

Stephen F. Rohde, Esq. (Pro Hac Vice)  
ROHDE & VICTOROFF  
1880 Century Park East, Suite 411  
Los Angeles, CA 90067  
Tel: (310) 277-1482/Fax: (310) 277-1485

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

**PLAINTIFF FREE SPEECH  
COALITION, INC'S  
MEMORANDUM OF LAW IN  
OPPOSITION TO MOTION TO  
DISMISS COMPLAINT FOR  
LACK OF STANDING**

## I. INTRODUCTION

Plaintiff Free Speech Coalition, Inc. (“FSC”) files this Memorandum of Law in opposition to Defendant Unspam Registry Services, Inc.’s (“Unspam”) Motion to Dismiss for Lack of Standing, in which Defendants Mark Shurtleff and Kevin V. Olsen have joined.

For each of the reasons set forth herein, the Motion should be denied.

The sole grounds advanced by Defendants to dismiss the Second Amended Complaint (“S.A.C.”) for lack of standing are as follows:

1. Defendants claim FSC lacks standing to sue on its own behalf because “it has not alleged that it sends messages which are covered by the CPR Act.” Motion, p. 6. As shown below, this is inaccurate and overlooks the specific allegations of the S.A.C.

2. Defendants claim FSC lacks associational standing to sue on behalf of its members because FSC “does not allege that its members send communications which ‘contain [] or ha[ve] the primary purpose of advertising or promoting material that is harmful to minors as defined in Section 76-10-1201.’” Again, as shown below, this is inaccurate and overlooks the specific allegations of the S.A.C.

3. Defendants claim FSC lacks associational standing to sue on behalf of its members because its claim regarding the constitutionality of Section 13-39-202(1)(a) of the CPR Act fails the third prong of the test under *Hunt v. Washington State Apple Advertisers Commission*, 432 U.S. 333 (1977) in that it “requires the participation of the individual members in the lawsuit.” 432 U.S. at 343. Again, as shown below, this argument misapprehends the law of associational standing and misapplies it to the allegations of the S.A.C.

FSC has previously brought suit on issues dealing with the expression of its members without challenge to its standing in *Ashcroft v Free Speech Coalition*, 353 U.S. 234 (2002) and *Free Speech Coalition, et al v Gonzales*, 406 F. Supp. 2d 1196 (D. Colo.).

## II. LEGAL STANDARDS FOR REVIEW AND STANDING

With three notable exceptions, the parties agree on the legal standards for review and standing (Motions pgs. 3-6).

First, in addition to the rule that the Court must accept as true all material allegations of the complaint, which Defendants acknowledge, Motion, p.4, the Court must construe the complaint in favor of the complaining party. *Jenkins v. McKeithen*, 395 U.S. 411, 421-422 (1996).

Second, Defendants have overlooked that according to the Supreme Court “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presume that general allegations embrace those specific facts that are necessary to support the claim’ [citation omitted].” *Lugan v. Defenders of Wildlife, et al.*, 504 U.S. 555, 561 (1992). Of course, as shown below, FSC believes that the allegations of the S.A.C. readily meet these standards.

Third, the Supreme Court, as discussed below, has adopted relaxed rules with regard to standing in First Amendment cases, such as this. *Village of Schaumburg v. Citizens for a better Env’t*, 444 U.S. 620, 634 (1980); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

## III. ARGUMENT

### A. Summary of the CPR Act

Despite its numbering, due to the distinctive nature of the recently amended version of the CPR Act (which by stipulation is subsumed within the S.A.C., see, “Stipulation,” docket #31), there are three (3) categories of emails which violate the CPR Act if sent to an email address that has been registered for more than 30 consecutive days:

1. An email that “has the primary purpose of advertising or promoting a product or

service that a minor is prohibited from purchasing. ” Utah Code Ann. §13-39-202(1)(a).

2. An email that “contains . . . material that is harmful to minors, as defined in Section 76-10-1201.” Utah Code Ann. §13-39-202(1)(b).

3. An email that “has the primary purpose of advertising or promoting material that is harmful to minors, as defined in Section 76-10-1201.” Utah Code Ann. §13-39-202(1)(b).<sup>1</sup>

**B. Allegations of the Second Amended Complaint Regarding Standing.**

The S.A.C. contains several allegations which establish FSC’s standing to sue.

1. “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. . . .” S.A.C. ¶5.

2. “FSC serves its members by promoting their collective interests, especially in defending its members against all forms of censorship.” S.A.C. ¶5.

3. “. . . both FSC and many of its members send email messages which Section 13-39-202(1) of the Utah CPR Act purports to regulate.” S.A.C. ¶5.

4. “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

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<sup>1</sup> The reason there are three (3) such categories is that part (b) of §13-39-2002(1) begins with the disjunctive phrase “contains or has the primary purpose, etc.” (Emphasis added).

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’).” S.A.C. ¶9.

5. “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*. S.A.C. ¶9.

6. “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. S.A.C. ¶9.

7. “Defendant Shurtleff stands ready and willing to enforce the criminal provisions of the Utah CPR Act against the Plaintiff and its members. . . . Some of the Defendants, 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.” S.A.C. ¶18.

8. “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.” S.A.C. ¶19.

9. “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 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.” S.A.C. ¶33.

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.” S.A.C. ¶10. (Emphasis added).

**C. FSC Has Standing to Sue On Its Own Behalf.**

It is readily apparent by reviewing the foregoing allegations, which by law are presumed to “embrace those specific facts that are necessary to support the claim,” *Lugan, supra* at 561, that FSC has standing to sue on its own behalf.

1. FSC alleges that it sends emails which have the primary purpose of advertising or promoting a product or service (namely FSC’s own conferences and trade shows) that minors are prohibited from purchasing. Indeed, with respect to those particular emails, FSC’s entire purpose is to advertise and promote such conferences and tradeshow which minor cannot attend. Utah law prohibits the sale or distribution of materials which include descriptions or depictions

of: “(a) human genitals in a state of sexual stimulation or arousal; (b) acts of human masturbation, sexual intercourse, or sodomy; (c) fondling or other erotic touching of human genitals or pubic region . . .” to persons under the age of 18. Utah Code Ann. §76-10-1227. In fact, minors are not even allowed onto premises where they can view such material. Utah Code Ann. §76-10-1228.

2. FSC alleges that it sends emails which “contain” material that could be found to be “harmful to minors.”

3. FSC alleges, similar to item 1 above, that it sends emails which have the primary purpose of advertising or promoting material (namely FSC’s own conferences and trade shows) that could be found to be “harmful to minors.”

Defendants appear to be quibbling over the fact that FSC alleges that the advertising and promotion of its trade shows and conferences “routinely involve display to the attending adults of expression which is likely to be obscene to minors.” Motion, p. 8 (emphasis added).

Defendants point out that FSC alleges that “it sends communications that ‘may’ or are ‘likely’ to be harmful to minors.” Motion, p. 8. Defendants emphasize the words “may” and “likely” as if they are somehow fatal to FSC’s standing. Motion, p.8.

On the contrary, given the prospective nature and uncertainties of a prosecution for distributing material “harmful to minors,” in violation of Utah Code Ann. §76-10-1201(4), including determining whether something is “patently offensive to prevailing standards,” or “suitable materials for minors” or has no “serious value for minors,” FSC (who has designed its materials for consumption by adults only) cannot and should not be required to insure that every email containing, advertising or promoting its adult services will not be deemed “harmful to minors.” Only with such assurance can a merchant not consider themselves constrained by the CPR. The allegation that such material is “likely to be obscene to minors,” is more than



adequate at this pleading stage where the allegations of the S.A.C. are presumed to embrace the requisite specific facts necessary to support the claim. *Lugan, supra* at 561, and the S.A.C. must be construed in favor of FSC. *Jenkins, supra* at 421-422.

Moreover, the requirements of standing are met where there is an “actual or imminent” invasion of a legally protected interest. *Lugan v. Defenders of Wildlife, et al*, 504 U.S. 555, 560 (1992) , citing *Allen v Wright*, 468 U.S. 737, 756 (1984). FSC’s use of terms such as “may” or “likely” properly capture the element of “imminence” sufficient to satisfy the requirements for standing.

Furthermore, as noted above, in the First Amendment context of this case, standing rules are relaxed. *Village of Schaumburg, Broadrick, and Taxpayers for Vincent, supra*. Indeed, even if FSC’s own rights of free expression are not violated, it can assert a facial challenge to the CPR Act, because of the “assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Broadrick, supra*. at 612. This explains, in part, why the Amici who support FSC’s position have come forward to urge that the entire CPR Act is unconstitutional.

Based on the specific allegations of the S.A.C., liberally construed, FSC has standing to challenge both subparts (a) and (b) of the CPR Act on its own behalf.

**D. FSC Has Standing to Sue On Behalf of Its Members.**

Both sides agree that a trade association like FSC has associational standing to sue on behalf of its members under *Hunt*, where “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief sought requires the participation of the individual members of the lawsuit.” 432 U.S. at 343.

Here, Defendants do not question that FSC satisfied the second prong, in that this lawsuit

plainly seeks to protect the interests of FSC's members that are directly germane to its purpose.

Instead, Defendants argue that FSC does not meet the first and third tests.

Frankly it is difficult to take defendants' argument entirely serious that FSC has not alleged that its members send emails which (a) contain material that is harmful to minors or (b) have the primary purpose of advertising or promoting material that is harmful to minors (Motion, p. 9) given each of the allegations quoted above, including but not limited to that "[m]ost 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 which "commercial transactions --proposed or facilitated-- involve products or services that minors in Utah are legally prohibit[ed] from purchasing, especially in light of the involvement of FSC's members in the adult entertainment industry." S.A.C. ¶10. (Emphasis added).

This (and the other allegations of the S.A.C. quoted above) clearly establish that FSC's "members would otherwise have standing to sue in their own right," as required by the first prong of the *Hunt* test. 432 U.S. at 343.

Defendants also appear to argue that FSC has failed the first and third prongs of *Hunt* because it alleges that "some," "most" or "many" of its members send emails that run afoul of the CPR Act. But defendants have cited no authority for the proposition that to establish associational standing under *Hunt*, 100% of an organization's members must have standing in their own right. In fact, the law is to the contrary.

*Hunt* itself holds (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)), that the "association must allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit." 432 U.S. at 393-4. (Emphasis added)

In *Hunt*, a unanimous Supreme Court upheld associational standing based on a finding by the District Court that “some Washington apple growers and dealers” were injured by the North Carolina statute at issue. 432 U.S. at 343. (Emphasis added). “As noted above, to justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. E.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).” *Warth*, supra., at 516.

It is perfectly clear that FSC’s allegations (quoted above) which prudently and modestly assert that “some,” “most” or “many” of its members send emails covered by the CPR Act fully meet the requirements for the first and third prongs of *Hunt*.

Aside from this grammatical quibble (“the use of indefinite pronouns,” Defendants argue, Motion, p. 10), Defendants do not suggest any other reason why FSC’s challenge to the constitutionality of the CPR Act “requires the participation of the individual members in the lawsuit.” Defendants claim that FSC’s members “have varied practices and interests” which require their individual participation. Motion, p. 10. Yet Defendants cite no facts in the S.A.C. to support this argument. Nothing in the S.A.C. alleges that FSC’s members “have varied practices and interests” as it relates to the CPR Act. On the contrary, as quoted above and as can be seen by the entire S.A.C., FSC’s members engage in the uniform practices of sending thousands of emails covered by the CPR Act. The “interests” of these members is identical and nothing in the S.A.C. (which is the focus of this Motion, not factual arguments contained in Defendants’ Memorandum of Law) alleges otherwise. On the face of the S.A.C., FSC’s challenge to the constitutionality of the CPR Act does not require “the participation of the individual members in the lawsuit.”

Also, since the S.A.C. only seeks injunctive and declaratory relief (as well as attorneys fees and costs), but not damages, S.A.C., Prayer, the participation of individual members is not required in connection with the relief sought. *Hunt*, 432 at 394.

Consequently, since FSC meets all three tests for associational standing under *Hunt*, it can sue in this action on behalf of its members.

#### IV. CONCLUSION

For each of the reasons set forth above, FSC has standing (a) to sue on its own behalf and (b) to sue on behalf of its members. Accordingly, Defendants' Motion to Dismiss should be denied. In all events, if any of the allegations are insufficient, FSC respectfully requests leave to amend.

DATED this 31<sup>st</sup> day of July, 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

Stephen F. Rohde, Esq. (Pro Hac Vice)  
ROHDE & VICTOROFF  
1880 Century Park East, Suite 411  
Los Angeles, CA 90067  
Tel: (310) 277-1482  
Fax: (310) 277-1485

Attorneys for Plaintiff

### CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Memorandum 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  
Assistant Attorney General  
160 East 300 South, 5<sup>th</sup> Floor  
Salt Lake City, UT 84114  
Counsel for Defendants Shurtleff and Levar

Brent O. Hatch  
Parker Douglas  
HATCH, JAMES & DODGE, P.C.  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
Counsel for Defendant Unspam Registry Services, Inc.

Randy L. Dryer  
Michael P. Petrogeorge  
PARSONS BEHLE & LATIMER  
201 South Main Street, Ste. 1800  
Salt Lake City, UT 84145  
*Counsel for Amici*

Respectfully submitted this 31<sup>st</sup> day of July 2006.

\_\_\_\_\_/s/ Jerome H. Mooney \_\_\_\_  
Jerome H. Mooney