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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' 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs respectfully submit this memorandum (a) as a reply memorandum in further support of their 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.

INTRODUCTION

Defendants' Opposition[1] to Plaintiffs' motion for summary judgment, and Defendants' cross-motion for summary judgment and motion to dismiss, are all predicated on assertions that Plaintiffs' motion did not take into account a 2008 amendment (the "2008 Amendment") to the Challenged Statutes, Utah Code §§ 76-10-1206 and 76-10-1233, that the 2008 Amendment removed Internet content providers from the scope of Section 1206, and that the 2008 Amendment remedied any constitutional infirmities of both Sections 1206 and 1233.[2]

Each of these assertions is without basis:

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[1] Memorandum in Support of Defendants' Motion to Dismiss and Cross Motion for Summary Judgment, and In Opposition to Plaintiffs' Motion for Summary Judgment, Doc. 95, July 29, 2011 ("Defendants' Opposition" or "Defts. Opp.").

[2] Capitalized terms are as defined in Plaintiffs' moving papers. Utah Code §§ 76-10-1206 and 76-10-1233 are referred to, respectively, as "Section 1206" and "Section 1233").

- Plaintiffs' summary judgment motion is addressed to the Challenged Statutes, ***as amended by the 2008 Amendment.*** Plaintiffs' Memorandum[3] quoted from, and specifically discussed, the Challenged Statutes, as amended by the 2008 Amendment.
- The 2008 amendment did not remove Internet content providers from the scope of Section 1206—one of the two Challenged Statutes. To the contrary, the language change in the 2008 Amendment cited by Defendants on this issue broadened, rather than narrowed, the scope of the Section 1206.
- The 2008 Amendment did not cure any of the constitutional infirmities of the Challenged Statutes addressed in Plaintiffs' Memorandum.

However, Plaintiffs' Memorandum did contain these mistakes: While addressing the Challenged Statutes, as amended by the 2008 Amendment, Plaintiffs' Memorandum did not discuss the fact that there had been an amendment in 2008 and, in one place (p. 22), inadvertently quoted from a section of the pre-2008 Challenged Statutes. Counsel apologizes to the Court and to the Attorney

[3] Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Doc. 82, June 8, 2011 ("Plaintiffs' Memorandum" or "Pls. Memo.").

General for these inadvertent errors. To ensure that these inadvertent errors do not create any confusion, Plaintiffs begin this Memorandum with a review of the 2008 Amendment, and a detailed correction of the specific errors in Plaintiffs' Memorandum.

None of these inadvertent errors, and none of the arguments and issues raised by Defendants, negate Plaintiffs' showing that the Challenged Statutes, both prior to and as amended by the 2008 Amendment, are unconstitutional and should be permanently enjoined.

THE 2008 AMENDMENT

The Challenged Statutes comprise two provisions.

Section 1206 is the central provision of Utah's "harmful to minors" statute, which makes it a crime to provide certain explicit sexual material (as defined) to minors. As in effect prior to the 2008 Amendment, Section 1206 included communications on the Internet, and thus was applicable to Internet content providers—whether based in Utah or elsewhere.

Section 1233 is a special provision of Utah's "harmful to minors" statute applicable to Utah-based Internet content providers, and Utah-based Internet hosting companies (but not to such companies based outside of this State). As in effect prior to the 2008 Amendment, Section 1233 required such Utah-based companies to "restrict access to material harmful to minors." Utah Code § 76-10-1233 (2007). Under the law prior to the 2008 Amendment, Section 1233 served as a limited "safe harbor" for Utah-based Internet content providers. A Utah-based Internet content provider that complied with Section 1233 (by restricting access) could not be held liable for negligent conduct (but could be held liable for willful conduct) under Section 1206.

The 2008 Amendment—HB 18 (2008)—clarified certain language in the Challenged Statutes and broadened their scope in some respects, but did not make material changes in any of the provisions at issue in this case. 2008 Utah Laws Ch. 297.

The principal changes were as follows (showing deletions with ~~strikethroughs~~ and additions with underscoring).

A. The 2008 Amendment Extended the Scope of the Statutes To Providing "Harmful to Minors" Materials To A Person Whom The Defendant "Believes" is a Minor

Prior to 2008, the Challenged Statutes applied when the defendant provided "harmful to minors" material to a person "knowing that a person is a minor, or having negligently failed to determine the proper age of a minor." Utah Code § 76-10-1206(1) (2007). The 2008 Amendment expanded the Challenged Statutes to apply when the defendant provides "harmful to minors" material to a person "knowing or believing that a person is a minor, or having negligently failed to determine the proper age of a minor." HB 18 (2008), *amending* Utah Code § 76-10-1206(1) (2007). Under the 2008 Amendment, the recipient of the material need not be a minor; it is sufficient if the recipient is either "a minor or a person the actor believes to be a minor." HB 18 (2008), *amending* Utah Code § 76-10-1206(1)(a)-(c) (2007). As noted in Defendants' Opposition (p. 9), this portion of the 2008 Amendment was designed to ensure that the statute would encompass providing "harmful to minors" materials to decoy police officers posing as minors.

This change has no impact on the issues in this litigation.

B. The 2008 Amendment Modified an Exception Applicable To "Internet Service Providers"

Prior to 2008, Section 1206 included an exception, applicable to some Internet service providers who played no role in the content of the material being transmitted. This exception was

expanded to cover other service providers (such as mobile service providers and cable operators), and clarified so that it could not be invoked by service providers who received enhanced fees as a condition of transmitting pornographic material:

> (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.

HB 18 (2008), *amending* Utah Code § 76-10-1206(1)(c) (2007).

This change has no impact on the issues in this litigation.

C. The 2008 Amendment Removed a Defense Previously Available To Some Utah-Based Internet Content Providers

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:

> (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.

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):

> (3) "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:

> (1) 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 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 "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"—*e.g.*, an Internet content provider who made 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 (as plaintiff ACLU) or a participant in a chat room or discussion group (listserv). 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.

The 2008 Amendment repealed this limited safe harbor:

> ~~(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.~~

HB 18 (2008), *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" (Defts. Opp., p. 3) 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 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.

D. The 2008 Amendment Continued In Place the Requirement That Utah-Based Content Providers "Restrict Access" To "Harmful to Minors" Material—But Deleted "Age Verification" as a Specified Means of Restricting Access

Section 1233(1) provided, prior to the 2008 Amendment, and continues to provide:

> (1) 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).

The 2008 Amendment changed the definition of "restrict access." Prior to 2008, Section 1230 provided:

> (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.

Utah Code § 76-10-1230(1) (2007). That definition was deleted by the 2008 Amendment, and this definition was enacted in its place:

> (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.

HB 18 (2008), *amending* Utah Code § 76-10-1230(6) (2007).

Thus, the requirement to "restrict access" remains in effect, but in apparent recognition of the fact that there is no feasible or practical means to verify the age of Internet users, the Legislature deleted "age verification" as one of the potential means of restricting access.

Because the requirement to "restrict access" remains in effect, this change does not eliminate any of the constitutional infirmities of the Challenged Statutes.

E. The 2008 Amendment Permits Utah-Based Internet Service Providers To Refer Users To Available Filtering Software, Rather Than Providing Such Software

Section 1231(1)(a), both prior to and after the 2008 Amendment, provides:

> (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.

Utah Code § 76-10-1231(1)(a). The 2008 Amendment provided an additional method for service providers to comply with this provision:

> (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, <u>or referring users to a third party that provides filtering software, by providing a clear and conspicuous hyperlink or written statement</u>, 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).

HB 18 (2008), *amending* Utah Code § 76-10-1231(3) (2007).

This change has no impact on any issue in this case.

F. The 2008 Amendment Changed the Penalties for Sections 1231 and 1233

The 2008 Amendment left intact the penalties for violating Section 1206, but changed the penalties for violating Sections 1231 and 1233.

This change, too, has no impact on the issues in this case.

CORRECTIONS TO PLAINTIFFS' MEMORANDUM

Plaintiffs' Memorandum contained the following errors:

Page 2. Plaintiffs' Memorandum stated, "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." The Memorandum should have stated: "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 amended the Challenged Statutes, but did not cure their constitutional infirmities."

Page 5 n. 4. Plaintiffs' Memorandum stated, "The Challenged Statutes (as amended), with other relevant statutes, are set forth in Exhibit A [the Amended Complaint] hereto." Plaintiffs' Memorandum should have stated: "The Challenged Statutes (as amended to the date of Plaintiffs' Amended Complaint), with other relevant statutes, are set forth in Exhibit A [the Amended Complaint] hereto. There was an additional amendment, in 2008, after the date of Plaintiffs' Amended Complaint, which amended provisions are incorporated in the 'Challenged Statutes' as that term is used herein."

Page 22. Plaintiffs' Memorandum stated:

> 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;
> > (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.

(Pls. Memo., p. 22). As noted above, the quoted section of the statute was modified by the 2008 Amendment. Plaintiffs' Memorandum should have stated:

> 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(6). That section sets out two ways to comply with Section 1233:
>
> > (a) properly rating content; or
> > (b) 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, subpart (b) does 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 that allow a content provider to "limit access to material harmful to minors." Thus, just as 76-10-1206 is unconstitutional, so is the second method defined by statute to comply with 76-10-1233.

SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS

A. Plaintiffs' Statement of Undisputed Facts

Plaintiffs' Memorandum included Plaintiffs' Statement of Undisputed Facts (Pls. Memo., pp. 5-10), comprising 22 numbered paragraphs. Defendants contest six of these paragraphs, and do not contest the remaining 16 of these paragraphs. For each of those six "disputed" paragraphs, Defendants do not dispute any of Plaintiffs' factual contentions, but simply raise issues of law for resolution by the Court.

Plaintiffs' Statement ¶ 3. Plaintiffs stated that the Challenged Statutes apply to Internet content providers. (Pls. Memo., p. 5). Defendants stated, in response, that the 2008 Amendment deleted a reference to content providers, and that the issue is one of law, rather than of fact. (Defts. Opp., pp. 4-5). As reviewed in detail above, the 2008 Amendment deleted a limited safe harbor applicable to certain content providers; the Challenged Statutes still apply to content providers. However, Plaintiffs agree with Defendants that this is an issue of law.

Plaintiffs' Statement ¶¶ 6, 10. Plaintiffs stated that they engage in communications that could be deemed "harmful to minors" under the Challenged Statutes, and that they therefore fear prosecution. (Pls. Memo., pp. 6-7). Relying upon a declaration of Paul G. Amman, Assistant Utah Attorney General, Defendants argue that "a minor in Utah viewing any of the Plaintiffs' websites does not constitute a violation of Utah's harmful-to-minors statute." (Defts. Opp., p. 5). While Plaintiffs, of course, welcome Defendants' statement that Plaintiffs would not be prosecuted under the Challenged Statutes, the issue of whether the Challenged Statutes, by their terms, cover Plaintiffs' present or future conduct is an issue of law for the Court.

Plaintiffs' Statement ¶ 11. Plaintiffs stated, "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." (Pls. Memo., p. 7). In response, Defendants reiterated that "Utah's harmful-to-minors statute does not allow prosecution of Plaintiffs for any material posted on their website." (Defts. Opp., p. 5). Defendants thus do not contest the fact that the "rating content" requirement is compelled speech; they simply maintain that Plaintiffs would not be subject to that requirement. Thus narrowed, this is an issue of law for the Court.

Plaintiffs' Statement ¶ 13. Plaintiffs stated:

> 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. … 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.

(Pls. Memo., pp. 7-8). In response, Defendants state that "Utah's harmful-to-minors statute does not force Plaintiffs to remove material from their websites . . . ." (Defts. Opp., p. 6). Defendants thus do not challenge any of the facts upon which Plaintiffs rely, but simply argue that—as a matter of law—the Challenged Statutes do not apply to Plaintiffs. Thus narrowed, this is similarly an issue of law for the Court.

Plaintiffs' Statement ¶ 20. Plaintiffs stated:

> 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.

(Pls. Memo., p. 9). Defendants state, in response:

> Utah's harmful-to-minors statute does not restrict the material Plaintiffs or any other content provider can post on their website. … Further, Plaintiffs' allegation is a legal argument, not a factual statement.

(Defts. Opp., p. 6). Defendants thus do not contest the availability of user-based methods and tools to block out unwanted content. Here, again, Defendants simply claim that the Challenged Statutes do not apply to Plaintiffs. Defendants acknowledge that that is a legal issue—and on that point, Plaintiffs agree.

B. Defendants' Statement of Undisputed Facts

Defendants' Opposition included "Defendants' Statement of Facts" (pp. 6-7), comprising five numbered paragraphs. With the exception of the first paragraph, each of these paragraphs raises issues of law, but does not present any facts.

Defendants' Statement ¶ 1. Plaintiffs do not dispute that Utah has an Internet Crimes Against Children (ICAC) task force, whose mission is to apprehend child sex predators. (Defts. Opp., pp. 6-7). Indeed, Plaintiffs applaud the work of the ICAC task force.

Defendants' Statement ¶ 2. Plaintiffs do not dispute that the Utah Legislature enacted HB 18 in 2008, and that it amended the Challenged Statutes. (Defts. Opp., p. 7). As reviewed in detail above, the 2008 Amendment did not remove Internet content providers from the scope of the Challenged Statutes, and maintained the requirement to "restrict access" (while eliminating the specification of age verification as one of the means of so doing).

Defendants' Statement ¶ 3. Defendants are correct that this Court's prior rulings were made before the enactment of HB 18. Defendants are incorrect in stating that HB 18 is not a part of the record in this case. (Defts. Opp., p. 7). Plaintiffs based their motion for summary judgment on the Challenged Statutes, as amended by HB 18 (2008).

Defendants' Statement ¶ 4. Defendants' statement that Plaintiffs' Memorandum focused solely on the Challenged Statutes as they existed prior to the 2008 Amendment is incorrect. (Defts. Opp., p. 7). Plaintiffs' Memorandum was based on, and quoted from, the Challenged Statutes as amended by the 2008 Amendment. Thus, *e.g.*, Paragraph 4 of Plaintiffs' Statement of Undisputed Facts, quoted the definition of "Restrict" as amended by the 2008 Amendment, and Plaintiffs' discussion of the *scienter* requirement of the Challenged Statutes included reference to the "belief" provision added by the 2008 Amendment. (Pls. Memo., pp. 5, 13). Plaintiffs' Memorandum did contain certain errors, reviewed in detail above, in which Plaintiffs mistakenly quoted from the pre-2008 version of the Challenged Statutes.

Defendants' Statement ¶ 5. Defendants state that the current version of the Challenged Statutes no longer contains the language "that served as the basis for Plaintiffs' challenges." (Defts. Opp., p. 7). That is incorrect, as reviewed in the above discussion of the 2008 Amendment and in the Argument below.

ARGUMENT:

THIS COURT SHOULD GRANT SUMMARY JUDGMENT HOLDING SECTIONS 1206 AND 1233 UNCONSTITUTIONAL

I. THE ATTORNEY GENERAL'S DEFENSE OF SECTION 1206 IS BASED ON THE INCORRECT PREMISE THAT SECTION 1206 DOES NOT APPLY TO INTERNET CONTENT PROVIDERS

The Attorney General's defense of Section 1206 is based on a simple, but incorrect premise: As a result of the 2008 Amendment, Section 1206 no longer applies to Internet content providers. That is not so. Section 1206 applies to Internet content providers. Indeed, instead of taking Internet content providers out from under Section 1206, the 2008 Amendment expanded the applicability of Section 1206 to Internet content providers.

As this Court held in its 2007 decision in this case, by its terms, Section 1206 applies to any "person" who intentionally distributes "harmful to minors" material to a minor, "with no geographic or other limit." *The Kings English, Inc. v. Shurtleff*, 620 F. Supp. 2d 1272, 1278 (D. Utah 2007). It has been clear, at least since the passage of HB 260 in 2005, that it was the intention and understanding of the Utah Legislature that Section 1206 applies to electronic distributions of harmful to minors materials.[4] Section 1206 applies to materials communicated on or through websites, emails, chat rooms, discussion groups (listservs), etc.

Prior to the passage of HB 18 in 2008, Section 1206 included "safe harbors" for some Utah-based Internet content providers, service providers, and web hosts. §1206(3)(c) and (4) (2007). As reviewed in detail above, the 2008 Amendment, among other things, deleted the limited safe harbor for Utah-based content providers previously found in Subsection 1206(4)(b). Defendants contend that "since § 1206 no longer contains any reference to Internet content providers" (Defts. Opp., p.3), Section 1206 no longer applies to any content providers. To the

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[4] See *The Kings English, Inc. v. Shurtleff*, 620 F. Supp. 2d at 1277 ("§ 76-10-1206 prohibits ISPs, content providers, and web hosts from distributing material that is 'harmful to minors' on the Internet.").

contrary, Utah-based Internet content providers are now at greater risk, no longer having the benefit of the "safe harbor."

A simple example illustrates this point. Suppose that a statute applied to "fruit" but had a limited exemption for "red apples." In that form, the statute would apply to, among other fruit, oranges, bananas, green apples, and yellow apples. Suppose further that the exemption of "red apples" were repealed. That would not release apples from the coverage of the statute (even though, in the Attorney General's language, the statute "no longer contains any reference to" apples). Rather the deletion would mean that *all* apples, not only green and yellow ones, would be statutorily covered. Here, Section 1206, before the 2008 Amendment, covered all Internet communications, with certain safe harbors / exemptions as to specific communicators and communications. The 2008 Amendment deleted the safe harbor for Utah-based content providers, leaving them fully covered by Section 1206.

Thus, Defendants' motion to dismiss Plaintiffs' claims under Section 1206 for lack of standing is no stronger than it was when a similar motion, which was denied by the Court, was made by Defendants in 2007. *See The Kings English*, 620 F. Supp. 2d at 1278. In fact, Defendants' position is weaker. By reason of the deletion of the limited safe harbor, the threat to Plaintiffs is greater today than it was in 2007.

As Section 1206 applies to all electronic transmissions—*i.e.* websites, chat rooms, discussion groups, etc.—Plaintiffs are entitled to summary judgment:

> If § 1206 is read so broadly as to allow Utah to police the entire Internet, Defendants would agree [that the statute is not narrowly tailored to achieve a compelling state interest.]

(Defts. Opp., p. 15).

II. THE CHALLENGED STATUTES ARE NOT SAVED BY THE SCIENTER REQUIREMENT, THE AVAILABILITY OF FILTERING, THE ABSENCE OF PROSECUTIONS, OR THE POSSIBILITY OF RATING CONTENT

The Attorney General also proffers a range of disparate arguments in defense of the Challenged Statutes—from the scienter requirement, to the availability of filtering, to the fact that there have been no prosecutions of Internet content providers, to the possibility of rating content. None of these arguments cure the constitutional infirmity of the Challenged Statutes.

A. The *Scienter* Requirement Does Not Save Section 1206

The Attorney General contends that the fact:

> a person transmitting harmful material must "know" the proper age of the person viewing the material . . . completely eliminates the prospect of Internet content providers being subject to [§ 1206].

(Defts. Opp., p. 3). This is the very same argument that was made by the U.S. Department of Justice in *Reno v. ACLU*, 521 U.S. 844 (1997), and rejected by the United States Supreme Court:

> This argument ignores the fact that most Internet forums—including chat rooms, newsgroups, mail exploders, and the Web—are open to all comers. *The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable.*

521 U.S. at 880 (emphasis added). *See also, e.g., ACLU v. Johnson,* 194 F.3d 1149, 1159 (10th Cir. 1999).

In addition, in the context of a chat room or listserv, there is the danger of a "heckler's veto"—that is, a member of the group desiring to silence a speaker, stating that his underage daughter is present. *Reno v. ACLU*, 521 U.S. at 880.

The presence of a scienter requirement thus fails to save Section 1206.

B. The Availability of User-Based Filtering—Which Plaintiffs Have Always Supported—Does Not Render the Statutes Constitutional

Defendants suggest that Plaintiffs are disingenuous by early in the case moving to strike governmentally mandated filtering programs, but:

> now freely admit[ting] that filtering is the "less restrictive, more effective" means for limiting the access of pornography by minors on the Internet. Pltfs. Memo., p. 18-22.

(Defts. Opp., p. 13). In fact, in both the 2005 Complaint (Doc. No. 1, ¶¶ 106-109) and the 2007 Amended Complaint (Doc. No. 43, ¶¶ 114-117), Plaintiffs contended the filtering was a less restrictive, more effective means. However, both then and now, Plaintiffs were addressing the use of filtering as a *voluntary, user-based* means of protection. Far from rendering the Challenged Statutes constitutional, the availability of voluntary, user-based filtering makes it clear that there are less restrictive alternatives to further the State's goal of protecting minors from "harmful to minors" material.

C. The Fact that the Internet Crimes Against Children Task Force Has Not Charged Internet Content Providers Does Not Render Section 1206 Constitutional

Assistant Utah Attorney General Paul G. Amann states:

> I have never charged the owner of a website, an Internet Service Provider (ISP) or an Internet content provider with violating Section 1206 for displaying or transmitting material harmful to minors on a website and do not intend to do so in the future.

(Doc. No. 94, paragraph 6). This is irrelevant to Plaintiffs' claims. Plaintiffs need not rely on prosecutorial promises. As Chief Justice Roberts stated in his opinion for the Court in *United States v. Stevens*,

> Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6-7. The

> Government hits this theme hard, invoking its prosecutorial discretion several times. See *id.*, at 6-7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

559 U.S. ___, 130 S. Ct. 1577, 1591 (2010).

There is yet another reason why the absence of prosecutions of Internet content providers does not demonstrate the constitutionality of the Challenged Statutes. Since August 25, 2006, Defendants have been enjoined by order of this Court from "enforcing, prosecuting, investigating or reviewing any matter" based on Section 1206:

> against any person or entity with respect 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 knows to the communicator, distributor or transmitter to be minors.

(Doc. No. 36, Stipulated Order Including Preliminary Injunction). The Attorney General's practice, as described in Mr. Amann's declaration, was not voluntary but in fact mandated by the preliminary injunction.

D. *Reno v. ACLU* Does Not Authorize The "Rating" Provisions Of Section 1233.

In an attempt to defend the constitutionality of Section 1233—which requires that Utah-based Internet content providers rate content[5]—the Attorney General contends that the U.S. Supreme Court's decision in *Reno v. ACLU*, 521 U.S. at 881-882 approved rating content, which they denominate as "tagging." That is incorrect.

In *Reno*, the Supreme Court did not consider "tagging . . . because the proposed screening software did not exist at that time." *Ctr. for Democracy and Tech. v. Pappert*, 337 F. Supp. 2d 606, 651-52 (E.D. Pa. 2004). Defendants' interpolation of the word "exist" in the quote from *Reno v. ACLU* in Defendants' Opposition distorts the holding of the Supreme Court:[6]

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[5] Section 1233 requires Utah-based content providers to "restrict access to material harmful to minors." This obligation is defined in Section 1230, as amended by the 2008 Amendment, as either "(a) properly rating content; or (b) any other reasonable measures feasible under available technology." The unconstitutionality of these alternatives is discussed in detail in Plaintiffs' Memorandum, pp. 22-27.

[6] The same error was made by the Tenth Circuit in *ACLU v. Johnson*, 194 F.3d 1149, 1157 (10th Cir. 1999).

Defendants' "Quote" from *Reno v. ACLU* (Defts. Opp., pp. 19-20) (emphasis added)	***Reno v. ACLU*, 521 U.S. 844, 879-881 (1997) (emphasis added)**
[P]ossible alternatives [exist] such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Websites—differently from others, such as chat rooms	The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. ***The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged"*** in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all. * * * [T]he Government suggests that "tagging" provides a defense that saves the constitutionality of the CDA. * * * ***The Government recognizes that its proposed screening software does not currently exist. Even if it did, there is no way to know whether a potential recipient will actually block the encoded material. Without the impossible knowledge that every guardian in America is screening for the "tag," the transmitter could not reasonably rely on its action to be "effective."***

Even if such software were to exist, and even if compelling the use of such software did not constitute unconstitutional compelled speech (which it does), tagging would not work in the context of the variable standard of "harmful to minors." The "harmful to minors" standard takes into the consideration the age and maturity of the minor. (*See* Pls. Memo., pp. 14-15) What is "harmful to minors" as to a 12-year old may not be "harmful to minors" as to a 17-year old. Thus "tagging" would have to recognize such age and maturational differences, making it impractical and perhaps impossible. Certainly, Utah Administrative Rules R152-la-4 to -5 totally disregard

these differences as well as fail to recognize the fact that only one small part of a website may be "harmful to minors." Thus, if material on a website is considered "harmful to minors" as to an average 11-year old girl, under section 1233 the website must be so labeled, which is no help or guidance to the parents of a average 16-year old boy. Nor will it be clear to a parent what part of the website caused the required labeling.

III. THE STATE DOES NOT RESPOND TO THE UNCONSTITUTIONALITY OF THE CHALLENGED STATUTES UNDER THE COMMERCE CLAUSE

Plaintiffs' Memorandum (pp. 27-31) sets forth the reasons why the Challenged Statutes are unconstitutional under the Commerce Clause. Seven state statutes similar to the Challenged Statutes have been found to violate the dormant Commerce Clause.[7] Defendants do not respond to Plaintiffs' contention. The Court should grant summary judgment holding the Challenged Statutes violative of and unconstitutional under the Commerce Clause.

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[7] *PSInet, Inv. v. Chapman*, 362 F.3d 227, 239-240, *reh'g. denied*, 372 F.3d 671 (4th Cir. 2004), *American Booksellers Found. for Free Expression v. Dean*, 342 F.3d 96, 102-104 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1160-1162 (10th Cir. 1999); *Southeast Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773, 786-787 (D.S.C. 2005); *ACLU v. Goddard*, 2004 WL 3770439, *2 (D. Ariz. 2004); *Cyberspace Commc'ns, Inc. v. Engler*, 142 F. Supp. 2d 827, 830-831 (E.D. Mich. 2001); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' Memorandum, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for summary judgment, deny Defendants' motion to dismiss and cross-motion for summary judgment, declare the Challenged Statutes unconstitutional, and permanently enjoin their enforcement as applied to the Internet.

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The undersigned certifies that a true and correct copy of the foregoing Memorandum was served via electronic filing this September 9, 2011, upon counsel for Defendants.

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