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**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 REGISTRY
SERVICES, INC., a Delaware Corporation,

Defendants.

**STATE DEFENDANTS' ANSWER
TO SECOND AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Judge Dale Kimball

Case No. 2:05CV00949

Mark Shurtleff in his official capacity as Utah Attorney General in the State of Utah and
Thad Levar in his official capacity as Director of the Division of Consumer Protection, Utah
Department of Commerce (State Defendants), by and through their attorney of record, Thom D.

Roberts, Assistant Utah Attorney General, and in response to the Second Amended Complaint for Declaratory Injunctive Relief, hereby admit, deny, allege, and respond as follows:

FIRST DEFENSE

The Second Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Second Amended Complaint does not constitute a short and plain statement of claim showing that the pleader is entitled to relief in accordance with Rule 8 (a), Federal Rules of Civil Procedure, and its allegations should be struck and the matter dismissed.

THIRD DEFENSE

The Plaintiff Free Speech Coalition lacks standing on its own behalf and on behalf its members, the Complaint does not raise a justiciable controversy, and the Court lacks jurisdiction to entertain this action.

FOURTH DEFENSE

The Plaintiff Free Speech Coalition lacks associational standing to bring this action, it asserts no justiciable claim, and the Court lacks jurisdiction to entertain this action.

FIFTH DEFENSE

With regard to the specific allegations of the Complaint the State Defendants hereby admit and deny as follows, with the general limitation that legal allegations or conclusions need not be either admitted or denied:

1. With regards to the allegations contained in paragraph 1, State Defendants admit the passage of the Utah Child Protection Registry Act, that its terms are set forth in the statute, that there is a charge as alleged for the “scrubbing” service, but deny the remaining allegations.

2. Admit the allegations in paragraph 2;

3. Admit the allegations in paragraph 3;

4. Regarding the allegation contained in paragraph 4, admit that venue is proper in this district because the Defendants reside here but deny the remaining allegations contained therein;

5. Regarding the allegations contained in paragraph 5, State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

6. Admit the allegations contained in paragraph 6;

7. Admit the allegations contained in paragraph 7;

8. Regarding the allegations contained in paragraph 8, admit that Defendant Unspam is the entity as alleged, that it was involved in the legislative process leading to the adoption of the Child Registry Act, and that it is operating under contract, but State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

9. Regarding the allegations contained in paragraph 9, State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

10. Regarding allegations contained in paragraph 10, State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

11. Regarding the allegations contained in paragraph 11, admit the allegation as they generally describe the internet, but State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

12. Regarding the allegations contained in paragraph 12, admit that Utah adopted the Child Registry Act, that Defendant Levar was directed to implement or contract with a private party to implement the Act, and that the Child Registry Act provides for what its statutory language says, but deny the remaining allegations contained therein;

13. Regarding the allegations contained in paragraph 13, admit that a “scrubbing” service is available for the alleged fee, but State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

14. Regarding the allegations contained in paragraph 14, admit that Defendants charge for each email address submitted for scrubbing and that parents, guardians, and schools may register email addressed without paying fees, but State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

15. Deny the allegations contained in paragraph 15;

16. Regarding the allegations contained in paragraph 16, admit that adults commonly use the internet, but State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

17. Regarding the allegations contained in paragraph 17, admit that the State Defendants are each a person within Title 42, Section 1983 of the United States Code, and that they are acting under the color of law, but deny the remaining allegations contained therein;

18. Regarding the allegation contained in paragraph 18, admit that the State Defendants will enforce the provisions of Utah law but deny the remaining allegations contained therein;

19. Deny the allegations in contained in paragraph 19;

20. Regarding the allegations contained in paragraph 20, State Defendants reassert their responses to the allegations contained in paragraphs 1 through 19 of this Complaint as if reasserted in this paragraph;

21. Regarding the allegations contained in paragraph 21, State Defendants admit that the United States Congress passed and the President signed the Controlling the Assault Non-Solicited Pornography and Marketing Act of 2003 (“CAN-Spam Act”), that its provisions are what they are and speak for themselves, but deny the remaining allegations contained therein;

22. Regarding the allegations contained in paragraph 22, admit that the CAN-Spam was enacted, that its provisions are what they are and speak for themselves, but deny the remaining allegations contained therein;

23. Regarding the allegations contained in paragraph 23, admit that the CAN-Spam Act was adopted and that the Federal Trade Commission (FTC) has taken certain actions, but that the Act and the actions of the FTC speak for themselves and are what they are, and State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

24. Regarding the allegations contained in paragraph 24, admit the supremacy clause of the United States Constitution, but deny the remaining allegations contained therein;

25. Regarding the allegations contained in paragraph 25, State Defendants reassert their responses to the allegations contained in paragraphs 1 through 24 of the Complaint as if fully restated herein;

26. Deny the allegations contained in paragraph 26;

27. Deny the allegations contained in paragraph 27;

28. Deny the allegations contained in paragraph 28;

29. Regarding the allegations contained in paragraph 29, admit that the desire and efforts of the State of Utah to protect children is laudable and is a legitimate state interest but deny the remaining allegations contained therein;

30. Deny the allegations contained in paragraph 30;

31. Deny the allegations contained in paragraph 31;

32. Regarding the allegations contained in paragraph 32, State Defendant reassert their responses to the allegations contained in paragraphs 1 through 31 of the Complaint as if fully restated herein;

33. Regarding the allegations contained in paragraph 33, State Defendants are without knowledge or information sufficient to form a belief as to the truth of the matters alleged therein and therefore deny the same;

34. Deny the allegations contained in paragraph 34;

35. Deny the allegations contained in paragraph 35;

36. Deny the allegations contained in paragraph 36;

37. Regarding the allegations contained in paragraph 37, State Defendants reassert their responses to the allegations contained in paragraphs 1 through 36 of the Complaint as if fully restated herein;

38. Deny the allegations contained in paragraph 38;

39. Deny the allegations contained in paragraph 39;

40. Deny the allegations contained in paragraph 40;

41. Regarding the allegations contained in paragraph 41, State Defendants reassert their responses to the allegations contained in paragraphs 1 through 40 of the Complaint as if fully restated herein;

42. Deny the allegations contained in paragraph 42;

43. Regarding the allegations contained in paragraph 43, admit that the state has significant and compelling interests in keeping the types of communications subject to the Child Registry Act from being distributed to minors, but deny the remaining allegations contained therein;

44. Deny the allegations contained in paragraph 44;

45. Deny the allegations contained in paragraph 45;
46. Deny the allegations contained in paragraph 46;
47. Deny the allegations contained in paragraph 47.

SIXTH DEFENSE

The state has a significant and compelling interest in keeping information subject to the Child Registry Act from Utah minors and it acted appropriately and lawfully in adopting the Child Registry Act.

SEVENTH DEFENSE

The state has a significant and compelling interest in protecting the privacy of email recipients and of assisting and facilitating such email address holders in controlling access to their email accounts and addresses.

EIGHTH DEFENSE

The Plaintiffs and its members have no significant interest in or right to send information subject to the Child Registry Act to minors.

NINTH DEFENSE

The Plaintiff and its member have no significant interest in or right to send advertisements for a product or service that a minor is prohibited by law from purchasing or that contains or advertises material that is harmful to minors as defined in Utah Code § 76-10-1201.

TENTH DEFENSE

Knowingly providing the information subject to the Child Registry Act to a minor may be a criminal act and that Child Registry Act is a method to help Plaintiff and its members and others to not violate that law.

ELEVENTH DEFENSE

The right of adults to receive information from the Plaintiff, its members and others is not impacted or burdened as such adults may have email addresses that are not registered under the Act and that Plaintiff and others may fully and without burden communicate with said adults.

TWELFTH DEFENSE

The Child Registry Act is narrowly drawn to protect those in Utah who have an email address that is owned, controlled, or which may be accessed by a minor and which they do not wish to receive the materials that are subject to the Child Registry Act.

THIRTEENTH DEFENSE

The subject matter of the Child Registry Act is an issue of lawful state concern and is not preempted by the CAN-Spam Act or the Commerce Clause of the United States Constitution.

FOURTEENTH DEFENSE

The Child Registry Act is not expressly preempted by the CAN-Spam Act and further is within the exceptions to preemption in that Act.

FIFTEENTH DEFENSE

There is a presumption against preemption of state laws, especially in matters involving significant state interests, and that such presumption is applicable here.

SIXTEENTH DEFENSE

The Child Registry Act is a lawful exercise of the State's authority, that it is pursuant to and in furtherance of the State's significant and compelling interests with regard to the protection of minors, the protection of privacy concerning the receipt of information to email addresses, and the rights of Utah citizens to privacy in their email addresses, that it does not significantly burden any right of the Plaintiff or its members, and is lawful.

SEVENTEENTH DEFENSE

Subsequent to the filing of the Second Amended Complaint, the Utah Legislature adopted HB 417, Amendments to Child Protection Registry, which affects the statutory provisions which are the subject matter of this suit, raising questions as to the justiciability of the claims of the Plaintiff on behalf of itself and its members of the association and whether their rights have been burdened or curtailed by the Child Registry Act.

WHEREFORE, having fully responded to Plaintiffs' Complaint, State Defendants pray that the matter be dismissed, no cause of action, that the Plaintiffs recover nothing thereby, that the Court determine that the Child Registration Act as adopted by the state is lawful and constitutional, that its operation is not in violation of the rights of the Plaintiff or its member, that the State Defendants recover their costs and attorney's fees incurred herein, and for such other and further relief as the Court shall deem just and equitable.

Dated this 5th day of April, 2006.

MARK L. SHURTLEFF
Attorney General

/s/ Thom D. Roberts
THOM D. ROBERTS
Assistant Attorney General
Attorney for State Defendants

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing State Defendants' Answer To Second Amended Complaint For Declaratory Injunctive Relief 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:

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And by means of United States mail, postage prepaid to the following at the below addresses as well as e-mail to the addresses listed below:

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