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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

NATHAN FLORENCE, et al., Plaintiffs, vs. MARK SHURTLEFF, et al., Defendants.	**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR LACK OF STANDING** Judge Dee Benson Case No. 2:05CV00485 DB

Defendants submit this Reply Memorandum in Support of their Motion for Summary Judgment and Motion to Dismiss for Lack of Standing.

INTRODUCTION

Plaintiffs filed a Motion for Summary Judgment based on legislation which had been repealed, Defendants responded pointing out the error, and Plaintiffs replied with a new theory

based on a law Plaintiffs had not raised in Plaintiffs' original Memorandum. Technically, under the rules, Defendants are precluded from responding to Plaintiffs' Reply.

Clearly, Plaintiffs Motion for Summary Judgment regarding Utah Code § 76-10-1206 challenges the constitutionality of Section 5 of HB 260, passed by the Utah State Legislature in 2005. As has been pointed out, section 5 of HB 260 as it pertains to content providers has been repealed. The remedy, therefore, is to either grant Defendants' Cross-Motion for Summary Judgment, or one of the alternative motions for dismissal.

This Memorandum will show why Plaintiffs' Motion for Summary Judgment, contrary to what Plaintiffs say in their Combined Memorandum, is based solely on § 76-10-1206 prior to 2008. There is also a brief response to the merits of their revised argument, but frankly, Defendants are at a loss at this point in understanding what Plaintiffs' complaint with the current law is.

As for Utah Code § 76-10-1233, all this section does is require Utah-based Internet content providers to limit access to minors of material harmful to minors by any "reasonable measures feasible under available technology." Contrary to what Plaintiffs say, rating is not required, but is an option. Rather than initiate prosecution for violation of the statute however, the Utah Attorney General is directed to notify the content provider of the violation and give him/her 30 days to correct the violation. There is no criminal penalty, so there is no "threat of prosecution." There is a monetary penalty. A copy of Utah Code § 76-10-1233 is attached hereto as Exhibit A.

I. UTAH CODE § 76-10-1206

A. The Case of the Missing Statute

Plaintiffs' Amended Complaint is a facial challenge to the constitutionality of Utah Code §§ 76-10-1206 and 76-10-1233, as amended by HB 260 and HB 5. (The "Challenged Statutes.") Plaintiffs are Internet content providers, having websites available on the Internet for anyone to view who has access to a computer and an Internet connection. They allege that they "fear prosecution under the Amended Act for communicating, sending, displaying or distributing material that might be deemed by some to be 'harmful to minors' under the Amended Act." Amended Cmplt., ¶ 146. (Doc. 43.)

The Complaint specifically asks this Court to "declare ... sections 4 through 7 and 9 of HB 260, as amended by HB 5" unconstitutional. (Amended Cmplt., p. 58.) (Doc. 43.) Since the Amended Complaint was filed in 2007, obviously the Amended Complaint does not allege any constitutional challenges against the Legislature's 2008 amendments. Neither does Plaintiffs' Motion for Summary Judgment. Under the heading "The Statutes" in Plaintiffs' Memorandum in Support of Summary Judgment, ¶ 1 references HB 260, and the footnote to that paragraph references the 2007 amendments. (Doc. 82.) No reference is ever made in the entire Memorandum to either HB 18 or the 2008 amendments. Plaintiffs even quote an entire subsection of HB 260 as evidence of the bill's unconstitutionality.[1] (Doc. 82, p. 22.)

[1]The "access restricted" provision in § 6 of HB 260. Utah Code § 76-10-1230 (2005).

The only problem: That subsection was repealed in 2008.[2]

So when Defendants point out in their Response Memorandum (Doc. 95) that Plaintiffs' are basing their challenge on repealed provisions of § 1206, Plaintiffs adamantly deny it. (Pltfs' Combined Memo., p. 1.) (Doc. 103.) They then spend 14 pages correcting their original Memorandum: summarizing the "2008 Amendments," (p. 3), making "Corrections to Plaintiffs' Memorandum," (p. 9), and offering "Supplemental Statement of Undisputed Facts" (p. 11). If that is not an admission against self-interest, nothing is.

Obviously Plaintiffs' Motion for Summary Judgment is based only on HB 260, as amended by HB 5. Proof of that is found in Plaintiffs' declarations attached to Plaintiffs' Memorandum in Support of Summary Judgment. (Doc. 84-90.) Each of the Declarants is either a Plaintiff or is a representative of a Plaintiff. In the first paragraph of each of their declarations, they state that they submit his declaration "in support of the plaintiffs' motion for summary judgment requesting a declaration of unconstitutionality and permanent injunctive relief prohibiting enforcement of sections 5 and 9 of House Bill 260,[3] enacted on March 2, 2005, as applied through amended Utah Code § 76-10-1206 and Utah Code § 76-10-1233 (collectively the "Challenged Statutes")." *See* ¶ 1 of the declaration of Nathan (Doc. 84), McCreary (Doc. 85), Brownstein (Doc. 86), Adler (Doc. 87), Finan (Doc. 89), and Jones (Doc. 90).[4]

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[2] HB 18, § 3.

[3]Section 5 of H.B. 260 amends Utah Code § 76-10-1206. Section 9 of H.B. 260 added the new section of § 76-10-1233 dealing with labeling.

[4]The declaration of Nathan Florence makes no reference to any bill. (Doc. 88.)

What § 5 of HB 260 changes in § 76-10-1206 is the safe harbor provision for Internet Service Providers (ISPs) and Internet content providers. That provision states:

> (4)(a) A service provider, as defined in § 76-10-1230, complies with this section if it complies with §§ 76-10-1231 and 76-10-1232.
> (b) A content provider, as defined in § 76-10-1230, complies with this section if it complies with § 76-10-1233.

That is it. With one exception,[5] which both sides agree is not material here, that is the total language change of § 1206 brought about by HB 260. And it is this provision the declarants say needs to be permanently enjoined.

To complicate the matter from Plaintiffs' perspective, Plaintiffs state in their declarations that they "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." (Pltfs' Memo., ¶ 10, p. 7.) (Doc. 82.) Declarations of seven individuals representing the Plaintiffs are all then cited as support for the proposition that the Plaintiffs are fearful of prosecution. *Id.* By way of example, those declarations follow the pattern of declarant Terry Nathan, who represents the Independent Book Publishers Association ("IBPA"). He states: "IBPA's members fear that they may be at risk of prosecution under the Bill challenged in this action for permitting minors to view or access constitutionally protected material which might be deemed 'harmful to minors' under the meaning of the Bill." Nathan

[5]There was a wording change in § 1206(1).

Decl., ¶ 6. (Doc. 84.) All other declarants say essentially the same thing – some using the same wording, others using slightly different wording to the same effect.

So, based upon the declarants own statements, the "bill" Plaintiffs' fear is HB 260. The section in HB 260 they fear is Section 5. Section 5 brought content providers into the ambit of § 1206. But the provision in section 5 of HB 260 dealing with content providers has been repealed.[6]

As one final note on the declarants' statements, even Plaintiffs' expert, Scott Bradner, who supports Plaintiffs' motion for injunctive relief, bases his opinion solely on HB 260 as amended by HB 5. He states he has "read the statutes at issue ... as amended by HB 260 and HB 5." Bradner Decl. ¶ 3. (Doc. 83.) At least he's read it. That's more than any of the other declarants said.

B. Responding to the Merits – If Any There Are.

Utah's Harmful to Minors statute, Utah Code § 76-10-1206, was originally passed in 1973 and remained untouched, except for penalty changes, until 2005 when the Legislature passed HB 260. Section 5 of HB 260, as has been noted above, included a safe harbor provision for Internet Service Providers (ISPs) and Internet content providers. The Internet content provider provision was removed from the statute in 2008, thus returning the substantive language of § 1206 back to the way it was from1973 to 2004. The statute was modeled after New York's

[6]HB 18, § 2.

harmful to minors statute after that statute was upheld in *Ginsberg v. New York*, 390 U.S. 629 (1969).

1. A Facial Challenge to a Statute That Has Been Upheld by the United States Supreme Court.

Returning § 1206 to its original 1973 language, which was modeled after the New York statute, means that Plaintiffs' attempt in their Combined Memorandum to re-channel their argument against the current statute really constitutes a facial challenge to a statute that has: (a) been upheld as constitutional by the United States Supreme Court, and (b) survived on the Utah statute books for over 30 years through hundreds of prosecutions.

Their challenge may be a viable theory in an "applied challenge," if the statute is ever applied to Internet content providers, but in terms of a facial challenge Defendants defense is *Ginsberg.*

2. Plaintiffs Fear of Prosecution Is the Fear of Prosecution of a Repealed Law.

As has been noted above, Plaintiffs all allege a fear of prosecution under § 5 of HB 260. With the repeal of § 5 there is nothing of record in this case indicating any fear by Plaintiffs of prosecution.

3. Burdens on Free Speech.

In their Memorandum in Support of Summary Judgment Plaintiffs reiterate, as they have done many times before, that the restrictions and burdens imposed by the Utah law violates free speech and the First Amendment. But they only get there by referencing § 5 of HB 260 and the

"access restricted" provision in HB 260 – both of which have been repealed. Absent those provisions, Plaintiffs have not made a case for restrictions and burdens on free speech.

4. Plaintiffs Never Show How Other Statutes – That Have Been Declared Unconstitutional – Are Similar to Utah's Statute.

Since the beginning of this case, Plaintiffs have gone to great lengths to say – repeatedly – that Utah's statute is similar to the Communications Decency Act ("CDA"), the Child On-Line Protection Act ("COPA"), and numerous other State statutes – all of which have been declared unconstitutional. What they do not ever say, however, is how Utah's statute is similar. More importantly now, they do not say how Utah's statute is similar in light of the 2008 amendments.

The CDA criminalized the intentional transmission of "obscene or indecent" messages as well as the transmission of information which depicts or describes "sexual or excretory activities or organs" in a manner deemed "offensive" by community standards. *Reno v. ACLU,* 521 U.S. 844 (1997). How is that similar to Utah's harmful to minors statute? Plaintiffs never say. How is COPA similar to Utah's statute in light of the 2008 amendments? Plaintiffs don't say.

Plaintiffs make flowery statements about the virtues of free speech and the First Amendment – and Defendants take no issue with that – but they totally ignore pointing out how the current Utah statute infringes on either of those.

5. The Commerce Clause

In their Combined Memorandum, Plaintiffs say the State has not responded their charge that the Challenged Statutes are unconstitutional under the Commerce Clause. The answer is

simple: If § 1206 does not apply to Internet content providers, and the section is not policing the entire world, then the Commerce Clause does not apply to the statute. The Commerce Clause does not apply to § 1233 because that section specifically states that it is limited to just Utah-based content providers.

The only question here, really, is: Are States' harmful to minor statutes constitutional?

II. UTAH CODE § 76 -10-1233

A. There Is Nothing in the Act That Requires a Content Provider to Choose the Option of Rating.

Utah Code § 76-10-1233(1) states, "A content provider that is domiciled in Utah, or generates or hosts contents in Utah, shall restrict access to material harmful to minors." § 1230 defines "restrict" as follows:

> (6) "Restrict" means to limit access to material harmful to minors by:
> (a) properly rating content; *or*
> (b) *any other reasonable* measures feasible under available technology.

Utah Code § 76-10-1230(6) (emphasis added).

Restricting access means to "limit access" by either rating the content "or" using "any other reasonable measures feasible under available technology." An internet content provider is not required to rate or label their content; rating is simply one of many options. With continuing advances in technology, there are more and more options available to content providers to aid them in restricting access to material that is harmful to minors. Section § 1230 provides content

providers with plenty of leeway to comply and will continue to expand as technology continues to advance.

Plaintiffs contend that Utah Code § 1233 *compels* content providers to label their content in violation of the First Amendment. That is simply not the case. Rather, all that § 1233 requires is that a content provider limit access to material harmful to minors by any "reasonable measures feasible under available technology." Rating is not required. The Act simply does not compel content providers to label their content.

B. Utah Code § 76-10-1230 Provides a Reasonable Standard for Restricting Access to Materials That Can Easily Be Met by Internet Content Providers.

The phrase "[a]ny other reasonable measures feasible under available technology" leaves content providers with a broad spectrum of choices for limiting access to materials harmful to minors. As technology continues to advance, so will the methods of limiting access expand. The state's interest in protecting children from harmful material is not outweighed by the relatively low burden placed on internet content providers.

C. *Reno v. ACLU* Contemplates Tagging.

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) contemplated "tagging" material harmful to minors. It found that the technology was not available and it would be difficult to determine whether or not the tagging would actually be effective which was an essential requirement under the statute. The Court stated that "the requirement that the good-

faith action must be 'effective' [...] [made] this defense illusory." *Id*. at 881(See CDA §223(e)(5)).

Reno was decided fourteen years ago. Internet technology has changed dramatically since their decision and continues to develop. Although tagging was found to be technologically ineffective in 1997 does not mean it cannot be effective in 2011. Defendants submit that tagging can be effective under current technology and, in fact, is the way search results are commonly obtained through internet search engines when consumers search for products.

D. The Harmful to Minors Standard Does Not Need to Adjust to the Age and Maturity of Every Minor.

Plaintiffs claim that the "harmful to minors" standard must adjust to the age and maturity level of each viewing minor thus rendering "tagging" impractical or impossible. This is not the case. The Utah statute's definition of "harmful to minors" uses the standards upheld in *Ginsberg v. New York*, 390 U.S. 629 (1968) and *Miller v. California*, 413 U.S. 15, 24 (1973).[7] In

[7]Utah Code § 76-10-1201(5) defines "harmful to minors" as follows:
(5)(a) "Harmful to minors" means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:
(i) taken as a whole, appeals to the prurient interest in sex of minors;
(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
(iii) taken as a whole, does not have serious value for minors.
(b) Serious value includes only serious literary, artistic, political or scientific value for minors.
The statute in *Ginsberg* defined "harmful to minors" as: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors. 390 U.S. 629, 633, 88 S. Ct. 1274, 1276, 20 L. Ed. 2d 195 (1968).
The definition of harmful to minors in *Miller* stated: " (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413

Ginsberg, the Supreme Court upheld a New York statute prohibiting selling to minors material harmful to them. The Court did not find that definition a "variable" or unworkable standard as Plaintiffs suggest (Pltfs' Combined Memorandum, ¶21). The Court upheld the definition as constitutionally valid.

The Utah statute's definition of "harmful to minors" is the same definition that has been upheld by the Supreme Court and likewise does not need to vary its definition depending on the age and maturity of the minor. Utah Code § 76-10-1201(5). On the contrary, the "tagging" option is similar to laws requiring restaurants to post nutritional information, see *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 116 (2d Cir. 2009). Indeed, tagging is no different from the use of blinder racks in most supermarkets and convenience stores. A mere warning or tag that the site contains material harmful to minors would be enough and would not stop an adult from viewing the material or a parent from allowing their child to view the material if they so chose.

In *Ginsberg*, the Supreme Court recognized that parents' "claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" and that parents "are entitled to the support of laws designed to aid discharge of that responsibility," at

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U.S. at 24.

639. Like the statute in *Ginsberg*, tagging or otherwise restricting material harmful to minors under Utah Code § 76-10-1233 supports parents' authority to direct the rearing of their children.

E. Identifying Party Plaintiffs.

As a side note, the only plaintiffs arguably subject to § 1233 are Plaintiffs Nathan Florence and the ACLU of Utah, inasmuch as they are the only Utah-based entities publishing content. Whether they both qualify as "content providers" within the meaning of § 76-10-1230(2) is debatable, however, given the requirement of the statute that the provider must create, collect, acquire, or organize the "electronic data for electronic delivery to a consumer with the intent of making a profit." Defendants believe that qualification eliminates the ACLU as a content provider. They do not know whether it eliminates Plaintiff Nathan Florence.

CONCLUSION

Plaintiffs' Motion for Summary Judgment should be denied. Defendants' Motion for Summary Judgment should be granted, or in the alternative Defendants' Motion for Judgment on the Pleadings, Dismissal for Mootness, or Dismissal for Lack of Standing should be granted.

DATED this 7th day of October, 2011.

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