Ira P. Rothken, Esq. (Pro Hac Vice)
ROTHKEN LAW FIRM
1050 Northgate Drive, Ste. 520
San Rafael CA 94903
Tel: (415) 924-4250
Fax: (415) 924-2905

Gregory A. Piccionelli, Esq. (Pro Hac Vice)
Robert A. Sarno, Esq. (Pro Hac Vice)
PICCIONELLI & SARNO
1925 Century Park East 2350
Los Angeles CA 90067
Tel: (310) 553-3375
Fax: (310) 553-5190

Jerome Mooney, Esq. (Utah Bar No. 2303)
Mooney Law Firm
50 W. Broadway, #100
Salt Lake City UT 84101
Tel: (801) 364-6500
Fax: (801) 364-3406

Attorneys for Plaintiff

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

FREE SPEECH COALITION, INC., A California Not-For-Profit Trade Association, On Its Own Behalf and On Behalf of Its Members, Plaintiff, vs. MARK SHURTLEFF in his official capacity as Utah Attorney General of the State of Utah; THAD LEVAR, in his official capacity as the Director of the Division of Consumer Protection in the Utah Department of Commerce, UNSPAM INC., a Delaware corporation Defendants.	Case No. 2:05-cv-00949 **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

NOW COMES the Plaintiff, Free Speech Coalition, Inc., by and through its undersigned attorneys, and complains against the Defendants Mark Shurtleff, Thad Levar, and Unspam, Inc.

as follows:

Nature of the Case

1. This action draws into question the validity of a Utah statute, its associated administrative regulations, and a contract by which the challenged statutory scheme is implemented. Known as the Utah Child Protection Registry Act ("CPR Act"), 2004 Utah Laws 338, (codified at Utah Code Ann. §§ 13-39-101 through 13-39-304) establishes a so-called "Child Protection Registry" through which parents or guardians of minor children in Utah may register electronic "contact points" – currently limited exclusively to email addresses – to which those minors have access. The Act then forbids anyone to send to a contact point registered more than 30 days previous any communication a) advertising any product or service which a minor is legally forbidden from purchasing or b) containing or advertising any material harmful to minors, *i.e.* legally obscene as to minors. The Act also explicitly excludes consent by a minor email recipient as a defense to its violation. Under the CPR Act, the Defendants contemplate that anyone seeking to send such email will first submit their list of intended email addresses to the Child Protection Registry so that the CPR can flag or eliminate from that list those email addresses which have been registered. For this so-called "scrubbing" service, the Defendants will charge a fee 0.5 cent per email address on the submitted list (*not* only per scrubbed email address). Thus emailers, many of whom have lists containing hundreds of thousands or even millions of email addresses, will incur substantial monthly scrubbing costs even if all or virtually all of their email addresses turn out to have nothing whatever to do with the Utah or its minors. Because Internet bandwidth and digital storage are so inexpensive, even the 0.5 cent per email address charge

will very substantially increase the cost of email subject to scrubbing by Utah. The Utah CPR Act is expressly preempted by the federal CAN-SPAM Act of 2003, P.L. 108-187 (codified at 15 U.S.C. §§ 7701 through 7713; 18 U.S.C. § 1037). It is also preempted by the negative impact of the Commerce Clause of the United States Constitution (the so-called "dormant commerce clause"). Beyond this, the Act and its associated administrative regulations, as well as the contract under which the Registry is implemented and operated, impermissibly interfere with and burden the right of the Plaintiff and its members to express themselves through an extraordinarily convenient, inexpensive, and pervasive electronic medium in violation of their rights protected by the First Amendment to the United States Constitution and Article I, Section 15 of the Utah Constitution. The Plaintiff in this action seeks declaratory and injunctive relief only, and sues the Defendant public officials only in their capacity as such, as contemplated by *Ex parte Young*, 209 U.S. 123 (1908), and its progeny.

2. This action arises under the federal CAN-SPAM Act of 2003 (P.L 108-187), 15 U.S.C. §§ 7701 through 7713 and 18 U.S.C. § 1037, under Sections 2201 and 2202 of Title 28 of the United States Code, under Sections 1983 and 1988 of Title 42 of the United States Code, under the Commerce and Supremacy Clauses of the United States Constitution, and under the First Amendment to the United States Constitution, as made applicable to each of the Defendants by the Due Process Clause of the Fourteenth Amendment thereto.

Jurisdiction and Venue

3. This Court has jurisdiction over the subject matter of this action under Sections 1331, 1337, and 1343 of Title 28 of the United States Code because this action arises under the Constitution and laws of the United States, because this action arises under Acts of Congress regulating commerce, and because this action seeks to redress the deprivation, under color of Utah law, of rights secured to the Plaintiff and its members by the United States Constitution.

4. Venue is proper in this District under Section 1391(b)(1) and (2) of Title 28 of the United States Code because all Defendants reside in this District and in the State of Utah and because a substantial part of the events and a substantial part of the property involved in this action occurred or is situated in this District.

Parties

5. The Plaintiff Free Speech Coalition, Inc. ("FSC") is a nonprofit, membership trade association incorporated in the State of California. It represents over 3000 members each of which is involved in the production, dissemination, or protection of sexually explicit but non-obscene expression which is presumptively protected by the First Amendment to the United States Constitution, as made applicable to each of the Defendants by the Due Process Clause of the Fourteenth Amendment thereto. FSC serves its members by promoting their collective interests, especially in defending its members against all forms of censorship. As more fully specified in paragraphs 9 and 10 of this complaint, both FSC and many of its members send email messages which Section 13-39-202(1) of the Utah CPR Act purports to regulate.

6. The Defendant Mark Shurtleff ("Shurtleff") is the Attorney General of the State of Utah. As such, he is charged generally with the responsibility of enforcing Utah statutes

including those imposing criminal penalties such as Sections 13-39-202(1) and 13-39-301(1) and (2) of the Utah CPR Act. He is sued in his official capacity only.

7. The Defendant Thad Levar ("Levar") is the Director of the Utah Department of Consumer Protection. He is consequently charged with the responsibility of establishing and operating of the Utah Child Protection Registry, or contracting for the same, and he is specifically authorized and directed to promulgate and maintain administrative regulations implementing and governing the CRP. He is sued in his official capacity only.

8. The Defendant Unspam, Inc. ("Unspam") is a for-profit corporation incorporated in the State of Delaware with its principal place of business located at 1901 Prospector Avenue Suite 200 Park City, Utah. On information and belief, its principals formulated and published the ideas underlying a computerized do-not-email-registry, and they have continually sought to profit from those ideas. On information and belief, those same principals were, for that reason, instrumental in persuading the Utah legislature to promulgate the Utah CPR Act, and they were an integral part of the development of the associated administrative regulations. Unspam has actually established and is now operating the Utah CPR under contract, just as Unspam has contemplated all along. In addition, Unspam has unilaterally articulated and promulgated an end user license agreement to which any registry user, especially including every emailer seeking to scrub its email list, must adhere without modification, amendment, or exception.

General Allegations

9. The FSC regularly disseminates via email to its adult members, to its adult supporters, and to other adults interested in receiving it the *Free Speech X-Press*, which, on a weekly basis, reports and comments upon legal, political, and social developments of concern to

those who oppose censorship of expression and to those who seek to remain free to produce, disseminate, and receive presumptively protected sexually oriented expression. The *Free Speech X-Press* always includes a link to the FSC web site, and that web site regularly contains banners advertising such matters as conferences and trade shows concerning the adult entertainment industry. Minors are not and cannot be admitted to such trade shows, as the shows routinely involve display to the attending adults of expression which is likely to be obscene as to minors (*i.e.* so-called "material harmful to minors"). From time to time, the *Free Speech X-Press* also contains direct references to such conferences and trade shows, and, at times, it urges the recipients to attend the same. These links and occasional references to conferences, trade shows, and other items or services which minors cannot purchase remain ancillary to and inextricably intertwined with the central news reporting and commentary contained in the *Free Speech X-Press*. From time to time, too, the *Free Speech X-Press* necessarily reports on matters that may be unsuitable for consideration by minors, and its editors make no effort to dilute or otherwise adjust their reporting in order to render their stories or commentary suitable to children.

10. Many of FSC's members regularly communicate with their customers, business associates, and others via email. Some of that email shares the character of the *Free Speech X-Press* as current events reporting, social commentary, or political organizing. Most of FSC's members' email expression, however, consists of messages the principle purpose of which is either to propose a commercial transaction or to facilitate a previously agreed upon commercial transaction over the Internet. Many of these commercial transactions – proposed or facilitated – involve products or services that minors in Utah are legally prohibiting from purchasing, especially in light of the involvement of FSC's members in the adult entertainment industry.

Indeed, for this reason, some of FSC's members' email messages which are directed solely to adults are sexually oriented but non-obscene, though they may be legally obscene as to (*i.e.* "harmful to") minors in Utah. Even if an FSC member's email messages do not themselves contain such material, such messages typically link to a web site which does contain such expression. In their efforts to communicate with adults about their products and services, FSC's members make no effort to dilute or otherwise adjust their advertising or other messages in order to render their expression suitable to minors.

11. The Internet is a world-wide network of millions of computers which are configured to communicate digital information between one another using a standard set of hardware devices and connections and standardized software data transmission protocols. The Internet currently links nearly one billion users worldwide, nearly a quarter of them in the United States alone. It has become a critical part of international and interstate commerce, accounting for well over $30 Billion worth of commercial transactions in a recent two-month period and for more than one quarter of the retail commerce in the United States. Information transmitted over the Internet is broken up into relatively small "packets" each of which is sent to its destination separately. As a result, a single Internet message sent 'across the street' may travel many separate routes to its destination, and some or all of those routes might well involve different states, nations, or even continents than those of the sender and receiver. One of the best known Internet-related software protocols is the HyperText Transfer Protocol which, *inter alia*, permits Internet users viewing world side web sites (and, through similar protocols, electronic mail messages) to "link" to other information on the Internet through a simple action such as a "mouse click." Another Internet-related protocol is among the most widely used: the Simple

Mail Transfer Protocol. Along with a set of closely integrated protocols, it permits users of computers with Internet connections to communicate text, graphic, and other digital information to one another by sending a message to a specified "address" where the message will be stored until it can be read or viewed at the recipient's convenience and then permanently saved or disposed of at the recipient's direction. Popularly known as "email," this system permits Internet users to send one another individualized email messages (similar to written letters, hence the term "electronic mail") and to conveniently reply to the same. As implemented on the Internet today, the email system also permits speakers to send identical messages to large numbers of recipients in one operation, effectively permitting one kind of message broadcasting over the Internet. Again, however, even these "broadcast" email messages are sent to individual email addresses where they are stored for retrieval at an individual recipient's convenience. Because this email system does not involve the physical transfer of paper or other material objects, the use of the email system on the Internet is extraordinarily convenient and inexpensive. It is one of the major ways in which the Internet permits anyone with a personal computer to become a "town crier" with a worldwide voice. The email addresses to which all email must be directed commonly consist of strings of alphanumeric characters which are generally legible and understandable to human beings. Millions of these email addresses are currently in use worldwide. The underlying software protocols govern the translation of these addresses into computer-readable form. As the email protocols are implemented on the Internet, neither the alphanumeric address nor the underlying numerical computer address give any indication of where the computer corresponding to the same is physically located. In this respect, email

addresses differ critically from physical postal addresses and from telephone numbers with area codes.

12. In an apparent recognition of the fact that email addresses do not reveal information concerning the physical whereabouts of the recipient – or, for that matter, any other information about potential recipients at the address – Utah has enacted the Child Protection Registry Act ("CPR Act"). Under that Act, the Defendant Levar is directed to implement or to contract with a private party to implement a so-called Child Protection Registry through which certain persons in control of email addresses may, for certain purposes and under certain circumstances, place those email addresses on a do-not-contact list. The CPR Act contemplate that, at some future time, other electronic contact points such as instant messaging addresses may be included on the registry, but for the present, the Act itself restricts the registry to emails addresses. As its name suggests, the Child Protection Registry is available to parents and guardians of minor children, and it permits the registration of email addresses to which minors have access. Similarly schools with minor students may register entire block of email addresses under their control. The Defendants are currently operating a web site through which these registrations may be, and are being, made. Once an email address has been so registered for 30 days, Utah seriously sanctions the sending of any email to that address which either a) advertises or links to an advertisement for any product or service which a minor cannot lawfully purchase b) or contains or advertises "materials harmful to minors," *i.e.* expression which is legally obscene as to minors. The sanctions available under the CPR Act include criminal sanctions, substantial civil administrative penalties and administrative cease and desist orders, and, on a suit by a guardian of a minor, actual or presumed civil damages and attorneys' fees.

13. The only way in which those who send email may determine whether or not any particular email address has been registered with Utah's registry is to themselves undertake a separate kind of registration in Utah. Emailers may, by providing required detailed information about their identity, location, and financial institutions, register to participate in the registry's so-called "scrubbing" services. Such scrubbing contemplates that each email address on a registered emailer's email list will be converted into a so-called "hash value" (*i.e.* a short encrypted message which is not meaningful to any human being who sees it but which is derived by non-uniquely specified, deterministic methods from the alphanumeric email address) and that value compared to the hash values derived from all of the email addresses already registered with the CPR. If an emailer's hash value matches that of a registry entry, the Defendants will so advise the emailer. On information and belief, the Defendants currently expect emailers to perform the necessary hashing (*i.e.* encryption) of their email lists at the emailers' expense using software provided to them by the Defendants but installed and integrated with the emailers' own computer hardware and software at the emailers' own expense. The Defendants – in particular Unspam, acting under the contract completed in the CPR Act – then undertake to compare the emailers' hash values with those of the registered email addresses. For this comparison and scrubbing service, the Defendants purport to charge emailers at a rate of $0.005 (one-half cent) per submitted email address (or corresponding hash value).

14. Since emailing – including the effective "broadcasting" of many identical email messages to many email addresses in a single operation – is extraordinarily inexpensive, even the Defendants' one-half cent per email address charge drastically increases the cost of emailing. The FSC, for instance, emails its *Free Speech X-Press* to its members and supporters at a

monthly cost of about $0.20. Given the number of names on the mailing list for the *Free Speech X-Press*, the Defendants' scrubbing fees will exceed the mailing cost by approximately a factor of one hundred. Many of FSC's members email at much higher rates and to many more recipients than FSC itself, so they will encounter annual scrubbing fees of many thousands of dollars. Furthermore, these larger emailers may well be able to take advantage of bulk bandwidth rates an similar discounts to further reduce their per email costs, but since the Defendants offer no bulk discounts for their scrubbing services, these emailers will face even higher cost multiples than FSC if they comply which the Defendants' scheme. This substantial burden arises because the Defendants charge emailers for each email address (or associated hash value) submitted for scrubbing, *not* for only those email addresses which must be scrubbed. And since the Defendants permit parents, guardians, and schools to register email addresses without paying any fee, the Defendants' scheme effectively focuses all of the scrubbing costs on emailers even if those emailers seldom or never email to any email address in Utah, let alone an email address to which children have access. Beyond the scrubbing costs, the Defendant's scheme impose financial cost associated with integrating the necessary software (provided by the Defendants) into each emailers' computerized email system. Such integration requires expertise beyond that of a typical persona computer or Internet user, and many emailers, among them FSC and many of its members will be required to pay for that expertise.

15. In addition to the foregoing financial burdens, the Defendants' scheme further burdens email expression by imposing altogether unconstrained delays associated with the initial emailer registrations and with the monthly scrubbing process itself and by and requiring any emailers to forego their anonymity with the Defendants and Utah and to compromise the same

for their members, supporters, business associates, and customers. The email lists which the Defendants expect FSC and its members to submit to them contain many addresses which are held by those who strongly prefer to remain anonymous to Utah and the Defendants. Even if the Defendants expect emailers to hash their lists with a so-called one-way hashing function before submitted them for scrubbing, the Defendants will still be able to determine whether some email address is on that list for one or more of the following reasons. Many one-way encryption functions contain a so called "trap door" whereby someone (usually with knowledge of a secret numerical "key") can easily reverse the encryption process and derive the original plaintext information, in this case, an alphanumeric email address readily legible to a human being. Furthermore, many one-way hashing functions are, in fact, insecure and can be "cracked" using well-known cryptanalysis techniques published in widely-available academic and technical literature. Finally, those working for Utah's registry could always hash a particular email address and compare it with, for instance, FSC's submitted list in order to see whether a particular email address is associated with an FSC member or supporter. (This is the same basic process which unscrupulous emailers – perhaps well beyond Utahs' criminal jurisdiction – can determine whether an actual email address is a genuine email address to which minors have access: they can hash random email addresses – millions of them – and submit them once for scrubbing. They will then know that any scrubbed email addresses are actual email addresses. This information is extremely valuable to email "spammers." Utah at least attempts to criminalize this effort when undertaken by emailers to discover actual registered email addresses, but it nowhere sanctions any analogous effort by, for instance, registry employees to discover actual email addresses on an email list submitted for scrubbing).

16. Adults commonly use the Internet in general, and email in particular, to transmit advertisements, or hypertext links to advertisements, which concern products or services which minors are forbidden by law to purchase. Similarly, adults commonly and perfectly properly use the Internet and email to transmit to one another expression which may be obscene as to (i.e. "harmful to") minors. Indeed, in the United States at least, adults are constitutionally protected in using the Internet and email in these ways. Because emailers can seldom be certain that an email address is *not* associated with Utah or with computers to which minors have access, virtually all emailers worldwide are effectively forced by the Defendant's scheme to use Utah's scrubbing service, even if they do not deliberately or knowingly have any other contact with Utah or with minors at all. Under the Defendants' scheme, these emailers must pay for this scrubbing service even if few or none of their email addresses turn out to have anything whatever to do with Utah or its minors, and they must do so at least once each month to avoid inadvertently running afoul of the criminal, administrative, and civil sanctions which the Defendants stand ready to enforce against them.

17. Each of the Defendants is a person within the meaning of Section 1983 of Title 42 of the United States Code, and each has acted and will act, at all times and in all matters material, personally or through its officers, employees, agents, and attorneys, under the color of the law of the State of Utah. Similarly, each of the Defendants' actions in seeking and threatening to enforce the Utah CPR Act amounts to state or governmental action for the purposes of the Fourteenth Amendment to the United States Constitution and Section 15 of Article 1 of the Utah Constitution.

18. Defendant Shurtleff stands ready and willing to enforce the criminal provisions of

the Utah CPR Act against the Plaintiff and its members. Similarly, Defendant Levar, has established, is maintaining, and is prepared to continue to maintain and enforce the administrative regulations implementing the Utah CPR Act and is supervising the operation of the Registry under a contract with Defendant Unspam. For its part, Defendant Unspam is operating and stands ready and willing to continue to operate the Registry under the terms of its contract and the terms of the end user license agreement which it has unilaterally prescribed and posted for Registry users, including emailers. Some of the Defedants, or their predecessors, recently sent letters to emailers outside of Utah indicating that they intend to enforce Utah's CPR Act. Each of the Defendants is thus prepared to insist that emailers anywhere pay Unspam and Utah for the privilege of avoiding the strict criminal liability which the Utah CPR Act purports to impose. A genuine dispute thus exists between the Plaintiff, on one hand, and each of the Defendants, on the other, concerning the validity and application of the Utah CPR Act, its associated administrative regulations, and the contract and end user license agreement under which Defendant Unspam is operating the Registry. A declaratory judgment is thus proper and appropriate to resolve this actual controversy between the parties.

19. Unless restrained by this Court, each of the Defendants will seek, in the manner described in paragraphs 12 through 16 of this complaint, to burden, interfere with, and deprive the Plaintiff and its members of their presumptively protected right to disseminate to consenting adults sexually oriented but nonobscene expression and to disseminate and reference advertisements for products and services which minors are legally forbidden to purchase. Against this disruption of their constitutionally protected expression, the Plaintiff and its members and their contractors, employees, and customers have no adequate remedy at law, and

they would suffer irreparable harm should their constitutional free expression rights be denied to them. Injunctive relief is thus proper and appropriate to resolve this actual controversy between the parties.

FIRST CAUSE OF ACTION
(For Preemption Under Section 7707 of the CAN-SPAM Act)

20. The Plaintiff reasserts the allegations contained in paragraphs 1 through 19 of this complaint as if fully restated in this count 1.

21. In 2003, the United States Congress determined to regulate the proliferation of unsolicited, commercial email (colloquially know as "spam"). As a result of committee hearings and studies presented to Congress by, *inter alia*, the Federal Trade Commission, Congress enacted and the President timely signed the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-Spam Act"). In so doing, Congress expressly determined that there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis. As a result, CAN-SPAM requires, *inter alia*, that the senders of certain unsolicited commercial email label the same in the email message's subject line so that recipients may discard, filter out, or otherwise avoid such unwanted email. The Federal Trade Commission subsequently and validly proscribed the content of this warning label, as required by the CAN-SPAM Act. That Act also restricts the placement of certain sexually oriented matter in email messages so that a recipient has a further opportunity to avoid the it. The CAN_SPAM Act provides for the abatement of violations of certain of its provisions as unfair trade practices, provides certain criminal penalties, urges the Department of Justice to make full use of existing laws to abate the bulk mailing of certain unsolicited commercial email, and provides for certain civil remedies including substantial presumed damages recoverable in an action brought by a

state attorney general such as Defendant Shurtleff. Each of these aspects of the CAN-SPAM Act is a valid exercise of Congress' legislative power under the Commerce Clause of the United States Constitution.

22. In enacting the CAN-SPAM Act, Congress expressly provided that Act supersedes any statute or regulation of a state, or political subdivision thereof, which purports to regulate commercial email except to the extent that the such state law prohibits falsity or deception in such an email message. Congress went on to provide that the CAN_SPAM Act does not preempt state laws relating to fraud or computer crime or not specific to email. Utah's CPR Act expressly and specifically purports to regulate commercial email in a manner dramatically different from that adopted by Congress in the CAN_SPAM Act. As it presently stands, the Utah CPR Act regulates *only* email, but even if it were also to regulate other electronic contact points, such as instant messaging addresses, sometime in the indefinite future, it would remain a specific regulation of email, though perhaps not exclusively email. Similarly, although it uses the term, the Utah CPR Act fails to define, restrict, punish or otherwise relate to any "computer crime" of the type which Congress intended to remove from the CAN-SPAM Act's preemptive effect. For each of these reasons, Utah's CPR Act is expressly superseded by Section 8(b)(1) of the CAN-SPAM Act, as codified at Section 7707(b)(1) of Title 15 of the United States Code.

23. In enacting the CAN-SPAM Act, Congress also expressly delegated to the Federal Trade Commission the task of reporting to Congress, from time to time, on the current situation involving unsolicited commercial email. In addition, Congress delegated to the FTC the task of planning for a nationwide do-not-email registry, and of considering and reporting to

Congress the technical and policy concerns, including privacy considerations, connected with the establishment of such a registry. In response, the FTC has consistently issued reports indicating that the CAN-SPAM Act and the enforcement of other existing laws is working to stem the tide of unsolicited commercial email. The FTC has also consistently criticized and declined to implement any nationwide do-not-email-list or registry because of its persistent and well-founded fears that any such registry would work more harm that good because of its potential for compromising the registered email addresses. Such compromise could result from a hacking of the computers used to implement the registry, but it necessarily results from that fact that, in order to put the registry's scrubbing results to use, emailers *must* know which email addresses are registered. Emailers may reasonably infer that those email addresses are actual email addresses to which minors have access (knowledge about any actual, as oppose to possible, email addresses is very valuable to spammers because they cannot succeed in their efforts by sending email to addresses to which no one has access), and the unscrupulous, including those who are geographically well beyond any fear of prosecution or other sanction by Utah, may use that inference to direct children's advertising – or much worse – to said addresses. Indeed, the fact that so many Internet marketers and pornographers as so far removed from Utah's jurisdiction thoroughly undercuts any reasonable prospect that Utah's registry will succeed where the FTC believes that a nationwide registry would fail. In any event, the FTC also to continue to criticize efforts to establish do-not-email registries such as Utah's at the state level as well. Because Utah's CPR Act and its implementing regulations establish and effectively require participation in a registry which Congress delegated to the FTC, Utah's Act and

administrative regulations are expressly preempted by Section 9 of the CAN-SPAM Act, as codified at Section 7708 of Title 15 of the United States Code.

24. Under the Supremacy Clause of the United States Constitution valid statutes, such as the CAN_SPAM Act, passed by Congress and signed by the President, and administrative regulations properly authorized by and promulgated under such statutes constitute a portion of the supreme law of the land which supersedes and preempts conflicting state statutes and administrative regulations. Where, as here, a federal statute expressly preempts state laws bearing on a subject and expressly delegates administrative authority over that subject to a federal administrative agency, no state may intrude into that area by statute or administrative regulation. As it presently stands and as they may apply in the future, Utah's CPR Act and its implementing administrative regulations expressly purport to govern the dissemination of commercial email by establishing a type of do-not-email registry. For all of the reasons specified in paragraphs 21 through 23 of this count 1, Utah's CPR Act, its implementing regulations are preempted by federal law and they and the Defendants actions taken pursuant thereto are void ab initio and altogether unenforceable against the Plaintiff and its members.

SECOND CAUSE OF ACTION
(For Violation of the Commerce Clause of the United States Constitution)

25. The Plaintiff reasserts the allegations contained in paragraphs 1 through 24 of this complaint as if fully restated in this count 2.

26. The only practical way for any emailer to know whether an email address relates in any way whatever to Utah or its minors is to use the scrubbing services which the Defendants provide through Utah's registry. Because Utah's CPR Act makes the dissemination of relevant email messages to any email address registered form more than 30 days a strict liability crime

and tort, any emailer who is remotely concerned about sanctions in Utah must either censor all of its email to what Utah thinks is appropriate for its children or submit its email list for scrubbing according to the Defendants' scheme. In either event, Utah's CPR Act thus has an extraterritorial effect which renders it *per se* invalid under the Commerce Clause of the United States Constitution. Even emailers who have never knowingly sought or done business in Utah or with any minors cannot know for certain whether any email address on their list concerns Utah or its minor or, more importantly, has been added to Utah's registry. An emailer who knows that its emails originate in California, for instance, and believes (but cannot be *certain*) that they will be received by adults in California as well would *still* risk serious sanction in Utah by sending covered emails without scrubbing its email list on a monthly basis. Under the Defendants scheme, that uncertainty, together with the strict liability crimes and torts which enforce it, effectively forces the use of Utah's registry on virtually everyone sending adult email, as a practical matter. Indeed, the Defendants have, by circular reasoning, established the registry and then criminalized the dissemination of emails to registered addresses. Similarly, by backwards reasoning, the Defendants have attempted to reverse the constitutionally appropriate presumptions and to place the burden on emailers to determine in advance the precise location (or at least the *non*-location) of every email address on its list. Furthermore, the Defendants expect and purport to require that emailers will pay them for the privilege of sustaining that burden. Indeed, Unspam seeks to profit from this scheme. Incredibly, Defendant Unspam even expects the same emailers to pay it again for scrubbing the same email list under a Michigan statute similar to Utah's. Indeed, if every state were to do as Utah has done here, the additional burden on email from monthly scrubbing cost alone would increase emailing costs not by a

factor of 100, as described in paragraph 14 of this complaint, but by a factor of fifty times one hundred, or about half a million percent. In any event, as a practical matter, the Defendants' entire unsound scheme effectively requires regulatory approval in Utah before an email transaction can take place elsewhere. Because Utah's CPR statute regulates interstate commerce extraterritorially it is *per se*, unconstitutional, void, and unenforceable.

27. The fact that the Defendants purport to charge emailers for every email address submitted – rather than only for those addresses which must be scrubbed – seriously exacerbates the unconstitutionality of their scheme. In the first place, it dramatically increases the financial costs of the monthly scrubbing process for virtually all emailers, including FSC and its members. More importantly for the purposes of this count 2, it means that the less an emailer has to do with Utah and its minors, the more it has to pay for useless administrative processing in Utah, *i.e.* the more it must pay for *non*scrubbing. Finally, the inevitable effect of the Defendants' elaborate, expensive, and burdensome scheme will be to direct away from Utah entirely some interstate commerce in the form of email expression which is constitutionally protected when directed to the intended adults but may be in some sense inappropriate when viewed by unintended minors. Thus the Defendants' scheme will effectively divert from Utah some interstate commerce which is disfavored there. Because the statute discriminates against commerce based on contact with the State of Utah it is *per se* unconstitutional, void, and unenforceable.

28. As detailed in paragraph 11 of this complaint, the Internet in general and email in particular profoundly transcend the State of Utah. An intrinsically interstate and even international system like Internet email is a poor subject for regulation by states, especially where such regulation is not strictly limited to determinable in-state effects. By imposing strict

criminal and tort liability and by placing the burden on emailers which have little or nothing to do with Utah the burden of ascertaining in advance the location (or at least the *non*location) of each email address on their lists, Utah and the Defendants impose their scheme on emailers long before their interstate commerce has had any effect whatever in Utah. Indeed, they impose their scheme on emailers whose interstate commerce will likely never have any effect – bad or good – in Utah at all. Because the statute subjects the use of the Internet to inconsistent regulation it is *per se* unconstitutional, void, and unenforceable.

29. Although the desire of the State of Utah to protect children is laudable, and such desire states a legitimate state interest, it clearly imposes a burden on commerce. A statute that survives the *per se* evaluations in paragraphs 26-28 of this Count 2 must then be examined under the *Pike* Test. (*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844 (1970)). As demonstrated above, the burden placed on commerce by this statute is substantial. And even if the State interest is great, the efficacy of the proposed regulation is considered in determining its weight against the burden. "Nearly half of Internet communications originate outside the United States … [where there is] little incentive to comply with [the statute] … [the result is] limited local benefit." *American Civil Liberties Union v. Johnson,* 194 F.3d 1149, 1162 (10th Cir. 1999). Thus, the burden on commerce far exceeds the local interest and Utah's CPR is unconstitutional, void, and unenforceable.

30. Although the Commerce Clause of the United States Constitution expressly grants powers to Congress and nothing more, its negative impact – the so-called dormant commerce clause – prevents state regulation of interstate commerce in each of the respects addressed in paragraphs 25 through 29 of this count 2. Utah's CPR Statute violates the Dormant Commerce

Clause of the United States Constitution, on a per se basis because: a) It burdens commerce occurring wholly outside the State of Utah; b) It discriminates between merchants based on their connection or lack of connection to the State of Utah, and; c) It creates inconsistent and potentially conflicting systems of regulation. And, even if found not to be a *per se* violation of the Commerce Clause, the burdens placed on commerce by Utah's CPR statute outweigh any local benefit obtained by the regulatory system.

31. For all of the foregoing reasons, Utah's CPR Act, its implementing regulations are preempted by the United States Constitution, and they and the Defendants actions taken pursuant thereto are void ab initio and altogether unenforceable against the Plaintiff and its members

THIRD CAUSE OF ACTION
(Prior Restraint)

32. The Plaintiffs reassert the allegations contained in paragraphs 1 through 31 of this complaint as if fully restated in this count 3.

33. The FSC's *Free Speech Express* and some of the expression which FSC members disseminate via email, as detailed in paragraphs 9 and 10 of this complaint, constitute core political expression which is presumptively protected by the First Amendment to the United States Constitution, as made applicable to the Defendants by the Due Process Clause of the Fourteenth Amendment thereto, as well as by Section 15 of Article 1 of the Utah Constitution. Furthermore, some of the expression disseminated via email by FSC's members, as detailed in paragraph 10 of this complaint, amounts to commercial speech which is also presumptively protected by the by the same constitutional provisions. Whether or not any of this expression is obscene as to (i.e. "harmful to") minors, it remains fully protected when addressed to its intended

and targeted audience of consenting adults. As such, said expression, when directed to adults, is immune from unconstitutional prior restraints upon its dissemination. Utah purports to criminalize and the Defendants threaten to sanction and to permit others to sanction the transmission of such presumptively protected email messages to any email address which has been registered for at least 30 days with the Child Protection Registry. There is no effective way for an emailer to know in advance whether an email address is listed on Utah's registry – or, indeed, even to know whether any email address has anything whatever to do with Utah or its minors – other than to use the registry's scrubbing services, as described in paragraphs 12 and 16 of this complaint. Because the only practical way to avoid the CPR Act's substantial penalties and other sanctions is to submit email lists to the registry and pay for scrubbing in advance of dissemination, the registry and the CPR Act effectively impose a prior restraint on email expression by the FSC and its members.

34. Prior restraints upon presumptively protected expression, such as Utah's effective requirement for prior submission and scrubbing of email lists, as described in paragraphs 13 through 15 of this complaint and in paragraph 33 of this count 3 are, under the foregoing constitutional provisions, presumptively unconstitutional and are valid and enforceable if, but only if, they strictly specify narrow, objective and definite standards to limit the discretion of the approving officials in order to insure that those officials will not base their decision to grant or deny approval upon their own evaluation of the content of the expression in question. Furthermore, any valid prior approval requirement must strictly specify the procedures to be used in evaluating a request for approval and in reviewing any decision thereon in order to insure against

improper administrative denial, against an unreasonable delay in approval for the expression, and against an effective denial of such approval by administrative inaction on such a request.

35. Utah's effective prior submission and scrubbing requirement amounts to an unconstitutional prior restraint for want of any remotely appropriate substantive or procedurals standards at all. Under the end user license agreement, detailed in paragraph 8 of this complaint, which the Defendants permit Unspam to require of emailers, for instance, Unspam may unilaterally refuse to do business with any emailer for any reason, leaving the emailer without any way to email advertisements for items and services which minors may not legally purchase or expression which may be obscene as to (*i.e.* "harmful to") minors without risking criminal prosecution and other sanctions in Utah. Because Unspam's discretion is altogether unconstrained in this regard, any available judicial review of Unspams's actions will be ineffective and in any event will not be sufficiently prompt to avoid unconstitutional delay of presumptively protected expression. In addition, for the reasons detailed in paragraph 13 of this complaint, the Defendants cannot properly ensure against "false positive" scrubs, *i.e.* scrubbing of an email address *not* registered on Utah's registry merely because that email address shares a hash value with another email which is so registered. Furthermore, neither the CPR Act, nor its associated administrative regulations, nor any judicial decision, nor any established administrative practice of such long standing that it amounts to an authoritative construction of the statute and regulations establishes any time constraints whatsoever upon the Defendants actions in, for instance, registering and accepting an emailer to use the registry's scrubbing services, providing the necessary software a registered emailer, or responding to the submission of an email list by scrubbing the registered email addresses. Finally, the charges which the

Defendants purport to exact for the registry's scrubbing services are excessive in that they exceed the cost of administering a proper system of prior restraint, force emailers to pay for matters and procedures which the Defendants have no legitimate interest in requiring of emailers let alone requiring them to pay for, and in fact fund Unspam's profit-making enterprise rather than any legitimate system of prior restraint. Each of these defects is particularly egregious because, as detailed in paragraphs 12 through 15 of this complaint, Utah's CPR Act contemplates that emailer's must repeat the scrubbing process on a monthly basis.

36. For all of the reasons enumerated in paragraphs 33 through 35 of this count 3, the Utah's effective requirement that emailers submit their email lists for monthly scrubbing amounts to a facially unconstitutional prior restraint upon presumptively protected expression, and it is, for that reason void and unenforceable.

FOURTH CAUSE OF ACTION
(Expressive Privacy)

37. The Plaintiff reasserts the allegations contained in paragraphs 1 through 36 of this complaint as if fully restated in this count 4.

38. The FSC's *Free Speech X-Press* and some of the expression which FSC members disseminate via email, as detailed in paragraphs 9 and 10 of this complaint, constitute core political expression which is presumptively protected by the First Amendment to the United States Constitution, as made applicable to the Defendants by the Due Process Clause of the Fourteenth Amendment thereto, as well as by Section 15 of Article 1 of the Utah Constitution. Furthermore, some of the expression disseminated via email by FSC's members, as detailed in paragraph 10 of this complaint, amounts to commercial speech which is also presumptively protected by the by the same constitutional provisions. Whether or not any of this expression is

obscene as to (or "harmful to") minors, it remains fully protected when addressed to its intended and targeted audience of consenting adults. As such, when directing such expression to adults, the FSC and its members are immune from unconstitutional conditions, constraints, and burdens upon their expression, including the chilling effects which would accompany public exposure of the identities of speakers or their respective audiences. Utah purports to require that emailers, who have no way of assuring compliance with the CPR Act other than to register for and use the scrubbing services provided by the registry, identify themselves in detail to the Defendants. Utah further purports effectively to require that emailers submit to the Defendants, on a monthly basis, their email lists so that they may be scrubbed according to Utah's basic scheme.

39. Under the foregoing constitutional provisions, those who engage in expression and in expressive association in furtherance of controversial and unpopular causes are entitled to maintain their anonymity and privacy in order to avoid the chilling effect which might accompany public exposure, whether those chilling effects result from unconstitutional retaliation by government agencies or officers or from private retaliation – lawful or unlawful – by non-government actors such as business associates, employers, political opponents, social acquaintances, vigilantes, or thugs. Expression and political activity concerning sexuality and sexual freedom are quite controversial in Utah as well as in many other parts of the United States. Many of FSC's member have often expressed the reasonable and well-grounded concern that publicly revealing their membership might create unnecessary difficulties for them ranging from adverse actions by business entities and associates who are otherwise perfectly willing to do business with them to illegal activity by those who are violently opposed to greater freedom of sexuality and sexual expression. Similarly, many of those who subscribe or do business with

FSC's members legitimately expect that their expression will remain private, and they, too, share the foregoing reasonable and well grounded concerns. In the case of FSC and its members, the initial information which the Defendants require of emailers when they first register for scrubbing services will publicly reveal not only that the registering emailer is disseminating expression which Utah finds questionable enough to regulate comprehensively but also the identity of financial institutions, internet service providers, and other contractors who have agreed to do business with FSC or its members, as the case may be. In the case of the FSC, and perhaps some of its members, the email lists which must be submitted to the Defendants on a monthly basis include membership lists. In other cases among FSC's members, said lists include their subscribers lists and information on others who are willing to business with them. The Defendants require that the initial emailer registration information be submitted to them in a form which is readily legible. Even if the Defendants permit hashing or similar encryption of the email lists submitted for scrubbing, the Defendants will, for the reasons specified in paragraph 15 of this complaint, be able to determine whether an actual email address is contained within a submitted list. These public disclosures would inevitably chill the willingness of many to join FSC and to otherwise engage in expression or political activity concerning sexuality or sexual expression. For this reason, these public disclosure requirements – necessary as they are, under the Defendants' scheme for avoiding sanction under Utah's CPR Act – impose a unconstitutional chilling effect upon FSC's and its members' presumptively protected expression even when that expression has nothing whatever to do with Utah or its minors.

40. For all of the reasons enumerated in paragraphs 38 through 39 of this count 4, the Utah's effective requirement that emailers submit detailed organization, financial and other

information to the Defendants and thereafter their email lists for monthly scrubbing imposes an impermissible chilling effect prior restraint upon presumptively protected expression, and it is, for that reason unconstitutional, void and unenforceable.

FIFTH CAUSE OF ACTION
(Burden on Protected Expression)

41. The Plaintiff reasserts the allegations contained in paragraphs 1 through 40 of this complaint and paragraphs 38 through 39 of count 4 as if fully restated in this count 5.

42. The FSC's *Free Speech X-Press* and some of the expression which FSC members disseminate via email, as detailed in paragraphs 9 and 10 of this complaint, constitute core political expression which is presumptively protected by the First Amendment to the United States Constitution, as made applicable to the Defendants by the Due Process Clause of the Fourteenth Amendment thereto, as well as by Section 15 of Article 1 of the Utah Constitution. Whether or not any of this expression is obscene as to (i.e. "harmful to") minors, it remains fully protected when addressed to its intended and targeted audience of consenting adults. As such, said expression, when directed to adults, is constitutionally immune from prohibitions which might be appropriate when directed to minors, and it is further immune from substantial burdens even when those burdens are intended to insure that minors cannot access such expression. Because the only practical way to avoid the CPR Act's substantial penalties, is to submit email lists to the registry and pay for scrubbing, the registry imposes substantial burdens, as detailed in paragraphs 14 and 15 of this complaint, on email expression by the FSC and its members even when that expression is directed only to adult and even when that expression has nothing whatever to do with Utah or its minors.

43. Bans and substantial burdens imposed on expression because of its content are presumptively invalid, and they are subject to the strictest constitutional scrutiny. They survive such scrutiny under the foregoing constitutional provisions only if they are narrowly tailored to serve a compelling governmental objective and even then only if no less restrictive alternate regulation is open to the government. The Utah CPR Act substantially burdens core political expression which is fully protected when disseminated to adults but which is possibly obscene as to minors. While Utah may have a compelling interest in keeping such expression from its minors, it has altogether failed to narrowly tailor the challenged requirements to that objective. Rather, Utah has effectively attempted to reverse the constitutional presumption that expression is protected and to shift to the speaker the burden of paying Utah to ascertain that a distant audience member is an adult. Indeed, Utah has effectively forbidden the FSC and its members from sending a constitutionally protected email message even to an *adult* in Utah if a) minors also have access to that adult's email account and b) that adult's spouse has registered the account with Utah's registry. Furthermore, Utah has overlooked many alternative regulations each of which is substantially less restrictive of constitutionally protected expression. Even if Utah maintains its do-not-email registry, for instance, it could (assuming that its one-way hashing function is secure, as the Defendants claim) simply post the hash values of the registered contact points in a file on a web site so that emailers could examine those values without cost and compare them to hash values which the emailer generates by hashing its own email list with Utah's publicly disclosed hash function. At the very least, Utah could impose a minimal charge upon only those email addresses which must be scrubbed, thus avoiding burdensome financial charges on the vast majority of email addresses which will have nothing whatever to do with

Utah or its children. Beyond this, Utah could, and must, accept as defenses to the CPR Act's sanctions defenses such as those establishing that an emailer reasonably believed that an adult had requested and would receive the email in question. Finally, by way of example, the federal CAN-SPAM Act readily demonstrates available less restrictive alternatives for regulating email even if it did not directly preempt the CPR Act.

44. Even if it avoids invalidity because of the burdens it imposes, the CPR Act is nevertheless invalid. Time, place, and manner restrictions upon presumptively protected expression, are, under the foregoing constitutional provisions, valid and enforceable if, but only if, they are content neutral with respect to the expression which they regulate, they are narrowly tailored to achieve an important or substantial governmental objective, and they leave open ample alternate avenues for the dissemination of the regulated expression. Utah's CPR Act is not content neutral, and Utah's purpose in keeping inappropriate expression from minors addresses a primary rather than a secondary effect of that expression. Again, even if Utah's basic purpose follows from an important or substantial governmental interest, Utah has altogether failed to narrowly tailor the challenged requirements to that objective. Because very few, if any, of FSC's or its member's email addresses will have anything whatever to do with Utah let alone its children, a substantial amount of the burden imposed by the CPR Act will fall upon expression which does not raise any substantial or even legitimate concern of Utah's. Finally, since Utah allows for no method other than content censorship of email (reducing all email to that appropriate for children) or full payment to its registry even for minimal or no actual scrubbing, Utah has failed to provide any reasonable (*i.e.* unburdened) alternate avenues

for expression which is constitutionally protected as between the FSC or its members and their respective willing adult audiences.

45. Some of the expression disseminated via email by FSC's members, as detailed in paragraph 10 of this complaint, amounts to commercial speech which is also presumptively protected by the by the First Amendment to the United States Constitution, as made applicable to the Defendants by the Due Process Clause of the Fourteenth Amendment thereto, as well as by Section 15 of Article 1 of the Utah Constitution. Even when it proposes a commercial transaction which is permitted to adults but forbidden to minors, such commercial speech does not lose its constitutional protection merely because minors may have access to that expression when it is directed to adults. Thus, even when presumptively protected commercial speech by FSC members has nothing whatever to do with Utah or its minors, Utah's CPR Act substantially and impermissibly burdens it in each of the ways described in paragraph 42 of this Count 5.

46. Under the foregoing constitutional provisions, commercial speech which proposes a lawful transaction and is not misleading is subject to regulation if, but only if, the regulation, burden, or restriction directly advances a substantial governmental interest which cannot be served by a less extensive regulation. Again, even if Utah's basic purpose followed from a substantial governmental interest, the challenged scheme fails to directly advance that concern and is far more extensive than is necessary or permissible to advance any interest in prohibiting minors from certain commercial transactions. Commercial speech which proposes a transaction lawful for adults but prohibited to children does not, for that reason, become unprotected when children happen to see or read it. Utah cannot reduce the advertising audience to receiving only that which advertises items and services which children may buy. Beyond this, Utah cannot

directly serve any legitimate interest in restraining children from certain commercial transactions by shifting the burden to advertisers – let alone forcing them to pay – to establish that no child will even have access to commercial speech proposing transactions forbidden to minors. Utah may sufficiently serve its interest in limiting minors' commercial transactions by enforcing criminal or civil prohibitions on the transaction themselves (insofar as they involve minors) or by adopting any of the less restrictive alternative regulations suggested, by way of example, in the final sentence of paragraph 43 of this count 5.

47. For all of the foregoing reasons, the Utah CPR Act imposes constitutionally impermissible burdens on the presumptively protected expression which the FSC and its members direct to their respective willing adult audiences.

PRAYER FOR RELIEF

WHEREFORE the Plaintiff, Free Speech Coalition, Inc., respectfully requests that this Court award to it and against each of the Defendants the following:

1. If necessary and on proper motion or application, temporary and preliminary injunctive relief enjoining and restraining each of the Defendants, and their respective agents, employees, successors, attorneys, and others acting in concert with them or under their control or direction from enforcing against the Free Speech Coalition or any of its members, directly or indirectly, any of the prohibitions contained in the Utah CPR Act and from effectively requiring the Free Speech Coalition or any of its members to register for, use, or pay for the "scrubbing" services offered by Utah's Child Protection Registry;

2. Permanent injunctive relief enjoining and restraining each of the Defendants, and their respective agents, employees, successors, attorneys, and others acting in concert with them

or under their control or direction from enforcing against the Free Speech Coalition or any of its members, directly or indirectly, any of the prohibitions contained in the Utah CPR Act and from effectively requiring the Free Speech Coalition or any of its members to register for, use, or pay for the "scrubbing" services offered by Utah's Child Protection Registry;

3. A declaratory judgment establishing that the prohibitions contained in the Utah CPR Act, the civil sanctions and causes of action provided for by the Utah CPR Act, and any effective requirement that emailers use or pay for the "scrubbing" services offered by Utah's Child Protection Registry, as well as that registry itself are expressly preempted by federal law and therefore facially unconstitutional, void, and unenforceable;

4. A declaratory judgment establishing that the prohibitions contained in the Utah CPR Act, the civil sanctions and causes of action provided for by the Utah CPR Act, and any effective requirement that emailers use or pay for the "scrubbing" services offered by Utah's Child Protection Registry, as well as that registry itself are preempted by the United States Constituion and therefore facially unconstitutional, void, and unenforceable;

5. A declaratory judgment establishing that the prohibitions contained in the Utah CPR Act, the civil sanctions and causes of action provided for by the Utah CPR Act, and any effective requirement that emailers use or pay for the "scrubbing" services offered by Utah's Child Protection Registry are facially unconstitutional, void, and unenforceable because they amount to an unfettered and financially burdensome prior restraint upon presumptively protected expression;

6. A declaratory judgment establishing that the prohibitions contained in the Utah CPR Act, the civil sanctions and causes of action provided for by the Utah CPR Act, and any

effective requirement that emailers register for, use, or pay for the "scrubbing" services offered by Utah's Child Protection Registry impose chilling effects up on presumptively protected expression in the form of email which render Utah's child protection registry scheme facially unconstitutional, void, and unenforceable;

7. A declaratory judgment establishing that the prohibitions contained in the Utah CPR Act, the civil sanctions and causes of action provided for by the Utah CPR Act, and any effective requirement that emailers use or pay for the "scrubbing" services offered by Utah's Child Protection Registry impose burdens on presumptively protected expression in the form of email which are facially unconstitutional, void, and unenforceable because they amount to content-based or otherwise impermissible regulation of core political expression and commercial speech;

8. Their reasonable attorneys' fees and the costs of this action as permitted by Section 1988 of Title 42 of the United States Code; and

9. For such other and further relief as this Court deems appropriate and just.

DATED this 17th day of January, 2006.

___/s/ Jerome H. Mooney_____
Jerome Mooney, Esq. (Utah Bar No. 2303)

Mooney Law Firm
50 W. Broadway, #100
Salt Lake City UT 84101
Tel: (801) 364-6500
Fax: (801) 364-3406

Attorneys for Plaintiff

_____/s/ Ira P. Rothken___
Ira P. Rothken, Esq. (Pro Hac Vice)

ROTHKEN LAW FIRM
1050 Northgate Drive, Suite 520
San Rafael, CA 94903
Telephone: (415) 924-4250
Facsimile: (415) 924-2905

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Motion on Behalf of Plaintiff was served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Thom D. Roberts
Assisstant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114
Counsel for Defendants Shurtleff and Levar

Respectfully submitted this 17th day of January 2006.

/s/ Jerome H. Mooney _____
Jerome H. Mooney