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

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Memorandum Opposing
	)	Defendant's Motion to Dismiss
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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COMES NOW the Plaintiffs, by counsel, and, pursuant to the Court's order (Document #17), files this Memorandum Opposing Defendant's Motion to Dismiss and argues that Defendant's motion be denied for the reasons discussed below.

**Facts**

Plaintiffs do not dispute the facts as recounted by Defendant in Section I.C. of their Memorandum (Document #14), with the following exceptions:

1. In his introduction the Defendant states that the case arises out of a single telephone call. This is clearly not accurate. The case arises out of a pattern of enforcement engaged in by Defendant over a long period of time as adduced by the declarations accompanying this filing.<sup>1</sup>
2. In his Section I. A. “Relevant Background” Defendant says “Registration is only required for those charities whose solicitations ‘originate in Utah,’ are ‘received in Utah’ or are ‘caused to be made through business operations in Utah.’ PFCs are also required to register, regardless of whether or not the charity is exempt, if the PFC and charity are benefitted by soliciting contributions in Utah.” (citing Utah Code Ann. § 13-22-5(1)(b) and § 13-22-5(4)). In this case the *only* situation being challenged is when the solicitations are received in Utah after being sent from other states and when the PFC has insufficient contacts with Utah to justify Utah’s jurisdiction over the PFC.
3. Contrary to paragraph 13, Straight Women in Support of Homos, Inc. (“SWiSH”) never intended to conduct special events in Utah. The registration form used is accepted by many states. While SWiSH intended to conduct special events, none were intended to be conducted in Utah.
4. Contrary to paragraph 14, Plaintiff Rainbow Direct Marketing, LLC (“RDM”) never contracted with SWiSH to “design and implement a fundraising campaign in Utah.” Rather, RDM contracted with SWiSH to assist SWiSH with its nationwide solicitation

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<sup>1</sup> See Declarations of Rod Taylor, Tim Youngbar, Robert Tigner, Janet Copland, Christopher Dann, Allison Porter, and John Genette.

campaign that may or may not incidentally include solicitation in Utah because of the use of national mailing lists that may include some such addresses.<sup>2</sup> There is no evidence supporting an allegation that either party specifically contemplated that RDM would assist SWiSH with a solicitation campaign focused on, directed toward, conducted in, or otherwise even cognizant of solicitation in Utah.

### **Argument**

Defendant advances various arguments for dismissal. This memorandum will address each in the order in which they were raised.

#### ***II.A.1. Subject Matter Jurisdiction / Claim or Controversy***

Defendant first argues that there is no “case or controversy” to justify federal court jurisdiction over this matter. In Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979) the Supreme Court went to great lengths to explain that

[t]he basic inquiry is whether the “conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.” A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement. But “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” When contesting the constitutionality of a criminal statute, “it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.” When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he “should not be required to await

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<sup>2</sup> See Declarations of Amy Tripi and Sue Sena.

and undergo a criminal prosecution as the sole means of seeking relief.”<sup>3</sup>

Plaintiffs have articulated a justiciable case for Article III purposes under the Babbitt test:

- The parties have a substantial controversy and adverse legal interests. Plaintiffs believe that Defendant cannot compel Rainbow Direct Marketing (“RDM”) and similarly situated professional fundraising consultants (“PFCs”) to register with his office without violating their constitutional rights. Defendant disagrees and insists that the registration requirement does not violate the Constitution.
- RDM has demonstrated a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement. In fact, RDM has *already* suffered a direct injury in that it has lost income that it otherwise would have earned but for the Defendant’s threats.<sup>4</sup> Moreover, RDM’s client SWiSH has been deprived of the value of RDM’s counsel in crafting its solicitation campaign.<sup>5</sup> Perhaps most importantly, Plaintiff will lose some of its Constitutionally protected rights when the registration requirement is enforced against it. Although a price cannot be put on this loss, it is a loss just the same.
- RDM need not wait to be prosecuted for engaging in constitutionally protected activity in the face of a statutory prohibition. The Supreme Court has repeatedly held that charitable

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<sup>3</sup> Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979) (internal citations omitted; hereinafter, “Babbitt”).

<sup>4</sup> See Declaration of Amy Tripi.

<sup>5</sup> See Declaration of Sue Sena.

solicitation speech is constitutionally protected.<sup>6</sup> And it has consistently held that a State has no jurisdiction over an entity having no contact with the State.<sup>7</sup> In this case, there is a “credible threat” of prosecution.<sup>8</sup> A Division of Consumer Protection (“DCP”) employee averred that the DCP would take administrative action against RDM when SWiSH renewed its registration.<sup>9, 10</sup>

Although it is obvious that Plaintiffs have alleged a “case or controversy” under the

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<sup>6</sup> See, e.g., Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1979) and Riley v National Fed’n of the Blind of N.C., 487 U.S. 781, 789 (1988).

<sup>7</sup> See, e.g., Hanson v. Denckla, 357 U.S. 235, 253 (1958); Burger King v. Rudzewicz, 471 U.S. 462, 474-75 (1985); and World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).

<sup>8</sup> N.B. The controversy test only requires a “credible threat.” Babbitt, 442 U.S. at 298. It does not require a promise to enforce or some metaphysical certainty of enforcement. Nor does it require that an investigation or administrative action be pending.

<sup>9</sup> Complaint, ¶ 24. It appears Defendant is claiming that there is uncertainty as to whether the DCP will take administrative action against RDM. See Document #14, page 9, ¶ 23 and n. 36. It strains credulity to argue that the DCP does not, in its routine course of business, contemplate and threaten administrative action against unregistered PFCs under contract with charitable organizations registered in Utah and follow through on said action if such PFCs refuse to register. The DCP aggressively pursues unregistered PFCs. (See, e.g., Declaration of Janet Copland.) The DCP’s widely known enforcement posture has led many PFCs having no contact with Utah to register with the DCP (and thus surrender some of their Constitutional rights) merely to avoid the expense and trouble of defending against an administrative enforcement action. (See Declarations of Rod Taylor, Robert Tigner, Janet Copland, Christopher Dann, and Allison Porter.) In fact, the DCP routinely pursues administrative actions against PFCs that *are* registered but have contracted with charities which subsequently allowed their own registrations to expire in Utah. (See, e.g., Declarations of Tim Youngbar, Christopher Dann, and Allison Porter.)

<sup>10</sup> Even if RDM escaped administrative action, it would be the exception rather than the rule and many other PFCs, including members of American Charities for Reasonable Fundraising Regulation, Inc., would still be subject to such action if they refused to register.

Babbitt standard, it is still instructive to compare the Babbitt facts to the instant facts to demonstrate how robustly the “case or controversy” requirement is fulfilled in this case. The Babbitt plaintiffs had challenged various aspects of an Arizona law. One such aspect was a provision making “it an unfair labor practice ‘[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful, or deceptive publicity.’” The seven Justice Babbitt majority found the challenge to this provision to be a justiciable Article III case or controversy even though the Babbitt plaintiffs had not even been threatened with prosecution for violating this provision.<sup>11</sup>

In fact, the Babbitt plaintiffs had argued that they planned to *avoid* violating this provision. They did not want to propagate untruths, but they observed that “erroneous statement is inevitable in free debate.”<sup>12</sup> Although the Babbitt defendants pointed out that “the criminal penalty<sup>13</sup> has not yet been applied and may never be applied to ... forbidden consumer publicity,” the Court still found a justiciable controversy because a “plaintiff need not ‘first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.’”<sup>14</sup> The

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<sup>11</sup> Babbitt, 442 U.S. at 301.

<sup>12</sup> Ibid.

<sup>13</sup> The Court was careful to note that it was not only the threat of *criminal* penalties that made a justiciable case or controversy. The mere *prospect* of various *administrative* sanctions, including administrative cease-and-desist orders and court-ordered injunctions, was sufficient to create a justiciable Article III case or controversy. Babbitt, 442 U.S. at 302, n. 13. Thus, a “final administrative decision” is not required for these purposes.

<sup>14</sup> Babbitt, 442 U.S. at 302 (citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)).

Court went on to observe that

the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. [The Babbitt plaintiffs] are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity. In our view, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision ... to present a case or controversy.<sup>15</sup>

In light of this ruling, the Plaintiffs in the instant case have most certainly pleaded a case or controversy because they have alleged either more or equivalent qualification on each element than the Babbitt plaintiffs had alleged:

- The Babbitt plaintiffs had *not* been threatened with prosecution and even admitted that they planned to *not* violate the challenged provision. In this case, the Plaintiffs *have* been threatened and emphatically *do* wish to assist charities registered with the DCP without having to register with the DCP themselves.
- The challenged provision in the Babbitt case had *never* been enforced, while in this case Defendants cannot credibly argue that they have never enforced the registration requirement for PFCs who assist charities soliciting in Utah.<sup>16</sup>
- In both the Babbitt case and in this case, the States have not disavowed any intention of enforcing the challenged provision, so both the Babbitt plaintiffs and the Plaintiffs in this case must operate in fear of enforcement.

Thus, just as in the Babbitt case, the parties in this case are sufficiently adverse with

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<sup>15</sup> Ibid.

<sup>16</sup> Utah Code Ann. § 13-22-9. See Declarations of Janet Copland, Rod Taylor, Robert Tigner,

respect to the PFC registration requirement to present a justiciable Article III case or controversy.

The Babbitt Court applied its test to two other challenges and found other justiciable claims. One was a challenge to provisions requiring certain union election procedures. The Babbitt plaintiffs had not even *attempted* the procedures and had *no intention* of attempting them. Yet the challenge was ruled justiciable merely because the Babbitt plaintiffs considered the procedures futile.<sup>17</sup> The other Babbitt challenge attacked the act’s criminal penalty as overly vague. The Court found the challenge justiciable even though the Babbitt plaintiffs could not articulate what, exactly, the provision prohibited, let alone point to a threat of enforcement.<sup>18</sup> By comparison to these Babbitt claims as well, the Plaintiffs have most certainly exceeded the minimum threshold for pleading a justiciable case or controversy.

To be sure, Babbitt is not a jurisprudential anomaly.<sup>19</sup> Rather, it is the leading opinion on the “case or controversy” question in the context of a threat of enforcement. Babbitt and related cases have been followed hundreds of times nationwide and scores of times within the Tenth Circuit. A review of these cases indicates that the standards for pleading a justiciable case or

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Christopher Dann, and Allison Porter.

<sup>17</sup> Babbitt, 442 U.S. at 299-300.

<sup>18</sup> Babbitt, 442 U.S. at 302.

<sup>19</sup> See, e.g., Doe v. Bolton, 410 U.S. 179 (1973) (holding that physicians consulted by pregnant women “present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State’s abortion statutes”) and Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 62 (1976).

controversy in the Tenth Circuit have been met in this case. For example, in Initiative and Referendum Institute v. Walker, 450 F.3d 1082 (10<sup>th</sup> Cir. 2006), the court held that the claim was justiciable because the plaintiffs had adduced

(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.<sup>20</sup>

As noted above and in the affidavit and declarations accompanying the Complaint and this filing, all such factors are present in the instant case.<sup>21, 22</sup>

After his “case or controversy” argument, Defendant next contends that there is a stark difference between the Pinellas County cases<sup>23</sup> and the American Target case.<sup>24</sup> Defendant is quite correct. In American Target, the PFC admittedly helped its charity-client to purposefully

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<sup>20</sup> Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1089 (10<sup>th</sup> Cir. 2006).

<sup>21</sup> See especially the attached Declaration of Amy Tripi.

<sup>22</sup> See also, Kansas Judicial Review v. Stout, 519 F.3d 1107 (10<sup>th</sup> Cir. 2008); New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10<sup>th</sup> Cir. 1995); Wilson v. Stocker, 819 F.2d 943 (10<sup>th</sup> Cir. 1987); University of Utah v. Shurtleff, 252 F.Supp.2d 1264 (D.Utah 2003); and Universal Life Church v. Utah, 189 F.Supp.2d 1302 (D.Utah 2002)

<sup>23</sup> American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 221 F.3d 1211 (11<sup>th</sup> Cir. 2000) and American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 189 F.Supp.2d 1319 (M.D.Fla. 2001) (hereinafter, collectively, the “Pinellas County cases”).

<sup>24</sup> American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000) (hereinafter, “American Target”).

direct solicitations towards Utah. This gave the PFC a “minimum contact” or nexus with Utah.<sup>25</sup> In the Pinellas County cases, the PFC did *not* purposefully direct solicitations toward Pinellas County, therefore there was no “minimum contact” or nexus between the PFC and Pinellas County.<sup>26</sup> The problem for Defendant, as is clearly admitted in his brief’s footnote 58, is that the PFC in this case falls on the Pinellas County side of the “minimum contact” question rather than on the American Target side. The uncontradicted pleadings show that Plaintiff RDM has no contact with Utah and does not seek to direct SWISH’s solicitations to Utah.<sup>27</sup> Thus, Defendant’s reliance on American Target is misplaced and irrelevant.

Next, Defendant argues that Plaintiff suffered no injury that can be traced to him. Defendant points out that “RDM agreed to register in any state where legally required” but ignores the obvious question: is registration legally required in Utah? Certainly Utah law purports to require PFCs to register. But can that statutory requirement be imposed upon Plaintiffs and those similarly situated without violating their Constitutional rights? Is the registration requirement itself constitutional or “legal” as applied to these Plaintiffs? Rather than address this question, Defendant asks this Court to deprive itself of jurisdiction by agreeing that Utah law is beyond constitutional scrutiny.

As explained above, the PFC registration requirement – backed up by the threat of

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<sup>25</sup> American Target, 199 F.3d at 1255.

<sup>26</sup> Pinellas County, 221 F.3d at 1217-18.

<sup>27</sup> See Declarations of Amy Tripi and Sue Sena. Similarly, various PFC members of ACFRFR have no contact with Utah and do not direct their charity-clients’ solicitations to Utah. See Declarations of Robert Tigner, Janet Copland, John Cain, Christopher Dann, and Allison Porter.

administrative action to enforce it – has deprived RDM of the benefits of a business relationship, has infringed RDM’s constitutional rights, and has impeded SWiSH’s constitutionally protected right to solicit charitable contributions and disseminate its public education message. And these injuries are “fairly traceable” to Defendant acting in his official capacity because (a) he is charged with enforcing the PFC registration requirement, (b) because his office does, in fact, enforce this requirement, and (c) because Defendant’s agent warned RDM that it would face administrative action if it failed to register.<sup>28</sup>

***II.A.2.a. Subject Matter Jurisdiction / Standing / ACFRFR’s Own Standing***

ACFRFR is the assignee of a claim against Defendant. ACFRFR is litigating this claim on behalf of New River Direct, Inc.<sup>29</sup>

***II.A.2.b. Subject Matter Jurisdiction / Standing / ACFRFR’s Associational Standing***

Next Defendant argues that ACFRFR lacks associational standing because it has not alleged that any members of ACFRFR have standing “in their own right [to sue] because they have suffered actual injury or immediate threat of injury.”<sup>30</sup> Association standing is available to

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<sup>28</sup> See, e.g., Glover River Organization v. U.S. Dept. of Interior, 675 F.2d 251, 253 (10<sup>th</sup> Cir. 1982, holding that a plaintiff must merely allege a “some chain of causation linking that injury to the challenged actions of the defendant”) and Nova Health Systems v. Gandy, 416 F.3d 1149, 1156 (10<sup>th</sup> Cir. 2005, holding that a plaintiff must only show “that his or her injury is ‘fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court’” and that “Article III’s causation requirement demands something less than the concept of proximate cause” (citations omitted)). Plaintiffs have clearly exceeded this standard.

<sup>29</sup> See Declaration of Rod Taylor. N.B. Defendant implicitly concedes at page 17 of his brief that such an assignment confers unquestioned standing upon Plaintiff ACFRFR.

<sup>30</sup> Document #14, p. 16.

any association if “(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 requested requires the participation of individual members in the lawsuit.”<sup>31</sup>

As noted in Complaint ¶ 2, in this action “ACFRFR represents ... its members ... who are national direct mail fundraising organizations who have been subject to Utah’s state regulatory requirements.”<sup>32</sup> And it cannot be disputed that the interests that ACFRFR is trying to protect are germane to ACFRFR’s purpose.<sup>33</sup> Finally, resolution of the legal issues faced by

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<sup>31</sup> Utah Ass’n of Counties v. Bush, 455 F.3d 1094 (10<sup>th</sup> Cir. 2006). See also Roe No. 2 v. Ogden, 253 F.3d 1225 (10<sup>th</sup> Cir. 2001) and Warth v. Seldin, 422 U.S. 490 (1975) (holding that an association has standing if alleges that “its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit”).

<sup>32</sup> ACFRFR represents these members both directly (See Declarations of Amy Tripi, and John Cain) and indirectly (See Declarations of Robert Tigner, Christopher Dann, Janet Copland, and Allison Porter). (Note also that SWiSH is an ACFRFR member. See Declaration of Sue Sena and John Cain.) Additionally, another PFC has assigned its claim against Defendant to ACFRFR. (See Rod Taylor Declaration.) While the situations are not precisely identical, the injuries are materially identical. In the case of each PFC, it had no contact with Utah other than the fact that one or more of its clients may or may not solicit charitable contributions in Utah (depending on whether Utah addresses appear on national lists used). Yet each PFC was injured by either (a) having to relinquish some of its constitutional rights by registering with the DCP to avoid criminal or administrative sanction or (b) by foregoing a business relationship while preparing to vindicate said rights through litigation.

Given that Defendant’s counsel apparently deems that the formalities of pleading have not been followed, in the spirit of comity, Plaintiff’s counsel will file a motion to amend the pleadings to show ACFRFR’s association standing more clearly by alleging the above stated facts and attaching the noted Declarations.

<sup>33</sup> Complaint ¶ 11.

ACFRFR's members does not require their participation in this lawsuit given that RDM's factual situation and legal conundrum are materially identical to theirs. Thus, ACFRFR has association standing.

Defendant also argues that "Plaintiffs cannot assert the rights of unnamed, unidentified persons."<sup>34</sup> But the law is well-settled to the contrary on this issue. Plaintiffs cannot be compelled to name or identify any member fundraising consultant wishing to remain anonymous as it would be a violation of their constitutionally protected freedom-of-assembly rights.<sup>35</sup> This doctrine is in place to allow associations to maintain lawsuits on behalf of their members when such lawsuits might invite retaliation against their members if the members were named parties.<sup>36</sup>

***II.A.2.c. Subj. Matter Juris. / Standing / RDM's Standing to Sue on Behalf of SWiSH***

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<sup>34</sup> Document #14, p. 17. Defendant cites no legal authority whatsoever in support of this proposition.

<sup>35</sup> National Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 462 (1958). See also Doe v. Stincer, 175 F.3d 879 (11<sup>th</sup> Cir. 1999) (holding that "we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought").

<sup>36</sup> N.B. Even if ACFRFR did not have association standing and if Defendant agreed not to enforce the registration requirement against RDM, this case would not be moot. The facts that (a) there would be a lingering dispute over the legality of the registration requirement for PFCs in RDM's situation and that (b) Defendant could easily return to his old ways would "militate against a mootness conclusion." United States v. W.T. Grant Co., 345 U.S. 629 (1953). See also Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221 (10<sup>th</sup> Cir. 1997) (holding that an employer's suspension of an illegal policy does not moot the claim); F.E.R. v. Valdez, 58 F.3d 1530, (10<sup>th</sup> Cir. 1995) (holding that a case was not moot simply because Utah state government agents who had seized medical records returned those records) and Committee for First Amendment v. Campbell, 962 F.2d 1517 (10<sup>th</sup> Cir. 1992).

Defendant argues that “RDM lacks standing to assert those [First Amendment] claims on behalf of SWiSH.” However, federal courts have long recognized that Constitutional rights require a certain “breathing space” to be adequately protected.<sup>37</sup> One way to provide for that breathing space is to allow litigants to assert the constitutional claims of others,<sup>38</sup> even when the litigant himself would not enjoy the same constitutional protection.<sup>39</sup>

There are numerous cases that carve out exceptions to the standing rules. These cases provide for *jus tertii* or “third party” standing to litigate the types of constitutional claims raised by RDM in the Complaint, even when the litigant himself may not enjoy the constitutional protections invoked by those claims.<sup>40</sup>

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<sup>37</sup> Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

<sup>38</sup> There is no doubt that the charitable solicitations that SWiSH hopes to conduct with RDM’s assistance are fully protected speech. Riley v. National Fed’n of the Blind of N.C., 487 U.S. 781, 789 (1988).

<sup>39</sup> See, e.g., Bigelow v. Virginia, 421 U.S. 809, 816 (1975) (holding that “this ‘exception to the usual rules governing standing’ reflects the transcendent value to all society of constitutionally protected expression”). See also Gooding v. Wilson, 405 U.S. 518, 521 (1972) (holding that allowing third party standing is “necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.”)

<sup>40</sup> See, e.g., Bigelow v. Virginia, 421 U.S. 809, 815 (1975) (noting that “this Court has recognized that a defendant’s standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged”); Broadrick v. Oklahoma, 403 U.S. 601, 612 (1973) (holding that “litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression”); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (holding that third-party has standing to challenge law as overbroad even though the third-party had not even claimed that the ordinance punished his own expressive activity); and Gooding v. Wilson, 405 U.S. 518, 521

The most relevant eligibility test for *jus tertii* standing is set forth in Sec’y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984) which provides that “the court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and, whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.” Coincidentally, the facts of the *Munson* case relevant to the standing issue are materially identical to the facts in the instant case.

In Munson, the plaintiff was a “professional for-profit fundraiser” just as RDM is a for-profit fundraiser.<sup>41</sup> The Munson plaintiff faced “civil restraint and criminal liability” imposed by the Secretary of State because of certain terms appearing in the fundraising contracts between it and its nonprofit clients.<sup>42</sup> The Munson plaintiff suffered injury because one of its potential clients “was reluctant to enter into a contract” because of the Maryland law at issue.<sup>43</sup> Similarly, Defendant threatened “administrative action”<sup>44</sup> against RDM and is empowered to impose criminal sanctions<sup>45</sup> if RDM consults with SWiSH on SWiSH’s nationwide solicitation

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(1972) (holding that “although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others” (citations omitted)).

<sup>41</sup> Munson, 467 U.S. at 950 and Compl. ¶ 20.

<sup>42</sup> Munson, 467 U.S. at 954.

<sup>43</sup> Munson, 467 U.S. at 954-55.

<sup>44</sup> Compl. ¶ 25.

<sup>45</sup> Utah Code § 13-22-4(1).

campaigns without first registering with the DCP. This threat had the clear effect of unconstitutionally limiting SWiSH's ability to disseminate its message.<sup>46</sup>

The Munson plaintiff was “not a charity and [did] not claim that its own First Amendment rights [had] been or [would be] infringed by the challenged statute.”<sup>47</sup> Rather, the Munson plaintiff was focusing “its argument solely on its ability to assert the First Amendment right of Maryland charities.”<sup>48</sup> Similarly, RDM is not a charity and is, for the purposes of showing standing to litigate these elements of its Complaint, asserting the constitutional rights of its nonprofit clients, not its own.<sup>49</sup>

Because the facts relevant to standing in Munson and the instant case are materially identical, the application of the law to the facts in this case should be consistent with the result in Munson. In Munson, the court observed that the plaintiff lost a potential client because of the challenged law which gave rise to “sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement.”<sup>50</sup> Because Defendant's agent's threats have deprived RDM of the benefits of a commercial relationship,<sup>51</sup> RDM has also satisfied the case-or-controversy requirement.

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<sup>46</sup> See Declaration of Sue Sena. See also Speiser v. Randall, 357 U.S. 513, 518 (1958).

<sup>47</sup> Munson, 467 U.S. at 955.

<sup>48</sup> Munson, 467 U.S. at 955 n. 6.

<sup>49</sup> Compl. ¶¶ 60-69.

<sup>50</sup> Munson, 467 U.S. at 954-55.

<sup>51</sup> See Declaration of Amy Tripi.

The Munson court then considered whether the plaintiff could “be expected satisfactorily to frame the issues in the case.”<sup>52</sup> The Court reasoned that because

the activity sought to be protected [fundraising] is at the heart of the business relationship between Munson and its [nonprofit] clients, and Munson’s interests in challenging the statute are completely consistent with the First Amendment interests of the charities it represents ... we see no prudential reason not to allow it to challenge the statute.” *Ibid.*

Likewise, because the fundraising activities in which RDM and SWiSH had hoped to be engaged are at the heart, if not *the* heart, of the business relationship between RDM and SWiSH, and because RDM’s interests in challenging the Defendant’s enforcement of the registration requirement are entirely consistent with SWiSH’s constitutional interests, there is no prudential reason not to allow RDM to assert this constitutional claim.<sup>53</sup>

### ***II.A.3. Subject Matter Jurisdiction / Declaratory and Injunctive Relief***

Defendant argues that declaratory and injunctive relief is inappropriate solely because there is no case or controversy present. As noted above, Plaintiff has already alleged an injury, a “case or controversy,” and an inadequate remedy at law in the Complaint<sup>54</sup> and in the

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<sup>52</sup> Munson, 467 U.S. at 958.

<sup>53</sup> See also Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (holding that “[g]iven a case or controversy, a litigant whose own activities are *unprotected* may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court” (emphasis supplied)).

<sup>54</sup> See Complaint ¶¶ 26-27, 76-77 and Declarations of Rod Taylor, Robert Tigner, Janet Copland, Christopher Dann, Allison Porter, and John Genette) for allegations of injury and inadequate remedy at law. See Complaint generally and foregoing argument in this Memorandum for allegation of case or controversy.

declarations accompanying this filing.

The central issue in this case is whether the Constitution prohibits the DCP from compelling a PFC to register even though that PFC has no contact with Utah, except that one or more of its clients may or may not solicit contributions in Utah depending solely on whether some Utahans' names may appear on a national mailing list. RDM and the PFCs represented by ACFRFR have already been confronted with this question and have been injured by the registration requirement. RDM has lost the benefits of a business relationship and ACFRFR's member PFCs have seen their constitutional rights infringed. There is no adequate remedy at law for these injuries as no money judgment will restore their constitutional rights. Only an injunction and/or a declaratory judgment can protect and restore Plaintiffs' constitutional rights and those of similarly situated PFCs.<sup>55, 56</sup>

***II.A.4. Subj. Matter Juris. / §1983 Claim against Olsen can only be in his official capacity***

Plaintiffs seek to sue Defendant only in his official capacity.

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<sup>55</sup> See, e.g., Terrace v. Thompson 263 U.S. 197 (1923). See also Morales v. Trans World Airlines, Inc. 504 U.S. 374, 381 (1992) and Oklahoma City v. Dolese, 48 F.2d 734 (10<sup>th</sup> Cir. 1931) (holding that a company is entitled to an injunction against ordinance that violated company's constitutional rights).

<sup>56</sup> Defendant also argues that Plaintiffs rights will be protected by some unspecified "state and federal procedures" and notes that "Plaintiffs fail to explain why the existing administrative process is inadequate." Doc #14, pp 19-20. Defendant fails to cite *any* case law indicating the significance of these claims. Regardless, Plaintiff reiterates that it is the clear position of Defendant that RDM and other similarly situated PFCs register with Defendant's office. There is no "state or federal procedure" or "administrative process" that will qualify or reverse that position. Defendant cannot simply back away from his statute and repeatedly reiterated and enforced regulatory policy whenever he finds it convenient to avoid litigation or responsibility. United States v. Oregon State Medical Soc., 343 U.S. 326, 696 (1952).

## *II.B&C. Commerce Clause, First Amendment, and Due Process Clause*

Defendant then argues that the American Target case has resolved all of the constitutional causes of action alleged in the Complaint. But, as noted above, the facts of the American Target case are significantly different from the facts of the instant case. In American Target, the PFC “suggest[ed] lists of potential Utah donors” and “purposefully direct[ed] efforts toward residents of [Utah.]”<sup>57</sup> In this case, and especially at this stage, neither RDM nor any of the ACFRFR member-plaintiffs is even *alleged* to purposefully direct activity toward Utah. Quite the opposite, the Plaintiff PFCs have no intention of directing solicitation activity toward Utah or any other state and have no contact with Utah at all – except that one or more of their clients *may* send mail there because of their use of national mailing lists that may or may not include addresses located in Utah.

This distinction makes the American Target jurisprudence of limited value in this case; especially since the precise nature of Plaintiffs’ activity has not been discovered. Without a connection to Utah, American Target’s Due Process jurisprudence is wholly inapplicable. There is not even an allegation that any of the instant Plaintiffs’ activities are “purposefully directed” toward Utah and thus various well-settled opinions from the Supreme Court of the United States militate a decision that Plaintiffs cannot, consistently with due process jurisprudence, be compelled to register with the DCP.<sup>58</sup>

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<sup>57</sup> American Target, 199 F.3d at 1255.

<sup>58</sup> See, e.g., Asahi Metal Indus. Co., v. Superior Court of California, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v.

Similarly, The United States Supreme Court has repeatedly held that the “Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”<sup>59</sup> When the Court encounters such statutes directly regulating interstate commerce, they are “generally struck down ... without further inquiry”<sup>60</sup> “regardless of whether the statute’s extraterritorial reach was intended by the legislature.”<sup>61</sup> Instead, “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.”<sup>62</sup>

In Edgar v. Mite Corp.,<sup>63</sup> the Supreme Court struck down an Illinois statute regulating tender offers for corporations connected to Illinois.<sup>64</sup> After the Court found that the law regulated such offers when they “take place across state lines, even if wholly outside the

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Rudzewicz, 471 U.S. 46 (1985); and Hanson v. Denckla, 357 U.S. 235 (1958).

<sup>59</sup> Edgar v. MITE Corp., 457 U.S. 624, 642-643 (1982).

<sup>60</sup> Brown-Forman v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

<sup>61</sup> Healy v. The Beer Institute, 491 U.S. 324, 336 (1989).

<sup>62</sup> Ibid. (citing Brown-Forman, 476 U.S. at 579).

<sup>63</sup> 457 U.S. 624 (1982).

<sup>64</sup> N.B. Defendant rests his argument exclusively on American Target. American Target based its reasoning on the fact that two cases cited by the plaintiffs in that action were tax cases and distinguished them saying “the Utah Act imposes licensing and registration requirements, not tax burdens.” While Plaintiffs do not concede that such tax cases have limited application, they wish to point out that each of the six cases cited *supra* in notes 59, 60, 61 and *infra* in notes 65 and 66 are *not* tax cases. Thus, American Target cannot preclude consideration of causes of action premised upon the Commerce Clause.

State,”<sup>65</sup> the Court deemed it a constitutionally “prohibited regulation and invalid, regardless of the purpose with which it was enacted.”<sup>66</sup> Similarly, the PFC registration requirement violates the Commerce Clause because it directly regulates commerce occurring entirely outside Utah. The uncontroverted pleadings demonstrate that Plaintiffs do not engage in any commerce in Utah.

Finally, Defendant argues that American Target precludes any First Amendment challenge to the Utah Charitable Solicitations Act. In actuality, American Target supports Plaintiffs’ First Amendment challenge. The American Target court found the Act to be a prior restraint on speech and struck down part of it.<sup>67</sup> That court also found the Act’s bonding requirement to be facially unconstitutional.<sup>68</sup> In this case, Plaintiffs also allege prior restraints and facial unconstitutionality.<sup>69</sup> Further, Plaintiffs allege that the Act’s requirements, considered in light of the burdens imposed by other states and localities, impose an undue burden on the free speech rights of the charities they serve. These claims were not argued in the American Target case and therefore American Target cannot preclude consideration of them.

### **Conclusion**

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<sup>65</sup> Edgar, 457 U.S. at 641 (quoting Southern Pac. Co. v. Arizona, 325 U.S. 761, 775 (1945)).

<sup>66</sup> Edgar, 457 U.S. at 642 (quoting Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925)). See also Healy v. The Beer Institute, 491 U.S. 324, 336 (1989); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976).

<sup>67</sup> American Target, 199 F.3d at 1252.

<sup>68</sup> American Target, 199 F.3d at 1250.

<sup>69</sup> Complaint ¶¶ 41-52, 59.

Defendant's motion should be denied for the reasons discussed above.

**Statement Regarding Oral Argument**

Plaintiffs do not oppose oral argument. However, given the overwhelming weight of the body of law militating against dismissal and given the facts adduced in the accompanying declarations, Plaintiffs do not feel that oral argument is necessary. Plaintiffs therefore await the judgment of the Court.

Respectfully submitted this March 19, 2009.

CHARLES H. NAVE  
/s/ Charles Nave  
PLAINTIFFS' COUNSEL  
AND COUNSEL ON BRIEF

GEOFFREY W. PETERS  
/s/ Geoffrey Peters  
PLAINTIFFS' COUNSEL  
AND TRIAL COUNSEL

### **CERTIFICATE OF SERVICE**

I, Charles Nave, hereby certify that on the 19<sup>th</sup> day of March, 2009, I electronically filed the foregoing Memorandum Opposing Defendant's Motion to Dismiss with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Jeffrey S. Buckner -- [jbuckner@utah.gov](mailto:jbuckner@utah.gov)

Graden P. Jackson -- [gjackson@strongandhanni.com](mailto:gjackson@strongandhanni.com), [intakeclerk@strongandhanni.com](mailto:intakeclerk@strongandhanni.com)

William B. Ingram -- [wingram@strongandhanni.com](mailto:wingram@strongandhanni.com), [intakeclerk@strongandhanni.com](mailto:intakeclerk@strongandhanni.com)

Charles H. Nave -- [charlie@nave-law.com](mailto:charlie@nave-law.com)

Geoffrey W. Peters -- [gpeters@gpeters.net](mailto:gpeters@gpeters.net), [gpeters@cdr-nfl.com](mailto:gpeters@cdr-nfl.com)

DONE in the City of Roanoke, Commonwealth of Virginia, this 19<sup>th</sup> day of March, 2009.

/s/ Charles Nave

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
**333 Church Avenue SW**  
**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
**Facsimile: 540 345 8849**

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

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Amy Tripi
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Amy Tripi, am President of Rainbow Direct Marketing, LLC (“RDM”). I have personal knowledge of the facts stated in this declaration.

1. Before I founded RDM, I worked as a professional fundraising consultant at other organizations.
2. I founded RDM to provide fundraising consulting services to organizations, like Straight Women in Support of Homos, Inc. (“SWiSH”), that advocate for issues and causes of concern to the lesbian, bisexual, and gay community.
3. RDM wishes to assist SWiSH and other clients with their nationwide solicitation

campaign, which may, incidentally, include solicitations in Utah through use of national mailing lists containing names of persons located in Utah.

4. Ever since RDM was threatened with an administrative action for failing to register as a PFC with the Utah Division of Consumer Protection, RDM has been unable to perform services for SWiSH. This has injured RDM in that it cannot earn the service fees for which it has contracted.
5. RDM and SWiSH still wish to move forward with their contract and collaborate on a national charitable solicitation campaign, but the actions of the Utah Division of Consumer Protection have prevented us from doing so.
6. Ever since it became apparent that Utah's actions were thwarting our efforts we joined American Charities for Reasonable Fundraising Regulation ("ACFRFR") to rectify this problem. To date we have been unsuccessful and thus we have entered into this litigation both on our own behalf and as members of ACFRFR.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 17<sup>TH</sup> day of February 2009.

/s/ Amy Tripi \_\_\_\_\_  
AMY TRIPI

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
**333 Church Avenue SW**  
**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Sue Sena
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Sue Sena, am President of Straight Women in Support of Homos, Inc. (“SWiSH”). I have personal knowledge of the facts stated in this declaration.

1. SWiSH has not engaged RDM to assist it with solicitations in Utah. SWiSH has engaged RDM to assist SWiSH with a nationwide solicitation campaign, which may include solicitations in Utah through use of national mailing lists containing names of persons located in Utah.
2. Ever since RDM was threatened with an administrative action for failing to register as a PFC with the Utah Division of Consumer Protection, RDM has been unable to perform

services for SWiSH. This has injured SWiSH in that we cannot avail ourselves of RDM's services and expertise in conducting a solicitation campaign.

3. RDM and SWiSH still wish to move forward with their contract and collaborate on a national charitable solicitation campaign, but the actions of the Utah Division of Consumer Protection have prevented us from doing so.
4. Ever since it became apparent that Utah's actions were thwarting our efforts we joined American Charities for Reasonable Fundraising Regulation ("ACFRFR") to rectify this problem. To date we have been unsuccessful and thus we have entered into this litigation both on our own behalf and as members of ACFRFR.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 17<sup>TH</sup> day of February 2009.

/s/ Sue Sena  
SUE SENA

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
**333 Church Avenue SW**  
**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
**Facsimile: 540 345 8849**

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

---

AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Rod Taylor
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Rod Taylor, am President of New River Direct, Inc. (“NRD”), located at 3810 Inverrary Boulevard, Suite 401, Lauderhill, FL 33319. NRD is a professional fundraising consultant (“PFC”) that is currently registered with the Utah Division of Consumer Protection. I have personal knowledge of the facts stated in this declaration.

1. NRD has no offices in Utah. NRD has no employees in Utah. NRD does not solicit business in Utah. NRD has no other contact with Utah. NRD does not purposefully direct its activities or the activities of our clients toward Utah. However, some of our clients solicit

contributions nationwide using national mailing lists and these campaigns may include solicitations in Utah.

2. Given that NRD has no contact with Utah, it is our understanding that Utah does not have jurisdiction over us to compel us to register with the Division of Consumer Protection (the “Division”). We have nevertheless registered with the Division because we wanted to avoid the expense and distraction of defending against an administrative enforcement action brought by the Division to force us to register, and perhaps fining us for failing to do so.

3. At the time we registered with the Division, we knew that NRD’s constitutional rights were being infringed because NRD did not have any contact with Utah and therefore the Division did not have jurisdiction to enforce any registration requirement.

4. Moreover, the registration requirement burdened and infringed the constitutional rights of our clients. Because NRD must register as a PFC with Utah, and with other states, we must pass these costs – which amount to roughly \$15,000 per year for NRD – along to our charity-clients. And requiring NRD to register with the Division adds another impediment to our charity-clients’ free flow of speech to Utah, given that any misunderstanding or imperfection in the paperwork could lead to an interruption in our charity-client’s charitable solicitation and public education campaigns.

5. No compensation can make NRD whole for this infringement of its rights. The only adequate relief that NRD could enjoy is to be free of the threat of the Division’s registration requirement.

6. To that end, NRD has assigned its right to pursue a cause of action against the Division for redress of this injury to its and its charity-client's constitutional rights to American Charities for Reasonable Fundraising Regulation, Inc.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 4<sup>th</sup> day of March 2009.

/s/ Rod Taylor  
Rod Taylor

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
**333 Church Avenue SW**  
**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
**Facsimile: 540 345 8849**

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

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Tim Youngbar
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Tim Youngbar, am a Group Manager at Creative Direct Response, Inc. (“CDR”), located at 16900 Science Drive, Suite 210, Bowie, MD 20751. CDR is a professional fundraising consultant (“PFC”). In 2005, I served as the account executive in charge of CDR’s account with Help Hospitalized Veterans (“HHV”). I have personal knowledge of the facts stated in this declaration.

1. I was notified on September 29, 2005 by Stephen Dawson of CDR that the HHV registration in Utah had lapsed. Stephen Dawson was notified by CDR’s registration counsel, who was notified through a letter from the state of Utah.

2. Until this time I and my colleagues at CDR were under the impression that HHV's permit to solicit charitable contributions in Utah was current and valid. CDR's contract with HHV obligated each party to maintain at its own expense all necessary state permits, including HHV's Utah permit.

3. Upon receiving this information to the contrary, I contacted HHV to inform them that CDR had been contacted by Utah about their lapsed registration and CDR would not assist HHV with any direct mail that HHV had addressed to Utah until HHV's permit was renewed.

4. Upon learning this information, CDR did not provide HHV with any assistance with HHV's solicitation campaigns in Utah until HHV's Utah permit was later reinstated. We did this by securing an instruction from HHV to its data processing firm to suppress from the national mailings any addresses in Utah.

5. In the meantime, the Utah Division of Consumer Protection (the "Division") issued an administrative citation against CDR. CDR explained all of the above facts to the staff of the Division. The staff and counsel for the Division informed another CDR employee that the statute was "strict liability" and did not hinge on whether or not we knew we were violating the statute when we provide our consulting advice on their national mailing.

6. Among the charges was an allegation that CDR violated Utah Code Ann. § 13-22-5(4) which prohibits PFCs from knowingly advising a charity on a fundraising campaign when the charity is not registered. As I noted above, CDR did not know that HHV's permit had expired.

7. When we asked Utah how we could have known this information in order to avoid such charges, Utah's officials told another CDR employee through counsel that we should

have called and asked the Division before any national mailing was made by HHV with our consulting assistance.

8. CDR has more than 70 nonprofit clients, there is no feasible way to contact every state, every day to determine whether, unbeknown to us, one client's registration has lapsed in a particular state. In fact, our registration counsel has informed us that the States would not respond to these inquiries in a timely fashion if we had the wherewithal to make them.

9. Instead, we include a clause in our contracts that requires that our clients to maintain their registrations and permits with state regulators, like the Utah Division of Consumer Protection. When HHV failed to do so, the Division punished CDR.

10. CDR has no offices in Utah, has no clients headquartered in Utah, nor does any business in the State of Utah. Our clients use national mailing lists that presumably contain some addresses in Utah but we do not direct any of our consulting advice toward the citizens of any state as opposed to nationally.

11. Ultimately, CDR had to engage an attorney to defend itself and pay \$2500 to the Division to settle the case.

12. As the Division itself acknowledged in the administrative citation, CDR was "at all times registered." At no time did the Division even allege that any Utah resident or any other person was defrauded, misled, or otherwise harmed in any way by either HHV or CDR.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 4<sup>th</sup> day of March 2009.

/s/ Tim Youngbar  
TIM YOUNGBAR

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
**333 Church Avenue SW**  
**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
**Facsimile: 540 345 8849**

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

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	John Cain
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, John J. Cain work for the Priests of the Sacred Heart, a charity located at 6889 South Highway 100, Hales Corners, WI 53132. I represent the National Catholic Development Conference (“NCDC”) located at 86 Front Street, Hempstead, New York 11550 on the Board of Directors of American Charities for Reasonable Fundraising Regulation, Inc. (“ACFRFR”). The NCDC is the nation’s largest association of religious philanthropies. Since 1968 it has been dedicated to the promotion of the integrity of its member organizations to donors, the media and the general public. Our membership list is posted at <http://www.ncdc.org/membership/current/listings.asp>. As a member of the Board of Directors of

ACFRFR, I have knowledge of the facts stated in this declaration.

1. Among ACFRFR's members are Rainbow Direct Marketing, LLC ("RDM") and Straight Women in Support of Homos, Inc. ("SWiSH").
2. The present litigation commenced against Utah was authorized by the Board of Directors of ACFRFR on behalf of all of its members including those both named and unnamed in the litigation.
3. ACFRFR accepts as members all those who have provided support to ACFRFR in the past and present and elects to its board those who's financial support is \$5,000 or greater.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 16<sup>TH</sup> day of March 2009.

/s/ John Cain  
JOHN CAIN

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
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**Facsimile: 540 345 8849**

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

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Robert S. Tigner
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Robert S. Tigner, am the General Counsel of the Association of Direct Response Fundraising Counsel (“ADRFCO”) a nonprofit association located at 1612 K Street, NW Suite 510, Washington, D.C. 20006. ADRFCO members are businesses or divisions of businesses that provide consulting services to nonprofit organizations with respect to direct response fundraising. Members do not solicit funds from the public. Services provided by members include offering advice and counsel; conducting feasibility studies and tests; designing and managing campaigns; developing and producing solicitation materials; and obtaining lists of prospective donors. ADRFCO adopted the first comprehensive code of ethics in the history of

our industry and members are required to abide by same. The code can be found at [http://www.adrfco.org/index\\_files/rules.htm](http://www.adrfco.org/index_files/rules.htm). A current list of our members is located at [http://www.adrfco.org/index\\_files/membership.htm](http://www.adrfco.org/index_files/membership.htm).

I represent ADRFCO on the Board of Directors of American Charities for Reasonable Fundraising Regulation, Inc. (“ACFRFR”). As general counsel to ADRFCO and as a member of the Board of Directors of ACFRFR, I have knowledge of the facts stated in this declaration.

1. ADRFCO’s members are professional fundraising counsel.
2. ADRFCO joined ACFRFR because ACFRFR is dedicated to advancing the cause of reasonable fundraising regulation, a cause in which ADRFCO’s membership has a strong interest.
3. ADRFCO’s members advise charities that solicit charitable contributions nationwide.
4. Most, if not all, of ADRFCO’s members do not have contact with Utah. They have no offices, employees, or clients in Utah. They do not purposefully direct their activities or those of their clients toward Utah. They only have indirect contact with Utah in that their clients may solicit charitable contributions using national lists which contain some addresses located in Utah.
5. Although these ADRFCO members have no contact with Utah and understood that Utah did not have jurisdiction over them to compel their registration there as professional fundraising counsel, they nevertheless registered with Utah and suffered an abridgment of their constitutional rights to avoid the expense of defending against a Utah administrative enforcement action.
6. Each year when these ADRFCO members’ registration renewal comes up, they consider

not renewing registration with Utah and continuing to advise clients that solicit charitable contributions nationwide. To date, most have continued to renew their Utah registrations to avoid the threat of enforcement and the cost of defending against such enforcement.

7. Because these ADRFCO members' constitutional rights are being infringed, a money judgment will not make them whole. The only way to make these ADRFCO members whole is to prevent enforcement of the registration requirement against them as long as they have no contact with Utah.
8. The present litigation commenced against Utah was authorized by the Board of Directors of ACFRFR on behalf of all of its members including those both named and unnamed in the litigation and including the membership of ADRFCO.
9. ACFRFR accepts as members all those who have provided support to ACFRFR in the past and present and elects to its board those such as ADRFCO who's financial support is \$5,000 or greater.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 17<sup>TH</sup> day of February 2009.

/s/ Robert S. Tigner  
ROBERT S. TIGNER

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
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**333 Church Avenue SW**  
**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
**Facsimile: 540 345 8849**

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

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Janet Copland
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Janet Copland, am a Principal in Copland O’Neil, Inc. (“CO”), located at 902 NE First Street, Pompano Beach, FL 33060. CO is a professional fundraising consultant (“PFC”) that is currently registered with the Utah Division of Consumer Protection. I have personal knowledge of the facts stated in this declaration.

1. CO is a member of the Association of Direct Response Fundraising Counsel (“ADRFCO”).
2. CO has never had any offices in Utah. CO has never had any employees in Utah. CO has never had any other contact with Utah. CO has never purposefully directed its activities

or the activities of its clients toward Utah. However, some of CO's clients solicit contributions nationwide using national mailing lists and these campaigns may include solicitations in Utah.

3. Given that CO has no contact with Utah, it is CO's understanding that Utah does not have jurisdiction over CO to compel us to register with the Division of Consumer Protection (the "Division"). We have nevertheless registered with the Division because we wanted to avoid the expense and distraction of defending against an administrative enforcement action brought by the Division to force us to register.

4. At the time we registered with the Division in 2007, we knew that CO's constitutional rights were being infringed because CO did not have any contact with Utah and therefore the Division did not have jurisdiction to enforce any registration requirement.

5. Nevertheless, CO registered with the Division to avoid the cost of defending against an administrative citation.

6. When CO registered in 2007 we had to pay \$2000.00 to the Division because we had previously assisted two nonprofits with their fundraising campaigns before CO had registered with the Division. These services may have included "services regulated by the [Utah] Charitable Solicitations Act" – namely assisting our clients with solicitation efforts in Utah – although CO never had any specific knowledge that its clients were soliciting in Utah. CO assisted its clients with nationwide solicitation campaigns, which may have included solicitation in Utah, but CO was never specifically aware that its clients were soliciting in Utah and CO never directed its own or its clients' activities toward Utah.

7. In 2007 and in years prior, CO had delegated responsibility for maintaining a current PFC permit with the Division to an employee who failed to keep the permit renewed.

CO was under the impression that it was properly registered with the Division. When CO management discovered the lapse in compliance, CO acted to remedy the situation. As noted above, when CO acted to bring itself back into compliance with the laws enforced by the Division, CO had to pay \$2000.00 to the Division as part of a “settlement agreement” to do so.

8. In addition, approximately five years ago CO suffered from another dispute because of an expired PFC permit. Due to another clerical error, CO’s PFC permit expired. Given the relevant Charitable Solicitation Act, CO’s then charity-clients were prohibited from soliciting because their solicitation material had been created with the assistance of CO, an unregistered PFC.

9. Within days this charity-client severed its relationship with CO, thus depriving CO of at least six months worth of contract compensation, because CO has lost its PFC permit.

10. CO therefore suffered economic damage because of the PFC registration requirement. More importantly, at least one of CO’s charity-clients was unable to communicate with the public (through direct mail public education and charitable solicitation campaigns ) merely because CO had failed to renew its paperwork in a timely fashion.

11. No compensation can make CO whole for these various infringements of its rights. The only adequate relief that CO could enjoy is to be free of the Division’s registration requirement.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 17<sup>th</sup> day of March 2009.

/s/ Janet Copland  
Janet Copland

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
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**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
**Facsimile: 540 345 8849**

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

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Christopher Dann
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Christopher Dann, am President of Drakes Bay Fundraising, Inc. (“DBF”), located at 1100 Larkspur Landing Circle, Suite 280, Larkspur, CA 94939. DBF is a professional fundraising consultant (“PFC”) that is currently registered with the Utah Division of Consumer Protection. I have personal knowledge of the facts stated in this declaration.

1. DBF is a member of the Association of Direct Response Fundraising Counsel.
2. DBF has no offices in Utah. DBF has no employees in Utah. DBF does not solicit business in Utah. DBF has no other contact with Utah. DBF does not purposefully direct its activities or the activities of our clients toward Utah. However, some of our clients solicit

contributions nationwide using national mailing lists and these campaigns may include solicitations in Utah.

3. Given that DBF has no contact with Utah, it is our understanding that Utah does not have jurisdiction over us to compel us to register with the Division of Consumer Protection (the "Division"). We have nevertheless registered with the Division because we wanted to avoid the expense and distraction of defending against an administrative enforcement action brought by the Division to force us to register, and perhaps fining us for failing to do so.

4. At the time we registered with the Division, and on every occasion when we considered renewing our Utah permit, we knew that DBF's constitutional rights were being infringed because DBF did not have any contact with Utah and therefore the Division did not have jurisdiction to enforce any registration requirement. Yet we still registered and renewed to avoid the expense and burden of defending against an administrative citation from the Division.

5. No compensation can make DBF whole for this infringement of its rights. The only adequate relief that DBF could enjoy is to be free of the threat of the Division's registration requirement.

6. In 2007, the DBF was notified that one of our charity-clients had allowed its Utah registration to lapse. Until this time, DBF was under the impression that this charity-client was registered to solicit charitable contributions in all necessary jurisdictions, as it had earlier represented itself to be.

7. Upon learning this, DBF took immediate action to remedy the situation, including contacting the Division. DBF was surprised to learn that the Division was seeking to punish

DBF even though at all times relevant to this episode, DBF had a valid PFC permit issued by the Division.

8. Initially, the Division wanted DBF to pay \$7000.00 to the Division and sign a settlement agreement. Ultimately, DBF paid \$3750.00 to the Division, signed a settlement agreement and was still issued an administrative citation.

9. DBF has found the Division's enforcement of Utah law to be very burdensome and so have its clients. In fact, another one of DBF's charity-clients, whose identity DBF would like to keep confidential, has determined that the Utah laws as enforced by the Division are so burdensome that it would rather not solicit charitable contributions in Utah at all. This has harmed this charity-client in that it must now forego any possible donations from Utah residents and, more importantly, it has had to give up some of its First Amendment right to engage in public education and charitable solicitation to avoid the cost and administrative burden imposed by the Division.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 17<sup>th</sup> day of March, 2009.

/s/ Christopher Dann  
Christopher Dann

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	Allison Porter
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, Allison Porter, am Executive Vice President and Co-Founder of Avalon Consulting Group, Inc. (“Avalon”), located at 1150 17<sup>th</sup> Street, NW, Suite 200, Washington, DC 20036. Avalon is a professional fundraising consultant (“PFC”) that is currently registered with the Utah Division of Consumer Protection. I have personal knowledge of the facts stated in this declaration.

1. Avalon is a member of the Association of Direct Response Fundraising Counsel.
2. Avalon has no offices in Utah. Avalon has no employees in Utah. Avalon does not solicit business in Utah. Avalon has no other contact with Utah. Avalon does not

purposefully direct its activities or the activities of our clients toward Utah. However, some of our clients solicit contributions nationwide using national mailing lists and these campaigns may include solicitations in Utah.

3. Given that Avalon has no contact with Utah, it is our understanding that Utah does not have jurisdiction over us to compel us to register with the Division of Consumer Protection (the “Division”). We have nevertheless registered with the Division because we wanted to avoid the expense and distraction of defending against an administrative enforcement action brought by the Division to force us to register, and perhaps fining us for failing to do so.

4. At the time we registered with the Division, and on every occasion when we considered renewing our Utah permit, we knew that Avalon’s constitutional rights were being infringed because Avalon did not have any contact with Utah and therefore the Division did not have jurisdiction to enforce any registration requirement. Yet we still registered and renewed to avoid the expense and burden of defending against an administrative citation from the Division.

5. No compensation can make Avalon whole for this infringement of its rights. The only adequate relief that Avalon could enjoy is to be free of the threat of the Division’s registration requirement.

6. In 2005, when Avalon filed papers to renew its PFC permit with the Division, a discrepancy arose because several of our charity-clients had allowed their Utah registrations to lapse and we had continued to assist them. The Division would not renew Avalon’s PFC permit until the matter was investigated and resolved through a settlement agreement.

7. In the meantime, acting upon directions from the Division, Avalon was compelled to tell its other clients – clients whose permits to solicit charitable contributions in Utah were in

good standing – that they must suspend their charitable solicitation and public education campaigns until Avalon and the Division resolved this issue.

8. Thus, these charity-clients had their First Amendment Constitutional rights to solicit charitable contributions in Utah and communicate with Utahans suspended even though they had complied with the laws that the Division administers. In other words, the rights of these charity-clients were infringed merely because the Division was pursuing an administrative enforcement action against Avalon.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 18<sup>th</sup> day of March, 2009.

/s/ Allison Porter  
Allison Porter

**Charles H. Nave, admitted *pro hac vice***  
**Attorney for Plaintiffs**  
**CHARLES H. NAVE, P.C.**  
**333 Church Avenue SW**  
**Roanoke, VA 24016**  
**Telephone: 540 345 8848**  
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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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AMERICAN CHARITIES FOR REASONABLE	)	
FUNDRAISING REGULATION, INC. and	)	
RAINBOW DIRECT MARKETING, LLC,	)	Declaration of
	)	John Genette
Plaintiffs,	)	
	)	Case No.: 2:08cv00875 DAK
versus	)	
	)	
KEVIN V. OLSEN, Director of the Utah Division of	)	
Consumer Protection, Department of Commerce	)	
for the State of Utah,	)	
	)	
Defendant.	)	
	)	

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I, John Genette, am President of Black Mountain Communications, Inc. (“BMC”), located at 34522 N. Scottsdale Road, Ste 428, Scottsdale, AZ 85266. BMC is a professional fundraising consultant (“PFC”) that is not currently registered with the Utah Division of Consumer Protection. I have personal knowledge of the facts stated in this declaration.

1. BMC is a member of the Association of Direct Response Fundraising Counsel.
2. BMC has no offices in Utah. BMC has no employees in Utah. BMC does not solicit business in Utah. BMC has no other contact with Utah. BMC does not purposefully direct its activities or the activities of our clients toward Utah.

3. BMC represents various charities that solicit charitable contributions through direct mail. BMC is aware of the burdensome regulatory process imposed upon PFCs by the Utah Division of Consumer Protection (the “Division”). BMC has determined that this burden is so great that it does not want to register as a PFC with the Division and is willing to forgo any business that it may lose because of this decision.

4. BMC’s charity-clients are also aware of the burdensome registration and reporting requirements that the Division imposes upon PFCs and upon nonprofits soliciting charitable contributions in Utah. Our full-service clients have chosen to not register with the Division and have chosen to not solicit charitable contributions in Utah because of these burdensome regulatory requirements.

5. When our full-service charity-clients’ donors happen to relocate to Utah, our full-service charity-clients lose contact with these donors. Because our full-service charity-clients are not registered with the Division to solicit charitable contributions in Utah, our full-service charity-clients cannot continue to contact these donors through the public education and charitable solicitation mailings they conduct.

6. Thus, these charity-clients are harmed by losing potential donations, by losing contact with existing donors, by losing opportunities for public education, and, most importantly, by the infringement of their right to free speech as guaranteed by the Constitution. This is all attributable to the burdensome regulatory requirements imposed by the Division on charities and PFCs. Without these burdensome requirements, our full-service charity-clients would be able to conduct public education and charitable solicitation campaigns in Utah with BMC’s assistance.

7. No compensation can make BMC whole for this infringement of its rights. The only adequate relief that BMC could enjoy is to be free of the threat of the Division's registration requirement.

I declare under penalty of perjury that the foregoing is true and correct. 28 U. S. C. § 1746.

Executed on this the 19<sup>th</sup> day of March, 2009.

/s/ John Genette \_\_\_\_\_  
John Genette