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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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS FOR MOOTNESS

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THIS COURT SHOULD DENY DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS FOR MOOTNESS, WHICH ARE BASED ON INCORRECT FACTUAL AND LEGAL PREMISES

In response to Plaintiffs' motion for summary judgment, Defendants have made four motions: (1) a cross-motion for summary judgment; (2) a motion to dismiss for lack of standing; (3) a motion for judgment on the pleadings with respect to Plaintiffs' challenge to Utah Code § 76-10-1206 ("Section 1206"); and (4) a motion to dismiss for mootness with respect to Plaintiffs' challenge to Section 1206. Defendants' first two motions—their cross-motion for summary judgment and motion to dismiss—were filed in response to Plaintiffs' motion for summary judgment. Defendants' third and fourth motions—their motion for judgment on the pleadings and to dismiss for mootness—were filed with Defendants' reply papers on their first two motions.

At their core, all of Defendants' motions are based on three supposedly factual premises:

- In 2008, the version of Section 1206 which was the subject of this litigation was repealed by HB 18 ("HB 18" or the "2008 Amendment").
- As a result of the 2008 Amendment, Section 1206 no longer applies to content providers.
- In any event, only the pre-2008 version of Section 1206 is at issue in this case, and that is what the parties have been litigating about.

Each of Defendants' factual premises is incorrect—as is Defendants' legal premise, that the mere amendment of a challenged statute renders an action moot.

1. THE 2008 AMENDMENT DID NOT REPEAL SECTION 1206 OR SECTION 1233.

Defendants repeatedly state that HB 18 "repealed" Section 1206 as to content providers.[1]

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[1] *See, e.g.,* [Defendants'] Memorandum in Support of Defendants' Motion for Judgment on the Pleadings and/or Motion to Dismiss for Mootness, Oct. 6, 2011 ("Defendants' Mootness (cont'd)

This simply is incorrect. Rather, HB 18 amended Section 1206 in a few minor respects; it did not repeal Section 1206. The only "repeal" in the 2008 Amendment was the repeal of a safe harbor; that repeal expanded the scope of Section 1206, and exacerbated its violation of the First Amendment.

This is crystal clear from the Enrolled Copy of HB 18,[2] which provides, "Section 76-10-1206 is amended to read . . .", and then sets forth the modifications—most of them minor—to the language of Section 1206. Similarly, the Enrolled Copy of HB 18 made modifications—also minor—to Utah Code § 76-10-1233 ("Section 1233"). All of the pertinent modifications to the statutory language, made by the 2008 Amendment, are reviewed in detail in Plaintiffs' Combined Memorandum.[3]

It is thus not correct to state that the 2008 Amendment "repealed" the pre-2008 version of Sections 1206 or 1233. Instead, the 2008 Amendment made minor modifications to those sections, without removing the features of those sections which are the subject of this constitutional challenge.

Memorandum") (Doc. 110), p. 6; Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment and Motion To Dismiss for Lack of Standing, Oct. 7, 2011 (Doc. 111), pp. 1, 2, 6, 7.

[2] Exhibit A to Defendants' Mootness Memorandum (Doc. 110-1). For the convenience of the Court, an additional copy is annexed hereto as Exhibit 1.

[3] Plaintiffs' Combined Memorandum (A) As A Reply, In Further Support Of Plaintiffs' Motion For Summary Judgment (B) In Opposition To Defendants' Cross-Motion For Summary Judgment, And (C) In Opposition To Defendants' Motion To Dismiss For Lack Of Standing, Sept. 9, 2011 ("Plaintiffs' Combined Memorandum") (Doc. 102), pp. 3-9.

2. THE 2008 AMENDMENT DID NOT RELIEVE CONTENT PROVIDERS FROM LIABILITY; IT BROADENED SUCH LIABILITY.

It is similarly incorrect for Defendants to argue that the 2008 Amendment relieved "content providers" of liability, so that Plaintiffs have nothing to fear under the statutes, as amended.[4] To the contrary, the 2008 Amendment broadened such liability.

A. Section 1206 Prior to the 2008 Amendment

Prior to the 2008 Amendment, Section 1206—the core statutory provision that makes it a crime to deal in material "harmful to minors"—contained a defense specific to some Utah-based Internet content providers. That defense stated:

> A content provider, as defined in Section 76–10–1230, is not negligent under this section if it complies with Section 76–10–1233.

Utah Code § 76-10-1206(4)(b) (2007). Section 1230 provided this definition of content provider (which was renumbered but not modified by the 2008 Amendment):

> "Content provider" means a person domiciled in Utah or that generates or hosts content in Utah, and that creates, collects, acquires, or organizes electronic data for electronic delivery to a consumer with the intent of making a profit.

Utah Code § 76-10-1230(3) (2007). Section 1233(1) (not modified by the 2008 Amendment) provided and continues to provide:

> A content provider that is domiciled in Utah, or generates or hosts content in Utah, shall restrict access to material harmful to minors.

Utah Code § 76-10-1233(1) (2007).

Thus, prior to the 2008 Amendment, the statute provided a limited safe harbor for some (but not all) Utah-based content providers. Prior to the 2008 Amendment, a Utah-based "content provider" (as defined in Section 1230(3)) could be convicted, under Section 1206, of

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[4] Defendants' Mootness Memorandum (Doc. 110), p. 3

"knowingly" providing "harmful to minors" material to a minor, but could not be convicted of doing so "negligently" if such content provider met Section 1233's requirement to "restrict" access to such material. This limited safe harbor was not available to any Internet content provider who did not come within the statutory definition of "content provider," such as an Internet content provider who makes material available to consumers in Utah but is not domiciled in Utah, and does not generate or host content in Utah, or a content provider who does not have an "intent of making a profit," such as a not-for-profit (*e.g.,* plaintiff ACLU) or a participant in a chat room or discussion group. Any such Internet content provider would be a "person" subject to Section 1206, but could not have relied on the Section 1233 limited safe harbor.

B. Section 1206 After the 2008 Amendment

The 2008 Amendment repealed this limited safe harbor.

~~A content provider, as defined in Section 76-10-1230, is not negligent under this section if it complies with Section 76-10-1233.~~

HB 18, *repealing* Utah Code § 76-10-1206(4)(b) (2007). Through the repeal of the limited safe harbor, the 2008 Amendment *expanded* the scope of the Challenged Statutes as applied to Internet content providers.

Defendants' statement that "§ 1206 no longer contains any reference to Internet content providers"[5] is thus accurate, but misleading. A correct statement is: The limited safe harbor in Section 1206, which had been available to some Utah-based Internet content providers, was repealed by the 2008 Amendment, so that the full breadth of Section 1206 now applies to all

[5] [Defendants'] Memorandum in Support of Defendants' Motion to Dismiss and Cross Motion for Summary Judgment, and In Opposition to Plaintiffs' Motion for Summary Judgment, July 29, 2011 (Doc. 95), p. 3.

Internet content providers.

Because this change expanded the scope of Section 1206 as it applies to Internet content providers, it did not in any way undermine Plaintiffs' position in this case and does not support any of Defendants' four motions.

3. BOTH PLAINTIFFS AND DEFENDANTS HAVE BEEN LITIGATING THIS CASE BASED ON SECTIONS 1206 AND 1233, AS AMENDED BY THE 2008 AMENDMENT

Defendants' final factual premises—that Sections 1206 and 1233, as amended by the 2008 Amendment, have not been placed in issue in this action, and the parties have not been litigating about the amended statutes—is belied by Defendants' own litigation conduct.

The 2008 Amendment was signed into law on March 18, 2008. At that time, there was in place in this action (and there remains in place today) a Stipulated Order, entered by this Court on November 28, 2005, which provides:

> This Court hereby ORDERS that Defendants shall not enforce against any person or entity
>
> (1) Sections two, and four through nine (Section 2, and Sections 4-9) of H.B. 260 (2005) and
>
> (2) Section 76-10-1206 as it applies to harmful to minors material which is communicated, distributed or transmitted electronically, except when the material is intended to be, and is, communicated, distributed or transmitted to one or more specific identifiable persons actually known to the communicator, distributor or transmitter to be minors, with respect to any acts occurring prior to the earlier of a decision by the Court on the merits or 30 days after written notice to Plaintiffs of Defendants' intent to enforce any of the above referenced sections against any person or entity.

Stipulated Order, Nov. 28, 2005 (Doc. 27), p. 2. Sections 2 and 4 through 9 of HB 260 (2005) included amendments to Utah Code § 67-5-19 and §§ 76-10-1205, -1206, -1230, -1231, -1232, and -1233. Thus, the amendments to each of those sections of the Utah Code could not be enforced, under this Court's Stipulated Order.

HB 18 further amended Utah Code §§ 76-10-1201, -1206, -1230, -1231, and -1233. Thus,

HB 18 amended four of the sections which were the subject of the Stipulated Order: Utah Code §§ 76-10-1206, -1230, -1231, and -1233.

On April 16, 2008, one month after HB 18 had been signed into law, Defendants filed a motion to lift the injunction against the enforcement of Utah Code § 76-10-1231 ("Section 1231")[6]—apparently based on the enactment of HB 18. Defendants thus took the position that the 2008 Amendment to Section 1231—which replaced a requirement that data service providers provide filtering software with a requirement that they refer users to third party vendors, limited penalties to intentional or knowing violations, and limited penalties to a civil fine (rather than a misdemeanor)—cured the constitutional infirmity of Section 1231.

Tellingly, Defendants did not take the position that the enactment of HB 18—which also amended Sections 1206 and 1233—warranted lifting the injunction against enforcement of those sections. Nor did Defendants take the position that the enactment of HB 18 rendered this action moot. Nor did Defendants give notice—as the Stipulated Order permitted them to do—that they would now enforce Sections 1206 and 1233, based on Defendants' belief that HB 18 had cured any constitutional infirmity.

To the contrary, Defendants' limited application made clear that Defendants believed that this action would continue, and that the Stipulated Order enjoining enforcement of Sections 1206 and 1233 remained in place.

On February 19, 2008 (prior to the enactment of HB 18, and not related to HB 18),

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[6] [Defendants'] Motion to Lift Injunction Against Utah Code Ann. §§ 76-10-1205 and 1231, April 16, 2008 (Doc. 68).

Plaintiffs had moved for leave to file a Second Amended Complaint.[7] Defendants filed their opposition to that motion on April 16, 2008—a month after the enactment of HB 18.[8] In opposing that motion, Defendants did not take the position that HB 18 had rendered this action moot.

Statements by both Plaintiffs and Defendants in discovery also made clear that all parties understood that they were litigating about Sections 1206 and 1233, as amended by HB 18. On April 15, 2009, Plaintiffs served their Amended First Set of Interrogatories, Requests for Production of Documents and Requests for Admission. In each of these documents, the term "Act" was defined to mean

> all sections of the Utah Code amended by House Bill 260, enacted on March 2, 2005 . . . , *including as such sections may have been subsequently amended.*

Plaintiffs' Amended First Set of Interrogatories, Definitions and Instructions ¶ 4 (emphasis added).[9] In their response, Defendants recognized that the Challenged Statutes had been amended by HB 18, and that this action was addressed to the statutes, as amended. For example:

- In response to Plaintiffs' Interrogatory No. 11, with respect to scienter, Defendants quoted Section 1206, as amended by HB 18.[10]
- In response to Plaintiffs' Interrogatory No. 13, which addressed the issue of how the statutes applied to a person who was not a minor, but was posing as a minor, Defendants similarly responded by quoting Section 1206, as amended by HB 18.[11]

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[7] Plaintiffs' Motion for Reconsideration, or in the Alternative, for Leave to File a Second Amended Complaint, Feb. 19, 2008 (Doc. 64).

[8] Defendants' Response to Plaintiffs' Motion for Reconsideration or in the Alternative Relief to File a Second Amended Complaint, April 16, 2008 (Doc. 67).

[9] Plaintiffs' Amended First Set of Interrogatories, Plaintiffs' Requests for Production of Documents and Plaintiffs' Requests for Admission are annexed to the accompanying Declaration of Michael Bamberger as Exhibits A, B, and C, respectively.

[10] Defendants' Supplemental Answers to Plaintiffs' Amended First Set of Interrogatories, served Dec. 17, 2009, which is annexed to the Bamberger Declaration as Exhibit D.

It is thus abundantly clear that, even though the Amended Complaint (which had been amended in April 2007)[12] was not further amended to reflect the passage of HB 18, all parties understood that they were litigating the constitutionality of Sections 1206 and 1233, as amended from time to time including the 2008 Amendment.

There was no need for Plaintiffs to further amend the Amended Complaint (although, of course, if this Court believes that that would be a better way to frame the issues, Plaintiffs respectfully request leave to file an Amended Complaint, and will do so forthwith).

In this connection, Defendants also argue that the fact affidavits and the expert affidavit submitted by Plaintiffs might have been addressed to the pre-2008 versions of Sections 1206 and 1233. To eliminate any possible ambiguity on this issue, Plaintiffs are submitting herewith supplemental affidavits of each of the fact and expert witnesses, which make clear that all of their statements are addressed to the current versions of the Challenged Statutes.

4. PLAINTIFFS' SUMMARY JUDGMENT MOTION, AND ALL FOUR OF DEFENDANTS' MOTIONS, SHOULD BE RULED UPON BASED ON THE CURRENT VERSIONS OF SECTIONS 1206 AND 1233—AS THEY WERE AMENDED BY THE 2008 AMENDMENT

Just as the factual premise of Defendants' motions is wrong, so too is the legal premise.

Defendants argue that Plaintiffs' claims are moot, or that Defendants should be granted judgment on the pleadings, because the Challenged Statutes were amended after the filing of this action (and after the last time the complaint was amended), so the exact version of the statute placed in issue by the Amended Complaint is no longer in effect.[13] That identical argument was flatly rejected by the United States Supreme Court in *Northeastern Fla. Chapter of Associated*

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[11] *Id.*

[12] Amended Complaint, April 30, 2007 (Doc. 43).

[13] Defendants' Mootness Memorandum (Doc. 110), p. 3.

General Contractors of America v. City of Jacksonville, Fla., 508 U.S. 656 (1993) ("*Northeastern Fla. Chapter*").

In *Northeastern Fla. Chapter,* the City of Jacksonville argued that a claim by an association of contractors, challenging a city ordinance which established a minority set-aside program, was moot because the city ordinance had been repealed and replaced with a new ordinance which "differs in certain respects from the old one." 508 U.S. at 662. Applying "the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,'" *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), the Supreme Court held that an amendment of a statute—or even a repeal of a statute—does not moot a constitutional challenge to the statute:

> *City of Mesquite* does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.

Northeastern Fla. Chapter, 508 U.S. at 662.

In *Citizens for Responsible Government State Political Action Committee v. Davidson,* 236 F.3d 1174 (10th Cir. 2000) ("*Davidson*"), the Tenth Circuit set forth the principles which govern whether or not a statutory amendment will render an action moot. Defendants quote from *Davidson,*[14] but downplay the following critical language:

> Where a new statute "is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues," the controversy is not mooted by the change, and a federal court continues to have jurisdiction. *Northeastern Fla. Chapter of Associated General Contractors of America v. City of Jacksonville,* 508 U.S. 656, 662 & n. 3, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993); *see also Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 1301, 1310 (11th Cir. 2000) ***("[A] superseding statute or regulation moots a case only to the extent that it removes challenged features of***

[14] Defendants' Mootness Memorandum (Doc. 110), p. 7.

> ***the prior law.")*** (quotations and citation omitted); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1548 (8th Cir. 1996).

236 F.3d at 1182.[15] Thus, the dispositive question under *Davidson* is: ***Has HB 18 "remove[d] challenged features of the prior law"?***

In *Doe v. Shurtleff,* 2009 WL 2601458 (D. Utah 2009), *aff'd,* 628 F.3d 1217 (10th Cir. 2010), defendant Shurtleff (also the defendant in this case) sought to vacate a judgment, arguing that amendments to a sex offender registration statute rendered a constitutional challenge to the statute moot. This Court applied the principles of *Davidson* to evaluate Shurtleff's mootness argument—and, in a step-by-step analysis of each of the amendments to the sex offender registration statute, held that one aspect of the challenge had been rendered moot—because a challenged requirement has been "stricken" from the statute—but that none of the remaining challenges were moot:

> The requirement that offenders provide their Internet passwords to the UDOC was stricken from the Registry Statute by the amendments. Accordingly, there is no case or controversy concerning this provision and the challenge is moot. The court's order staying the enforcement of this provision is likewise moot.
>
> In contrast, the requirements concerning disclosure of Internet identifiers remain in place. While the amendments made meaningful changes to the restrictions on UDOC's use of the information, Mr. Doe's challenge went beyond these concerns. In particular, he argues that the Registry Statute violates the Fourth Amendment and ex post facto clause of the Constitution. These challenges are unaffected by the amendments and are not moot.
>
> In addition, although Mr. Doe's First Amendment challenge included arguments based on the lack of controls on the information, he also argued that the required disclosure itself violated his First Amendment rights. The changes to the Registry Statute, while giving the court good cause to reconsider its earlier order, are not so numerous and fundamental as to render Mr. Doe's First Amendment challenge moot. See *Citizens for Responsible Gov't.,* 236 F.3d at 1182. In particular, in considering "whether granting a present determination of the issues offered will

[15] In *Davidson,* the Tenth Circuit held the action moot because the statutory changes were "too numerous and too fundamental to preserve out jurisdiction." *Id.*

> have some effect in the real world," it is clear that the relief requested by Mr. Doe (enjoining the enforcement of the Registry Statute provisions requiring him to disclose his Internet identifiers) will have a real effect.

2009 WL 2601458, at *3. It bears noting that, in *Doe v. Shurtleff,* Doe did not amend his complaint to address the amendments to the statute, and this Court did not require that he do so. Instead, this Court addressed the merits of Doe's claim under the statute, as amended—just as this Court should do so here. In *Doe v. Shurtleff,* this Court went on to hold that the fundamental amendments to the sex offender registration statute cured the constitutional infirmity of the prior law. Its decision was affirmed by the Tenth Circuit. *Doe v. Shurtleff,* 628 F.3d 1217 (10th Cir. 2010). The Tenth Circuit, too, addressed the current version of the sex offender registration statute, as amended—even though Doe had not amended his complaint to address the statutory amendments.

That same analysis here compels the conclusion that Plaintiffs' challenge to Sections 1206 and 1233 is not moot, for a simple reason: HB 18 did not "remove [the] challenged features of the prior law." *Davidson,* 236 F.3d at 1182.

- The 2008 Amendment extended the scope of the Challenged Statutes to providing "harmful to minors" materials to a person whom the defendant "believes" to be a minor—such as a decoy police officer.[16] This change has no impact on the issues in this litigation. It did not remove any of the challenged features of the prior law.

- The 2008 Amendment modified an exception in the prior law applicable to Internet service providers.[17] This change, too, has no impact on the issues in this litigation. It did not remove any of the challenged features of the prior law.

- The 2008 Amendment removed a "safe harbor" previously available to some Internet content providers.[18] This change aggravated the constitutional infirmity of the

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[16] Plaintiffs' Combined Memorandum (Doc. 102), p. 4.

[17] Plaintiffs' Combined Memorandum (Doc. 102), pp. 4-5.

[18] Plaintiffs' Combined Memorandum (Doc. 102), pp. 5-7.

statutes. It did not remove any of the challenged features of the prior law; it made them worse.

- The 2008 Amendment continued in place the requirement that Utah-based content providers "restrict access" to harmful to minors materials, but deleted "age verification" as a suggested means of restricting access. [19] Because the requirement to "restrict access" was left in place, this change did not remove any of the challenged features of the prior law.

- The 2008 Amendment permits Utah-based Internet service providers to refer users to available filtering software, rather than to provide such software.[20] This change has no impact on any issue in this case.

- The 2008 Amendment left intact the criminal penalties (fine and mandatory incarceration) for violating Section 1206, but changed the penalties for violating Sections 1231 and 1233.[21] This change has no impact on any issue in this case.

This case thus stands in sharp contrast to *Kansas Judicial Review v. Stout,* 562 F.3d 1240 (10th Cir. 2009), cited by Defendants,[22] in which the Tenth Circuit held that amendments to the Kansas Code of Judicial Conduct rendered an action moot because the amendments "completely eliminated the challenged portion" of one clause and contained "significant narrowing language not present in the old canons." 562 F.3d at 1246. Here, HB 18 neither eliminated the challenged portion of Section 1206 or Section 1233, nor contained "narrowing language" not present in the pre-2008 statutes. To the contrary, HB 18 aggravated the constitutional problems of the pre-2008 statutes.

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[19] Plaintiffs' Combined Memorandum (Doc. 102), pp. 7-8.

[20] Plaintiffs' Combined Memorandum (Doc. 102), pp. 8-9.

[21] Plaintiffs' Combined Memorandum (Doc. 102), p. 9. Prior to HB 18, violation of Sections 1231 subjected a person to a civil fine of $2,500 for each separate violation, up to $10,000 per day and an intentional violation was a class A misdemeanor. Prior to HB 18, violation of Sections 1233 was a third degree felony. HB 18 removed the misdemeanor and felony provisions applicable to Sections 1231 and 1233, and made the civil fine provisions of $2,500 for each separate violation, up to $10,000 per day applicable to both sections.

[22] Defendants' Mootness Memorandum (Doc. 110), p. 8).

Applying the principles articulated by the Tenth Circuit in *Davidson,* and applied by this Court in *Doe v. Shurtleff,* compels the conclusion that this case is not moot.

CONCLUSION

HB 18 did not remove any of the challenged features of Sections 1206 and Section 1233. To the contrary, HB 18 aggravated the constitutional infirmity of the statutes by removing a safe harbor. This action is not moot. Plaintiffs' motion for summary judgment should be granted.

November 21, 2011

Respectfully submitted,

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The undersigned certifies that a true and correct copy of the foregoing Plaintiffs' Memorandum In Opposition To Defendants' Motions For Judgment On The Pleadings And To Dismiss For Mootness and eight supplemental declarations were served via electronic filing this November 21, 2011, upon counsel for Defendants.

s/ Michael A. Bamberger
Michael A. Bamberger

EXHIBIT 1

MATERIAL HARMFUL TO MINORS AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Paul Ray

Senate Sponsor: Darin G. Peterson

LONG TITLE

General Description:

This bill modifies the Criminal Code regarding materials harmful to minors.

Highlighted Provisions:

This bill:

- amends the intent of a person dealing with material harmful to minors to include persons who believe the victim is a minor;
- modifies the definition of "restrict" regarding access to material harmful to minors by removing "age verification mechanism" as a form of restriction;
- amends the definition of "service provider" to include only Internet service providers;
- allows a provider to comply with the requirement to provide filtering for users by referring users to a third party that provides filtering software; and
- removes certain criminal penalties, imposes the standard of intentionally and knowingly, and imposes civil financial penalties regarding failure to comply with requirements that Internet service providers:
  - provide information about filtering content; and
  - restrict access to material harmful to minors.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

76-10-1201, as last amended by Laws of Utah 2007, Chapters 123, and 337

76-10-1206, as last amended by Laws of Utah 2007, Chapter 337

76-10-1230, as last amended by Laws of Utah 2007, Chapter 337

76-10-1231, as last amended by Laws of Utah 2007, Chapter 337

76-10-1233, as last amended by Laws of Utah 2007, Chapter 322

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-10-1201** is amended to read:

76-10-1201. Definitions.

For the purpose of this part:

(1) "Blinder rack" means an opaque cover that covers the lower 2/3 of a material so that the lower 2/3 of the material is concealed from view.

(2) "Contemporary community standards" means those current standards in the vicinage where an offense alleged under this part has occurred, is occurring, or will occur.

(3) "Distribute" means to transfer possession of materials whether with or without consideration.

(4) "Exhibit" means to show.

(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 [~~with~~] 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.

(6) (a) "Knowingly," regarding material or a performance, means an awareness, whether actual or constructive, of the character of the material or [~~of a~~] performance. [~~A~~]

(b) As used in this Subsection (6), a person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the subject matter and if a failure to inspect or observe is either for the purpose of avoiding the disclosure or is criminally negligent as described in Section 76-2-103.

(7) "Material" means anything printed or written or any picture, drawing, photograph, motion picture, or pictorial representation, or any statue or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. Material includes undeveloped photographs, molds, printing plates, and other latent representational objects.

(8) "Minor" means any person less than 18 years of age.

(9) "Negligently" means simple negligence, the failure to exercise that degree of care that a reasonable and prudent person would exercise under like or similar circumstances.

(10) "Nudity" means:

(a) the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering;

(b) the showing of a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or

(c) the depiction of covered male genitals in a discernibly turgid state.

(11) "Performance" means any physical human bodily activity, whether engaged in alone or with other persons, including singing, speaking, dancing, acting, simulating, or pantomiming.

(12) "Public place" includes a place to which admission is gained by payment of a membership or admission fee, however designated, notwithstanding its being designated a private club or by words of like import.

(13) "Sado-masochistic abuse" means:

(a) flagellation or torture by or upon a person who is nude or clad in undergarments, a

mask, or in a revealing or bizarre costume; or

(b) the condition of being fettered, bound, or otherwise physically restrained on the part of a person clothed as described in Subsection (13)(a).

(14) "Sexual conduct" means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

(15) "Sexual excitement" means a condition of human male or female genitals when in a state of sexual stimulation or arousal, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Section 2. Section **76-10-1206** is amended to read:

76-10-1206. Dealing in material harmful to a minor -- Exemptions for Internet service providers and hosting companies.

(1) A person is guilty of dealing in material harmful to minors when, knowing or believing that a person is a minor, or having negligently failed to determine the proper age of a minor, the person intentionally:

(a) [~~intentionally~~] distributes or offers to distribute, exhibits or offers to exhibit, to a minor or a person the actor believes to be a minor, any material harmful to minors;

(b) [~~intentionally~~] produces, [~~presents~~] performs, or directs any performance, before a minor[~~,~~] or a person the actor believes to be a minor, that is harmful to minors; or

(c) [~~intentionally~~] participates in any performance, before a minor[~~,~~] or a person the actor believes to be a minor, that is harmful to minors.

(2) (a) Each separate offense under this section is a third degree felony punishable by:

(i) a minimum mandatory fine of not less than $1,000 plus $10 for each article exhibited up to the maximum allowed by law; and

(ii) incarceration, without suspension of sentence, for a term of not less than 14 days.

(b) This section supersedes Section 77-18-1.

(3) (a) If a defendant has already been convicted once under this section, each separate

further offense is a second degree felony punishable by:

(i) a minimum mandatory fine of not less than $5,000 plus $10 for each article exhibited up to the maximum allowed by law; and

(ii) incarceration, without suspension of sentence, for a term of not less than one year.

(b) This section supersedes Section 77-18-1.

(c) (i) This section does not apply to an Internet service provider, as defined in Section 76-10-1230, a provider of an electronic communications service as defined in 18 U.S.C. Sec. 2510, a telecommunications service, information service, or mobile service as defined in 47 U.S.C. Sec. 153, including a commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or a cable operator as defined in 47 U.S.C. Sec. 522, if:

(A) the distribution of pornographic material by the Internet service provider occurs only incidentally through the [~~Internet service~~] provider's function of:

(I) transmitting or routing data from one person to another person; or

(II) providing a connection between one person and another person;

(B) the [~~Internet service~~] provider does not intentionally aid or abet in the distribution of the pornographic material; and

(C) the [~~Internet service~~] provider does not knowingly receive [~~funds~~] from or through a person who distributes the pornographic material [~~in exchange~~] a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute the pornographic material.

(ii) This section does not apply to a hosting company, as defined in Section 76-10-1230, if:

(A) the distribution of pornographic material by the hosting company occurs only incidentally through the hosting company's function of providing data storage space or data caching to a person;

(B) the hosting company does not intentionally engage, aid, or abet in the distribution of the pornographic material; and

(C) the hosting company does not knowingly receive [~~funds~~] from or through a person

who distributes the pornographic material [~~in exchange~~] a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute, store, or cache the pornographic material.

(4) [~~(a)~~] A service provider, as defined in Section 76-10-1230, is not negligent under this section if it complies with Section 76-10-1231.

[~~(b) A content provider, as defined in Section 76-10-1230, is not negligent under this section if it complies with Section 76-10-1233.~~]

Section 3. Section **76-10-1230** is amended to read:

76-10-1230. Definitions.

As used in Sections 76-10-1231 and 76-10-1233:

[~~(1) "Access restricted" means that a content provider limits access to material harmful to minors by:~~]

[~~(a) properly rating content;~~]

[~~(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.~~]

[~~(2)~~] (1) "Consumer" means a natural person residing in this state who subscribes to a service provided by a service provider for personal or residential use.

[~~(3)~~] (2) "Content provider" means a person domiciled in Utah or that generates or hosts content in Utah, and that creates, collects, acquires, or organizes electronic data for electronic delivery to a consumer with the intent of making a profit.

[~~(4)~~] (3) (a) "Hosting company" means a person that provides services or facilities for storing or distributing content over the Internet without editorial or creative alteration of the content.

(b) A hosting company may have policies concerning acceptable use without becoming a content provider under Subsection [~~(3)~~] (2).

[~~(5)~~] (4) (a) "Internet service provider" means a person engaged in the business of

providing a computer communications facility in Utah, with the intent of making a profit, through which a consumer may obtain access to the Internet.

(b) "Internet service provider" does not include a common carrier if it provides only telecommunications service.

[~~(6)~~] (5) "Properly rated" means content using a labeling system to label material harmful to minors provided by the content provider in a way that:

(a) accurately apprises a consumer of the presence of material harmful to minors; and

(b) allows the consumer the ability to control access to material harmful to minors based on the material's rating by use of reasonably priced commercially available software, including software in the public domain.

(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.

(7) (a) Except as provided in Subsection (7)(b), "service provider" means[~~: (i)~~] an Internet service provider[~~; or (ii) a person who otherwise provides an Internet access service to a consumer in Utah with the intent of making a profit~~].

(b) "Service provider" does not include a person who does not terminate a service in this state, but merely transmits data through:

(i) a wire;

(ii) a cable; or

(iii) an antenna.

(c) "Service provider," notwithstanding Subsection (7)(b), includes a person who meets the requirements of Subsection (7)(a) and leases or rents a wire or cable for the transmission of data.

Section 4. Section **76-10-1231** is amended to read:

76-10-1231. Data service providers -- Internet content harmful to minors.

(1) (a) Upon request by a consumer, a service provider shall filter content to prevent the transmission of material harmful to minors to the consumer.

(b) A service provider complies with Subsection (1)(a) if it uses a generally accepted and commercially reasonable method of filtering.

(2) At the time of a consumer's subscription to a service provider's service, or at the time this section takes effect if the consumer subscribes to the service provider's service at the time this section takes effect, the service provider shall notify the consumer in a conspicuous manner that the consumer may request to have material harmful to minors blocked under Subsection (1).

(3) (a) A service provider may comply with Subsection (1) by:

(i) providing in-network filtering to prevent receipt of material harmful to minors, provided that the filtering does not affect or interfere with access to Internet content for consumers who do not request filtering under Subsection (1); or

(ii) providing software, [~~or~~] engaging a third party to provide software, or referring users to a third party that provides filtering software, by providing a clear and conspicuous hyperlink or written statement, for [~~contemporaneous~~] installation on the consumer's computer that blocks, in an easy-to-enable and commercially reasonable manner, receipt of material harmful to minors.

(b) A service provider may charge a consumer for providing filtering under Subsection (3)(a).

(4) If the attorney general determines that a service provider violates Subsection (1) or (2), the attorney general shall:

(a) notify the service provider that the service provider is in violation of Subsection (1) or (2); and

(b) notify the service provider that the service provider has 30 days to comply with the provision being violated or be subject to Subsection (5).

(5) A service provider that intentionally or knowingly violates Subsection (1) or (2) is[~~:~~ ~~(a)~~] subject to a civil fine of $2,500 for each separate violation of Subsection (1) or (2), up to $10,000 per day[~~; and~~].

[~~(b) guilty of a class A misdemeanor if:~~]

[~~(i) the service provider knowingly or intentionally fails to comply with Subsection (1);~~ ~~or~~]

[~~(ii) the service provider fails to provide the notice required by Subsection (2).~~]

(6) A proceeding to impose a civil fine under Subsection (5)[~~(a)~~] may only be brought by the attorney general in a court of competent jurisdiction.

(7) (a) The Division of Consumer Protection within the Department of Commerce shall, in consultation with other entities as the Division of Consumer Protection considers appropriate, test the effectiveness of a service provider's system for blocking material harmful to minors under Subsection (1) at least annually.

(b) The results of testing by the Division of Consumer Protection under Subsection (7)(a) shall be made available to:

(i) the service provider that is the subject of the test; and

(ii) the public.

(c) The Division of Consumer Protection shall make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, to fulfil its duties under this section.

Section 5. Section **76-10-1233** is amended to read:

76-10-1233. Content providers -- Material harmful to minors.

(1) A content provider that is domiciled in Utah, or generates or hosts content in Utah, shall restrict access to material harmful to minors.

(2) If the attorney general determines that a content provider violates Subsection (1), the attorney general shall:

(a) notify the content provider that the content provider is in violation of Subsection (1); and

(b) notify the content provider that the content provider has 30 days to comply with Subsection (1) or be subject to Subsection (3).

(3) (a) If a content provider intentionally or knowingly violates this section more than 30 days after receiving the notice provided[~~in~~] under Subsection (2), the content provider is [~~guilty of a third degree felony.~~] subject to a civil fine of $2,500 for each separate violation of

Subsection (1), up to $10,000 per day.

(b) A proceeding to impose the civil fine under this section may be brought only by the state attorney general and shall be brought in a court of competent jurisdiction.