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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.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Judge Dee Benson Case No. 2:05CV00485 DB

Defendants respectfully submit this Memorandum in Support of their Motion to Dismiss Plaintiffs' claims as to Utah Code § 76-10-1206 and in support of their Motion for Summary Judgment, and in Opposition to Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

Plaintiffs' Motion for Summary Judgment is a facial challenge to Utah Code §§ 76-10-1206 ("§ 1206") and 76-10-1233 ("§ 1233"), in which they are asking this Court to declare these Utah Code sections unconstitutional and permanently enjoin their enforcement as "applied to the Internet."

Such a ruling would be a travesty. Utah uses Internet communications extensively to apprehend child sexual predators through its Internet Crimes Against Children task force. These contacts constitute one-on-one contact through Internet chat rooms and personal communication. Granting of Plaintiffs' motion would thwart that effort entirely.

While there may be a debate as to whether Utah's harmful-to-minors statute applied to Internet communications prior to HB 260 in 2005, there is no question that it did after the passage of the Act. Even though HB 260 made no modification to the substantive portion of the harmful-to-minors statute[1] that would indicate the harmful-to-minors statute would now apply to Internet communications, it did provide safe harbor language to Internet Service Providers (ISPs) and Internet content providers in subsection 4 of § 1206. The arguable inference suggested by Plaintiffs was that as a result of HB 260 Utah's harmful-to-minors statute was made applicable to Internet content providers. Whether that is true or not is now strictly academic. The sole reference to content providers in § 1206 provided by HB 260 was deleted by HB 18 in 2008. Plaintiffs make no reference to this amendment in their Memorandum.

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[1] § 1206(1)

Besides the deletion of content providers from § 1206, HB 18 made other changes to the Utah Code brought about by HB 260. Of particular note was the removal of the requirement that content providers employ age verification mechanisms. Utah Code § 76-10-1230(1) (2005). Yet Plaintiffs quote this provision in their Memorandum as if it were still part of the statute. To the extent HB 260 was ever "indistinguishable from other States' statutes," as Plaintiffs are wont to say, that is certainly not true of the Utah harmful-to-minors statute now.

The changes made to § 1206 in 2008 clearly marks a sea-change away from inferences contained in HB 260. But in addition to those changes, Plaintiffs completely ignore the scienter requirement of § 1206. In order to be charged under the Utah harmful-to-minors statute a person transmitting harmful material must "know" the proper age of the person viewing the material. That requirement alone completely eliminates the prospect of Internet content providers being subject to the statute. Since there is no reasonable way for Internet content providers to know who is viewing their website there is no way to hold content providers accountable for "knowing" the age of each of its users.

Plaintiffs remaining in this case are all Internet content providers. Since § 1206 no longer contains any reference to Internet content providers, all of the remaining Plaintiffs should be dismissed for lack of standing to challenge § 1206. This Court's prior consideration of the lack of standing issue dealt only with the Utah statute as it existed prior to 2008. This Court has never considered Plaintiffs challenge to the statute in light of the amendments offered by HB 18.

At a minimum, since none of the Plaintiffs are ISPs or hosting companies, they certainly do not have standing to challenge the existing safe harbor provisions in § 1206 for ISPs and hosting companies. Utah Code § 76-10-1206(3)(d).

As for § 1233, Plaintiffs miss the point. The idea of "tagging," which is all § 1233 requires – and then only of Utah based content providers – was proposed by the U.S. Supreme Court in the very case Plaintiffs cite for declaring § 1206 unconstitutional. In *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329 (1997), the Supreme Court held the Communications Decency Act ("CDA") was not narrowly tailored enough to achieve the goal of protecting minors given that one possible alternative to achieving the same result would be the requirement that indecent material be "tagged." *Id.* at 879. Taking its cue from the Supreme Court, the Utah Legislature required that material harmful to minors be "tagged" by Utah based content providers so customers who voluntarily choose filtering can do so more effectively. That is all § 1233 requires.

DISPUTED FACTS

Defendants dispute paragraphs 3, 6, 10, 11,13 and 20 of the "Undisputed Facts" portion of Plaintiffs' Memorandum.

1. In ¶ 3 of the "Undisputed Facts," Plaintiffs state: "The amendment to section 76-10-1206 expanded the reach of Utah's 'harmful to minors' law to include Utah-based Internet content providers and Internet service providers (ISPs) doing business in Utah."

That may have been the effect of HB 260, but any discussion of that today is strictly academic. Today that statement is not true. ISPs still have a safe harbor provision in § 1206, but

any reference to content providers has been removed. *See* Utah Code § 76-10-1206 (3)(d). Further, Plaintiffs' allegation is a legal argument, not a factual statement.

2. In ¶ 6 of the "Undisputed Facts," Plaintiffs state: "Plaintiffs, their members, and the users of their websites obtain information and engage in communications that may be deemed harmful to minors under the Challenged Statutes."

Defendants dispute this statement on the basis that a minor in Utah viewing any of the Plaintiffs' websites does not constitute a violation of Utah's harmful-to-minors statute. Amman Decl., ¶ 6-8.

3. In ¶ 10 of the "Undisputed Facts," Plaintiffs state: "Plaintiffs fear prosecution under the Challenged Statutes because some material they host, generate, or provide onlin–while entirely constitutionally protected as to adults–could be considered "harmful" to minors."

Defendants dispute this statement on the basis that Utah's harmful-to-minors statute does not allow prosecution of Plaintiffs for any material posted on their website. Amman Decl., ¶ 6-8.

4. In ¶ 11 of the "Undisputed Facts," Plaintiffs state: "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."

Defendants dispute this statement on the basis that Utah's harmful-to-minors statute does not allow prosecution of Plaintiffs for any material posted on their website. Amman Decl., ¶ 6-8.

5. In ¶ 13 of the "Undisputed Facts," Plaintiffs state: "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."

Defendants dispute this statement on the basis that Utah's harmful-to-minors statute does not force Plaintiffs to remove material from their websites to comply with the challenged statutes. Amman Decl., ¶ 8.

6. In ¶ 20 of the "Undisputed Facts," Plaintiffs state: "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."

Defendants dispute this statement on the basis that Utah's harmful-to-minors statute does not restrict the material Plaintiffs or any other content provider can post on their website. Amman Decl., ¶ 6-8. Further, Plaintiffs' allegation is a legal argument, not a factual statement.

DEFENDANTS' STATEMENT OF FACTS

Defendants submit the following facts are undisputed and are essential for a fair determination of the respective parties' positions:

1. The State of Utah has an Internet Crimes Against Children (ICAC) task force, which is a multi-jurisdictional task force that investigates and charges persons dealing with enticement,

child pornography and distributing harmful material to minors over the Internet. Decl. of Paul Amman Decl., ¶ 3. This task force has been in operation for a number of years and is regarded as being very successful at apprehending child sexual predators.

2. HB 18 was passed by the Utah Legislature in 2008 amending sections 76-10-1201, -1206, -1230, -1231, and -1233 of the Utah Code. This bill made significant changes to Utah's harmful to minors statute. Among other things, this bill removed content providers from the provisions of § 1206, and removed the age verification requirements from the provisions of § 1230. A copy of HB 18 is attached hereto as Ex. A.

3. Prior hearings and court filings in this case have only dealt with HB 260 (2005) and HB 5 (2007). HB 18 (2008) has never been made a part of the record in this case, and has not been ruled upon by this Court in either of its two Memorandum Opinions and Orders. Doc. 63 & 72.

4. Plaintiffs' Memorandum makes no mention of HB 18. Rather Plaintiffs Memorandum focuses solely on HB 260 (2005) and HB 5 (2007). *See* Statement of Undisputed Facts, ¶ 1 and accompanying footnote 4.

5. The current version of Utah Code §§ 76-1-1206 and 76-10-1233 no longer continues the language that served as the basis for Plaintiffs' challenges. Pltfs.' Amend. Cmplt. ¶¶ 89-91, 100-138, 140-145, 181-204.

I. INTERNET CONTENT PROVIDERS HAVE NO EFFECTIVE WAY OF "KNOWING" WHO IS VIEWING THEIR WEBSITE. THEREFORE THE STATUTE DOES NOT APPLY TO THEM.

A. Utah's Harmful-to-Minors Statute.

The current subsection 1 of Utah's Harmful-to-Minors statute reads:

> A person is guilty of dealing with 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) distributes or offers to distribute, or exhibits, or offers to exhibit, to a minor or a person the actor believes to be a minor, any material harmful to minors;
>
> (b) produces, 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) participates in any performance, before a minor or a person the actor believes to be a minor, that is harmful to minors. (Emphasis added.)

Utah Code § 76-10-1206(1). This is the substance of Utah's harmful-to-minors statute. The remaining subsections in § 1206 deal with penalties, except that beginning in 2005, one subsection included safe harbor provisions for certain providers.[2]

A copy of the current version of § 1206, including all subsections, is attached hereto as Ex. B.

1. Changes Made to HB 260 By HB 18 in 2008.

HB 260 (2005) provided a safe harbor to content providers in § 1206 if they complied with Utah Code § 76-10-1233. This provision was deleted in 2008, and is no longer in the

[2] Subsection 4 of § 1206 under HB 260. Currently § 1206(3)(d).

statute. HB 260 also required that access to material harmful to minors be restricted. The Act used the term "access restricted" in Utah Code §§ 76-10-1231, 76-10-1232, and 76-10-1233, which was defined in § 76-10-1230(1). That definition required content providers to limit access to material harmful to minors by "providing an age verification mechanism designed too 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." HB 260, § 6 (previously Utah Code § 76-10-1230(1) (2005)). This provision was also deleted in 2008, and is no longer in the statute.[3]

2. The Addition of the Word "Believing" to § 1206(1)

By way of explanation, HB 18 also added the term "believing" to § 1206(1). That was done because defendants who had been apprehended by decoy police officers entering Internet chat rooms posing as young teenage girls[4] were alleging that they could not be charged under the harmful-to-minors statute because the person they were communicating with in a chat room or other one-on-one communication over the Internet was not a minor, but actually an adult. Amman Decl. ¶¶ 11-12.

B. Plaintiffs Assume Too Much.

The key sentence in Plaintiffs' Memorandum that explains their position as to why they claim § 1206 regulates the entire Internet is found on page 13. It states:

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[3] HB 18, § 3, lines 152-58.

[4] Pursuant to Utah's Internet Crimes Against Children task force. *See* http://attorneygeneral.utah.gov/intenet_safety.html.

> But because one "knows" that there are minors using Internet browsers in Utah, and because Internet users have no means to prevent sexually frank communications from passing to Utah minors without restricting all Internet users, Internet users in general, and Plaintiffs in particular, can only comply with the Challenged Statutes if they speak in language suitable for children.

That is like saying that because a magazine publisher or video producer of pornographic magazines or videos "knows" that some young boy sometime, somewhere in Utah, will take a peek at their product that those magazines and videos can only be distributed in Utah if they "are suitable for children." That extremely broad definition of "knowing," which does not fit the scienter definition of knowing, is really more akin to an educated guess. The fact is, if that is how "knowing" is to be defined, Utah prosecutors could have brought thousands of cases over the last forty years against magazine publishers and video producers. They have not.

And it is not because Utah prosecutors were hesitant about filing § 1206 cases. Over 700 § 1206 cases were filed in the Utah courts between October, 1982 and June 30, 2009. Utah Administrative Office of the Courts report, submitted to Plaintiffs in compact disc form attached to Defs.' Supp. Responses to Pltfs.' Amended First Set of Interrogs., dated Sept. 28, 2009. Attached as Ex. C.

1. Historical Application of § 1206.

Historically, the typical § 1206 scenario takes place in a magazine or video shop. There, a minor attempts to view or purchase material that may be deemed obscene or pornographic. Through visual inspection, the store clerk "knows" who is viewing or purchasing the material. They have visual contact. If the viewer or purchaser appears to be underage, the clerk is in a

position to inquire as to that person's age. The viewer or purchaser then has a choice: produce identification establishing his or her age, or abandon the view or purchase. This interaction undoubtedly occurs thousands of times in Utah and throughout the country. In Utah, local police departments occasionally, maybe even regularly, engage minors to test the magazine and video store's age verification protocols. See *State v. Haltom*, 2007 UT 22, ¶ 3, 156 P.3d 792.

Other recent Utah cases that have evoked § 1206 violations have involved an adult showing "dirty" or "porno" movies to a minor. *State v. Brown*. 856 P.2d 358 (Utah Ct. App. 1993), *State v. Vigil*, 840 P.2d 788 (Utah Ct. App. 1992). And an adult showing magazines containing obscene pictures to minors. *State v. Burke*, 675 P.2d 1198 (Utah 1984).

In each of the above cases the adult had one-on-one contact with the minor and knew or had reason to believe that person was a minor.

Since there was nothing in § 1206 as it existed prior to HB 260 that specifically precluded the application of Utah's harmful-to-minors statute to Internet content providers, if prosecutors thought "knowing" meant "because one 'knows' there are minors using the Internet browers in Utah" there again would have been ample opportunities to bring cases against Internet content providers. There were approximately 500 cases brought in Utah charging § 1206 violations between 1990 (using that date as an approximate date for the beginning popularity of the Internet) and the date of the injunction in this case (Nov. 28, 2005). Extrapolating numbers from the Utah Administrative Office of the Courts report, submitted to Plaintiffs in compact disc form attached to Defs.' Supp. Responses to Pltfs.' Amended First Set of Interrogs., dated Sept. 28, 2009. Attached as Ex. C.

Certainly among 500 cases, if prosecutors had any idea that one could be convicted under the Utah harmful-to-minors statute because "knowing" the age of a minor really meant "because one knows there are minors using Internet browers in Utah," one would logically suspect (know?) that such a case would have been brought. It was not.

2. Applying § 1206 to the Internet.

Section 1206 is used extensively in Utah to charge persons using the Internet to sexually exploit minors. The State of Utah has an Internet Crimes Against Children (ICAC) Task Force. It

is administered in the Utah Attorney General's office, but includes local police departments and county prosecutors as well. *See* http://attorneygeneral.utah.gov/internet_safety.html. Notably, the Attorney General has "supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices..." Utah Code § 65-5-1(6).

On an almost daily basis, investigators working for ICAC pose as young females in Internet chat-rooms. These exchanges often lead to one-on-one communications, and those communications oft times lead to personal meetings. Based on these personal meetings, arrests are frequently made of those attempting sexual exploitation of children. Plaintiffs say that had they understood the statute to mean one-on-one contact their challenge to § 1206 "might have been unnecessary." Pltfs. Memo., p. 4.

But that issue has been key in this case from the very outset. In stipulating to the injunction early on in this case, Defendants were insistent that it not preclude the enforcement of the statute "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." Motion for Entry of Stipulated Order, Doc. # 25, (the injunction). Because Defendants do not believe – and never have believed – that § 1206 applies to Internet content providers such as website owners, they had no problem agreeing that the statute was not to be enforced against these providers.

3. Restricting the Ability of Minors to Access Pornography on the Internet.

On page 16 of Plaintiffs' Memorandum, Plaintiffs cite statements contained in Defendants' prior court filings. The first is contained in Defendants' Motion to Dismiss, dated May 31, 2007, stating that the purpose in passing HB 260 was "to restrict the ability of minors to access pornography on the Internet." Plaintiffs want to turn this statement into meaning that § 1206 is meant to restrict the ability of minors to access pornography on the Internet. That is not what Defendants said. Defendants said the "Act" was meant to restrict the ability of minors to access pornography on the Internet. Use of the word "Act" means HB 260. HB 260 included a requirement that ISPs make an Internet filter available to customers.[5] Defendants believe filtering will help to restrict the ability of minors to access pornography on the Internet. In fact, even though Plaintiffs initially challenged this section, they now freely admit 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. "The most reliable method of protecting minors and others from unwanted Internet content is through the use of filter software installed on the user's own

[5] This challenge was dismissed by the Court for lack of standing. (Doc. 63.)

computer." Bradner Decl. ¶ 67, Pltfs.'. Memo., p. 19. The Act required filtering be made available by ISPs. Thus, when stating in 2007 that the Act would help restrict minors' access to harmful material on the Internet, Defendants meant the entirety of HB 260 – not every individual provision of the Act read in isolation.

Next, Plaintiffs state that the Challenged Statutes fail under strict scrutiny because Defendants admitted the that the Act will not achieve the government's stated purpose. They cite Defendants' answer to interrogatory 14 of Plaintiffs' Amended First Set of Interrogatories. Defendants' answer stated:

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

Cited in Plaintiffs' Memorandum at p. 16.

As is obvious from a reading of the above answer that reference is being made to § 1206 because § 1206 is the only provision of the Act to require one to "know" the age of its viewers. In re-reading the answer, Defendants acknowledge it would be more clear if they had used the term "§ 1206" in the above answer instead of the word "Act."

It is certainly Defendants position that the Act will reduce the availability in Utah of material that may be harmful to minors over the Internet. As has been pointed out above, and as will be pointed out below, even Plaintiffs seem to acknowledge that now in light of their references to filtering.

4. Not Narrowly Tailored to Achieve a Compelling State Interest.

Plaintiffs' Memorandum makes a lengthy argument that the statute is not narrowly tailored to achieve a compelling state interest. Pltfs. Memo., p. 17 et seq. If § 1206 is read so broadly as to allow Utah to police the entire Internet, Defendants would agree and the statute would need clarification yet again. But that is not how the plain language of § 1206 reads. As has been explained above, it is Defendants' position that § 1206 does not apply to Internet content providers. So it is not a matter of the statute not being narrowly tailored; it is a matter of it not applying at all. Plaintiffs are still challenging HB 260.

But in challenging HB 260, it is ironic in this portion of Plaintiffs' Memorandum that they make such a concerted effort to say that there are less restrictive, more effective alternatives available than using § 1206 to police the whole world. Pltfs.' Memo., p. 18-21. And the less restrictive, more effective alternative is FILTERING. Voila!

That is what HB 260 did. It requires filtering. That is the significance of § 1231. Plaintiffs challenge of HB 260 challenged the filtering requirement. Now they are touting it a means for the State to attempt to at least limit where possible pornography from the Internet in Utah. That is where the Utah Legislature was in 2005.

It is also the reason why Defendants believe that the Act will help reduce the availability of pornography accessible to minors over the Internet in Utah.

II. The Comparison to the Communications Decency Act.

Title V of the Telecommunications Act of 1996 is known as the Communications Decency Act ("CDA"). It contains two provisions that were challenged by the ACLU. They are informally described as the "indecent transmission" provision and the "patently offensive display" provision. Plaintiffs use the CDA to attempt to show that Utah's statute is a "broadly restrictive censorship law that imposes severe content-based restrictions" on constitutionally-protected speech on the Internet. Pltfs. Memo., p. 1. The problem with this approach is that there are no meaningful similarities between the CDA and the Utah statute.

The first challenged provision of the CDA "prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age" by means of a "telecommunications device..." *See Reno v. ACLU*, 521 U.S. 844, 859-60, 117 S.Ct. 2329, 2338-39 (1997). The second provision "prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age" using an interactive computer service. *Id.* The Act criminalized the intentional transmission of "obscene or indecent" messages, 47 U.S.C. § 223(a), as well as the transmission of information which depicts "sexual or excretory activities or organs" in a manner deemed "offensive" by community standards. 47 U.S.C. § 223(d).

In holding both provisions to be content-based blanket restrictions on speech in violation of the First Amendment, the Court said the Act failed to clearly define "indecent" communications, limit its restrictions to particular times or individuals, or conclusively

demonstrate that the transmission of "offensive" material is devoid of any social value. *Id.* at 871-879.

Defendants have no problem with the holding in *Reno,* but it has no application to the Utah statute. There is no specific prohibition on the transmission of obscene or indecent material in the Utah statute. Neither is there a prohibition on the displaying of patently offensive material on an "interactive computer service."

Clearly the CDA is an attempt to prohibit Internet content providers from transmitting obscene or indecent material by means of a "telecommunications device" or "patently offensive" material by means of an "interactive computer service." Equally as clear, is the fact that § 1206 of the Utah statute attempts to do neither.

III. Tagged Material in § 1233.

There is no clearer evidence that Plaintiffs are still battling the former law, HB 260, than the fact that the lead-in sentence to the attack on § 1233 cites language which was part of HB 260, but has since been deleted from the statute. They state: "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:" They then quote that section of the statute as follows:

> (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 measure feasible under available technology [that limits access to material harmful to minors].

Pltfs.' Memo., p. 22. The only problem with attacking that statutory provision is that it is not part of the Utah Code. It was repealed in 2008.[6]

A. Current § 1233.

Section 1233 of the current Utah Code reads:

> (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 (3).
> (3)(a) If a content provider intentionally or knowingly violates this section more than 30 days after receiving the notice provided under Subsection (2), the content provider is 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.

"Restrict,"as used in subsection 1 above, is defined in the code as:

> "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).

[6] HB 18, § 3, lines 152-58.

B. The State is Permitted to Regulate Material that is Indecent with Respect to Minors.

What § 1233 is attempting to do is regulate material that is 'indecent' with respect to minors. Even if such material is not 'obscene' under the Court's formulation for adults, if the State can demonstrate that the regulation in question is narrowly tailored to serve a compelling government interest, then the State is permitted to regulate it. "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989), citing *Ginsberg v. New York,* 390 U.S. 629, 639-40, 88 S.Ct. 1274, 1280-81 (1968).

As the Court said in *Sable*, the government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Sable* at 126. As a means of meeting this requirement, the Supreme Court itself in *Reno* suggested "tagging" as a possible alternative to the difficulties in the CDA. In concluding that the CDA was not narrowly tailored to achieve the goal of protecting minors, the Court suggested a possible alternative. It said:

> [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.

Reno at 879. The 10th Circuit approvingly quoted the above language in *ACLU v. Johnson*, 194 F.3d 1149, 1157 (1999).

So if tagging Internet websites is acceptable to the U.S. Supreme Court and the 10th Circuit, what is facially unconstitutional about Utah's tagging statute?

CONCLUSION

Plaintiffs' assault on HB 260 is an academic exercise. The fact is, HB 260 was significantly modified in 2008 and removed from the statute those provisions Plaintiffs are now challenging. Their motion for Summary Judgement should be denied. Plaintiffs Motion to Dismiss Plaintiffs' challenge to § 1206 for lack of standing, and Plaintiffs' Cross-Motion for Summary Judgment as to § 1233 should be granted. In the event Defendants' Motion to Dismiss is denied, Plaintiffs Cross-Motion as to both § 1206 and § 1233 should be granted.

DATED this 29th day of July, 2011.

MARK L. SHURTLEFF
Attorney General

/s/ Jerrold S. Jensen
JERROLD S. JENSEN
Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was served by the following methods this 29th day of July, 2011 to:

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