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

NATHAN FLORENCE, et al., Plaintiffs, vs. MARK SHURTLEFF, et al., Defendants.	Civil No. 2:05CV00485 DB Judge Dee Benson Magistrate Judge Samuel Alba

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs respectfully submit this memorandum in support of their motion for summary judgment.

INTRODUCTION

In 2005, the Utah legislature enacted a broadly restrictive censorship law that imposes severe content-based restrictions on the availability, display and dissemination of constitutionally-protected speech on the Internet, on the grounds that such material may be "harmful to minors." The Utah law, Utah Code §§ 76-10-1206 and 76-10-1233 (the "Challenged Statutes") is substantively indistinguishable from statutes of other states which, in the eight years preceding its enactment and in the six years since, have been struck down by seventeen federal judges in five judicial circuits.[1]

[1] *PSInet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004), *reh'g. denied*, 372 F.3d 671, *aff'g* 167 F. Supp. 2d 878 (W.D. Va. 2001); *American Booksellers Found. for Free Expression v. Dean*, 342 F.3d 96 (2d Cir. 2003), *aff'g* 202 F. Supp. 2d 300 (D. Vt. 2002); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D. N.M. 1998); *Southeast Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005); *ACLU v. Napolitano*, No. 4:00-CV-0505 (D. Ariz. June 14, 2002) (statute as amended in 2000 permanent injunction), *sub nom. ACLU v. Goddard*, No. Civ. 00-505 TUC ACM, 2004 WL 3770439 (D. Ariz. Apr. 23, 2004) (statute as amended in 2003 permanently enjoined); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (summary judgment and permanent injunction), 55 F. Supp. 2d 737 (E.D. Mich. 1999) (preliminary injunction), *aff'd*, 238 F.3d 420 (6th Cir. 2000) (unpublished); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); see also preliminary injunctions granted in *American Booksellers Found. for Free Expression v. Coakley*, No. 10-11165-RWZ, 2010 WL 4273802 (D. Mass. Oct. 26, 2010) and *American Booksellers Found. for Free Expression v. Burns*, Civ. No. 3:10-cv-00193 (D. Alaska Oct. 20, 2010). As to the First Amendment issues, all of these cases relied heavily on *Reno v. ACLU*, 521 U.S. 844 (1997) ("*Reno*"), in which a unanimous Supreme Court struck down a similar federal statute, the Communications Decency Act, Title V of the Telecommunications Act of 1996. The Child Online Protection Act, 47 U.S.C. § 231, a federal statute similar to the Amended Act, was also held unconstitutional. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009). In addition, the Wisconsin Supreme Court found the Wisconsin statute unconstitutional for lacking an appropriate scienter requirement. *State v. Weidner*, 611 N.W.2d. 684 (Wis. 2000).

In November 2005, with the consent of the Attorney General of Utah, this Court entered a Stipulated Order (Doc. 27) ordering that defendant Attorney General of Utah and defendants Utah District and County Attorneys not enforce the Challenged Statutes pending decision by the Court on the merits or 30 days' written notice to Plaintiffs.

On August 25, 2006, again with the consent of Defendants, this Court entered a Preliminary Injunction (Doc. 36), preliminarily enjoining enforcement of the Challenged Statutes "until the final judgment of this Court, or further order of this Court, whichever comes first." The Preliminary Injunction included a temporary stay of discovery, to provide the Utah Legislature with an opportunity to cure the constitutional infirmity of the Challenged Statutes. The Legislature never acted.

That Preliminary Injunction has remained in place for five years. Plaintiffs now move for summary judgment, pursuant to FED.R.CIV.P. 56—asking that this Court strike down the Challenged Statutes on the same grounds that comparable statutes of other states have been held unconstitutional; the statutes violate the First Amendment and the Commerce Clause.[2]

In holding comparable statutes of other states unconstitutional, the courts have relied on First Amendment or Commerce Clause grounds that apply with equal force to the Challenged Statutes. In all but one case in which the First Amendment has been addressed,[3] the courts have relied heavily on *Reno v. ACLU*, 521 U.S. 844 (1997) ("Reno"), in which a unanimous United States Supreme Court struck down a similar federal statute, the Communications Decency Act, Title V of the Telecommunications Act of 1996.

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[2] Section 76-10-1233 also has an unconstitutional "compelled speech" component that is not found in the other state statutes. That constitutional issue is discussed *infra* Section I.D.

[3] The only such case that did not rely on *Reno* was *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), which preceded the Supreme Court's *Reno* decision.

The conclusions of those courts nationwide that have invalidated or enjoined statutes like the Challenged Statutes here are further bolstered by both (i) the Supreme Court's decision upholding an injunction against the federal Child Online Protection Act ("COPA") and (ii) the factual findings and legal conclusions of the COPA trial court, on remand from the Supreme Court, that held COPA to be unconstitutional on First Amendment grounds. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004), *remanded sub nom. ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009). As in this case, the COPA litigation involved a statute that sought to directly regulate "harmful" content online. *Id.* at 661. COPA was overturned because it was not the least restrictive alternative, and the same is true here. *Mukasey*, 534 F.3d at 202 (noting that "filters and the Government's promotion of filters are more effective than COPA.").

Plaintiffs brought this litigation because the Challenged Statutes' sweeping restrictions and burdens on the communication over the Internet of constitutionally protected health, literature, arts, and other information would severely damage the commercial and democratic potential of this revolutionary, interactive global medium. Plaintiffs understand first-hand the many ways in which, due to the practical inability for website operators and other online speakers to choose or restrict access to online content by geography and age of viewers, the Challenged Statutes would chill and disrupt the free flow of information that is so essential to Internet growth and commerce. Plaintiffs also understand that the Challenged Statutes would be completely ineffective for their purported goal, *i.e.*, the protection of minors online, and are aware of a range of far more effective and flexible tools that enable parents and other responsible adults, consistent with their own needs and values, to control Internet access by minors.

Plaintiffs do not challenge the Utah laws criminalizing child pornography, sexual solicitation or luring of minors, or obscenity over the Internet. However, a striking judicial consensus holds that state statutes such as the Challenged Statutes, which impose a content-based criminal burden on fully protected adult speech in a medium that is inherently interstate in nature while providing no practical protection to children, cannot constitutionally stand. *See supra* note 1.

Defendants attempt to mitigate the unconstitutionality of the Challenged Statutes by reading them in a way that is totally unsupported by their plain language. In their Supplemental Response to Interrogatory 11, for example, Defendants contend that the Challenged Statutes apply "only if the ISP or the content provider has a one-on-one contact with a viewer; disseminates material harmful to a minor to that viewer; and knows, believes or negligently fails to determine the viewer is a minor." Had the Utah legislature passed such a statute, which would seem to apply only to emails and similar communications to a specific person known or believed by the sender to be a minor, then Plaintiffs' challenge to section 76-10-1206 might have been unnecessary. There is nothing in the language of the Challenged Statutes, however, to support Defendants' efforts to limit their unconstitutional breadth.

STATEMENT OF UNDISPUTED FACTS

This Statement of Undisputed Facts is based upon those allegations of the Amended Complaint, dated April 30, 2007 ("Am. Complaint") (Doc. 43) (**Exhibit A**) which have been admitted in the Answer, dated September 10, 2008 ("Answer") (Doc. 74) (**Exhibit B**); Defendants' Supplemental Responses to Plaintiffs' Interrogatories, dated December 16, 2009 ("Defts. Supp. Response") (Doc. 81) (**Exhibit C**); the accompanying Declarations of fact witnesses Allen R. Adler, Charles Brownstein, Christopher Finan, Nathan Florence, Barbara M.

Jones, Karen McCreary, Terry Nathan, and the accompanying Declaration of expert witness Scott Bradner (each declaration is cited with the witness's last name followed by "Decl.").

I. THE STATUTES

1. House Bill 260, enacted on March 2, 2005, and signed by Governor Jon Huntsman, Jr. on March 21, 2005 ("the Act") amended Utah Code section 70-10-1206 and created Utah Code section 76-10-1233.[4]

2. Amended sections 76-10-1206 and 76-10-1233 are challenged in this proceeding (the "Challenged Statutes").[5] Am. Complaint ¶ 8; Answer ¶ 7.

3. The amendment to section 76-10-1206 expanded the reach of Utah's "harmful to minors" law to include Utah-based Internet content providers and Internet service providers (ISPs) doing business in Utah. Am. Complaint ¶¶ 3, 89; Answer ¶¶ 2, 26.

4. Section 76-10-1233 requires that Utah-based content providers segregate out and label material that may be "harmful" to minors, Am. Complaint ¶¶ 3, 91; Answer ¶¶ 2, 26. "A content provider that is domiciled in Utah, or generates or hosts content in Utah, shall restrict access to material harmful to minors." "Restrict" is defined in section 76-10-1230(6) as "to limit access to material harmful to minors by: (a) properly rating content; or (b) any other reasonable measures feasible under available technology."

5. Defendants state that "the only method Defendants are aware of that would comply with the statute at this time is for the content provider to rate his material and label it in

[4] In 2007, some of the provisions of House Bill 260 were repealed or amended. Am. Complaint ¶ 6; Answer ¶ 5. The changes to the Challenged Statutes did not cure their defects. Am. Complaint ¶ 7. The Challenged Statutes (as amended), with other relevant statutes, are set forth in Exhibit A hereto.

[5] The Challenged Statutes have not been enforced since November 28, 2005 pursuant to stipulated order; enforcement has been preliminarily enjoined pursuant to stipulated order since August 25, 2006. Am. Complaint ¶ 5; Answer ¶ 4.

accordance with Utah Admin R. 152-1a. Any other reasonable measures' is meant to provide other technological options to identify harmful material that may exist or become available." Defts. Supp. Response ¶ 21(A). According to Defendants, "Anyone, whether in-state or out-of-state, who deals in material harmful to minors and who knowingly or having negligently failed to determine the proper age of a minor distributes said material in the State to a minor is subject to the State's harmful to minors statute." Defts. Supp. Response ¶ 10.

II. PLAINTIFFS AND THEIR SPEECH

6. Plaintiffs, their members, and the users of their websites obtain information and engage in communications that may be deemed harmful to minors under the Challenged Statutes. Adler Decl. ¶¶ 4, 5; Brownstein Decl. ¶¶ 7, 9, 10; Finan Decl. ¶¶ 5-8, 14; Florence Decl. ¶¶ 3, 4; Jones Decl. ¶¶ 4-8; McCreary Decl. ¶¶ 7-12, 16; Nathan Decl. ¶¶ 4, 5.

7. Plaintiffs represent a broad range of individuals and entities who are speakers, content providers, and access providers on the Internet. Am. Complaint ¶¶ 23, 24; Answer ¶ 16; Adler Decl. ¶¶ 2-5; Brownstein Decl. ¶¶ 2, 3; Finan Decl. ¶¶ 2, 3, 6-8; Florence Decl. ¶¶ 1, 2, 4, Jones Decl. ¶¶ 2-4; McCreary Decl. ¶¶ 2-6; Nathan Decl. ¶¶ 2-5, 7, 8.

8. Plaintiffs make available online, discuss, and facilitate discussion of constitutionally-protected content, including resources on sexual advice for disabled persons, AIDS prevention, visual art and images, literature, and books and resources for lesbian, gay, bisexual, and transgender ("LGBT") youth. Am. Complaint ¶¶ 23, 24; Answer ¶ 16; Adler Decl. ¶¶ 3-5; Brownstein Decl. ¶¶ 6-10; Finan Decl. ¶¶ 6-8; Florence Decl. ¶¶ 1-2, 4; Jones Decl. ¶¶ 3-4; McCreary Decl. ¶¶ 4-13, 15, 16; Nathan Decl. ¶¶ 4, 5, 8.

9. Plaintiffs have a direct interest in representing, and providing services to, their members and users, including in their ability to send and receive First Amendment-protected content through the Internet. Adler Decl. ¶¶ 2-5, 14; Brownstein Decl. ¶¶ 6-10; Finan Decl. ¶¶ 3,

4, 13, 14; Florence Decl. ¶¶ 1, 2, 6; Jones Decl. ¶¶ 2-4, 6, 7, 9; McCreary Decl. ¶¶ 2-4, 12, 13, 15; Nathan Decl. ¶¶ 4, 5, 7, 8, 10-14.

10. Plaintiffs fear prosecution under the Challenged Statutes because some material they host, generate, or provide online—while entirely constitutionally protected as to adults—could be considered "harmful" to minors. Adler Decl. ¶¶ 4, 5, 8, 9-16; Brownstein Decl. ¶¶ 7, 9-12; Finan Decl. ¶¶ 5-7, 11-14; Florence Decl. ¶¶ 3-7; Jones Decl. ¶¶ 5-12; McCreary Decl. ¶¶ 16, 17; Nathan Decl. ¶¶ 5, 6, 11-14.

11. The Challenged Statutes' rating requirement may compel authors and artists to speak about their work in a way that they would not voluntarily do, and in a way that, for certain works, may be counter to their actual opinions. Nathan Decl. ¶ 6.

12. Speech on the Internet is generally available to anyone with access to basic communications technology. Am. Complaint ¶ 102; Answer ¶ 31. Anyone who posts content to the Web, chat rooms, mailing lists, or discussion groups automatically makes that content available to all users worldwide, including minors. Am. Complaint ¶ 102; Answer ¶ 31; Bradner Decl. ¶¶ 46, 47. Essentially all speech on the Internet is accessible in Utah regardless of the geographical location of the person who posted it. Bradner Decl. ¶ 19.

13. Because there is no way to prevent minors from accessing constitutionally protected material that may be considered "harmful" to minors, Plaintiffs would be forced to remove the material from their websites to comply with the Challenged Statutes. Bradner Decl. ¶ 18; Am. Complaint ¶ 102; Answer ¶ 31. Further, the Challenged Statutes fail to distinguish between material that is "harmful" for older (as opposed to younger) minors, and thus would require websites to restrict access by a 17-year-old to material that is entirely appropriate and not

"harmful" to her, but that may be inappropriate and "harmful" to an 8-year-old. Am. Complaint ¶ 103; Answer ¶ 32.

III. THE INTERNET

14. The basic characteristics of the Internet material to this motion for summary judgment are not disputable. They are admitted by Defendants as set forth in Plaintiffs' Am. Complaint ¶¶ 41-83; Answer ¶ 22.

15. The basic structure and operation of the Internet has been examined and described by a number of courts, including the Supreme Court in *Reno*,[6] the Eastern District of Pennsylvania in *Gonzales*, 478 F. Supp. 2d at 781-82, the Third Circuit in *Mukasey*, 534 F.3d at 184, and the Southern District of New York in *Pataki*, 969 F. Supp. at 164-67.

16. For the vast majority of Internet communications and information, including those potentially subject to prosecution under the Challenged Statutes, it is not technically, economically, or practically feasible for organizational or individual speakers to ascertain the age of persons accessing materials over the Internet, or to restrict or prevent access by minors to them. Bradner Decl. ¶ 18.

17. For the vast majority of Internet communications and information, including those potentially subject to prosecution under the Challenged Statutes, it is not economically and/or practically feasible for organizational or individual speakers to ascertain the geographic location of persons accessing materials over the Internet, nor is it technically, economically or practically feasible to restrict or prevent these communications and materials from traveling through or being received in Utah. Bradner Decl. ¶ 19.

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[6] The United States Supreme Court's decision in *Reno* is based on extensive factual findings of the United States District Court for the Eastern District of Pennsylvania, which the Supreme Court incorporated by reference into its ruling. *See Reno*, 521 U.S. at 849-53.

18. Most communications and information on the Internet are available for free, even when displayed or disseminated by a commercial organization. Requiring users to register and provide personal data in order to receive such information will deter them from exploring or receiving such information to the detriment of users, commercial interests, and the development of new business models made possible by the Internet. Bradner Decl. ¶ 20.

19. The majority of communications and materials on the Internet that could be subject to the prohibitions of the Challenged Statutes are published outside the United States, and such material will continue to be as available to minors as information displayed or posted in Utah itself. Bradner Decl. ¶ 21.

20. Widely available, user based methods and tools, which can block out unwanted material or services regardless of geography or commercial purpose, provide a far more effective and less restrictive alternative for parents and families to control access by minors to information that is deemed unsuitable based on individual family values and circumstances. Bradner Decl. ¶ 21.

21. While computers connected to networks do have "addresses," they are digital addresses on the network rather than geographic addresses in real space. Bradner Decl. ¶ 37. The geographic indicators that do exist do not necessarily indicate the geographic location of the user, because users can gain access to their particular e-mail accounts and other information from anywhere without any sort of indication that the user may be accessing the Internet from a place other than their home access point. Bradner Decl. ¶¶ 37, 38.

22. No aspect of the Internet can feasibly be closed off to users from another state. Bradner Decl. ¶¶ 19, 46. An Internet user who posts material on a Web page or participates in a chat room or discussion group cannot prevent residents of Utah or of any state from accessing

that page and, indeed, will not even know the state of residency of any visitors to that site, unless the information is voluntarily (and accurately) given by the visitor. *Id*.

ARGUMENT

THIS COURT SHOULD GRANT SUMMARY JUDGMENT HOLDING THE STATUTES UNCONSTITUTIONAL

Plaintiffs are entitled to summary judgment holding the Challenged Statutes unconstitutional, because the Statutes violate the First Amendment and the Commerce Clause, and are unconstitutionally vague.

A motion for summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED R. CIV. P. 56(c); *Brown v. Royal Maccabees Life Ins. Co.*, 137 F.3d 1236, 1240 (10th Cir. 1998). When considering such a motion, the court views the facts in the record, and all the reasonable inferences that can be drawn from the record, in the light most favorable to the non-moving party. *See Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1164 (10th Cir. 2000). To survive a motion for summary judgment, the non-moving party must do more than merely assert factual disputes. *See Branson v. Price River Coal, Co.*, 853 F.2d 768, 771-72 (10th Cir. 1998). The non-moving party must set forth specific facts showing that there is a genuine issue for trial and provide probative evidence supporting the allegations. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986). "The mere existence of an alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment." *Id*. at 256.

I. THE CHALLENGED STATUTES VIOLATE THE FIRST AMENDMENT

In accord with the Supreme Court ruling striking down the Communications Decency Act, and as almost every federal court reviewing similar laws regulating content that is

"harmful" to minors on the Internet has held,[7] the Challenged Statutes violate the First Amendment. Like these other enjoined federal and state statutes, the Challenged Statutes ban an entire category of materials that by definition are entirely lawful as to adults, but may be prohibited as to certain minors. The Challenged Statutes would criminalize the mere display and communication of such speech by a large number of speakers using any method of Internet communication; section 76-10-1206, for example, applies to anyone who "distributes or offers to distribute, exhibits or offers to exhibit." Due to the unique nature of the online medium and the practical inability of speakers on the Internet to choose or restrict viewers of their speech, the Challenged Statutes would effectively limit much constitutionally protected content available through the Internet to a level deemed suitable for juveniles.[8]

As explained further below, such broad and restrictive content-based regulations of speech are not narrowly tailored to advance the State's asserted interests. In addition, less restrictive user-based methods exist for parents to control online access by minors to sexually explicit Internet content. Accordingly, the Challenged Statutes violate the First Amendment and must be enjoined as unconstitutional.

A. The Supreme Court Has Ruled that Internet Regulations Such as the Challenged Statutes are Per Se Unconstitutional Because They Flatly Ban Constitutionally-Protected Speech for Adults.

[7] The Court in *Pataki*, after holding the New York Statute unconstitutional under the Commerce Clause declined to decide the First Amendment issue in light of the pending decision by the U.S. Supreme Court in *Reno*. 969 F. Supp. at 183.

[8] The National Research Council, the working arm of the National Academy of Sciences and the National Academy of Engineering, issued a comprehensive study, commissioned by Congress, on protecting children on the Internet. COMMITTEE TO STUDY TOOLS AND STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY, YOUTH, PORNOGRAPHY, AND THE INTERNET 11-13 (Dick Thornburgh & Herbert S. Lin, eds., 2002) ("NRC Report") (summarizing alternatives); *Id*. at 373 ("[I]n an online environment in which it is very difficult to differentiate between adults and minors, it is not clear whether denying access based on age can be achieved in a way that does not unduly constrain the viewing rights of adults").

The Challenged Statutes violate the First Amendment for precisely the same reasons that two federal statutes and seven state statutes have been found unconstitutional by the United States Supreme Court, the Second, Fourth, and Tenth Circuit Courts of Appeals, and seven federal district courts.[9] The Supreme Court has made it clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno*, 521 U.S. at 874 (*quoting Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). Even under the guise of protecting children, the government may not justify the complete suppression of constitutionally protected speech because to do so would "burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).[10]

In striking down the CDA's prohibitions on transmissions to minors by means of the Internet, the Supreme Court noted that while "we have repeatedly recognized the governmental interest in protecting children from harmful materials . . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875. Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Supreme Court has *never* upheld a criminal ban on non-obscene sexually explicit communications between adults.[11]

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[9] *See supra* note 1.

[10] *See also Sable*, 492 U.S. at 128 (the government may not "reduc[e] the adult population . . . to . . . only what is fit for children.") (internal quotations omitted) (*citing Butler*, 352 U.S. at 383); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("The Government cannot ban speech fit for adults simply because it may fall into the hands of children."); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814 (2000) ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if protection can be accomplished by a less restrictive alternative.").

[11] *Id; see, e.g., Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (striking down a ban on mail advertisements for contraceptives); *cf. Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565, (2001) (holding that Massachusetts may not totally bar truthful speech contained in cigarette advertisements in an attempt to achieve substantial and compelling interest of protecting minors).

But adult Internet users cannot engage in sexually frank communications and also comply with the Challenged Statutes. The vast majority of Internet speakers cannot distinguish between minors and adults in their audience.[12] Moreover, in most cases, the Internet does not permit users to control who accesses the information they make available online or where those users are. *ACLU v. Reno*, 217 F. 3d 162, 175 (3d Cir. 2000) ("*Reno II*"). But because one "knows" that there are minors using Internet browsers in Utah, and because Internet users have no means to prevent sexually frank communications from passing to Utah minors without restricting all Internet users, Internet users in general, and Plaintiffs in particular, can only comply with the Challenged Statutes if they speak in language suitable for children. Thus, like the CDA found unconstitutional by the United States Supreme Court in *Reno*, the Challenged Statutes improperly and unconstitutionally operate as a criminal ban on constitutionally protected speech among adults on the Internet. *See Reno*, 521 U.S. at 874.

The Challenged Statutes' scienter requirement does not obviate this constitutional deficiency. The Challenged Statutes only require that the transmitter either (i) know, (ii) believe or (iii) negligently fail to determine the proper age of a minor and does not require that the transmitter know the character and content of the transmitted matter. Criminal liability cannot be imposed for mere negligence if the result is deprivation of First Amendment rights, and the Supreme Court requires knowledge of the character and content of the matter. *See Hamling v. United States*, 418 U.S. 87, 123 (1974). But even if the statute required "actual knowledge," that would not support the constitutionality of the Challenged Statutes. The Supreme Court

[12] *See* INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES 28-31, App. D 10 (Dec. 2008), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf.

addressed the constitutionality of similar provisions of the CDA and found them wanting. *Reno*, 521 U.S. at 880 (holding that a requirement that an actor have knowledge that indecent material will pass to a "specific person under the age of 18" confers broad censorship power in the form of a "heckler's veto" by any opponent of supposedly "indecent" speech on the Internet and, therefore, such requirement does not make the statute constitutional).

B. The Challenged Statutes Unconstitutionally Restrict Older Minors' First Amendment Rights.

The Challenged Statutes are also unconstitutionally overbroad because they proscribe speech on the Internet that may be "harmful" to younger minors but that unquestionably is constitutionally protected for older minors. The Supreme Court has ruled in many contexts that the First Amendment protects minors as well as adults, and that minors have the constitutional right to speak and to receive the information and ideas necessary for their intellectual development and their participation as citizens in a democracy, including information about reproduction and sexuality. *See Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975) (minors are entitled to a "significant measure" of constitutional protection); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 693 (1977) (state cannot ban distribution of contraceptives to minors) (plurality opinion); *Board of Educ. v. Pico*, 457 U.S. 853, 865, 870-71 (1982) (First Amendment rights apply to students in the school setting and therefore local school boards could not remove books from school library shelves simply because they disliked the ideas contained in those books).

The Challenged Statutes impermissibly burden the right of older minors to obtain ideas and information about sexuality, reproduction, and the human body—subjects that are of special interest to maturing adolescents. The Challenged Statutes can make no distinction between "nudity" and "sexual conduct" that may be inappropriate for younger minors and "nudity" and

"sexual conduct," such as explicit safer sex information, that may be valuable when communicated to teenagers. Recognizing this problem, courts in other states have upheld statutes regulating the dissemination of material deemed "harmful to minors" only after construing them to prohibit only that material that would lack serious value for older minors. *See American Booksellers Ass'n v.Webb*, 919 F.2d at 1493 (11th Cir. 1990) (concluding that "if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors' for purposes of the statute"); *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989) (concluding that "if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." (*quoting Commonwealth v. American Booksellers Ass'n*, 372 S.W.2d 618, 624 (Va. 1988))).

C. The Challenged Statutes Fail Strict Scrutiny.

Material that is "harmful to minors" but not obscene is constitutionally protected as to adults; thus, the District Court correctly held that the Challenged Statutes are presumptively invalid and subject to strict scrutiny under well-established First Amendment precedent. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000); *Reno*, 521 U.S. at 868, 870 (holding that content-based restrictions on speech are reviewed under a strict scrutiny analysis and there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."); *Sable*, 492 U.S. at 126.[13] Under strict scrutiny, Utah must identify a compelling government interest *and* it must show that the Challenged Statutes will actually and

[13] *See also R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992) (holding that the First Amendment does not permit individuals to "impose special prohibitions on those speakers who express views on disfavored subjects."); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (noting that the First Amendment "does not countenance governmental control over the content of messages expressed by private individuals").

materially achieve that interest and that no less restrictive alternatives exist to achieve that interest. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (holding that the government "must demonstrate" that "the regulation will in fact alleviate these harms in a direct and material way."), *claim dismissed*, 910 F. Supp. 734 (D. D.C. 1995); *Sable*, 492 U.S. at 126-29 (holding that the government must prove that less restrictive alternatives have been tested and failed).

1. The State admits that the Challenged Statutes do not materially achieve the government's asserted interest.

Utah, in its Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Amended Complaint dated May 31, 2007 ("Defts. Motion to Dismiss") (Doc. 49) (**Exhibit D**), stated that the Utah Legislature's purpose in passing the Challenged Statutes was "to restrict the ability of minors to access pornography on the Internet." Defts. Motion to Dismiss p. 1. Under strict scrutiny, the government must show that the legislation will actually and materially achieve its asserted compelling interest. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (requiring the government to prove that speech restrictions "will in fact alleviate [the harms recited] to a material degree."); *Edenfield v. Fane*, 507 U.S. 761, 770 (1992) (*quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 477 U.S. 557, 564 (1980)) (noting that even commercial speech regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose.").

Defendants unequivocally state:

> Because this statute does not require ISPs or content providers to know the age of its [sic] viewers it is the Defendants position that the Act is not only not likely to, but will not, reduce the availability in Utah of material that may be harmful to minors over the Internet.

Defts. Supp. Response ¶ 14. Based on this admission alone, the Challenged Statutes fail under strict scrutiny.

2. The Challenged Statutes are not narrowly tailored to achieve a compelling state interest.

A content-based regulation of protected speech can be upheld only if it is justified by a compelling governmental interest and is narrowly tailored to effectuate that interest. *See Reno*, 521 U.S. at 879. In striking down the CDA, the Supreme Court found that statute to fail the narrow tailoring test because, "[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppress[ed] a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno*, 521 U.S. at 874. As discussed *supra* Section I.A, the same analysis applies to the Challenged Statutes, and the Challenged Statutes' knowledge requirement does not narrow the provision sufficiently to salvage its constitutionality.

3. The Challenged Statutes fail strict scrutiny because they are an ineffective method for achieving the government's interest.

The Challenged Statutes also fail the strict scrutiny analysis because they are, as defendants themselves admit, a strikingly ineffective method for addressing the government's asserted interest. Defts. Supp. Response ¶ 14. Under strict scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The government bears the burden of showing that its scheme will in fact alleviate the alleged "harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664. In this case, the defendants have not and cannot meet this burden.

As Justice Scalia wrote in *Florida Star v. B.J.F.*, "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring). Due to the nature of the online medium, even a total content-based ban in the United States would fail to eliminate "harmful to minors" material available online. The Internet

is a global medium and material posted on a computer overseas is just as available as information posted next door. To that end, "[a] large percentage, perhaps 40% or more, of content on the Internet originates outside the United States." *ACLU v. Reno*, 929 F. Supp. 824, 848 (E.D. Pa. 1996) ("*Reno III*").[14] Thus, the Challenged Statutes will not prevent minors from gaining access to the large percentage of "harmful" material that originates abroad. *See PSINet*, 108 F. Supp. 2d at 625; *ACLU v. Reno*, 31 F. Supp. 2d 473, 496-97 (E.D. Pa. 1999) ("*Reno IV*"). This reality prompted Judge Dalzell of the Federal District Court for the Eastern District of Pennsylvania to conclude in the lower court ruling in *Reno*:

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

Reno III, 929 F. Supp. at 882-83 (Dalzell, J.). The Challenged Statutes fail to alleviate the alleged "harms in a direct and material way" and are thus unconstitutional. *Turner Broad. Sys.*, 512 U.S. at 664.

4. Less restrictive, more effective, alternatives are available.

The Challenged Statutes also fail strict scrutiny because they are not the least restrictive means of achieving the government's asserted interest. *See Sable*, 492 U.S. at 126 (in order to survive strict scrutiny, means chosen to regulate speech must be carefully tailored to achieve legislative purpose). A less restrictive and more effective solution lies in widely available user-based (*i.e.*, parental) controls on computers. *See Reno*, 521 U.S. at 877 (noting user based software can provide a "reasonably effective method by which *parents* can prevent their children

[14] A more recent finding is approximately 50%. *Gonzales*, 478 F. Supp. 2d at 789.

from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children . . .") (emphasis in original); *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 755-56 (1996) (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material).[15] More recently, in finding unconstitutional a federal statute similar to the Challenged Statutes, the Third Circuit stated that "[g]iven the vast quantity of [foreign-originated] speech that COPA [the federal statute at issue] does not cover but that filters do cover, it is apparent that filters are more effective" than a criminal prohibition like that imposed by Utah. *Mukasey*, 534 F.3d at 203.

"The most reliable method of protecting minors and others from unwanted Internet content is through the use of filtering software installed on the user's own computer." Bradner Decl. ¶ 67. Most Internet Service Providers ("ISPs") and commercial online services provide without additional cost features that subscribers may use to prevent children from accessing chat rooms and to block access to websites and news groups based on keywords, subject matter, or other designations. "Parents can, and do, install such software on their children's computers and configure it to block access to content that the parent considers unsuitable for the child." *Id*. "This type of filtering software is widely available and works without regard to the geographic location of the content and without regard to the commercial or non-commercial nature of the source of the content." *Id*. These services also offer screening software that blocks messages containing certain words and tracking and monitoring software to determine which resources a particular online user, such as a child, has accessed. *See Gonzales*, 478 F. Supp. 2d at 791. They

[15] *See also* NRC Report, *supra* note 8, at 10 ("[F]ilters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable"); *see generally id*. at Section 2.

also offer the possibility of children-only discussion groups that are closely monitored by adults. *See id*. at 792.

Online users also can purchase special software applications, known as user-based filtering software, that enable them to control access to online resources. *Engler*, 55 F. Supp. 2d at 744. These applications allow users to block access to certain websites and resources, to prevent children from giving personal information to strangers by email or in chat rooms and to keep a log of all online activity that occurs on the home computer. *Id*. AOL maintains a parental control feature that allows parents to establish a separate account for their children and choose predefined limits for e-mail, chat room capabilities, and Web access that are based on the age range of the child. *See Engler*, 55 F. Supp. 2d at 744; *Reno III*, 929 F. Supp. at 842; *Gonzales*, 478 F. Supp. 2d at 792.

In addition, user-based content filtering programs such as CyberPatrol, SurfWatch, and NetNanny maintain lists of web sites known to contain sexually explicit material. *PSINet*, 108 F. Supp. 2d at 625; *Reno III*, 929 F. Supp. at 839. When installed, this software blocks access to web sites containing sexually explicit material, and also blocks Internet searches, utilizing particular key words such as "sex" or character patterns such as "xxx." *PSINet*, 108 F. Supp. 2d at 625; *Reno III*, 929 F. Supp. at 839-42. Concerned parents can also choose to obtain Internet access through ISPs that allow their users to access only a limited number of child-appropriate sites. *See* NRC Report, *supra* note 8, at 271-72.

Filtering software was squarely before the Supreme Court when it upheld an injunction against the federal COPA law. In his majority opinion, Justice Kennedy specifically concluded that user-based filtering software was a less restrictive alternative:

> The primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering software is an alternative that is less

> restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them. . . .
>
> Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.[16]

As with COPA, the Challenged Statutes are not the least restrictive means to address the governmental interest. The NRC Report highlights a number of other specific steps that the government can take to address the availability of sexually explicit material to minors online, including to:

> promote media literacy and Internet safety education (including development of model curricula, support of professional development for teachers on Internet safety and media literacy, and encouraging outreach to educate parents, teachers, librarians, and other adults about Internet safety education issues); support development of and access to high-quality Internet material that is educational and attractive to children in an age-appropriate manner; and support self-regulatory efforts by private parties.

NRC Report, *supra* note 8, at 8. The NRC Report also noted that:

> [N]either technology nor policy can provide a complete—or even a nearly complete—solution. . . . [S]ocial and educational strategies to develop in minors an ethic of responsible choice and the skills to effectuate these choices and to cope with exposure are foundational to protecting children from negative effects that may result from exposure to inappropriate material or experiences on the Internet.

Id. at 12, Section 10. All of these approaches are notably less restrictive than Utah's criminal ban.

[16] *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

On the basis of the foregoing, it is clear that the Challenged Statutes violate strict scrutiny and are unconstitutional.

D. Section 1233 Constitutes "Compelled Speech" in Violation of the First Amendment.

Section 76-10-1233 requires content providers to "restrict access to material harmful to minors," which in turn is defined in Section 76-10-1230(1). That section sets out three ways to comply with Section 1233:

> (a) properly rating content;[17]
>
> (b) providing an age verification mechanism designed to prevent a minor's access to material harmful to minors, including requiring use of a credit card, adult access code, or digital certificate verifying age; or
>
> (c) any other reasonable measures feasible under available technology [that limits access to material harmful to minors].

For all of the reasons set out above pertaining to the Section 76-10-1206, subparts (b) and (c) do not provide any viable means by which a content provider can comply with 76-10-1233. Simply put, as detailed above, there are no technologies (including age verification mechanisms) that allow a content provider to "limit access to material harmful to minors." Thus, just as 76-10-1206 is unconstitutional, so are the second and third methods defined by statute to comply with 76-10-1233.

That leaves only the first defined method to comply with 76-10-1233, which is *also* unconstitutional because it is compelled speech in violation of the First Amendment. Generally, the government is prohibited from dictating the content of a person's speech. This prohibition extends to mandatory labels that convey the government's, and not the speaker's, evaluation of

[17] Section 76-10-1230(5) defines "properly rated" content as "using a labeling system to label material harmful to minors provided by the content provider in a way that accurately apprises a consumer of the presence of material harmful to minors" and that allows users to control access to harmful to minors material using a filtering program.

the speech. "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods*, 533 U.S. 405, 410 (2001). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988).

As discussed *supra* Section I.B., standards as to what material is "harmful to minors" varies by the age of the minor and by geographic location. Section 1233 requires material on the Internet to be broadly labeled as "harmful to minors" even though that assessment may not be accurate as to older minors or as to some recipients outside Utah. Compelling such a pejorative label violates the First Amendment. *Meese v. Keene*, 481 U.S. 465, 483 (1987) (upholding a government labeling requirement because the term at issue was a "broad, neutral one rather than a pejorative one.").

The regulations that implement Section 1233 do not save the statute; indeed they highlight its unconstitutionality as they too fail strict scrutiny. Utah Administrative Rules R152-1a-4 and -5 are not narrowly tailored. R152-1a-4, Acceptable Rating Labels, requires content providers to use the label XXX, xxx, or -NFM- to indicate that material is harmful to minors. This requirement is overbroad: There are a number of existing websites displaying constitutionally protected speech that use "XXX" or "-NFM-" in their URLs.[18] Websites

[18] For example, the University of Michigan Health Services Department maintains a webpage on the Trisomy X genetic disorder at the web address http://www.med.umich.edu/yourchild/topics/xxxsyn.htm. Nebraska Furniture Mart maintains a website at http://www.nfm.com, and the company NFM Welding Engineers maintains its corporate site at http://www.nfm.net.

dedicated to various racing sports frequently employ "xxx" in their URLs,[19] as does the official website for Super Bowl XXX.[20] Many news articles about the ".xxx" top-level domain recently approved by the Internet Corporation for Assigned Names and Numbers would be filtered,[21] as the URLs for these pages are often automatically generated from the title of the article. News websites and blogs would run into the same problem with the "-NFM-" label when using "NFM" as an acronym for a business or organization name.[22]

R152-1a-5, Acceptable Rating Locations, requires content providers to place labels in the Uniform Resource Locator (URL) of the website or in the first 300 characters of Hypertext Markup Language (HTML) of the website. This requirement is overbroad; websites can contain thousands, even millions, of images, text files, and videos, and R152-1a-5 forces the website operator to label his entire site with "XXX" or "-NFM-" when only a few materials may ultimately be judged "harmful to minors."

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[19] *See, e.g.*, XXX Racing-AthletiCo, http://xxxracing.org/ (cycling); Triple-X Racing, http://www.xxxraceco.com/ (sprint car); Moto XXX, http://www.motoxxxstore.com/ (motorcross); XXX Main, http://xxxmain.com/ (remote-controlled cars).

[20] Superbowl XXX, http://www.nfl.com/superbowl/history/recap/sbxxx.

[21] *See, e.g.*, Ian Shapira, *Coming Soon to a computer near you: Dot-XXX*, WASH. POST, Mar. 18 2011, http://www.washingtonpost.com/business/economy/coming-soon-online-dot-xxx/2011/03/16/ABV1AAr_story.html (last viewed June 3, 2011); Shan Li, *Adult content websites get .xxx* domain, L.A. TIMES, Matr. 18 2011, http://latimesblogs.latimes.com/technology/2011/03/adult-content-websites-xxx-domain.html (last viewed June 3, 2011); Laurie Segall, *ICANN approves .xxx for adult sites*, CNNMoney.com, Mar. 18 2011, http://money.cnn.com/2011/03/18/technology/icann_approves_xxx/ (last viewed June 3, 2011).

[22] *See, e.g.*, Alex Boyer, *Arrest Made in NFM Homicide Investigation*, RSW FL., May 26, 2011, http://www.nbc-2.com/story/14726494/2011/05/26/death-investigation-underway-at-nfm-home (last viewed June 3, 2011); Andrea Galabinski, *NFM Elks Club Seeking Car Show and Motorcycle Enthusiasts, Vendors for Three-Day Summer Fest Event*, NORTHFORTMYERSNEIGHBOR.COM, May 31, 2011, http://www.northfortmyersneighbor.com/page/content.detail/id/509472/NFM-Elks-Club-seeking-car-show-and-motorcycle-enthusiasts--vendors-for-three-day-Summer-Fest-event.html?nav=5164 (last viewed June 3, 2011).

Further, compliance with R152-1a-5 will be unduly burdensome for website operators. The requirement that website operators include the "XXX" or "-NFM-" label in the first 300 characters of HTML for a website assumes that website operators have access to the raw HTML of their website, when many in fact may not. Website operators that use site-creation tools intended to simplify the content-posting process will not always have access to the source code for the pages that display their content. And even if the source code for a particular page or site is technically accessible, the content provider may not have the expertise or technical ability to edit it; many site-creation tools attract users precisely because they do not require any knowledge of coding language to use.[23] Requiring all Utahans who generate and post content online to develop a working knowledge of HTML source code editing would be a significant burden and will chill speech.

The alternative presented by R152-1a-5, that site operators may include the label in the URL for their website, is similarly burdensome. Compliance may require site operators to purchase a new domain name in order to incorporate the labels; plaintiff Sexual Health Network would have to purchase www.sexualhealthxxx.com and direct all traffic to its current site to that domain. While it would be technically possible for website operators to create an xxx or -nfm- subdomain for their existing websites (http://www.sexualhealth.com would become http://xxx.sexualhealth.com), this process again requires a level of expertise with website creation that the court should not presume the typical Utahan possesses. It is likely that content

[23] For example, the software program Microsoft Word allows users to publish documents to the web without first learning a web coding language. Users generating a web page with Microsoft Word cannot specify the contents of the first 300 characters of HTML it produces; the first ten thousand characters of HTML are automatically generated by the program. *See, e.g.*, Greenerhills Homeowners Association of Heber City, Utah, http://greenerhills-hoa.org/info.htm (an example of a speaker who uses Word to create HTML).

providers would engage in self-censorship, depriving themselves of the opportunity to speak and others of the opportunity to access material, rather than incur the costs of compliance or risk violating the law.

Finally, R152-1a-4 and -5 are not the least restrictive means the government could use to pursue its interest; there are more effective means for parents to filter and otherwise restrict access to material they deem inappropriate for their own children. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.") In cases challenging video game labeling statutes, courts have routinely struck down mandatory labeling of content.[24] In *Entertainment Software Association v. Blagojevich*, the 7th Circuit found that the government had not demonstrated that an educational campaign to raise awareness of existing voluntary ratings schemes would be ineffective, and that such an educational campaign would be preferable to a content-based restriction on speech. 469 F. 3d 641, 650-651 (7th Cir. 2006). In the present case, the state has not demonstrated that existing user empowerment tools would not achieve their interest in protecting minors from inappropriate content. These tools permit users to set their own standards for content filtering and provide for a more fine-grained level of access control than the total block on all sites that display an "XXX" or "-NFM-" label suggested by the state. The state has not demonstrated that an educational campaign focused on raising parents'

[24] *See, e.g.*, *Video Software Dealers Ass'n v. Webster*, 773 F. Supp. 1275 (W.D. Mo. 1992), aff'd, 968 F.2d 684 (8th Cir. 1992); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17 2007).

awareness of and access to user-directed control tools would be less effective in achieving their interest than the challenged provisions.

II. THE CHALLENGED STATUTES VIOLATE THE COMMERCE CLAUSE.

The Challenged Statutes violate the Commerce Clause in three ways. First, they regulate commercial activity occurring entirely in other states. Second, they directly regulate inherently interstate activity, threatening it with inconsistent standards. Third, they impose an undue burden on interstate commerce that is not justified by unique local benefits.

A. The Challenged Statutes Impermissibly Attempt to Regulate Commercial Activity Entirely in Other States.

Our federal system necessarily forbids one state from directly regulating commercial activity occurring entirety outside its borders or to regulate in-state conduct in a manner that has the "practical effect of exporting that state's domestic policies" to every other state. *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 174 (S.D.N.Y. 1997). "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). The Tenth Circuit Court of Appeals, in *ACLU v. Johnson*, 194 F.3d 1149, 1161 (1999), applied that precedent to a statute similar to 76-10-1206. There is no doubt that the Challenged Statutes fall squarely within this proscription.

The State acknowledges that the Challenged Statutes apply both in-state and out-of-state to speakers on the Internet. Defts. Supp. Response ¶ 10. A speaker on the Internet knows as a certainty that his or her speech is capable of being received in Utah. Indeed, all Internet communications are available in the State of Utah or anywhere else with Internet access, regardless of where they originated, even if they are not directed to Utah. Thus, the Challenged Statutes directly burden commerce in every other state by improperly requiring speakers in those states, both on the Web and otherwise over the Internet, to consider and abide by Utah's

standards and requirements to avoid potential prosecution in Utah. That is so even if the particular message is not intended to reach anyone in Utah.

Out-of-state content providers will face further burdens on their speech due to the requirement in section 76-10-1233 that Utah-based *hosts* restrict access to material that is "harmful" to minors. Utah is home to a number of content-hosting companies that provide server space for websites operated by customers across the country and around the world.[25] Some of these sites facilitate commercial transactions between parties that have no connection with Utah whatsoever. But out-of-state customers of Utah-based hosting companies will face burdens on their speech and their commercial activity because their Utah-based hosts will be required to restrict access to material that may be "harmful" to minors.

B. The Challenged Statutes Directly Burden a Means of Commerce that Inherently Requires Nationally Uniform Regulation.

The Challenged Statutes also independently run afoul of the Commerce Clause because they violate the "long-established rule barring the states from regulating those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Pataki*, 969 F. Supp. at 181-82 (collecting authority) (internal quotation marks omitted). Just as trucks and trains carry tangible items interstate, the Internet transmits speech and expression interstate. It also allows entities to provide online services across state lines, and facilitates the interstate sale and distribution of commercial goods. The considerations that have foreclosed most state regulation of other modes of interstate transportation apply with even more force to the Internet:

[25] *See, e.g.*, HostMonster, Inc., http://www.hostmonster.com (based in Provo, UT); Bluehost, Inc., http://www.bluehost.com (based in Provo, UT); BlueFish Web Hosting, LLC, http://www.bluefishhosting.com (based in Orem, UT).

> The Internet, like the rail and highway traffic at issue in the cited cases, requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations. Regulation on a local level, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different [communities]. . . New York is not the only state to enact a law purporting to regulate the content of communications on the Internet. Already [as of 1997] Oklahoma and Georgia have enacted laws designed to protect minors from indecent communications over the Internet; as might be expected, the states have selected different methods to accomplish their aims. Georgia has made it a crime to communicate anonymously over the Internet, while Oklahoma, like New York, has prohibited the online transmission of material deemed harmful to minors.

Id. at 182.

Importantly, this doctrine does not depend upon Congressional preemption. To the contrary, *Wabash, St. Louis & Pacific Railroad v. Illinois*, 118 U.S. 557 (1886), which struck down state regulation of core railroad operations, was *followed* the next year by creation of the Interstate Commerce Commission. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887). Federal legislation thus came in response to the declared constitutional and practical disabilities of the states.

This basis of invalidity also does not depend upon a showing that, at this moment, commerce is in fact being subjected to inconsistent requirements or is otherwise being unduly burdened. The validity of Utah's regulation of the Internet does not and cannot depend on what laws other states decide to adopt or amend. Instead, although the Supreme Court has noted actual inconsistencies in state regulation when they exist, the critical element is the potential for burdensome inconsistencies if states attempt to regulate in the field.[26] *Wabash*, 118 U.S. at 572.

[26] As the Court explained in *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945): "If one state may regulate train length, so may all the others, and they need not prescribe the same . . . limitation." Thus, the Court struck the statute down even though only one other state had actually imposed different limits. *Id*. at 774 n.3. Significantly, the Court recognized that trains could comply with the length limits of all states, however varied they might be, by simply conforming to the shortest limit imposed by any state. *Id*. at 773. Thus, the states did not impose unavoidably conflicting demands. Nevertheless, because of the inherently interstate

("If each state was at liberty to regulate the conduct of carriers . . . the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate . . . regardless of the interest of others.")

Internet-facilitated commercial activity and communication are precisely the types of interstate commerce that require regulation at the national level. If Utah can regulate Internet content, the other 49 states can also do so. The potential for interstate inconsistency and conflicting regulation is readily apparent in both of the Challenged Statutes. Section 1206's definition of "harmful to minors" is based on "the prevailing standards in the adult community as a whole." It is likely that "the adult community as a whole" in Utah will come to different conclusions regarding what is harmful to minors than, for example, the adult community in Massachusetts, or the adult community considered on a nationwide basis.[27] If each state were permitted to restrict access to content on the Internet based on that state's own standards, then the speech available on the Internet would be reduced to only what is acceptable in the most conservative state, barring adults nationwide from accessing content that is constitutionally protected as to them.

Section 1233's mandatory labeling requirement would likewise place a burden on interstate commerce. In addition to raising significant compelled speech concerns under the First Amendment (*see supra* Section I.D), section 1233 would introduce a non-standard content rating system that would apply to all content on the Internet. Other states would surely develop their

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nature of the railroad operations, allowing any state regulation would impermissibly permit the state with the lowest limit "to control train operations beyond the boundaries of the state." *Id.* at 775; *see also CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 88-89 (1987) (restating vitality of "needed uniformity" constraint on states).

[27] Further, the application of Utah community standard to Internet communities may itself be unconstitutional. *See United States v. Kilbride*, 584 F.3d 1240, 1249-56 (9th Cir. 2009); *see also Ashcroft v. ACLU*, 535 U.S. 564, 589 (2002).

own rating systems, leading to a patchwork of labels that content providers would be required to attach to their speech.

C. The Balance of Benefits and Burdens Strongly Disfavors the Challenged Statutes.

Although protecting minors from material harmful to them is an important goal, it is a goal the Challenged Statutes cannot achieve. The State concedes that the Challenged Statutes "will not reduce the availability in Utah of material that may be harmful to minors over the Internet." Defts. Supp. Response ¶ 14. This conclusion is almost unavoidable in light of the fact that a significant portion—perhaps even most—of all sexual content on the Internet is hosted overseas (and is thus far outside of the reach of the Challenged Statutes).[28] *See supra* Section I.C.3. In light of these facts and the State's concession, no significant local benefit exists. On the other hand, the burdens associated with the Utah statutes are substantial and include chilling the First Amendment activities of entire classes of adult Americans. *Pataki*, 969 F. Supp. at 179-80 (detailing the similar burdens imposed by the New York statute).

For the reasons detailed above, the Challenged Statutes violate the dormant Commerce Clause. They must be declared unconstitutional and their enforcement enjoined.

III. THE CHALLENGED STATUTES ARE UNCONSTITUTIONALLY VAGUE.

The Challenged Statutes are unconstitutionally vague and thus violate the plaintiffs' due process rights as guaranteed by the Fifth and Fourteenth Amendments. *See United States v. Williams*, 553 U.S. 285, 304 (2008). First, the term "minors" in the phrase "harmful to minors"

[28] *Gonzales*, 478 F. Supp. 2d at 789 (finding that "a substantial number (approximately 50 percent) of sexually explicit websites are foreign in origin."). Even if the percentage of sites featuring sexual content that are hosted overseas were substantially lower, the state will still not achieve its goal of limiting minors' access to sexual content, as such sites still number in the hundreds of thousands.

is vague because material that may be considered appropriate for a seventeen-year-old may not be considered appropriate for a thirteen-year-old. As the Third Circuit recognized in *Mukasey*, "[w]eb publishers cannot tell which of these minors should be considered in deciding the content of their Web sites." *Mukasey*, 534 F.3d at 205 (holding the federal COPA statute was unconstitutionally vague).

Second, Utah Code § 76-10-1201(5) requires that web content's appeal to the prurient interest and value for minors be analyzed "taken as a whole" to determine whether matter is "harmful to minors." This language is adapted from the test established by the Supreme Court for determining what is "harmful to minors" in *Miller v. California*, 413 U.S. 15 (1973) and *Ginsberg v. New York*, 390 U.S. 629 (1968). When dealing with actual materials, the phrase "taken as a whole" is not vague. One looks at the book as a whole, the movie or video as a whole, the periodical as a whole, etc. In the Internet context, what constitutes a "whole" is not clear. Is it the screen view, the web page, or the entire web site? Does one include hyperlinked materials? "Instead of having a two-hundred page book or an issue of a magazine to look to for context, . . . [the Amended Statute] invokes some undefined portion of the vast expanse of the Web to provide context for material allegedly violating the statute." *Gonzales*, 478 F. Supp. 2d at 818-19.

It is this sort of vagueness in a law directed at First Amendment protected freedoms that cannot be tolerated. As the Supreme Court said in *NAACP v. Button*, 371 U.S. 415, 432-33 (1963):

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Because First Amendment freedoms need breathing

> space to survive, government may regulate in the area only with narrow specificity.

See also Baggett v. Bullitt, 377 U.S. 360, 373 (1964); *Ozonloff v. Berzak*, 744 F.2d 224, 231 (1st Cir. 1984) ("[G]overnment standards tending to inhibit speech must be clear and precise").

For these same reasons, the federal COPA statute was found unconstitutionally vague:

> "[A] Web publisher will be forced to guess at the bottom end of the range of ages to which the statute applies, and thus will not have "fair notice of what conduct would subject them to criminal sanctions under COPA" and "will be deterred from engaging in a wide range of constitutionally protected speech."

Mukasey, 534 F.3d at 205 (*citing ACLU v. Ashcroft*, 322 F.3d 240, 268 n. 37).

CONCLUSION

For the above reasons, plaintiffs respectfully request that the Court declare the Challenged Statutes to be unconstitutional and permanently enjoin their enforcement as applied to the Internet.

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Respectfully submitted,

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The undersigned certifies that a true and correct copy of the foregoing Memorandum in Support of Plaintiffs' Motion for Summary Judgment in support thereof was served via electronic filing this 8th day of June, 2011, upon counsel for Defendants.

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