

No. A092653

**IN THE COURT OF APPEAL OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
(Division 2)**

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MARK FERGUSON, on behalf of himself and all others  
similarly situated,

Plaintiff/Appellant,

vs.

FRIENDFINDER, INC., ANDREW B. CONRU, CONRU  
INTERACTIVE, INC., et. al.,

Defendants/Respondents.

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Appeal from the Superior Court  
In and For the County of San Francisco  
Hon. David A. Garcia  
Case No. 307309

**RESPONDENTS' ANSWER TO BRIEFS OF AMICUS CURIAE**

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Unfair Competition Case.  
(See Bus. & Prof. Code § 17209 and Rule 16(d).)

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## INTRODUCTION

Defendants and Respondents Friendfinder, Inc., Andrew B. Conru and Conru Interactive, Inc. (hereinafter “Friendfinder” or “Respondents”) submit this Answer in response to the brief of the Attorney General as Amicus Curiae (hereinafter “brief of the Attorney General”) and to the Amicus Curiae Brief of The Internet Alliance (hereinafter “brief of Internet Alliance”).<sup>1</sup>

Neither *amicus* brief addresses the fatal flaw in the e-mail provisions of Business & Professions Code § 17538.4.<sup>2</sup> These California provisions exclusively appropriate the single short subject line or "header" allotted per e-mail message and the unique “first text” allotted per e-mail message and then specify exact symbols and information that must be placed in those locations. Similar laws of other states could impose and do in fact impose different specific symbols and/or information for the same single subject line and “first text”.

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<sup>1</sup> We combine the arguments in response to both Amicus Curiae Briefs for the convenience of the court even though we do not find leave of court for The Internet Alliance to have filed an amicus curiae brief.

<sup>2</sup> Hereinafter, all statutory references are to the California Business & Professions Code unless otherwise indicated.

As a practical necessity, California's mandatory inclusions must be followed nationwide. This conclusion follows from the broad, elastic imposition of the regulations on any business "qualified to do business in this state," the absence of geographical indicators in email addresses of the vast majority of potential recipients and the complete absence of any notice or knowledge element in the statute. (See Friendfinder's original Respondents' Brief at 23-25).

Existing statutes enacted by other states have other mandates that clash with California's; and national e-mailers, as a practical matter, cannot comply with all. Legitimate interstate commerce is in danger of being stifled. The situation can only get worse as new clashing mandates from additional states accumulate.

As shown in detail below, there are presently existing and irreconcilable inconsistencies between § 17538.4 and a Pennsylvania statute that involve more than just the conflict between "ADV:ADLT" and "ADV-ADULT" as the required first characters in the subject line. The statutes differ as to which e-mail messages are subject to an "adult" classification and provide for entirely different classes of exceptions and exemptions. Although the Attorney General suggests

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that an advertiser sending unsolicited commercial e-mail “could put both notices in its subject line,” (brief of the Attorney General at 22), this clumsy remedy, even if it would be recognized as legitimate, would not resolve the other clashes involving scope of coverage and exceptions. There are further clashing provisions in the existing statutes of other states that provide for other mandates and other exceptions. The result is a crazy quilt of regulations that blankets the nation.

Moreover, § 17538.4 cannot be constitutionally valid today and then become unconstitutional tomorrow, should more states impose new systems of requirements for content and positioning of information in the subject line and first text of an e-mail message that would generate a geometrically increasing set of inconsistencies. Nor should the constitutionality of a statute depend on a race between legislatures. If a new state statute is unconstitutional because of the piling on of inconsistencies, the federal system and respect among the states requires that California’s and Pennsylvania’s must also be unconstitutional and unconstitutional now. This is the logic behind the rule stated by the United States Supreme Court in *Healy v. The Beer Institute* (1989) 491 U.S. 324, 336 [109 S.Ct. 2491, 105 L.Ed.2d

275] that the court must consider “what effect would arise if not one, but many or every, State adopted similar legislation.” (See Friendfinder’s original Respondents’ Brief at 9-11 where *Healy* is quoted at length and in context.)

As to the arguments in the briefs of *amicus curiae* about the evils of spam and the “falsified domain names, forged headers, fictitious addresses and disguised return paths” that are the focus of the brief of The Internet Alliance (e.g., at page 1), Friendfinder submits that they do not touch the dormant commerce clause issue. Friendfinder does not generate spam and is opposed to fraud and deception. But § 17538.4, even if it were followed, would accomplish next to nothing in restricting the flow of spam and the statute says nothing to prevent fraud or deception.

The positive mandates of section 17538.4 are thus different from prohibitions against fraud such as those involved in the Act at issue in *State of Washington v. Heckel* (2001) \_\_\_ Wa. \_\_\_, 24 P.3d 404, 407 n. 6, which was directed at one who misrepresents the point of origin or the transmission path of a commercial e-mail and/or one who inserts "false or misleading information in the subject line." Hence, the Washington court emphasized the “truthfulness

requirements of the Act” and held “it is inconceivable that any state would ever pass a law requiring spammers to use misleading subject lines of transmission paths.” (*Id.* at 411.) Truthfulness in commercial Internet advertising and false transmission paths are not involved in § 17538.4.

Equally irrelevant are arguments about the possibility that the legislature could have enacted a constitutionally valid statute that would have reached the alleged activities of Friendfinder, a possibility that, without being explicitly identified, is a pervasive theme of the brief of the Attorney General.

The arguments about the standard to be applied when a statute is challenged on its face create needless complication and complexity. We explore the standard governing review of a facial challenge in depth herein, but submit that common sense should be the guiding principle and that once the common sense facts are recognized, the complications, complexities and controversies involving a facial challenge to a statute resolve themselves accordingly. Similarly, once recognition is given to the common sense purpose of the dormant commerce clause doctrine — the maintenance of interstate commerce free from stifling state regulation — the various statements of that

doctrine fall into their proper places.

Friendfinder acknowledges the validity of one argument of The Internet Alliance: that the court should sever and retain the portions of the statute regulate facsimile transmissions. (See brief of Internet Alliance at 7 and 10.) Friendfinder has never challenged the constitutionality of those regulations. Because the locations of recipients of facsimile telephone transmissions are directly ascertainable, no dormant commerce clause issue is presented with respect to those portions of the statute.

The guiding principle was stated in Tribe, *American Constitutional Law*, § 6-12 at pp. 434-435 (2d ed. 1988):

“Just as activities which appear to be entirely local when viewed in isolation can become so nationally significant in the aggregate that they may be regulated by Congress under the commerce clause, so too regulations that individually seem only local in impact can collectively burden multi-state enterprises to such a degree that all will be barred by the negative implications of the commerce clause. ... State regulations may discourage national enterprises in this way either by being *contradictory* or by imposing weighty *cumulative burdens* upon multi-state business concerns.” (emphasis in original, footnote deleted)

The dormant commerce clause is, at root, a common sense approach to the problem of state regulation of interstate commerce in a federal system. The Internet has provided a new context in which

common sense must be applied. A common sense approach to the dormant commerce clause should be the guide during the formal discussion of technical principles and authorities below.

## LEGAL DISCUSSION

### I

#### **THE QUESTION PRESENTED IS WHETHER SECTION 17538.4 PRESENTLY AND INEVITABLY VIOLATES THE DORMANT COMMERCE CLAUSE.**

As is evident from the brief of the Attorney General, the standard to be applied when there is a facial challenge to a statute has been stated in different ways. The Attorney General quotes three different standards: (1) the standard originally stated in *Pacific Legal Foundation v. Brown* (1981) 1084, 1081-1082 [172 Cal.Rptr. 487, 624 P.2d 1215] and reiterated in *Tobe v. City Ana* (1995) 9 Cal.4<sup>th</sup> 1069, 1084 [40 Cal.Rptr.2d 402, 892 P.2d 1145] (brief of the Attorney General at 6) — the *Pacific Legal Foundation* standard which Friendfinder submits is the proper standard; (2) a standard used by the

Ninth Circuit in *S.D. Myers, Inc. v. San Francisco Human Rights Commission* (9<sup>th</sup> Cir., June 14, 2001) 01 C.D.O.S. 4894, 4896 (*Ibid.*) that, as stated in the *Myers* opinion, derives from *United States v. Salerno* (1987) 481 U.S. 739, 745 [107 S.Ct. 2095, 95 L.Ed.2d 697] (see 01 C.D.O.S at 4895); and (3) a truncated statement tacked on as an addendum to the *Pacific Legal Foundation* standard in *People v. Hsu* (2000) 82 Cal.App.4th 976, 982 [99 Cal.Rptr.2d 184] (“In short, a facial challenge must be rejected unless no set of circumstances exists in which the statute can be constitutionally applied”) which, although without citation in *Hsu*, is also derived from *Salerno*, as shown below. (See the brief of the Attorney General at 3 and 11.) In addition, other formulations have been stated. (See, e.g., *Clare v. State Board of Accountancy* (1992) 10 Cal.App.4th 294, 304 [12 Cal.Rptr.2d 481] (“its unlawful application must be substantial and real when judged in relation to the statute’s plainly legitimate sweep”) and *California State Employees’ Association v. State of California* (1988) 199 Cal.App.3d 840, 846 [245 Cal.Rptr. 232], discussed below.)

The problem of multiple statements of the applicable standard is exacerbated by truncated quotations that take language out of

context. This is the problem with standard (3) above. The truncation did not matter in *Hsu*, but, as discussed below, the Attorney General argues that the truncated quotation means something contrary to the meaning when read in the original context.

Friendfinder submits that the proper standard to be applied in this case is stated in *Pacific Legal Foundation*, supra. In fact, that standard is functionally equivalent for the purposes of this case to the other standards, including the *Salerno* standard when that standard is fully stated.

In *Pacific Legal Foundation*, the court ruled that the State Public Employment Relations Board authorized by statute could co-exist with the State Personnel Board created by the state constitution. The standard for evaluating a facial challenge to the statute was thus stated:

“To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute, or as to particular terms of employment to which employees and employer may possibly agree. Rather, petitioners must demonstrate that the act’s provisions *inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.*”  
(second emphasis added)

It is apparent from this context what the Supreme Court had in

mind. There was in that case no presently existing and fatal conflict between the statute and the Constitution. The possibility, based on future hypothetical situations, that a conflict might arise would not serve to invalidate the statute. Such a conflict was not inevitable. Statutory and/or constitutional interpretation might be employed to avoid any fatal conflict.

As demonstrated in Friendfinder's original Respondents' Brief and below, the situation is different here. There is no way to interpret § 17538.4 so as to avoid constitutional infirmity: the statute's content and positioning requirements are too definite and specific for interpretation; its expansive geographical reach cannot be restricted by any reasonable interpretation given the nature of the Internet and Internet businesses; and there is no way to add a notice or knowledge element without judicially inserting into the statute an entirely new provision. There is a present fatal conflict between § 17538.4 and the dormant commerce clause when the *Healy* test is applied. The conflict is “inevitable” because, given the expansive geographical reach of § 17538.4, there is no way presently conceivable to avoid it (e.g., speculation in the brief of the Attorney General’s at page 8 of his brief, that email advertisers “can ascertain the geographical

location of recipients of their messages,” is contrary to established facts about the Internet set forth at pp. 17-18 of Friendfinder’s original Respondents’ Brief and the existence of “fictitious” email accounts such as Hotmail as discussed below.)

The reasoning set forth above is supported by decisions that have closely examined statutes facially challenged. In *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4<sup>th</sup> 307, 347 [66 Cal.Rptr.2d 210, 940 P.2d 797], dealing with legislative restrictions of abortion, the court found the statute there in issue to be unconstitutional and, after a detailed review of various standards, ruled that *Pacific Legal Foundation* and *Tobe*:

“...make it clear that a law may not be held unconstitutional simply because those challenging the law may be able to hypothesize some instances in which application of the law might be unconstitutional. In each of these cases, the court found that the statute in question clearly was constitutional in its general and ordinary application, and explained that such a law could not be struck down ‘on its face’ merely because there might be some instances in which application of the law might improperly impinge upon constitutional rights.”

Again, in *Clare v. State Board of Accountancy* (1992) 10 Cal.App.4th 294, 304 [12 Cal.Rptr.2d 481], the court held (inner quotation marks and citation omitted):

“A statute will be declared invalid in its entirety only when

its scope cannot be limited to constitutionally applicable situations except by reading in numerous qualifications and exceptions, i.e., rewriting it....”

As discussed below, an attempt to save § 17538.4 by rewriting it would require numerous qualifications and exceptions even if such a reading were possible.

We turn now to the standards for facial challenge derived from *Salerno*, supra. As stated in *Salerno* at 481 U.S. 745, one who challenges a statute on its face:

“must establish that no set of circumstances exists under which the Act would be valid. The fact that the ... Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”

It is apparent that, insofar as this case is concerned, the language used by the United States Supreme Court (“might operate unconstitutionally under some conceivable set of circumstances”) makes the *Salerno* test the equivalent of the *Pacific Legal Foundation* test applicable to California (“hypothesize some instances in which application of the law might be unconstitutional”). Problems have arisen, however, because some commentators and courts, usually as shorthand, have truncated the language so that only the first phrase

remains: (e.g., the language in *Hsu* at 82 Cal.App.4th 982, repeatedly quoted by the Attorney General that “In short, a facial challenge must be rejected unless no set of circumstances exists in which the statute can be constitutionally applied.”)<sup>3</sup>

When fully set out, both the *Pacific Legal Foundation* standard and the *Salerno* standard mean the same thing, at least in the context of this case. A statute is presumptively valid. That presumption is not rebutted by imagining a set of hypothetical set of circumstances in which someone might try to apply the statute so as to infringe upon another's rights. If an actual case were to arise where such an infringement appeared, interpretation of the statute could possibly save it. When, however, the statute as written inevitably conflicts with a constitutional prohibition, the statute will be declared to be invalid.

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<sup>3</sup> The confusion was explored, but, unfortunately, not clarified in *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 166-168 [77 Cal.Rptr.2d 676]. (See also *City of Chicago v. Morales* (1999) 527 U.S. 41, 55-56, n. 22 [119 S.Ct. 1849, \_\_\_ L.Ed.2d \_\_\_]; (rejecting the dissent's argument that “state courts must apply the restrictive *Salerno* test”); *Washington v. Glucksberg* (1997) 521 U.S. 702, 739 [117 S.Ct. 2302, 138 L.Ed.2d 772] (“The appropriate standard to be applied in cases making facial challenges to states statutes has been the subject of debate within this Court” — concurring opinion of Justice Stevens).)

For example, in *California Restaurant Assoc. v. Henning* (1985) 173 Cal.App.3d 1069, 1077 [219 Cal.Rptr. 630], relied upon by the Internet Alliance in its brief at 9, the court held that a statute giving the Labor Commissioner the power to issue subpoenas without judicial review was unconstitutional:

"The defects from which section 93 suffers are not hypothetical. As identified by plaintiff they are clear and present in every instance in which the Commissioner issues an administrative subpoena. We therefore conclude that section 93 is unconstitutional on its face and as applied. (See *Pacific Legal Foundation v. Brown*, supra, 29 Cal.3d 168 at pp. 180-181...)"

This was, indeed, the standard properly applied in *Hsu* and in both *S.D. Myers, Inc. v. San Francisco Human Rights Commission* (9<sup>th</sup> Cir., June 14, 2001) O1 C.D.O.S. 4894 and *Hatch v. Superior Court* (2000) 80 Cal.App.4<sup>th</sup> 170 [94 Cal.Rptr.2d 453], all repeatedly cited by the Attorney General. Both *Hsu* and *Hatch* involved Penal Code § 288.2, which prohibits using the Internet to send sexually arousing materials to a minor with the intent of arousing sexual desires. Both defendants were Californians charged with sending such materials to a Californian. In each case, the court explained that, given limits on the reach of criminal prosecution, there was no

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possibility that the statute could or would be enforced outside the state. See *Hsu* at 82 Cal.App.4th 985, *Hatch* at 80 Cal.App.4th 196-197. Here, because of the absence of geographical indicators in Internet e-mail addresses, an Internet advertiser who wanted to comply with state regulation would have to try to follow the regulations of every state, including those imposed by California, as to all e-mail messages, including those that, were the full facts to be ascertainable, did not involve California in the slightest.

In *Myers*, the court found two ways to read the San Francisco ordinance and adopted a "narrow reading." 01 C.D.O.S at 4896. The *Myers* court was unimpressed by "speculation" that "[c]onflicts would arise when other local jurisdictions define [terms] in ways that could not be reconciled with the City's requirements" when there was no evidence of any such conflict.

The situation is very different here. First, there is now in existence a Pennsylvania statute that imposes requirements on unsolicited email advertising that overlap those imposed by § 17538.4 but with clashing mandates, prohibitions, applications and exceptions. The result of this overlap is a complicated and dissonant structure that is mind boggling. Even worse, in *Myers* only two, or,

at worst, a small number of jurisdictions could possibly be involved, while the Internet, in which geography is dissolved, would require an advertiser to simultaneously comply with every state's statute. There is no way to stop with just California and Pennsylvania. If the statutes of any state is constitutionally valid, so must be the statutes of all. There is a presently existing and painful dissonance that threatens to become an unbearable pandemonium unless the dormant commerce intervenes. The single subject line of an e-mail is not appropriate for State by State regulation.

## II

### **A STATE STATUTE VIOLATES THE DORMANT COMMERCE CLAUSE IF IT CONTROLS COMMERCE WHOLLY EXTRATERRITORIAL TO THE STATE AND THE PRACTICAL EFFECT OF INCONSISTENT STATUTES WOULD BE TO STIFLE SUCH COMMERCE.**

The proposition stated in the point above was demonstrated in pages 8-17 of Friendfinder's original Respondents' Brief. Here, we answer arguments raised by the Attorney General.

The Attorney General argues that the Washington court in *State v. Heckel* (2001) \_\_\_\_ Wa. \_\_\_\_, [24 P.3d 404, 411] characterized the dormant commerce clause prohibition of imposition of extraterritorial reach and inconsistent state regulation as "two 'unsettled and poorly understood' aspects of the dormant Commerce Clause analysis." (Brief of the Attorney General at 20). The Attorney General is in error. The language "unsettled and poorly understood" was quoted by the Washington Court from the defendant's brief. Although prohibitions against inconsistent state regulation and extraterritorial reach may sometimes be difficult to apply to particular fact situations (as with all constitutional prohibitions), they are neither unsettled nor poorly understood. They are, rather, designed to achieve the

constitutional mandate of an unimpeded flow of interstate commerce free from local regulation that might shut that commerce down, reserving to Congress the power to regulate nationally when such regulation is appropriate.

The Attorney General also argues that prohibitions against extraterritorial reach and inconsistent state regulation are best understood not as independent tests, but rather as "factors within the *Pike* balancing test." (Brief of the Attorney General at 20-21.) As authority for the argument, the Attorney General relies on a statement in the decision, *Heckel*, *supra*, at 24 P.3d 411, and *C & A Carbone, Inc. v. Town of Clarkstown* (1994) 511 U.S. 383, 390 [114 S.Ct. 1677, 128 L.Ed.2d 399], said to stand for the proposition that there are "in dormant Commerce Clause context only 'two lines of analysis...'" (Brief of the Attorney General at 20-21.)

In support of the statement in *Heckel*, (which is there *obiter dictum* because "the Act survives both inquiries" — 24 P.3d at 411), the Washington court cited only two law review articles, principally *Goldsmith & Sykes*, "The Internet and the Dormant Commerce Clause," 110 Yale L.J. 785 (2001) that advocates an approach to the dormant commerce clause other than that declared by the United

States Supreme Court, namely a new approach calling for a balancing of economic interests that has been bruited about in academia but found unacceptable by the courts, which understand that it would turn the formulation of legal doctrine over to economic experts retained by wealthy litigants.

As to *C & A Carbone*, supra, the Attorney General has inserted the word "only" where such an insertion is not justified. What the Supreme Court said was "***For this inquiry***, our case law yields two lines of analysis... As we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test." (511 U.S. at 390, emphasis added.) In *CTS Corp. v. Dynamics Corp. of America* (1987) 481 U.S. 69, 87 [107 S.Ct. 1637, 95 L.Ed.2d 67], on the other hand, on which the Attorney General also relies, the Supreme Court declared that:

"... as the volume and complexity of commerce and regulation have grown in this country, the Court has articulated a ***variety of tests*** in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulation it prohibits. (emphasis added)

Moreover, the *CTS Corp.* opinion reiterated the rule that:

"This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations." 481 U.S. at 88.

It is true, as the Attorney General states in his brief at 24, that the *CTS Corp.* opinion did not find inconsistent regulation there to be present. But this was not because of a repudiation of its earlier statements of doctrine, as the Attorney General suggests (quoting from a dissenting opinion), but because: "So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." 481 U.S. at 89. Moreover, corporations are "entities whose very existence and attributes are a product of state law." *Ibid.* The circumstances are very different here. Internet advertisers will be subject to the law of every state. Internet advertising exists prior to the intervention of any law, although it may be subject to regulation if that regulation can be constitutionally imposed.

We note parenthetically that courts have found violations of the dormant commerce clause on the sole grounds that the state statute operates extraterritorially and controls commerce wholly outside the State (e.g. *Air Transport Association of America v. City and County of San Francisco* (N.D. Cal. 1998) 992 F.Supp. 1149.) Ultimately each

case must be evaluated on its own terms.

A proper view of the dormant commerce clause as an instrument for the maintenance of the free flow of interstate commerce puts the separate branches in perspective. Discrimination against interstate commerce violates when it stifles such commerce; excessively burdensome regulation violates when it stifles such commerce; improper extraterritorial reach and/or inconsistent state regulations violate when they stifle such commerce. If some new constellation of factors involved in state regulation stifled interstate commerce, that new constellation would also violate the dormant commerce clause. It is not a matter of doctrine but the purpose of doctrine that should be the focus of attention. Here, the focus of attention should be on the free flow on interstate commerce in the form of Internet advertising. There is nothing wrong about such advertising in and of itself. It may be proper to regulate such advertising but not if the inadvertent result of regulation is to stifle it altogether. Because California's approach of regulating content and positioning of information, if generalized, with variations, to other states, would stifle Internet advertising altogether, the California statute violates the dormant commerce clause.

### III

**THERE IS A PRESENTLY EXISTING, INEVITABLE  
CONFLICT BETWEEN SECTION 17538.4 AND THE  
DORMANT COMMERCE CLAUSE BECAUSE SECTION  
17538.4 CONTROLS COMMERCE WHOLLY  
EXTRATERRITORIAL TO CALIFORNIA AND BECAUSE  
INCONSISTENT STATUTES OF OTHER STATES WOULD  
STIFLE UNSOLICITED E-MAIL ADVERTISING**

The *Pacific Legal Foundation* standard set forth, supra, requires § 17538.4 to be declared unconstitutional if there is an existing, fatal and inevitable conflict between it and a constitutional provision. This includes a conclusion that the statute cannot be salvaged by interpretation, severance or reformation, a point discussed below.

As demonstrated in Friendfinder's original Respondents' Brief, the e-mail provisions of § 17538.4 presently and fatally conflict with the dormant commerce because they require specific characters ("ADV:" or "ADV:ADLT") to be inserted as the first characters in the very limited space of the subject line of an e-mail message, specific information to be inserted in the first text of the body of the message,<sup>4</sup>

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<sup>4</sup> The extracts from § 17538.4 attached as Appendix A to the brief of the Attorney General do not include the requirement from subsection

because of statute reaches "any business or organization qualified to do business in this state" and because there is liability when an e-mail message is delivered to a California resident without any element of knowledge or notice of such residency. The "practical effect" of the statute is to require nearly every Internet advertiser in the United States to conform to California's statute as to all e-mail advertisements. Because of existing conflicts with a similar statute enacted by Pennsylvania (but with complicated differences in detail) and because of the possibility of conflicts with additional similar statutes that could be enacted by other states if the dormant commerce clause does not intervene, the "practical effect" is to interdict unsolicited commercial e-mail advertisements altogether, even though such an interdiction is not the evident purpose of § 17538.4 and even though such advertisements are a legitimate form of commercial speech entitled to constitutional protection.

The problem is acute in Internet commerce because "The

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(b) that "the statement [informing the recipient of a valid return address to which the recipient may e-mail notifying the sender not to e-mail any more documents] *shall be the first text in the body of the message.*" (emphasis added)

Internet is wholly insensitive to geographical distinctions." *American Libraries Association v. Pataki* (S.D.N.Y. 1997) 969 F.Supp. 160, 171. The geographical locations of recipients of messages from "telemarketers, direct mail marketers, mail order firms, and radio and television advertisers" (brief of the Attorney General at 24) are all ascertainable; at most two states' regulations are involved. For Internet advertisers, as shown above, the regulations of all the states must be followed if any one is valid.

The presently existing conflict between California's statute and 18 Pa.C.S.A. § 5903 (Appendix A hereto) illustrates the difficulty:

- The "adult" provisions of California's statute apply to unsolicited advertising material for the "lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that may be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older" while the "adult" provisions of Pennsylvania's statute apply only to electronic communications that contain "explicit sexual materials" — but "explicit sexual materials" is defined broadly to include, *inter alia*, printed matter however reproduced that explicitly describes "sexual excitement" and pictures, photographs, drawings or visual images of

nudity, including the showing of bare buttocks or a female breast with less than a fully opaque covering of any portion below the top of the nipple. (*See* 18 Pa.C.S.A. §§ 5903 (a.1), (c) and (d))

- Pennsylvania requires the term "ADV-ADULT" at the beginning of the subject line ("The area of an electronic communication that contains a summary description of the content of the message" — *Id.*, § 5903(b)) while California requires the characters "ADV:ADLT" at the beginning of the same subject line.

- California has exceptions for documents addressed to a recipient with whom the sender has an existing personal or business relationship or which are sent at the request or with the express consent of the recipient, while Pennsylvania does not provides for these exceptions but exempts from its statute's requirements historical societies, museums, and certain libraries, including "any archive or library under the supervision and control of the Commonwealth or a political subdivision." (*Id.*, § 5903(j))

We anticipate that California does not want a California travel agent sending Internet advertisements to existing customers to have to contend with restrictions against showing bare buttocks or a female breast not fully covered below the nipple if one existing customer

should happen to be a Pennsylvania resident. Comity between states requires this court to rule that California's statute infringes on the dormant commerce clause. Otherwise, we will have no cause to protest if a Pennsylvania organization complains about the travel agent's advertisement as violative of Pennsylvania law.

"[I]f [California and Pennsylvania] may enact a ... statute [regulating the content and positioning of information in unsolicited e-mail advertising], ... so may every other State in the Nation." *See Healy v. The Beer Institute* (1989) 491 U.S. 324, 339 [109 S.Ct. 2491, 105 L.Ed.2d 275]. The conflicts between California's statute and Pennsylvania's statute could foment an unending stream of litigation. Other states are equally entitled to enact their own

specific legislation.<sup>5</sup> The result, at least for the Internet advertiser who heeds the law, is to shut down his, her or its operations.

#### IV.

### **SECTION 17538.4 IS NOT SAVED BY IMAGINING A DIFFERENT STATUTE THAT COULD PROPERLY BE APPLIED TO FRIENDFINDER.**

A major argument of the Attorney General in opposition to the dormant commerce clause challenge begins on page 7 of his brief ("There plainly exist circumstances in which the statute at issue here can be applied constitutionally") and ends on page 11 ("Here, there exist a set of circumstances — indeed, an extensive variety of

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<sup>5</sup> We note some complications arising from existing statutes. Although California requires only a "valid sender operated e-mail address" for notification purposes (§ 17538.4(a)(2)), Nevada requires "the legal name, complete street address and electronic mail address of the person transmitting the electronic mail" (Nev. Rev. Stat. § 41.730(c)(1)) and authorizes an action for \$10 per item and attorney's fees and costs if there is a violation (*Id.*, § 41.730(2)). West Virginia requires that each e-mail message sent to an address that the sender "has reason to know is held by a West Virginia resident" must "clearly provide the date and time the message is sent [and] the identity of the person sending the message." Michie's West Virginia Code Ann., § 46A-6G-2. Idaho authorizes a suit for statutory damages but establishes an exception for a person who provides free e-mail access and "as a condition of providing such access, requires such users to receive unsolicited advertisements." Idaho Code, Title 48, §§ 48-603(E)(4) and (5)(c).

circumstances — in which the statute at issue does not violate the dormant Commerce Clause"). Despite the Attorney General's reference to "the statute at issue," examination of the circumstances he suggests demonstrates that he is not talking about § 17538.4, but one or more imagined statutes that might constitutionally be applied to Friendfinder under the facts of this case. Whatever the merits of those imagined statutes, his argument does not save the actual "statute in issue."

The Attorney General argues that, because e-mail advertisers can sometimes determine the geographical location of holders of e-mail addresses, some companies "might well send e-mail only to people located within a particular geographical area." This argument is fallacious. It is often impossible to ascertain the geographical location of holders of e-mail messages. For example, the popular Internet service, Hotmail, allows any Internet user to establish a fictitious e-mail address (e.g. its\_me\_tom@hotmail.com) and there is no legal way, short of serving a subpoena on Hotmail, of ascertaining the recipient's actual Internet Service Provider. (See *Hotmail Corp. v. Van\$ Money Pie Inc.* (N.D. Cal. 1998) 47 U.S.P.Q.2d 1020, 1021;

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there are a plethora of other Internet services offering fictitious e-mail addresses, including yahoo.com, angelfire.com and addresses collected at www.mail.com.) This fact highlights the total lack of any notice or knowledge element in § 17538.4 (*see* § 17538.4(d): "this section shall apply when the unsolicited e-mailed documents are delivered to a California resident..."). In contrast, for example, the Washington statute at issue in *State v. Heckel* (2001) 24 P.3d 404, 407, n. 6, discussed below, does have a knowledge element ("a person knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address").

The Attorney General also argues that an e-mail advertiser could "use only those addresses whose Internet Service Providers ("ISP") serve solely in-state populations." (Brief of the Attorney General at 8.) Were § 17538.4 to remain in force, an advertiser who complied with the statute might well have to resort to such a limitation. But, as recognized by the United States Supreme Court, "[s]everal major national 'online services' such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access" to the

Internet." *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 850 [117 S.Ct. 2329, 128 L.Ed.2d 874].

The Attorney General would limit the right to send e-mail advertisers to "advertisers who seek [a] ... limited, local clientele," (brief of the Attorney General at 9), a restriction of free speech that was not even intended by the legislature and that has no discernible rational basis.

The fact that an entirely different statute might be written that would impose requirements on "a California-based company [that] used a computer located in California to send e-mail to a California resident who received the e-mail in California" (brief of the Attorney General at 9) does not speak to *this statute* with its expansive application to "any business or organization qualified to do business in this state." Section 17538.4(d). The same error infects the "set of circumstances" posited by the Attorney General as to "an e-mail transaction involving a California corporation as sender and a California resident as recipient, taking place entirely within California." (Brief of the Attorney General at 10.) The Attorney General is speculating about statutes that do not exist.

The Attorney General is attempting to employ a truncated

version of the *Salerno* standard applicable to facial challenges to statutes to sustain an argument that has no genuine basis in that standard. The attempt should be rejected.

## V

### **SECTION 17538.4 CANNOT BE SALVAGED BY INTERPRETATION, SEVERANCE OR REFORMATION.**

The Internet Alliance suggests either that this court should salvage § 17538.4 through interpretation, severance or reformation or remand to the trial court for such a purpose. (Brief of the Internet Alliance at 9-12.) There is, however, no suggestion about such a salvage operation could be conducted. There is no construction of § 17538.4 that "will render it constitutional." *Id.* at 9. Its content and positioning requirements, its expansive geographical reach and the absence of geographical indicia in the vast majority of e-mail addresses are not susceptible of a saving interpretation.

Nor does the Internet Alliance suggest what portion or portions of the e-mail provisions of § 17538.4 could be reasonably severed. The requirements as to informational content and positioning are the statute's essence and it is these requirements that violate the dormant commerce clause. "When, however, to sustain the remaining

valid portion would accomplish a result different from that intended by the Legislature, the whole will be declared invalid." 7 Witkin, *Summary of California Law* (9<sup>th</sup> ed. 1988), "Constitutional Law," § 88 at p. 139.

Although the Internet Alliance declares: "We disagree with Respondents' view that wholesale revisions would be necessary to save the statute or would involve the court in forbidden encroachments on the legislative function (Respondents' Brief at 30)," there is again no suggestion about appropriate revisions. If they have not been presented to this court, despite multiple briefings, there is no expectation that a busy trial court could do better.

The e-mail provisions of § 17538.4 are an integrated system of regulations. It is the central features of that system that infringe on the United States Constitution. Interpretation, severance and reformation are not possible. The judgment should be affirmed.

## VI

### **ARGUMENTS ABOUT THE EVILS OF SPAM AND FRAUD ARE ONLY REMOTELY CONNECTED TO THE CHIEF ISSUES IN THIS CASE.**

The briefs of appellant and *amicus curiae* unite in denouncing unsolicited e-mail advertisements, often called "spam" or "junk e-mail." As stated in Friendfinder's opening Respondents' Brief at p. 3, n. 2, Friendfinder does not send unsolicited e-mail advertising. Nor does Friendfinder feel obliged to defend unsolicited e-mail advertising.

Just as important, however, is the fact that there is nothing in § 17538.4 that would seriously impact the volume of unsolicited e-mail advertising. The statute only requires advertisers to insert specified information in the subject line and first text of the advertisements. Advertisers with the means to comply with state statutes will be the ones least likely to be deterred by their complexities. Advertisers who don't care or who consider themselves unreachable will not be deterred at all.

If § 17538.4 is declared to be constitutionally valid, the chief beneficiaries will not be Internet consumers but, as Friendfinder's attorney stated in the trial court (Transcript of Proceedings, March 30,

2000 at 11:13-18), attorneys who will bring actions predicated on the statute against "some poor shnooky company in New York [that] doesn't know the law in California and sends out an email, one email..."

Even more remote are the denunciations against forged domain names, forged header, disguised return addresses, fraudulent information, fraudulent activity and deception liberally sprinkled through the briefs of *amicus curiae*. The only provision in § 17538.4 even possibly directed at truthfulness is the requirement that requiring a "valid sender operated e-mail address that the recipient ... may e-mail to notify the sender not to e-mail any further unsolicited documents." (§ 17538.4(a)(2).) Even here, however, an advertiser could maintain a fictitious address at Hotmail or an equivalent provider of fictitious e-mail addresses.

It is, above all, the absence of provisions in § 17538.4 directed at fraud, forgery and deception that distinguishes this case from *Heckel*, supra, where the Act, reproduced at 24 P.3d 407, n. 6, prohibited misrepresentation of point of origin or the transmission path of commercial e-mail and/or the incorporation of false or misleading information in the subject line. It was these "truthfulness

requirements" that could not be the subject of inconsistent state regulation. 24 P.3d at 412.

Friendfinder is an established, enduring enterprise that wants an efficient and honest Internet. If the prevention of fraud, forgery and deception is the goal, Friendfinder supports proper legislation that will combat those evils.

### **CONCLUSION**

For the foregoing reasons, and those stated in Friendfinder's original Respondents' Brief, Friendfinder submits that the decision of the trial court was proper and should be affirmed.

Dated: August 6, 2001

Respectfully submitted,  
ROTHKEN LAW FIRM

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Ira P. Rothken, Esq.

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Robert Kovsky, Esq.

Attorneys for Defendants and  
Respondents Friendfinder, Inc.,  
Andrew B. Conru, and Conru  
Interactive, Inc.

**APPENDIX**  
(18 Pa.C.S.A. § 5903)

**PROOF OF SERVICE**

**Ferguson v. Friendfinder, Inc., et al.**  
**California Court of Appeal, First Appellate District, Division Two**  
**Case No. A092653**

I am over the age of 18 years, employed in the county of Marin, and not a party to the within action; my business address is 1050 Northgate Drive, Suite 520, San Rafael, California, 94925.

On August 6, 2001, I served the within:

**RESPONDENTS' ANSWER TO BRIEFS OF AMICUS  
CURIAE**

on the parties in said action and on amici curiae and on the Attorney General of California and the District Attorney of San Francisco (pursuant to Rule 16(d) of the California Rules of Court) by US MAIL by placing the document listed above in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at San Rafael, California, addressed as set forth below:

Mr. John L. Fallat  
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District Attorney of San Francisco  
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San Francisco, CA 94103

I also delivered five copies of such brief to the Supreme Court of the State of California and deposited one copy with the clerk of the Superior Court of California, City and County of San Francisco for delivery to Hon. David A. Garcia.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 6, 2001, at San Rafael, California.

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JARED R. SMITH