption provision apply to the "contains material" provision as to communications that also would be subject to a different provision – *e.g.*, an advertisement for a pornographic web-site that uses pornographic material as part of the advertisement. For the word "expressly" to have significance, as the familiar canon of statutory construction requires, *see*, *e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), *Circuit City v. Adams*, 532 U.S. 105, 113 (2001), it must mean that, to be subject to the preemption provision, the provision at issue must specifically mention electronic advertisements in defining the scope of its prohibition. 15 U.S.C. § 7707(b) is therefore not implicated at all by the prohibition on sending communications to registered "contact points" containing material that is itself "harmful to minors." Because section 7707(b)(1) does not apply at all to the "contains material" restriction, it is unnecessary to address the applicability of the exceptions to that provision, which are set forth in section 7707(b)(2).

B. THE PORTION OF THE UCPR GOVERNING COMMUNICATIONS THAT HAVE THE PRIMARY PURPOSE OF ADVERTISING OR PROMOTING MATERIAL THAT IS "HARMFUL TO MINORS" FALLS WITHIN THE EXCEPTION FOR LAWS THAT "RELATE TO COMPUTER CRIME"

Unlike the provision addressed in the previous subsection, 15 U.S.C. § 7707(b)(1) clearly applies to the UCPR's prohibition on sending communications to registered e-mail addresses that advertise or promote material that is "harmful to minors." *See* Utah St. 13-39-202(1). That provision governs "the use of electronic mail to send commercial messages," and no party has contended otherwise. Instead, the parties dispute the applicability of the preemption exceptions set forth in 15 U.S.C. § 7707(b)(2). Plaintiff contends that neither exception applies, while

defendants contend that both exceptions apply. Neither plaintiff nor defendants are entirely correct: the first exception for "State laws that are not specific to electronic mail, including State trespass, contract, or tort law" (15 U.S.C. § 7707(b)(2)(A)) does not apply, while the second exception for "other State laws to the extent that those laws relate to acts of . . . computer crime" (15 U.S.C. § 7707(b)(2)(B)) does apply.

1. The UCPR Is "Specific to Electronic Mail" Within the Meaning of Section 7707(b)(2)(A)

The exception for laws that are not "specific to electronic mail" does not exempt the UCPR from the preemptive ambit of the CAN-SPAM Act.[4] The UCPR specifically regulates e-mail advertisements. Indeed, though it has the potential to include other types of contact points, the registry presently consists exclusively of e-mail addresses. The words "including State trespass, contract, or tort law" further make clear that Congress intended this exception to cover categories of generally applicable state law that do not specifically reference – *i.e.*, are not "specific to" – e-mail. *See also* S. Rep. 108-102, at 22 (2003) ("Section 8(b)(2) of the legislation clarifies that there would be no preemption of State laws that do not *expressly regulate e-mail*. . . ." (emphasis added)).

[4] Defendant Unspam asserts that the UCPR is "not specific to electronic mail" because it regulates "contact points," a term that potentially could encompass "instant-message identities," fax numbers, and/or mobile phone numbers, in addition to e-mail addresses. *See* Defendant Unspam Registry Services, Inc.'s Brief in Opposition to Plaintiff's Motion for Preliminary Injunction ("Unspam Br.") at 22. The State of Utah asserts that because the Utah statute "deals with material that is harmful to minors," it is "not merely limited to or specific to email." *See* Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 10. Both defendants therefore read the words "not specific to" to mean "not limited to."

In addition, "any understanding of the scope of a preemption statute must rest primarily on a fair understanding of *congressional purpose*." *Medtronic*, *Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (internal citation and quotation marks omitted) (emphasis in original). *See also Bailey v. United States*, 516 U.S. 137, 145 (1995) (the "meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citation omitted); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir. 2001) (a reasonable interpretation of statutory language should be favored over an alternate interpretation that would thwart a statute's purpose). The argument that the statute is not "specific to e-mail" because it could conceivably include other contact points, such as instant messaging, *see* Defendant Unspam Br. at 22, would effectively nullify the CAN-SPAM Act's preemption provision. Under that interpretation, every state could evade the preemptive scope of the CAN-SPAM Act simply by adding instant messaging to their anti-spam statutes. The preemption provision would thus fail to advance Congress' stated intent to create a uniform regulatory standard governing the sending of unsolicited commercial e-mail. *See* 15 U.S.C. § 7701(a)(11); *see also* S. Rep. 107-318, at 13 (2002).

2. The UCPR is a Law "Related to Computer Crime"

The UCPR provision concerning the advertisement of material that is harmful to minors is exempt from the CAN-SPAM Act's preemption provision because it "relates to . . . computer crime" within the meaning of section 7707(b)(2)(B). In construing the words "relates to computer crime," three points are worth noting at the outset. *First*, "all pre-emption cases" must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, *Inc.*

v. Lohr, 518 U.S. at 485. *Second*, Congress did not define the term "computer crime," and no party has presented the Court with any basis for concluding that "computer crime" is a term of art with a single commonly accepted meaning.[5] *Third*, the context and stated purpose of the CAN-SPAM Act's preemption provision make clear that a state cannot evade preemption by simply labeling an anti-spam law (which will, by definition, involve computers) as a "computer crime." The first two points, together with the fact that Congress used the words "relate to" to modify the words "computer crime," make clear that the exception for laws that "relate to . . . computer crime" should be construed broadly, while the third demonstrates that the definition adopted must be more than a matter of labels.

The proper definition of the words "computer crime" – one which pays due regard for the presumption against preemption, the language of the "computer crime" exception, and the purpose of the preemption provision – encompasses crimes involving computers that have traditionally been the subject of state police-power regulation – *i.e.*, actions that could plausibly be termed a "crime." There can be no doubt that the protection of children from sexually explicit materials is such an area. Nearly 40 years ago, the Supreme Court upheld the "obscene as to minors" standard, which is incorporated in the Utah definition of "harmful to minors," *see* Utah St. § 76-10-1201(3), in evaluating the constitutionality of a *state* criminal statute prohibiting the

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[5] Contrast http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861688155 (defining "computer crime" as "crime using computers: illegal activities carried out on or by means of a computer") and http://www.definethat.com/define/769.htm (defining "computer crime" as "Breaking the criminal law by use of a computer") with http://www.answers.com/topic/computer-crime (defining "computer crime," within the site's "Legal Encyclopedia," as "the use a computer to take or alter data, or to gain unlawful use of computers or services").

sale of such material to minors. *See Ginsberg v. New York*, 390 U.S. 629 (1968); *see also* Utah St. § 76-10-1206 (prohibiting the distribution to a minor of material that is "harmful to minors"). The UCPR thus relates to "computer crime" because it addresses actions committed using computers within an area that has long been the subject of state criminal regulation. This interpretation also tracks the standard for applying the presumption against preemption (*i.e.*, an area that has traditionally been the subject of state police power regulation) and, at the same time, would not eliminate the effectiveness of the CAN-SPAM Act's preemption provision because there is no tradition of state criminal laws prohibiting truthful commercial advertising for legal products.

Notwithstanding the foregoing, plaintiff asserts that the "real meaning of 'computer crimes' relates to property damage and unauthorized access to a computer system, impairing the physical integrity of the system." Pl. Mem. at 17. According to plaintiff, any alleged offense contained in the *content* of an email does *not* constitute a 'computer crime' against the recipient's computer itself." *Id.* (emphasis in original). Plaintiff's support for this definition, however, consists only of a federal statute that does not use, let alone define, the words "computer crime" and two cases, for which plaintiff provides no explanation or even pinpoint citations, that also offer no support for the definition. *See id.*; *see also* Reply Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction ("Pl. Reply") at 18. Other than offering a definition that amounts only to *ipse dixit*, plaintiff has little else to say about the definition of "computer crime." It never really explains why defining the words "computer crime" to mean "crime involving computers" is "contorted" or why the term necessarily excludes

crimes involving electronic mail content. *See* Pl. Mem. at 16. Further, as explained *supra*, plaintiff is wrong that such a definition would thwart the purpose of the CAN-SPAM Act's preemption provision. Plaintiff's proposed definition also would also result in, *inter alia*, the preemption of state and local proscriptions on advertising child pornography or illegal "escort" services, even though there is nothing in the CAN-SPAM Act or its legislative history suggesting that Congress intended such a result.

Further, any doubt about the relative merits of the proposed definitions should be resolved against preemption in this instance. *See supra* at 6. At a minimum, the definition set forth in this section is reasonable. Several states have statutes (enacted prior to the CAN-SPAM Act) that classify similar prohibitions as "computer crimes." *See*, *e.g.*, AR St. § 5-27-602(a) (classifying the distribution of child pornography via a computer as a "computer crime"); HI St. § 708-893 (classifying the use a computer to commit a separate crime, including the promotion of pornography for minors, as a "computer crime"); W. Va. St. § 61-3C-14a (classifying as "computer crime and abuse" the unlawful use of a computer to send obscene material); *see also* note 5, *supra*. Moreover, the exception at issue applies not only to "computer crimes" but to all laws that "relate to" computer crime. A law against computer advertising of pornographic material to minors, at a minimum, "relates to" the computer crime of distributing pornographic material to minors. Indeed, as plaintiff notes, an e-mail advertisement will typically contain a link providing direct and easy access to material that is harmful to minors, without itself containing such material. *See* 2d Am. Compl. ¶ 10 ("Even if an FSC member's email messages

do not themselves contain such material, such messages typically link to a web site which does contain such expression").

II. THE UCPR DOES NOT VIOLATE THE FIRST AMENDMENT

A. "OPT-IN" STATUTES SUCH AS THE UCPR APPROPRIATELY PROTECT THE RIGHT OF PARENTS TO ENSURE THAT THEIR CHILDREN DO NOT RECEIVE SEXUALLY-ORIENTED MATERIAL THAT IS "HARMFUL TO MINORS"

Two well-established constitutional principles establish the UCPR's constitutionality. *First*, Utah may prohibit the sale to minors of material that is "harmful to minors" (as defined by Utah law), even where such material is not obscene as to adults. *Ginsberg v. State of New York*, 390 U.S. 629 (1968). Recognizing that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," the Court in *Ginsberg* applied a form of rational-basis scrutiny to New York's prohibition on the sale of such material to minors, notwithstanding the fact that it was arguably "content-based." *Id*. at 639. *See also M.S. News Co. v. Casado*, 721 F.2d 1281, 1288-89 (10th Cir. 1983) (restrictions on the display of sexually-oriented material to minors are properly evaluated as time, place, and manner restrictions).

Second, the First Amendment does not protect a speaker's right to "send unwanted material into the home of another" or to "press even 'good' ideas on an unwilling recipient." *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 738 (1970) (upholding a federal prohibition on the mailing of "pandering" advertisements to individuals who informed the Post Office that they did not wish to receive such advertisements). Instead, the Court has repeatedly

recognized that the "right of every person 'to be let alone' must be placed in the scales with the right of others to communicate" and, indeed, that the right of a mailer "*stops* at the outer boundary of every person's domain." *Id*. at 738 (emphasis added). The Court in *Rowan* reached this conclusion, notwithstanding the fact that the statute at issue applied only to sexually-oriented advertisements. This principle forms the basis for other federal laws (in effect for more than three decades) that prohibit the mailing of sexually-oriented advertisements to names and addresses that have been registered on the Postal Service's "Do Not Mail" list. *See* 18 U.S.C. § 1735; 39 U.S.C. § 3010. *See Pent-R-Books*, *Inc. v. United States Postal Service*, 328 F. Supp. 297 (E.D.N.Y. 1971) (relying on *Rowan* to uphold 39 U.S.C. § 3010's prohibition on the mailing of sexually-oriented advertisements to registered names and addresses). Likewise, in a case decided this year, the Seventh Circuit, relying on *Rowan*, declined to apply heightened scrutiny to a state do-not-call list for telemarketers that exempted certain types of charitable and commercial solicitations. *See Nat'l Coalition of Prayer*, *Inc. v. Carter*, 455 F.3d 783, 787-88 (7th Cir. 2006). *See also Hill v. Colorado*, 530 U.S. 703, 716 (2000) (noting the "significance difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication").

The UCPR prohibits only communications that are sent directly to registered e-mail addresses accessible to Utah minors. In protecting the right of Utah parents to have their children "let alone," without prohibiting the distribution of such material to willing adult recipients, the UCPR rests on the basic and fundamental interests that formed the basis for the decisions in the foregoing cases. The application of heightened scrutiny, particularly in a manner that fails to

give due regard to the statute's "opt-in" features, would devalue those basic and fundamental rights in contravention of Supreme Court and other precedent. Plaintiff errs in relying on inapposite cases that prohibited the distribution of indecent material to willing adults, or that placed significant restrictions on the ability of adults to access such material.[6] In addition, the underlying rationale for heightened scrutiny – *i.e.*, concern over the state's favoring or disfavoring of particular messages – is absent in this case. The UCPR does not determine whether Utah minors may receive particular messages. Instead, it empowers parents to make that decision based on the indisputable recognition that many parents view such messages as particularly invasive and desire such an opportunity, and the parents' "basic" right to decline to receive such messages.[7] *See also FTC v. Mainstream Marketing Services*, *Inc.*, 345 F.3d 850, 856 (10th Cir. 2003) ("how invasive a phone call may be is also influenced by the manner and substance of the call"); *Fraternal Order of Police*, *North Dakota State Lodge v. Stenejehm*, 431 F.3d 591, 597 (8th Cir. 2005) (concluding that an opt-in statute that imposed greater restrictions

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[6] *See*, *e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000) (striking down a statute that prohibited adult programming for all listeners for 16 hours per day during which time 30 to 50 percent of the programming at issue was ordinarily viewed by adult consumers); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (striking down a ban on the communication of indecent and sexually explicit speech to all listeners); *Butler v. Michigan*, 352 U.S. 380, 381 (1957) (prohibiting entirely the distribution of certain publications to all recipients).

[7] There appears to be nothing to plaintiff's oft-repeated but never justified assertion that the UCPR implicates political speech. *See* Pl. Reply Mem. at 12, 13, and 39. While alleging that it and unnamed members engage in political speech, plaintiff never alleges – let alone establishes with the level of certitude necessary to obtain the extraordinary relief of a preliminary injunction – that its asserted political speech could plausibly be viewed as "harmful to minors" under the Utah definition. The fact that plaintiff has apparently not used the Unspam scrubbing service since the statute has been in effect also belies the assertion that plaintiff faces a credible threat of prosecution under the statute. Further, because plaintiff has not shown that the statute regulates any political speech, it obviously has not shown that it implicates a sufficient amount of political speech to justify a facial challenge to the statute.

on certain types of charitable solicitations and that distinguished between solicitation and advocacy was content-neutral "[b]ecause solicitation may reasonably be viewed as more invasive than advocacy").

Moreover, the content lines drawn by the UCPR track lines drawn by the Constitution itself. Specifically, the Utah definition of "harmful to minors" is, for all relevant purposes, the same as the standard that the Court articulated and upheld in *Ginsberg*. At the same time, the *Ginsberg* Court emphasized that it had "no occasion" to go beyond the State of New York's definition and "consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State." *Ginsberg*, 390 U.S. at 636. Since that time, courts have limited the ability of state and local governments to prohibit the sale of speech to minors of material that does not meet the criteria upheld in *Ginsberg*. *See*, *e.g.*, *American Amusement Machine Assoc. v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001) (declining to extend *Ginsberg* to a prohibition on the sale of video games that appeal to minors' "morbid interest in violence"); *Video Software Dealers Assoc. v. Maleng*, 325 F. Supp. 2d 1180, 1183 (W.D. Wash. 2004) (holding that a similar ban on the sale of violent video games was unconstitutional and citing other cases striking down similar laws). Further, the CAN-SPAM Act limits the ability of states to regulate unsolicited commercial speech, and plaintiff itself has argued that minors may not be denied access to political speech. *See* Pl. Mem. at 29-30. "It would seem anomalous to strike down a law because the legislature fostered as much speech as possible while still effectively protecting a state interest." *Nat'l Coalition of Prayer*, *Inc. v. Carter*, 455 F.3d at 791.

Further, giving plaintiff the benefit of the doubt that it is not claiming the right to distribute sexually-oriented material to minors, *see* Pl. Reply at 1, the right that plaintiff *is* claiming as the basis for its challenge – *i.e.*, the right to send sexual messages that are "harmful to minors" (unsolicited and otherwise) directly to personal e-mail addresses that belong to or are potentially accessible by children – is questionable at best. To begin with, "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality).[8] Further, to "say that one may avoid further offense by turning off the radio" or deleting a sexually offensive e-mail "is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978). The Court has also differentiated so-called "Dial-a-Porn" services from other media by noting that in "contrast to public displays, unsolicited mailings, and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no 'captive audience' problem . . . ." *Sable Communications of California v. FCC*, 492 U.S. at 127-28. Thus, the Supreme Court has

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[8] *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) (stating that nude dancing "is expressive conduct within the outer perimeters of the First Amendment" though "only marginally so"); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) ("For First Amendment purposes, the important point is that the Plaintiffs are able to convey their chosen message – not that they are able to do so in a state of undress. Appearing nude is not a First Amendment interest in the abstract, but only insofar as nudity is a means by which some message is conveyed.")

questioned the right to send unsolicited sexual messages directly to recipients who lack the opportunity to avoid receiving the message – a particular problem with unsolicited sexual e-mail.[9] The fact that unsolicited sexual e-mail unquestionably implicates the captive-audience problem, and the fact that the UCPR protects only captive audiences of minors whose parents have affirmatively opted them out of receiving such material, only further demonstrate the lack of merit to plaintiff's contention that the statute threatens the First Amendment right of its members.[10]

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[9] Compare *Missouri v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir.), *reh'g denied* (2003); *Destination Ventures, Ltd. v. Federal Communications Commission*, 844 F. Supp. 632 (D. Or. 1994), *aff'd,* 46 F.3d 54, 55 (9th Cir. 1995) (both upholding (along with numerous other cases) the Telephone Consumer Protection Act's prohibition on unsolicited fax advertising).

[10] One of plaintiff's declarants suggests that his company, which is purportedly the "largest marketer of adult products in the world," must scrub its list of existing customers against the Utah list on a monthly basis. *See* Declaration of David A. Groves in Support of Plaintiff's Motion for Preliminary Injunction ¶¶ 2, 11. While the truth of the assertion does not affect the statute's constitutionality for all of the other reasons discussed in the text, it is worth noting that it is highly questionable that such a step is necessary. To begin with, that declarant only actually scrubbed its e-mail list twice from July 1, 2005 (the effective date of the statute) until March 21, 2006 (the date of the declaration). *See id.* at ¶¶ 9, 10. Further, the declarant knows the address of such customers, and it therefore can determine whether they are Utah residents. *Id*. at ¶ 6. Thus, for monthly scrubbing of its entire e-mail list to make sense, one would have to posit the possible existence of an individual who (a) is a customer of a company that registers the customer's e-mail address with a company that markets sexually-oriented products; (b) is a non-Utah resident when he registers with the company; (c) subsequently becomes a Utah resident without changing his address with the company; and (d) then chooses to register his e-mail address with the Utah registry (e) without removing his e-mail address from the company's mailing list or informing the company that the individual does not wish to receive such messages. Then the company would have to e-mail a covered message to such an e-mail address, the customer (or the customer's spouse) would have to report the violation, and Utah would have to determine that it is worth the effort to prosecute such a company for this technical violation of the statutory terms. The other potential scenarios set forth by the plaintiff and declarant are equally if not more unlikely. Groves Dec. at ¶ 9. While the "largest marketer of adult products in the world" may choose to take this precaution, plaintiff presents no reason to believe that any adult marketer will refrain from e-mailing its customers out of a fear of this unlikeliest of scenarios coming to pass. Moreover, even apart from the extreme unlikelihood of such a scenario,

(continued...)

The foregoing demonstrates that the Court should apply a relaxed standard of review in evaluating the UCPR – *i.e.*, one that gives due regard to the importance of the rights protected by the statute while ensuring that the state is not seeking to prohibit all sexually-oriented speech under the guise of protecting minors. However, as the debate between the majority and concurrence in the *National Prayer Coalition* case demonstrates, the question of the appropriate standard of review is ultimately academic. Whether the Court evaluates the UCPR as an opt-in statute subject to relaxed scrutiny under *Rowan*, *see supra*, or as a statute subject to heightened scrutiny that is narrowly tailored because it is an opt-in statute, the statute is constitutional.

Assuming the relevance of a heightened-scrutiny standard,[11] courts applying different levels of heightened scrutiny have repeatedly recognized the validity of opt-in statutes that impose costs on speakers in ensuring that they do not send particular material to those who have affirmatively stated that they do not wish to receive it. In *United States v. Playboy Entertainment*

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[10](...continued)
plaintiff is not simply asserting that the statute would be unconstitutional as applied in that narrow set of circumstances. Instead, it is unjustifiably using this example to support a facial challenge to the statute.

[11] While the UCPR would satisfy any level of heightened scrutiny, if the Court determines that heightened scrutiny is applicable, the applicable standard of review for the regulation of advertisement of material that is "harmful to minors" would be the intermediate scrutiny applied to regulations of commercial speech. Under that standard, restrictions must be narrowly tailored but need not be the least restrictive alternative. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) ("the least restrictive means is not the standard; instead, the case law requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends") (internal quotation marks and citation omitted); *Mainstream Marketing Services*, *Inc. v. FTC*, 358 F.3d 1228, 1242 (10th Cir. 2004) (narrow tailoring depends upon whether "there are numerous and obvious alternatives that would restrict less speech and would serve the government's interest *as effectively* as the challenged law") (emphasis added). *See also FTC v. Mainstream Marketing Services*, *Inc.*, 345 F.3d 850, 854 (10th Cir. 2003) ("while the fit must be reasonable and in proportion to the interest served, it need not be a perfect fit or the best fit.").

Group, Inc., 529 U.S. at 824, for example, the Supreme Court recognized that "targeted blocking" of sexually-oriented programming is constitutional notwithstanding the applicability of strict scrutiny and "the cost" to cable systems "of installing blocking devices" on the televisions of unwilling recipients. Further, as defendants and amici for defendants have emphasized, this Circuit also recently concluded that the FTC's National Do-Not-Call list, which required advertisers to pay a fee to access the list, was narrowly tailored because the statute "restricts only calls that are targeted at unwilling recipients." *See Mainstream Marketing Services*, *Inc. v. FTC*, 358 F.3d at 1242.[12] *See also* 18 U.S.C. § 1735; 39 U.S.C. § 3010 and cited case, discussed *supra* at 11.

Similarly, courts that have evaluated "opt-in" statutes in the context of charitable solicitations have held that such statutes are constitutional, notwithstanding the heightened scrutiny applicable to restrictions on charitable solicitations. *See Fraternal Order of Police*, *North Dakota State Lodge v. Stenejehm*, 431 F.3d 591 (8th Cir. 2005) (applying intermediate scrutiny); *Nat'l Coalition of Prayer*, *Inc. v. Carter*, 455 F.3d 783 (7th Cir. 2006) (Williams, J., concurring) (arguing unsuccessfully for the application of heightened scrutiny to an opt-in list for charitable solicitations but agreeing with the majority, which applied a lower level of scrutiny, that the statute was constitutional). Statutes such as Utah's are therefore carefully tailored to achieve Utah's undeniably compelling interest in enabling parents to protect their children from

[12] *See id*. at 1242-43 ("The Supreme Court has repeatedly held that speech restrictions based on private choice (*i.e.*, an opt-in feature) are less restrictive than laws that prohibit speech directly. . . . The idea that an opt-in regulation is less restrictive than a direct prohibition of speech applies not only to traditional door-to-door solicitation, but also to regulations seeking to protect the privacy of the home from unwanted intrusions via telephone, television, or the Internet.")

harmful sexually-oriented material. By contrast, plaintiff's brief has identified no cases striking down an opt-in statute, and the United States is aware of none.

B. THE SPECIFIC FEATURES OF UTAH'S STATUTE THAT PLAINTIFF CHALLENGES DO NOT POSE CONSTITUTIONAL PROBLEMS

There is also no apparent basis for plaintiff's challenge to certain specific features of the UCPR. Plaintiff asserts that the fees charged are not narrowly tailored because the state has purportedly not shown that they are limited to the costs of running the registry. *See* Pl. Mem. at 22; Pl. Reply at 27. While the United States has no unique knowledge as to the basis for the particular fee chosen in this instance, it is clear that plaintiff's reasoning is flawed. There would be no sense to a rule preventing states in this area from contracting with private entities with prior expertise and/or proprietary technology that the state reasonably determines would most effectively accomplish the purpose of the statute. Put another way, the need for such a contractor to earn a modest profit is part of the costs of the registry. Plaintiff also has certainly offered no basis for a facial or as-applied challenge to the fee when the cost of scrubbing its e-mail database (even granting the heretofore unjustified assumption that the statute applies to the plaintiff) would amount to no more than $20 per month. *See* 2d Am. Compl. at ¶ 14.

Plaintiff also erroneously complains that the scrubbing features of the UCPR impose a prior restraint on purveyors of sexually explicit material. *See*, *e.g.*, Pl. Reply at 26-27. As an initial matter, the Supreme Court has held that "traditional prior restraint principles do not apply fully to commercial speech. . . ." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 668 n.13 (1985). Further, the regulations that the Court has "found

invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Hill v. Colorado*, 530 U.S. at 735 n.42 (2000) (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989)) (additional citation and internal quotation marks omitted) (emphasis omitted); *see Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196, 1204 (D. Col. 2005) (rejecting plaintiff Free Speech Coalition's claim that record-keeping requirements designed to prevent child pornography were a prior restraint). The UCPR involves no licensing or preclearance system nor does it require speakers to obtain the permission of anyone prior to speaking. Further, sending a message without using the scrubbing process is not a violation of Utah law. Moreover, the mere fact that a regulation requires that a party take some action in association with communicating a message does not transform the regulation into a prior restraint.[13] It is also worth noting that the purported risk that purportedly "standardless discretion" will lead to delays in speech, *see* Pl. Reply at 27, appears to be without merit. Plaintiff identifies no instances of such delay in the months that the statute has been in effect, and it is the United States' understanding that the scrubbing process is nearly instantaneous. *See also City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781-83 (2004) (noting the presumptive adequacy of ordinary judicial review procedures even in cases that do involve prior restraints).

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[13] If it did, the requirement that music performers use a city's sound system prior to performing, *Ward*, 491 U.S. at 793 and n.5, that abortion protesters obtain the consent of pedestrians outside an abortion clinic before approaching the pedestrian, *Hill*, 530 U.S. at 735 n.42, or any time, place, and manner restriction would be subject to prior-restraint analysis. The Supreme Court, however, has concluded that such restrictions are not prior restraints

Furthermore, the Utah legislature's preference for centralized scrubbing over a database accessible to all is justified by its desire to reduce the chance that the database could become a source of information for pedophiles. Plaintiffs correctly point out that the FTC has cautioned that centralized scrubbing and other protective measures (such as one-way hashing, which Utah also makes use of) do not eliminate the risk of abuse of a child registry, and has advised state legislatures against adoption of registries even with such measures. *See* Federal Trade Commission, National Do Not Email Registry A Report to Congress (2004) ("2004 FTC Report"); Letter from Federal Trade Commission to the Honorable Angelo "Skip" Saviano, October 25, 2005 ("FTC Letter"), at 9-11; Pl. Mem. at 9. The FTC acknowledged, however, that these measures "may reduce certain types of computer security threats. . . ." FTC Letter at 9; *see also* National Do-Not-E-mail Registry A Report to Congress at 19 (noting that "a centrally-scrubbed Registry would prevent spammers from obtaining a full copy of the Registry"). In any event, the Utah legislature is entitled to draw its own conclusions regarding the policy concerns weighing for and against creation of the registry.

As plaintiffs also point out, *see* Pl. Reply at 9, the FTC has expressed concern that commercial e-mailers with large unverified e-mail lists could potentially use such registries to identify valid e-mail addresses on their lists, thereby potentially increasing the amount of total spam to those on the list. *See* FTC Letter at 8-9. Utah law has attempted to address this problem by making such use a second-degree felony, presumably as a means of making it less likely that a commercial e-mailer of sexually-oriented material will find it worthwhile to incur the cost, effort and risk of criminal liability to confirm the validity of e-mail addresses accessible to minors of a

single state. Here again, this is a policy determination, necessarily based on predictive judgment, that is within the prerogative of the Utah legislature to make. As the Supreme Court has recognized, "policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994).

It is a virtue of our federal system that states can, in Justice Brandeis' words, provide the "laboratories" for experiments that the federal government is not prepared to implement on a national basis. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The protection of the fundamental right of parents to protect their children from harmful sexually-oriented material is indisputably a worthy goal. At this preliminary stage, plaintiff has not provided the Court with any basis for its request that the Court halt Utah's experiment in its tracks.

CONCLUSION

For the foregoing reasons, the Court should hold that plaintiff has no likelihood of success on its preemption and First Amendment claims.

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