



Utah Child Protection Registry Act Challenge Denied by U.S. District Court

By [Ronald G. London](#)

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The U.S. District Court in Utah has refused to issue a preliminary injunction in the challenge to the Utah Child Protection Registry Act, which allows registration of email addresses and other "contact points" utilized by minors (e.g., IM identities, phone/fax/wireless numbers, etc.), and bars for those contact points the marketing of goods and services that are illegal for minors to buy and/or the transmission of material that is itself "harmful to minors" (e.g., pornographic content). The registry affects the practices of providers of alcohol, cigarettes, gambling, and adult-entertainment and related products, among others. The Act imposes strict liability, and fines of up to \$1,000 per message sent in violation of the law, as well as potential criminal penalties.

The Utah law is particularly problematic because, among other reasons, it does not define the categories of goods and services that are unlawful for minors to buy and thus fall within the Act, and it incorporates a "harmful to minors" standard that other courts recently have held is inherently vague in the online context, where the age of the minor in question may not be discernible. To avoid liability, advertisers must scrub their marketing lists of contact points monthly against Utah's registry. Even if someone using a registered contact point has "opted in" to messages from the advertiser, advertisers still must comply with the registry, since consent is not a defense. The case is *Free Speech Coalition v. Shurtleff*, No. 2:05CV949DAK (D. Utah).

Though the court found Free Speech Coalition (FSC) had standing to maintain its challenge to the registry and Act, it rejected claims that the law is invalid and should be enjoined on preemption, Dormant Commerce Clause and First Amendment grounds. With respect to preemption, as many of you know, the federal CAN-SPAM Act preempts state law attempting to regulate commercial email, except to the extent the state law is one of general application not specific to email or targets fraud and/or computer crime. However, the court held that, given FSC's burden of proving likelihood of success on the merits and the extent to which the CAN-SPAM Act's reference to laws "not specific to email" could be interpreted "to support either side in this controversy," a preliminary injunction could not issue on a preemption theory. Moreover, it held the CAN-SPAM Act leaves states broad leeway to define "computer crime" under their laws, and Utah's law against targeting children with pornography pre-dating the Registry Act could qualify. On this point, the court also relied on a U.S. government statement of interest filed in the case that stated CAN-SPAM preemption does not

reach the Utah law due to the "computer crimes" exception. The court also held there was no preemptive effect in Congress conferring on the FTC authority to adopt a "do-not-email" registry under CAN-SPAM and the FTC's decision not to do so, since "an agency's after-the-fact reports shed no light on the intent of Congress."

With respect to the Dormant Commerce Clause, the court held the claim was "essentially a reiteration of [the] federal preemption claim, except it rests on the assumption that the [law's] alleged unconstitutionality violates an implied power of Congress to regulate interstate commerce, even absent congressional action" and suffered the "analytical flaw" that "Congress has expressly allowed states to regulate commercial email." The court also held the registry and Act does not discriminate between in-state and out-of-state senders. In addition, it held the registry and Act do not place an undue burden on interstate commerce notwithstanding FSC's claim that the cost of using scrubbing against the registry is an undue burden itself, and especially if every state were to follow Utah's example, since FSC "acknowledges that it[s] members do] not have a constitutional right to send its materials to children" and (i) the registry provides information needed to comply with existing criminal laws prohibiting distribution of adult entertainment to minors, (ii) it enables determining if a contact point is accessible by children, (iii) the cost to "scrub" each email is still less than the alternative of communicating with an "unscrubbed" list of snail-mail recipients, and (iv) if the list of recipients diminishes with each monthly scrub, the sender's costs of using the registry will diminish over time.

Finally, the court rejected several First Amendment challenges to the registry and Act. It held they do not constitute a prior restraint, because they involve no licensing or pre-clearance and do not require speakers to obtain permission of anyone prior to speaking or to pre-provide the content of intended expression, and "the mere fact that a regulation requires that a party take some action in association with communicating a message does not transform [it] into a prior restraint." It also held "a majority of [] other First Amendment claims falter" given "the right of citizens to avoid unwanted communication . . . as part of [their] broader right to be left alone" under cases such as *Hill v. Colorado*, 530 U.S. 703 (2000), and *Rowan v. United States Post Office*, 397 U.S. 728 (1970). This is so, the court held, even to the extent FSC claimed the First Amendment affords a right to send sexual messages that are "harmful to minors" directly to email addresses that belong to or are accessible by children because there can be no interference with its members' right to access adults that may also use those contact points.

With respect to the strict scrutiny to which FSC claimed the registry and Act are subject because they are content-based, the court distinguished cases involving means of communication such as dial-a-porn, which it held require affirmative action by recipients of the speech to access, from those involving "captive audiences" such as broadcasting that is "pervasive," and to which the court likened unsolicited commercial email. It went on to hold that the registry and Act satisfy the *Central Hudson* test for commercial speech for much the same reasons that the Tenth Circuit decision in *Mainstream Marketing* (by which the Utah court is bound) that the national do-not-call registry passes constitutional muster. The court also rejected vagueness challenges to various parts of the law, including those involving the terms "access," "primary purpose," "promoting," "minor," and what goods and services are "prohibited by law" to minors, on grounds "the terms are easily understood, have common

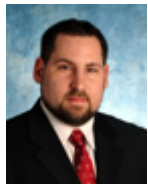
meanings, and reference applicable statutes that aid in their meaning."

On the other elements of the preliminary injunction test, the court held that while violations of constitutional rights are presumed to cause irreparable harm, "presumptions are not assumptions merely because allegations of such violations are asserted" and here "because of this court's findings and conclusions with respect to the merits . . . the presumption usually accorded allegations of constitutional violations does not apply." It also held that insofar as Tenth Circuit law states that postponing enforcement of a law is itself an injury that favors of the government, Utah would be harmed absent enforcement because "parents will lose an ability to control speech that enters their homes, their privacy will be compromised, and their right to raise their children as they see fit will be infringed" and "children whose parents have already registered contact points under the registry will be subjected to the ravages of pornography recognized as harmful," all of which "damage, by definition, cannot be remedied."



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For more information, please contact:



[Ronald G. London](mailto:ronnielondon@dwt.com)
Washington, D.C.
(202) 973-4235
ronnielondon@dwt.com



[Robert Corn-Revere](mailto:bobcornrevere@dwt.com)
Washington, D.C.
(202) 973-4225
bobcornrevere@dwt.com

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