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The Spam Sham of White Buffalo Ventures: A Proposal for Cities and Municipalities to Regulate Spam on a Public Network

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COMMENTS

THE SPAM SHAM OF *WHITE BUFFALO VENTURES*: A PROPOSAL FOR CITIES AND MUNICIPALITIES TO REGULATE SPAM ON A PUBLIC NETWORK

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In 2004, President Bush announced a policy goal of bringing affordable, broadband technology "to every corner of [the] country by the year 2007."[1] Nearly three years later, the United States is still short of this goal of universal broadband coverage.[2] Increasingly, cities and municipalities are helping to bridge this gap by providing free or low-cost

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1. Remarks to the American Association of Community Colleges Convention in Minneapolis, Minnesota, 18 WEEKLY COMP. PRES. DOC. 695 (Apr. 26, 2004).

2. *See* JOHN B. HORRIGAN, PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2006, at i (2006), *available at* http://www.pewtrusts.org/pdf/PIP_Broadband_0506.pdf (noting that as of March 2006, 42% of all adults subscribed to high-speed Internet services). Consumer advocates argue that high prices have impeded the growth of broadband, while the Baby Bells and cable companies counter that universal broadband is economically unwise in today's regulatory environment. *Compare* MARK COOPER, CONSUMER FED'N OF AM., EXPANDING THE DIGITAL DIVIDE & FALLING BEHIND ON BROADBAND: WHY A TELECOMMUNICATIONS POLICY OF NEGLECT IS NOT BENIGN 1 (2004), *available at* http://www.consumerfed.org/pdfs/digitaldivide.pdf (arguing that the Baby Bells and cable TV companies, as the two providers of broadband, share a duopoly that keeps broadband prices high), *with* Steven Titch, *Market Failure in Broadband?*, IT&T NEWS, Oct. 1, 2005, *available at* http://www.heartland.org/Article.cfm?artId=17746 (noting that the United States ranks low in per capita broadband penetration because the nation is large and less densely populated, resulting in high costs in building and maintaining a nationwide system of fiber optic lines). Whoever is to blame, the United States continues to fall behind other developed countries in providing universal broadband access. *See* WebSiteOptimization.com, US Drops to 20th in Broadband Penetration, http://www.websiteoptimization.com/bw/0607/ (last visited Feb. 13, 2007) (noting that the United States fell from seventeenth to twentieth in broadband penetration world rankings in 2006).

broadband services to local businesses and residents.[3] Provo, Utah has owned and operated a fiber optic network for over nine years.[4] Likewise, Anaheim, California recently unveiled a wireless network that will eventually cover the entire city.[5] Other major cities that will soon provide broadband services to city residents include Philadelphia,[6] Tempe,[7] and New Orleans.[8]

As cities that provide free or low-cost broadband (public ISPs) flourish,[9] they will search for ways to promote efficiency and productivity on their networks.[10] In so doing, public ISPs will inevitably come face to face

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3. *See* HAROLD FELD, ET AL., CONNECTING THE PUBLIC: THE TRUTH ABOUT MUNICIPAL BROADBAND 1 (2005), *available at* http://www.mediaaccess.org/Municipal Broadband_WhitePaper.pdf (explaining how hundreds of local governments have recently explored ways to provide free municipal networks); Megan Barnett, *Tech Trends: In Some Towns, Cheaper Online Access*, U.S.NEWS.COM, Aug. 2, 2005, http://www.usnews.com/usnews/biztech/articles/050802/2techtrends.htm (describing activities in small towns across America to provide free or low-cost public Internet); *see also infra* notes 4-8 and accompanying text. Public officials have increasingly adopted a mindset that they can play a role in advancing universal broadband access. *See, e.g.*, *How Internet Protocol-Enabled Services Are Changing the Face of Communications: A View from Government Officials: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. 48-49 (2005) [hereinafter *Internet Protocol-Enabled Services Hearing*] (statement of David C. Quam, Director, Federal Relations, National Governors Association) (arguing that states should help advance the goal of universal broadband). This has led to a wave of cities building or contracting to build public networks.

4. *See Internet Protocol-Enabled Services Hearing*, *supra* note 3, at 5-6 (statement of Hon. Lewis K. Billings, Mayor, Provo City, Utah) (describing the efforts at Provo Utah to build a city-wide fiber optic network to benefit schools, businesses, and the community).

5. Matt Richtel, *A World Beyond Dial-Up: EarthLink Hurls Itself Into a Heady New Telecom Universe*, N.Y. TIMES, Aug. 18, 2006, at C1.

6. *See* Sewell Chan, *New York Plans to Examine Creating a Broadband Net*, N.Y. TIMES, July 7, 2006, at B2. The rates in Philadelphia will be as low as $10 per month. Michael Hinkelman, *Earthlink Exec Is Sky-High on Philly*, PHIL. DAILY NEWS, Oct. 5, 2005, at 5.

7. *See* Chan, *supra* note 6.

8. *See* Richtel, *supra* note 5, at C2.

9. *See* FELD ET AL., *supra* note 3, at 4 (noting that hundreds of cities have explored municipal broadband in 2004 and 2005 alone). The fact that municipal broadband is flourishing does not necessarily mean that public Internet is a good idea. *See* NEW MILLENNIUM RESEARCH COUNCIL, NOT IN THE PUBLIC INTEREST—THE MYTH OF MUNICIPAL WI-FI NETWORKS, at iv (2005), *available at* http://www.newmillennium research.org/archive/wifireport2305.pdf (arguing that "beneath the positive media coverage and glowing press announcements [of municipal broadband] are troubling signs that these publicly held networks can result in less than anticipated outcomes"). Currently, advocates and opponents of public Internet are battling in state and federal legislatures over the future of municipal broadband. *See* FELD ET AL., *supra* note 3, at 1. This topic, although critical to the future of public ISPs, requires a detailed analysis and is beyond the scope of this Comment.

10. *See* FELD ET AL., *supra* note 3, at 8-9 (noting that public ISPs are attractive to customers and businesses because they offer free, efficient Internet service); *see also* JOSEPH L. BAST, MUNICIPALLY OWNED BROADBAND NETWORKS: A CRITICAL

with spam. Spam[11] continues to clog the arteries of e-mail traffic on the Internet[12] and imposes significant costs on businesses that rely on the Internet for e-business and communications.[13] What better way for a public ISP to encourage the use of public Internet than by prohibiting spam on its network?[14]

The ability of a public ISP to do this may be limited by the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003,[15] the federal law that preempts the ability of a state to regulate nonfraudulent and nonmisleading spam (legitimate spam).[16] However, the Fifth Circuit's 2005 decision in *White Buffalo Ventures, LLC v.*

EVALUATION 5-6 (2004), *available at* http://www.heartland.org/pdf/15842.pdf (noting that public ISP proponents argue that free broadband spurs economic development and efficient Internet service).

11. The Federal Trade Commission formally defines spam as *unsolicited* commercial e-mail. 149 CONG. REC. S13,020 (daily ed. Oct. 22, 2003) (statement of Sen. McCain). However, some people think that spam is any *"unwanted"* e-mail that a consumer receives. *Reduction in Distribution of Spam Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 6 (2003) [hereinafter *House Judiciary Spam Hearings*] (statement of Jerry Kilgore, Att'y Gen. of Virginia). For purposes of this Comment, "spam" refers to the narrower class of commercial e-mail: unsolicited commercial e-mail communications.

12. *See* Tom Zeller Jr., *The Fight Against V1@gra (and Other Spam)*, N.Y. TIMES, May 21, 2006, § 3, at 1 (noting that 70% of all e-mail messages circulating on the internet are spam). The amount of spam on the Internet has remained consistent over the past few years. *See* Tom Zeller Jr., *Even in Vain, Swatting Spammers Feels Good*, N.Y. TIMES, Aug. 15, 2005, at C3 (noting that the amount of spam filtered by Postini in 2005 stayed the same as the previous year at 75%, while the amount for MessageLabs dropped from 83% to 67%).

13. *See* Gregg Keizer, *Data Worries Stunt E-commerce, Online Banking*, TECHWEB, June 23, 2005, http://www.techweb.com/wire/ebiz/164902296 (stating that spam could slow the development of e-commerce by as much as 3%). Although spam continues to proliferate, *see supra* note 12 and accompanying text, filters and user acceptance of spam have helped alleviate the spam crisis. *See* Logan G. Harbaugh, *Next-Gen Appliances Put Spammers in the Crosshairs*, INFOWORLD, Aug. 29, 2005, at 23, 23 (reporting that current filtering technology is so advanced that it can now eliminate 95% of all incoming spam); *see also* Memorandum from Deborah Fallows, Senior Research Fellow, Pew Internet & Am. Life Project 1 (Apr. 2005), *available at* http://www.pewInternet.org/pdfs/PIP_SPAM_Ap05.pdf (concluding that e-mail users are less annoyed with spam today than they were one year ago). Still, the spam that does trickle through filters continues to engender consumer distrust of e-mail, *see id.* at 2, an important factor that could slow the development of e-commerce, *see* Keizer, *supra*.

14. *See supra* notes 12-13 and accompanying text.

15. 15 U.S.C. §§ 7701-7712 (Supp. III 2003).

16. *See infra* Part I.B. Commentators on the CAN-SPAM Act have argued that the Act supersedes state laws restricting legitimate spam, but does not preempt state regulations dealing with fraudulent or misleading spam. *See, e.g.*, Jeffrey D. Sullivan & Michael de Leeuw, *Spam After CAN-SPAM: How Inconsistent Thinking Has Made a Hash Out of Unsolicited Commercial E-mail Policy*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 887, 895-97 (2004); Roger Allan Ford, Comment, *Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 375 (2005).

University of Texas at Austin[17] opens the door for such state regulations.[18] The Fifth Circuit held that the University of Texas at Austin, a *public* university, could prohibit spam on its server without being preempted by the CAN-SPAM Act.[19] This holding arguably supports a public ISP seeking to prohibit spam on its network.[20]

A public ISP interested in regulating spam thus faces two choices in the wake of *White Buffalo Ventures*: (1) ban all spam on its network under the Fifth Circuit's holding, or (2) comply with the CAN-SPAM Act.[21] Public ISPs cannot wait, however, for this judicial uncertainty to clear; they need to craft regulations today that will withstand tomorrow's legal challenges.[22] This Comment offers a legal approach to meet this need so that public ISPs can implement spam policies today that will ensure efficient public servers well into the future.[23]

This Comment begins with an overview of legal principles relevant to a public ISP regulating spam on its network. Next, this Comment describes the CAN-SPAM Act and the Fifth Circuit's decision in *White Buffalo Ventures* interpreting the scope of the CAN-SPAM Act's exemption and preemption provisions. This Comment then moves to a critical analysis of the *White Buffalo Ventures* decision. Finally, this Comment proposes a course of action for a public ISP seeking to formulate a viable spam policy in light of *White Buffalo Ventures*. This Comment proposes that a public ISP should adopt a hands-off approach that allows e-mail providers and filtering companies to continue to do what they do best: develop technology that stops spam from reaching e-mail accounts.

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17. 420 F.3d 366 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

18. *See generally infra* Part II (discussing the effect of *White Buffalo Ventures* on the preemption of state spam-blocking laws).

19. *White Buffalo Ventures*, 420 F.3d at 372-74.

20. *See infra* notes 144-52 and accompanying text.

21. *See infra* Part III.A.

22. Although some legal commentary has approved the Fifth Circuit's preemption holding, *see, e.g.*, Posting of Ethan Ackerman to Technology & Marketing Law Blog, http://blog.ericgoldman.org/archives/spam/ (Aug. 29, 2005, 22:00 EST); Posting of Lauren Gilman to Blogs at the Center for Internet and Society, http://cyberlaw.stanford.edu/blogs/gelman/archives/003227.shtml (Aug. 10, 2005, 10:29 EST), a closer inspection of the CAN-SPAM Act casts doubt on whether or not the court's approach will withstand future preemption challenges. *See infra* Part III.A. Since *White Buffalo Ventures* is the first litigation dealing with the preemptive effect of the CAN-SPAM Act, *see White Buffalo Ventures*, 420 F.3d at 371, future preemption suits will almost certainly arise.

23. *See infra* Part III.

I. THE LEGAL FOUNDATION FOR SPAM REGULATIONS ON A PUBLIC NETWORK: THE CONSTITUTION, THE CAN-SPAM ACT, AND THE *WHITE BUFFALO VENTURES* DECISION

A. Constitutional Principles Relevant to Spam Regulations

1. Preemption Law

Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which mandates that federal laws made pursuant to the Constitution "shall be the supreme Law of the Land."[24] There is some debate regarding whether preemption is a grant of power to Congress under the Constitution or a scheme of regulation under the Supremacy Clause.[25] Regardless of its origin, the practical effect of preemption is that when a state law conflicts with a federal law that is enacted pursuant to a constitutional grant of power, the state law is preempted.[26]

Over time, courts have defined three categories of preemption: express preemption, field preemption, and conflict preemption.[27] Express preemption occurs when Congress expressly defines the extent to which a federal law preempts state legislation.[28] Field preemption occurs when, on the face of a law, the "scheme of federal regulation . . . [is] so pervasive" that it can be inferred that Congress intended to occupy the field.[29] Even if Congress does not intend to occupy a field, conflict preemption may still occur if state and federal law naturally conflict with each other.[30]

Although preemption law has been criticized as lacking predictability or consistency,[31] there are several principles that can be gleaned from

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24. U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

25. *See* Viet D. Dinh, *Regulatory Compliance as a Defense to Products Liability: Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088-91 (2000). The Supreme Court has made sweeping statements that Congress has the power under the Constitution to preempt state law. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). However, constitutional law experts have criticized this generalization because Congress only has power to act within its enumerated powers, and preemption is not one of them. *See, e.g.*, Dinh, *supra*, at 2088. A more accurate characterization of preemption is that it is not a power of Congress, but a natural result that flows from the Supremacy Clause when an act of Congress conflicts with a state law. *See id.*

26. CHRISTOPHER R. DRAHOZAL, THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 94-95 (2004).

27. *See id.* at 95-96.

28. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78 (1990).

29. *Id.* at 79 (omission in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

30. *Crosby*, 530 U.S. at 372.

31. *See, e.g.*, William W. Bratton, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975) ("The Supreme Court . . . has not developed a uniform approach to preemption; its decisions in this area . .

preemption jurisprudence.[32] First, federal law should not preempt state law unless preemption is "the clear and manifest purpose of Congress."[33] Congressional intent should be determined through an incremental process.[34] The court should initially analyze the plain text of the statutory language.[35] If the plain meaning is not clear, the court can infer congressional intent by referring to the statute's structure[36] and to legislative history.[37] The legal community is divided, however, on the extent to which legislative history should be used to infer congressional intent;[38] some jurists endorse a sweeping review of legislative history,[39] while others ad-

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. [are] seemingly bereft of any consistent doctrinal basis."); Dinh, *supra* note 25, at 2085 ("[T]he Supreme Court's numerous preemption cases follow no predictable jurisprudential or analytical pattern.").

32. *See infra* notes 33-53 and accompanying text.

33. *See* Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992) ("[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis." (internal quotation marks omitted)).

34. *See infra* notes 35-37 and accompanying text.

35. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 895 (2000) (Stevens, J., dissenting) (noting that "the plain wording" of a clause "necessarily contains the best evidence of Congress' pre-emptive intent" (internal quotation marks omitted)).

36. *See id.* at 870-71 (majority opinion) (comparing a preemption provision and a saving provision to determine Congress' intent in the scope of the National Traffic and Motor Vehicle Safety Act of 1966); *see also Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in part and dissenting in part) ("The ultimate question in each case . . . is one of Congress's intent, as revealed by the text, *structure*, purposes, and subject matter of the statutes involved." (emphasis added)).

37. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 (1991); Hines v. Davidowitz, 312 U.S. 52, 79 (1941) (Stone, J., dissenting) (arguing that congressional intent is not only found by looking at the statute but also by analyzing the statute "in the light of its constitutional setting and its legislative history").

38. *See infra* notes 39-40 and accompanying text. *See generally* Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998) (describing the modern debate concerning the constitutionality of using legislative history to find congressional intent).

39. *See, e.g.*, *Mortier*, 501 U.S. at 610 n.4. Justice White, writing for the majority in *Mortier*, offered a ringing endorsement for using all available legislative materials to determine congressional intent:

> As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.

Id. at 611-12 n.4 (alteration in original) (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805)) (citation omitted). *But see id.* at 622 (Scalia, J., concurring) (arguing that Chief Justice Marshall would never support reaching into legislative history to determine congressional intent).

vocate for limited use due to its unreliability and tendency to be manipulated.[40]

The Supreme Court's decision in *Nixon v. Missouri Municipal League*[41] demonstrates how this principle of statutory construction is applied to a preemption provision in a telecommunications law.[42] In *Nixon*, a group of Missouri municipalities challenged a Missouri law that prohibited state subdivisions from providing telecommunications services.[43] The municipalities claimed that section 253 of the Telecommunications Act, which bans states from "prohibiting the ability of any entity to provide . . . telecommunications service[s],"[44] preempted the Missouri law.[45] The Court, in interpreting whether Congress intended for "any entity" to include state subdivisions, rejected a strict textual approach.[46] Instead, the Court looked to policy considerations, the structure of the statute, and legislative history to determine congressional intent.[47] The Court concluded that Congress did not intend for state subdivisions to fall under section 253, and declined to preempt the Missouri law in light of the presumption against preemption.[48]

A second principle governing preemption analysis is that courts recognize a "presumption against the pre-emption of state police power regulations."[49] This presumption only applies when Congress legislates "[i]n areas which the States have traditionally occupied" and not in a field where Congress has traditionally regulated.[50] Although federal law often intrudes upon state police powers,[51] the Court has refused to apply the presumption when a regulatory scheme fits squarely within federal pow-

40. *See generally id.* at 617-23 (Scalia, J., concurring) (describing the difficulty of culling congressional intent from committee reports and floor statements). Justice Scalia pointed out in *Mortier* that using legislative history in statutory construction is a relatively new phenomenon that Justice Jackson once described as a "'weird endeavor.'" *Id.* at 622 (quoting United States v. Pub. Util. Comm'n of Cal., 345 U.S. 295, 319 (1953)).

41. 541 U.S. 125 (2004).

42. *Id.* at 129.

43. *Id.*

44. 47 U.S.C. § 253 (2000).

45. *Nixon*, 541 U.S. at 129.

46. *See id.* at 132-33 ("The Eighth Circuit trained its analysis on the words 'any entity,' left undefined by the statute, with much weight being placed on the modifier 'any.' But concentration on the writing on the page does not produce a persuasive answer here.").

47. *See id.* at 131-41.

48. *Id.* at 140-41.

49. Cipollone v. Liggett Group, 505 U.S. 504, 518 (1992); *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

50. DRAHOZAL, *supra* note 26, at 111 (internal quotation marks omitted).

51. *Id.* at 113.

ers.[52] Even if the presumption is raised, it can be overcome if Congress has clearly manifested a purpose of preempting the state law.[53]

White Buffalo Ventures is the first case involving the scope of the CAN-SPAM Act's preemption provision, leaving this issue as an open question of law.[54] There is a line of dormant commerce clause decisions, however, that have considered whether spam regulations are an appropriate effectuation of state police powers.[55] These decisions established that state-level spam regulations constitute a legitimate use of the state police power.[56] The logical inference of this is that state-level spam regulations, as legitimate uses of state police power, are sufficient to trigger the presumption against preemption when federal law is in conflict.[57]

2. Commercial Speech Law

In addition to preemption, commercial speech law is relevant to a public ISP regulating spam on its server. The First Amendment provides that states cannot legislate in such a manner that restricts freedom of speech.[58] The Supreme Court first recognized commercial speech as a constitutionally protected form of speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[59] The Supreme Court recognized three interests underlying this protection: (1) the right of a speaker to advertise

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52. *See, e.g.*, United States v. Locke, 529 U.S. 89, 108 (2000) (holding that the presumption against preemption is not triggered when maritime trade regulations are involved); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001) (reaffirming that policing fraud against federal agencies is an exclusive federal power and not a state police power).

53. DRAHOZAL, *supra* note 26, at 112.

54. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 371 (5th Cir. 2005) ("To our knowledge . . . no court in this country has considered the [CAN-SPAM Act]'s preemption clause. This is therefore an issue of very, very first impression."), *cert. denied*, 126 S. Ct. 1039 (2006).

55. *See, e.g.*, Ferguson v. Friendfinders, Inc., 94 Cal. App. 4th 1255, 1261-62 (2002); State v. Heckel, 24 P.3d 404, 409-13 (Wash. 2001).

56. *See Ferguson*, 94 Cal. App. 4th at 1266-69 (holding that a California spam regulation that was narrowly written to apply only to state residents constituted a legitimate use of the state police power); *Heckel*, 24 P.3d at 836 (holding that because spam burdens ISPs and individual users, there is a "legitimate local purpose" in regulating spam). The court's reasoning in *Heckel* demonstrates *why* a spam regulation is a legitimate use of the state police power. In *Heckel*, a spammer challenged on dormant commerce clause grounds a state law that prohibited falsities in spam messages. *Heckel*, 24 P.3d at 407-08. Although the law burdened spammers by requiring truthful e-mail messages, the benefits to ISPs and consumers of receiving truthful e-mail messages outweighed any costs to spammers. *See id.* at 409-11.

57. *See supra* notes 49-53 and accompanying text.

58. U.S. CONST. amend. I. Although the First Amendment only limits federal actions, it has been incorporated through the Fourteenth Amendment to the states. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 368-69 (6th ed. 2000).

59. 425 U.S. 748, 770 (1976).

an economic interest; (2) a consumer's interest in advertisements; and (3) society's interest in the free flow of commercial information.[60] From the beginning, however, the Court recognized that false or misleading commercial speech was not protected by the First Amendment and could be regulated without restriction.[61]

Over time, the Supreme Court narrowed the right of commercial speech and increasingly recognized that the government's interest in regulating commercial speech outweighed any First Amendment protections.[62] In the landmark decision of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[63] the Supreme Court announced a four-part test to access the constitutionality of a government regulation of commercial speech: (1) whether the speech is fraudulent or lawful; (2) whether there is a substantial state interest in regulating the speech; (3) whether the regulation directly advances the state interest; and (4) whether the state regulation is no more extensive than necessary to advance the government interest.[64] The Supreme Court has since relaxed the fourth prong to require only that a regulation be "narrowly tailored" to meet a substantial state interest.[65]

Over the past three decades, courts have used the *Central Hudson* test to analyze commercial speech regulations in a variety of forums, including mail, telephones, and faxes.[66] From these cases, several major patterns emerge that are particularly relevant to government regulation of spam. First, the Supreme Court treats unsolicited communications the same as solicited communications—both are analyzed under the *Central*

60. *Id.* at 762-64.

61. *See id.* at 772; *see also* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980). Because the First Amendment is only concerned with "the informational function of advertising," governments are free to regulate commercial messages that are untruthful or illegal. *Id.* at 563-64. Thus, the government has power to "ban forms of communication more likely to deceive the public than to inform it." *Id.* at 563.

62. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970) ("[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.").

63. 447 U.S. 557 (1980).

64. *Id.* at 566.

65. *See* Edenfield v. Fane, 507 U.S. 761, 767 (1993); *see also* United States v. Edge Broad. Co., 509 U.S. 418, 427-28 (1993) (holding that the third and fourth prongs of *Central Hudson* require there to be a tight "'fit' between the legislature's ends and the means chosen to accomplish those ends"). This test, otherwise known as the "narrowly tailored" test, is easier to meet than the "least restrictive means" test. NOWAK & ROTUNDA, *supra* note 58, at 1144-45.

66. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68-69 (1983) (unsolicited advertisements sent via the postal service); Missouri v. Am. Blast Fax, Inc., 323 F.3d 649, 658 (8th Cir. 2003) (unsolicited faxes); State v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 891-92 (Minn. 1992) (pre-recorded, unsolicited telephone calls).

Hudson test.[67] Second, courts have generally favored opt-out schemes rather than complete bans on commercial speech.[68]

Most importantly, in assessing the government's interest in regulating unsolicited commercial speech, courts will often focus on the burden the advertisement imposes on consumers.[69] Courts have sometimes held that the protection of privacy rights is not enough to justify a finding of substantial government interest.[70] In *Bolger v. Youngs Drug Products Corp.*,[71] the Supreme Court held that the federal government did not have a substantial interest in restricting direct mailings of unsolicited contraceptive advertisements.[72] Here, the commercial speech right outweighed the consumer's minimal burden of discarding unwanted mail.[73] Other times, courts have concluded that consumer rights are burdened and that a substantial state interest exists.[74] In *Missouri v. American Blast*

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67. *See Bolger*, 463 U.S. at 69-70 n.18 (arguing that because a chosen medium of speech deserves full free speech protections even though alternative forms are available, unsolicited mail should receive the same protection as solicited mail).

68. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970) (holding that an opt-out statutory requirement for sexually provocativé mail advertisements is a constitutional restriction on commercial speech); *see also* Dominique-Chantale Alepin, *"Opting-Out": A Technical, Legal and Practical Look at the CAN-Spam Act of 2003*, 28 COLUM. J.L. & ARTS 41, 56-58 (2004) (arguing that opt-out schemes are preferred to complete bans on commercial speech).

69. *See, e.g.*, *Am. Blast Fax*, 323 F.3d at 655 (holding that the government has a substantial interest in regulating junk faxes "in order to prevent the cost shifting and interference such unwanted advertising places on the recipient"); *see also* Joshua A.T. Fairfield, *Cracks in the Foundation: The New Internet Legislation's Hidden Threat to Privacy and Commerce*, 36 ARIZ. ST. L.J. 1193, 1234 (2004) (arguing that the Supreme Court in *Bolger* and *Rowan* employed balancing tests to determine the intrusiveness of unsolicited mailings by weighing commercial speech rights against the privacy interests of mail recipients).

70. *See, e.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 185-89 (1999) (questioning government contention that restrictions on gambling advertisements are necessary to combat societal ills flowing from gambling); *Bolger*, 463 U.S. at 75 (holding that the burden of discarding unsolicited "junk" mail is minimal and does not outweigh commercial speech protections).

71. 463 U.S. 60 (1983).

72. *Id.* at 72.

73. *Id.* (reasoning that unsolicited mail does not impose a significant cost on an individual as the "'short, though regular, journey from mail box to trash can . . . is an acceptable burden'" (omission in original) (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967))).

74. *See, e.g.*, Mainstream Mktg. Servs. v. FTC, 358 F.3d 1228, 1237-38 (10th Cir. 2004) (holding that there is a substantial state interest in implementing a national opt-in registry prohibiting unsolicited commercial telephone calls because of the privacy interests of individuals in their homes); *Am. Blast Fax*, 323 F.3d at 655 (holding that a substantial state interest exists in preventing costs borne by fax recipients including ink costs and paper costs); Moser v. FCC, 46 F.3d 970, 974 (9th Cir. 1995) (upholding the finding that a substantial interest exists in protecting privacy rights of individuals who receive pre-recorded telephone calls).

Fax,[75] the Eighth Circuit upheld a federal law that prohibited unsolicited commercial faxes.[76] The court found a substantial state interest in protecting consumers from clogged phone lines and wasted ink—both the result of junk faxes.[77] As a whole, the case law lacks clarity on the extent of the burden that is necessary to justify a finding of a substantial state interest.[78]

3. Law of State Action

The advent of public ISPs has created a new regulatory area where the government and private parties interact to provide e-mail to the public.[79] This, in turn, raises the issue of state action.[80] The First Amendment only limits governmental conduct, not the actions of private parties.[81] However, under the doctrine of state action, the law will treat a private party as the state when the action of the private party "can fairly be attributed to the State."[82]

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75. 323 F.3d 649 (8th Cir. 2003).

76. *Id.* at 660.

77. *Id.* at 654-55.

78. The case law is so unpredictable that different courts facing similar sets of facts have come to polar opposite conclusions on whether or not privacy rights are burdened. *Compare* State v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 892 (Minn. 1992) (holding that a substantial state interest exists in the regulation of pre-recorded unsolicited telephone calls because of the intrusive and highly impersonal nature of the calls), *with* Lysaght v. New Jersey, 837 F. Supp. 646, 653 (D.N.J. 1993) (holding that a ban on pre-recorded telephone calls is unconstitutional because such calls do not intrude on privacy rights).

79. *See, e.g.*, Greg Lalas, *The Year of Living Wirelessly*, BOSTON GLOBE MAG., Apr. 24, 2005, at 30 (describing how municipal Internet services offer wi-fi users free access to e-mail providers); Alex L. Goldfayn, *Wi-Fi Opens Web Possibilities—and the Outdoors*, CHI. TRIB., May 8, 2004, § 2, at 4 (noting that public Internet offers residents free e-mail access).

80. *See* NOWAK & ROTUNDA, *supra* note 58, at 550 (explaining that state action suits arise when a litigant claims that the actions of a private party "involve sufficient governmental action so that they are subjected to the values and limitations reflected in the Constitution and its Amendments"). Courts previously rejected attempts to hold private e-mail providers liable as state actors, in part because the government had no role in blocking or allowing e-mail to flow onto networks. *See, e.g.*, Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 444 (E.D. Pa. 1996). With public ISPs, however, the state now participates in providing residents access to e-mail services. *See supra* note 79 and accompanying text.

81. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.").

82. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 306 (2001) (Thomas, J., dissenting).

There are four general categories of state action that are recognized by the Supreme Court.[83] First, under the "public function" doctrine, courts will treat a private party as the state if the private party acts in a capacity traditionally reserved for the state.[84] Second, under the state involvement doctrine, a private party will be treated like a state actor if there is a "sufficiently close nexus" between the action of the private party and the state so that "the action of the [private party] may be fairly treated as that of the State itself."[85] Third, under the encouragement test, if the state commands, encourages, or directs a private party's actions, courts may find that the private party should be treated as a state actor.[86] Finally, courts recognize a "symbiotic relationship" category where state action will be found if a mutually beneficial relationship exists.[87]

Many state action suits seeking to hold a utility company or telecommunications firm liable as a state actor have failed.[88] On the one hand, courts have rejected applying the public function doctrine to utility companies.[89] On the other hand, courts have held that extensive state regulation of a utility does not automatically lead to a finding of state action; there must be a sufficiently close "nexus" between the utility and the state to constitute state action.[90] The quantum of proof needed to dem-

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83. *See generally* NOWAK & ROTUNDA, *supra* note 58, at 567-80 (outlining the Court's recognition of state action).

84. Marsh v. Alabama, 326 U.S. 501, 506 (1946). Under the public function test, not all activities that the government *could* perform are considered public functions. Jackson v. Metro. Edison Co., 419 U.S. 345, 353-54 (1974). Courts will only find the existence of a public function if the activity at issue is one "traditionally associated with sovereign governments" and "operated almost exclusively by governmental entities." NOWAK & ROTUNDA, *supra* note 58, at 558.

85. *Jackson*, 419 U.S. at 351 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).

86. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

87. NOWAK & ROTUNDA, *supra* note 58, at 579-80.

88. *See, e.g.*, *Jackson*, 419 U.S. at 358-59 (rejecting the argument that a heavily regulated public utility is a state actor); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 445 (E.D. Pa. 1996) (declining to treat a private ISP as a state actor); Boudette v. Ariz. Pub. Serv. Co., 685 F. Supp. 210, 213 (D. Ariz. 1988) (declining to hold a public utility company as a state actor even though the company enjoyed a monopoly status and was heavily regulated by the state). *But see* Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1295-96 (9th Cir. 1987) (holding that a county attorney's recommendation to a telephone company to refuse to carry an adult entertainment company's messages constituted a state action violation); Stanford v. Gas Serv. Co., 346 F. Supp. 717, 722 (D. Kan. 1972) (holding a private utility company liable as a state actor, primarily because the company was given a broad grant of authority by the state).

89. *See, e.g.*, *Jackson*, 419 U.S. at 353 (holding that utility service "is not traditionally the exclusive prerogative of the State").

90. *Id.* at 350-51. In *Jackson*, the plaintiff sued a private utility company for cutting off her electricity, arguing that the utility company was a state actor. *Id.* at 346-48. Plaintiff advanced three arguments to support her state action theory: (1) the utility was a monopoly; (2) the utility provided an essential public service; and (3) the termination practice

onstrate this nexus is significant, and courts have been reluctant to find it.[91]

Courts that have considered the issue of whether private ISPs are state actors have consistently rejected this contention.[92] For example, in *Cyber Promotions, Inc. v. American Online, Inc.*,[93] a Pennsylvania district court rejected a spammer's claim that America Online (AOL) operated as "public system subject to the First Amendment."[94] The court concluded that AOL was not a public actor exercising a traditional state power.[95] This holding has been approved by legal commentators.[96]

B. The CAN-SPAM Regulatory World: State Laws Preempted, ISPs Exempted

To understand the Fifth Circuit's decision in *White Buffalo Ventures*, it is important to examine the CAN-SPAM Act and the regulatory environment that prompted its enactment.[97] Since the expansion of the Internet in the mid-1990s,[98] providers of Internet access have been, for the

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was authorized and approved by the state. *Id.* at 351-54. The Supreme Court found that this was not a sufficient nexus such that the utility company could be treated as the state. *Id.* at 350-51.

91. *See id.* at 350-51 (holding that private utility that is heavily regulated and enjoys a partial monopoly does not have a sufficient nexus of contacts with the government for a finding of state action). Contacts between a utility and a state that have been held insufficient to constitute a nexus include monopoly status, *see* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952), and speech restrictions built into tariff filings, *see* Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co., 802 F.2d 1352, 1361-62 (11th Cir. 1986).

92. *See, e.g.*, Howard v. Am. Online Inc., 208 F.3d 741, 754 (9th Cir. 2000) (holding that defendant was not an "instrument or agent" of the government); Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (finding AOL not to be a state actor); *Cyber Promotions*, 948 F. Supp. at 445 (holding that defendant was not a state actor).

93. 948 F. Supp. 436 (E.D. Pa. 1996).

94. *Id.* at 450.

95. *Id.* at 451 (holding that "neither the Internet itself nor AOL's accessway to the Internet involve the exercise of any of the municipal powers or public services traditionally exercised by the State so as to constitute a public system for purposes of the First Amendment" (emphasis omitted)).

96. *See* Irina Dmitrieva, *Will Tomorrow Be Free? Application of State Action Doctrine to Private Internet Providers*, *in* THE INTERNET UPHEAVAL: RAISING QUESTIONS, SEEKING ANSWERS IN COMMUNICATIONS POLICY 3, 21 (Ingo Vogelsang & Benjamin M. Compaine eds., 2000) (concluding that state action does not apply to private Internet providers). *But see* Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1307 (2000) (arguing that private ISPs should be treated as state actors in order to extend important free speech rights to Internet communications).

97. *See infra* notes 98-116.

98. *See* Jed Kolko, *The Death of Cities? The Death of Distance? Evidence from the Geography of Commercial Internet Usage*, *in* THE INTERNET UPHEAVAL: RAISING QUESTIONS, SEEKING ANSWERS IN COMMUNICATIONS POLICY, *supra* note 96, at 73, 74-

most part, private entities.[99] Not surprisingly, courts have treated ISPs as private parties separate from the state, and allowed ISPs to regulate e-mail without governmental interference.[100] Legislatures also adopted a hands-off approach to the Internet and provided ISPs with broad protections to encourage Internet development and innovation.[101]

However, the problem of spam increasingly spurred legislative efforts in the states to control the flow of spam.[102] These laws varied considerably in their regulation of spam,[103] and private parties that engaged in Internet transactions had a difficult time complying with the patchwork of laws.[104]

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75 (noting that between 1994 and 1998, there was an 11% *monthly* increase in registered Internet domains).

99. *See* ACLU v. Reno, 929 F. Supp. 824, 832-33 (E.D. Pa. 1996) (noting a host of private parties that provide Internet access including commercial entities, non-profit organizations, national online services, and local dial-in computer services), *aff'd*, 521 U.S. 884 (1997).

100. *See, e.g.*, Howard v. Am. Online Inc., 208 F.3d 741, 754 (9th Cir. 2000); *Cyber Promotions*, 948 F. Supp. at 445; Intel Corp. v. Hamidi, 71 P.3d 296, 311 (Cal. 2003). From the beginning of Internet litigation, courts have distinguished private ISPs from public Internet providers. *See* Reno v. ACLU, 521 U.S. 844, 850 (1997) (noting that Internet access provided by businesses and national "online services" is separate from Internet access provided by communities, local libraries, and colleges and universities). Courts allowed private ISPs to regulate e-mail without any First Amendment restraints because they exhibited no characteristics of a state actor. *See, e.g.*, *Cyber Promotions*, 948 F. Supp. at 442-45.

101. *See generally* Stephen C. Jacques, Comment, Reno v. ACLU*: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1965-66 n.107 (1997) (outlining the hands-off approach to the Internet that was adopted by President Clinton and Congress in the mid- to late- 1990s). Legislation passed during this period manifested a hands-off approach to the Internet and sought to encourage its development without burdensome legal restraints. *See* Smith v. Intercosmos Media Group, No. 02-1964, 2002 U.S. Dist. LEXIS 24251, at *6-8 (E.D. La. Dec. 17, 2002) (noting that the Communications Decency Act was passed to "'promote the continued development of the internet . . . unfettered by federal or state regulation'" (quoting 47 U.S.C. § 230 (2000))); *see also* 47 U.S.C. § 151 (2000) (stating that one of the purposes behind the Telecommunications Act of 1996 is to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . .").

102. *See* Ford, *supra* note 16, at 356 (noting that 36 states enacted spam regulations prior to the CAN-SPAM Act).

103. *Id.* at 363 (noting that "[state spam] laws vary widely in scope," from labeling laws to sweeping spam prohibitions); *see also* Sullivan & de Leeuw, *supra* note 16, at 888 (describing state approaches to regulating spam prior to the CAN-SPAM Act).

104. *See Legislative Efforts to Combat Spam: Joint Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection and the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 55 (2003) [hereinafter *House Energy and Commerce Spam Hearings*] (statement of Kenneth Hirschman, Vice President and General Counsel, Digital Impact, Inc.) (arguing that the varied state spam regulations have created "an unnecessarily complex compliance system"); *see also House Judiciary Spam Hearings*, *supra* note 11, at 23 (statement of Joseph S. Rubin, Senior

By 2003, the sheer volume of spam threatened the future of e-commerce and Internet communications.[105] In light of these concerns, Congress passed the CAN-SPAM Act in 2003 to provide a uniform system of regulation and to help combat the growing problem of spam.[106] Although legislators trumpeted the CAN-SPAM Act as a significant milestone in restricting the flow of all spam,[107] the legislation, in reality, distinguished fraudulent and misleading spam from legitimate spam,[108] and allowed legitimate spam to continue.[109] Thus, the CAN-SPAM Act provided harsh penalties for spammers responsible for fraudulent or misleading spam, but only regulated legitimate spammers.[110]

Director of Public and Congressional Affairs and Executive Director of Technology and e-Commerce, U.S. Chamber of Commerce) (noting that state spam regulations constitute a "patchwork system" that is "unnecessarily complex").

105. *See* S. REP. NO. 108-102, at 2, 6-7 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2348, 2348-49, 2352-53. Congress estimated that spam constituted over 46% of all worldwide e-mail in 2003. *Id.* at 2, 2003 U.S.C.C.A.N. at 2349. Research analysts estimated that spam was likely to cost U.S. businesses ten billion dollars in 2003 alone due to "lost productivity, network system upgrades, unrecoverable data, and increased personnel costs." *Id.* at 7, 2003 U.S.C.C.A.N. at 2353. As to individual e-mail users, experts noted the frustration associated with wading through spam, and the costs incurred to dial-up users paying for time spent deleting spam. *Id.* at 6-7, 2003 U.S.C.C.A.N. at 2353.

106. *See* 15 U.S.C. § 7701(a)(12), (b)(1) (Supp. III 2003) (finding that the federal government has a role to play in regulating and reducing the amount of spam on the Internet and that a substantial interest exists in a nationwide spam regulatory scheme).

107. *See, e.g.*, 149 CONG. REC. H12,193 (daily ed. Nov. 11, 2003) (statement of Rep. Wilson) (announcing that the CAN-SPAM Act targets junk e-mail and will allow Americans to "take . . . back and own [the Internet] without an encumbrance by spammers").

108. *See* S. REP. NO. 108-102, at 2-5, 2004 U.S.C.C.A.N. at 2348-52 (describing the two-fold purpose of the CAN-SPAM Act: to protect legitimate commercial e-mail, and to prohibit false and misleading spam). Congress believed that fraudulent and misleading spam posed the primary Internet danger, not legitimate spam. As noted in the CAN-SPAM Act:

> It is the sense of Congress that—
>
> (1) Spam has become the method of choice for those who distribute pornography, perpetuate fraudulent schemes, and introduce viruses, worms, and Trojan horses into personal and business computer systems; and
>
> (2) [T]he Department of Justice should use all existing law enforcement tools to investigate and prosecute those who send bulk commercial e-mail to facilitate the commission of Federal crimes . . . .

15 U.S.C. § 7703(c). Thus, the CAN-SPAM Act targeted fraudulent and misleading e-mail, but allowed legitimate spam to continue under certain regulations. S. REP. NO. 108-170, at 1 (2003).

109. *See* S. REP. NO. 108-102, at 2, 2004 U.S.C.C.A.N. at 2349 (noting that "legitimate businesses . . . wish to use commercial e-mail as another channel for marketing products or services"). Interestingly enough, the initial draft of the CAN-SPAM Act identified "a right of free speech on the Internet" and acknowledged spam as a "mechanism through which businesses advertise and attract customers in the online environment." 149 CONG. REC. S5204 (daily ed. Apr. 10, 2003).

110. *See* 15 U.S.C. §§ 7704-06. The CAN-SPAM Act prohibits spam that contains both false or misleading sender information, as well as false or misleading subject headings. *Id.* § 7704(a)(1)-(2). More importantly, the CAN-SPAM Act makes violation of these provi-

Congress included two important provisions in the CAN-SPAM Act to define its scope.[111] First, with the exception of state statutes relating to false or misleading e-mail, Congress explicitly preempted "any statute, regulation, or rule of a State or political subdivision . . . that expressly regulates the use of electronic mail to send commercial messages."[112] Congress crafted this provision under the belief that the regulation of spam fell within Congress' interstate commerce power.[113]

Second, the CAN-SPAM Act exempts "providers of Internet access service," or ISPs, from the federal law.[114] Congress imported the definition of "Internet access service" from the Internet Tax Freedom Act, which defines Internet access service as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet."[115] Both the CAN-SPAM Act and the committee reports accompanying the bills did not describe the scope of this definition.[116]

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sions a criminal act and provides for civil enforcement by federal and state authorities. *Id.* §§ 7704(a)(1)-(2), 7706. In regard to legitimate spam, there are only a few provisions that restrict e-mail content. Section 7704(a)(3) requires all legitimate spam senders to include options for e-mail recipients to opt out of receiving future messages. *Id.* § 7704(a)(3)(A)-(C). Section 7705(a) requires all businesses to comply with CAN-SPAM provisions that prohibit fraudulent and misleading e-mail. *Id.* § 7705(a). Other than this, the CAN-SPAM Act does nothing to restrict legitimate spam operations. *See, e.g.*, Sullivan & de Leeuw, *supra* note 16, at 895 (noting that the primary criticism of the CAN-SPAM Act was that it "provides a federal imprimatur for unsolicited e-mail by deeming it presumptively lawful").

111. *See infra* notes 112-16 and accompanying text.

112. 15 U.S.C. § 7707(b)(1).

113. S. REP. NO. 108-102, at 21-22, 2004 U.S.C.C.A.N. at 2365. The report from the Senate Committee on Commerce, Science, and Transportation argues:

> Given the inherently interstate nature of e-mail communications, the Committee believes that this bill's creation of one national standard is a proper exercise of the Congress's power to regulate interstate commerce that is essential to resolving the significant harms from spam faced by American consumers, organizations, and businesses throughout the United States.

Id. at 21, 2004 U.S.C.C.A.N. at 2365.

114. *See* 15 U.S.C. § 7707(c) ("Nothing in this chapter shall be construed to have any effect on . . . the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.").

115. *See id.* § 7702(11) ("The term 'Internet access service' has the meaning given that term in section 231(e)(4) of title 47.").

116. The CAN-SPAM Act imports the "Internet access service" definition without any comment on its scope. *See supra* note 115 and accompanying text. The committee reports describing the CAN-SPAM Act both lack any discussion concerning the intended scope of the term "Internet access service." *See* S. REP. NO. 108-102, at 15, 2004 U.S.C.C.A.N. at 2360; S. REP. NO. 108-170, at 5-6 (2003).

C. *The Fifth Circuit's Dilemma in* White Buffalo Ventures*: Is a University ISP Preempted or Exempted Under the CAN-SPAM Act?*

Almost immediately after the CAN-SPAM Act was signed into law, a novel question arose concerning the application of the CAN-SPAM Act to a public university with Internet and e-mail services.[117] The University of Texas at Austin (UT) enforced a general anti-solicitation policy that forbade solicitations on its campus and e-mail servers.[118] White Buffalo Ventures (White Buffalo), a provider of online dating services, sent e-mails through UT's servers to solicit students.[119] After having its e-mails blocked by UT's servers, White Buffalo sought an injunction to prohibit UT from this practice.[120] White Buffalo argued that UT's prohibition violated its free speech rights, conflicted with the Equal Protection Clause, and was preempted by the CAN-SPAM Act.[121] UT responded with a public policy argument, contending that if the CAN-SPAM Act preempted UT's solicitation policy, UT would be unable to filter *any* spam.[122]

The district court granted UT's motion for summary judgment and upheld UT's solicitation ban as applied to e-mail.[123] The district court presented two rationales for its decision. First, the court found that the CAN-SPAM Act did not preempt UT's regulation.[124] Although the court advanced several reasons for this holding,[125] its most plausible argument was that UT, as a provider of Internet access service, was expressly exempted from the federal law.[126] Second, the court found that UT's policy would "easily survive" a commercial speech challenge because of the

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117. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 371 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

118. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 WL 1854168, at *1 (W.D. Tex. Mar. 22, 2004), *aff'd*, 420 F.3d 366 (5th Cir. 2005).

119. *Id.*

120. *Id.* at *2.

121. *Id.*

122. *Id.*

123. *Id.* at *7.

124. *Id.* at *4.

125. *Id.* at *3-4. The district court held that because UT's spam policy was an off-shoot of its larger solicitation policy, it was not a regulation relating to spam that was preempted by the CAN-SPAM Act. *Id.* at *3. Additionally, the court posited that it was not clear that UT was a state subdivision for purposes of regulation under the CAN-SPAM Act. *Id.* Finally, in interpreting congressional intent, the court looked at the cost and scope of the spam problem, and concluded that Congress surely did not intend for colleges and universities to be handcuffed in combating spam. *Id.* at *4.

126. *See id.* at *3 ("UT is certainly a provider of Internet access service . . . and as such, is expressly authorized under the statute to implement policies declining to transmit, route, relay, handle or store spam.").

substantial government interest in blocking spam and regulating university servers.[127]

On appeal, the Fifth Circuit upheld both of the district court's holdings.[128] However, the Fifth Circuit took a much more exacting approach to both analyses.[129] In regard to preemption, the court noted that because Congress' preemption power is "'an extraordinary power in a federalist system,'" there is a historical presumption against preemption.[130] The court then noted that strong arguments both for and against preemption are "rooted firmly in the text of the [CAN-SPAM] Act."[131] On the one hand, Congress expressly preempted UT's spam regulations through the preemption provision.[132] On the other hand, Congress expressly exempted UT as an Internet access provider from the federal regulatory scheme.[133] Because of these conflicting provisions, the Fifth Circuit concluded that the presumption against preemption tipped the scales toward upholding UT's spam regulations.[134]

The Fifth Circuit also upheld the district court's holding that UT's spam regulations were valid under the *Central Hudson* commercial speech test.[135] In applying the *Central Hudson* test, the court first noted that White Buffalo's e-mails constituted commercial solicitations.[136] The court then found that UT had a substantial state interest in prohibiting spam: protecting e-mail users from unwanted spam and protecting the speed of UT's network.[137]

After giving the third *Central Hudson* prong only a cursory analysis, the court carefully reviewed UT's spam regulations under the fourth prong.[138] Although the court found a means-ends fit between prohibiting

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127. *Id.* at *4-6.

128. White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 372 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

129. *See generally id.* at 370-78.

130. *Id.* at 370 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

131. *Id.* at 372.

132. *Id.* at 372 n.11.

133. *Id.* at 372. The Fifth Circuit tried as best it could to interpret what Congress intended to fall under the term "Internet Access Provider." *Id.* at 373. In concluding that the ISP definition is so vague that UT must fall under it, the court noted, "[w]e doubt that [the] legislators responsible for passing the Internet Tax Freedom Act gave serious consideration to the situation the instant facts present." *Id.*

134. *See id.* at 372 (concluding that because a public university ISP can fairly be interpreted to be both a provider of Internet access exempt from the CAN-SPAM Act and a state entity preempted by the CAN-SPAM Act, the Act's "textual ambiguity triggers the strong presumption against [preemption]").

135. *Id.* at 378.

136. *Id.* at 374.

137. *Id.* at 374-75.

138. *Id.* at 375-78.

spam and keeping user in-boxes clean,[139] the court did not find the same fit in the server efficiency argument.[140] The court noted that the record showed that White Buffalo could send solicitations at off-peak hours when there was no threat of spam slowing or crashing the network.[141] However, because one of UT's substantial interests passed the means-ends test—the need to protect users from unwanted spam[142]—the court held that the spam prohibition was constitutional.[143]

II. *WHITE BUFFALO VENTURES*—A BENCHMARK IN PREEMPTION AND COMMERCIAL SPEECH LAW FOR PUBLIC ISPS LOOKING TO REGULATE SPAM

The Fifth Circuit's preemption holding in *White Buffalo Ventures* has enormous implications for a public ISP.[144] Although the court's holding could be limited to public universities,[145] its analysis, taken to its logical end, exempts any public ISP from the CAN-SPAM Act.[146] A public ISP is clearly a "provider of Internet access," at least as the Fifth Circuit has interpreted this statutory phrase.[147] A public ISP could thus lawfully filter

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139. *Id.* at 375-76.
140. *Id.* at 376.
141. *Id.* at 376-77.
142. *Id.* at 378.
143. *Id.*
144. *See infra* Parts II and III.
145. The Fifth Circuit only upheld the district court's limited holding that UT's spam regulations are not preempted by the CAN-SPAM Act. *See White Buffalo Ventures*, 420 F.3d at 374. The Fifth Circuit never made a blanket statement that all public ISPs are exempt from the CAN-SPAM Act. *Id.* at 373-74. Arguably, the ISP exemption could be limited to public universities on policy grounds because, unlike public ISPs, these entities directly maintain e-mail servers and would be overrun by spam if they could not regulate it. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, No. A-03-CA-296-SS, 2004 WL 1854168, at *4 (W.D. Tex. Mar. 22, 2004) (holding on policy grounds that the exemption provision must extend to a public university to protect it from being overrun with spam), *aff'd*, 420 F.3d 366 (5th Cir. 2005). Because the Supreme Court denied certiori to the Fifth Circuit's holding, *see* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 126 S. Ct. 1039 (2006), and because the Fifth Circuit did not address this issue, *see White Buffalo Ventures*, 420 F.3d at 373 n.13, this question is still open for debate.
146. *See infra* notes 147-52 and accompanying text.
147. The CAN-SPAM Act imports the definition for "Internet access service" from the Internet Tax Freedom Act. *See supra* note 115 and accompanying text. The Internet Tax Freedom Act defines Internet access service as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet." 47 U.S.C. § 231(e)(4) (2000). Under the strict textual approach employed by the Fifth Circuit, a public ISP clearly falls under this definition. *See, e.g.*, Lalas, *supra* note 79, at 32 (noting that users access the Internet on a public network); FLA. MUN. ELEC. ASS'N, THE CASE FOR MUNICIPAL BROADBAND IN FLORIDA 3 (2005) *available at* http://www.publicpower.com/telecom_study/telecom_report_2005.pdf (arguing that citizens reap economic benefits, educational opportunities, and efficient health care from public Internet).

spam under the CAN-SPAM exemption provision.[148] However, such a regulation would also fall under the CAN-SPAM preemption provision because it is a law prohibiting spam.[149] This would, in turn, trigger "textual ambiguity" between the exemption and preemption provisions,[150] which is indicative of unclear congressional intent.[151] In light of this, and because of the presumption against preemption, the regulation would be upheld and the public ISP could regulate spam without the limitations of the CAN-SPAM Act.[152]

A public ISP would face practical hurdles in administering a spam prohibition because it neither provides e-mail services[153] nor directly controls the flow of e-mail on the Internet.[154] However, if a state allows municipal broadband[155] and authorizes unrestricted local legislation,[156] a city with

148. *See* 15 U.S.C. § 7707(c) (Supp. III 2003) (allowing providers of an "Internet access service" to filter all e-mail messages).

149. *See supra* note 112 and accompanying text.

150. *See White Buffalo Ventures*, 420 F.3d at 372 (concluding that the CAN-SPAM Act is "textual[ly] ambigu[ous]" because the UT regulation, as a public regulation *issued by an Internet access provider*, logically falls under both the preemption and exemption provisions).

151. The Fifth Circuit held that because of "textual ambiguity," there was no clear congressional intent as to what Congress intended for public universities under the CAN-SPAM Act. *See id.* This is the critical step in the analysis—if congressional intent is ambiguous, a state regulation will survive because of the presumption against preemption. *See supra* note 52 and accompanying text. A public ISP spam prohibition would likewise survive under the Fifth Circuit's approach, which focuses exclusively on the plain text of the CAN-SPAM Act to determine congressional intent. *White Buffalo Ventures*, 420 F.3d at 372.

152. *See White Buffalo Ventures*, 420 F.3d at 372 (upholding a state regulation that is ambiguous under the CAN-SPAM Act because of the presumption against preemption).

153. Public ISPs, to date, have provided Internet access to residents and local businesses, *not* e-mail access. *See, e.g.*, Drew Clark, *The Quest for a Municipal UTOPIA*, NAT'L J. TECH. DAILY, Aug. 15, 2005, http://njtelecomupdate.com/lenya/telco/live/tb-JLQZ1124223622523.html (explaining that municipal broadband networks are "public highway[s]" where participants bear the responsibility of "handl[ing] functions for Internet services").

154. ISPs do not block spam per se; only ISPs with e-mail services have a role in blocking spam. *See* FED. TRADE COMM'N, SUBJECT LINE LABELING AS A WEAPON AGAINST SPAM: A CAN-SPAM ACT REPORT TO CONGRESS app. II at 4-5 (2005), *available at* http://www.ftc.gov/reports/canspam05/050616canspamrpt.pdf [hereinafter FTC SUBJECT LINE LABELING REPORT] (describing the process of sending an e-mail from one computer to another and noting that e-mail can only be blocked between e-mail servers). Thus, a public ISP without e-mail services cannot directly block spam.

155. *See* Free Press, Community Internet: Broadband as a Public Service, http://www.freepress.net/communityinternet/=states (last visited Feb. 13, 2007) (noting that fifteen states currently ban or curtail municipal broadband state-wide, and nine more are considering prohibitions of some kind).

156. *See* 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 107 (2000) (noting that in states with constitutions that do not grant municipalities the inherent right of self-government, local authorities cannot legislate without authorization from state legislatures).

municipal broadband, as a legislative entity, has the power to enact spam regulations.[157] Under the Fifth Circuit's rationale, a public ISP's spam prohibition would not be preempted by the CAN-SPAM Act[158] and would survive commercial speech scrutiny.[159] Thus, the Fifth Circuit's holdings must be scrupulously reviewed to determine whether a public ISP spam prohibition would withstand judicial scrutiny.[160]

A. The Preemption Holding: The Presumption Against Preemption Overcomes Unclear Congressional Intent

The Fifth Circuit's preemption decision in *White Buffalo Ventures* turns on two critical points: (1) the court's analysis of congressional intent; and (2) the court's application of the presumption against preemption.[161] To assess the Fifth Circuit's analysis, it is helpful to reference the Supreme Court's decision in *Nixon v. Missouri Municipal League*.[162] On the facts, *Nixon* and *White Buffalo Ventures* are different.[163] However, in both cases the courts looked to congressional intent to interpret the scope of statutory provisions.[164] Additionally, both courts used the presumption against preemption to uphold state regulations against preemption challenges.[165] Finally, as two recent telecommunications decisions involving preemption,[166] both decisions offer insight as to how preemption law is applied in this field.[167]

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157. Although most state constitutions do not grant municipalities the inherent right of local rule, *see id.*, forty states have enacted "home-rule" statutes that allow cities and municipalities to legislate without prior state authorization. *See* Diane Lang, *Dillon's Rule... And the Birth of Home Rule*, MUN. REP., Dec. 1991, *available at* http://www.nmml.org/Dillon.pdf. Thus, a public ISP operating in a "home-rule" state where state law does not prohibit local spam regulations arguably has the "home-rule" power to ban spam.

158. *See supra* notes 145-52 and accompanying text.

159. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 378 (5th Cir. 2005) (holding that a government entity can constitutionally ban spam on its servers under the *Central Hudson* test), *cert. denied*, 126 S. Ct. 1039 (2006).

160. *See supra* notes 149-59 and accompanying text.

161. *See supra* Part I.C.

162. 541 U.S. 125 (2004).

163. *Nixon* involved the interpretation of a vague statutory provision, *see supra* note 45 and accompanying text, whereas *White Buffalo Ventures* involved the interpretation of two provisions that, as applied to public universities, were seemingly contradictory. *See supra* notes 133-35 and accompanying text.

164. *Compare Nixon*, 541 U.S. at 133 (adopting a "broader frame of reference" in order to "get at Congress's understanding"), *with White Buffalo Ventures*, 420 F.3d at 372-73 (interpreting the text of the CAN-SPAM Act to determine Congress' purpose).

165. *Compare Nixon*, 541 U.S. at 140 (invoking the "working assumption" that federal law encroaching on traditional state regulatory powers "should be treated with great skepticism"), *with White Buffalo Ventures*, 420 F.3d at 372 (noting that the ambiguous language of the CAN-SPAM Act "triggers" the presumption against preemption).

166. *See Nixon*, 541 U.S. at 125; *White Buffalo Ventures*, 420 F.3d at 366.

167. *See supra* notes 161-65 and accompanying text.

1. The Advantages and Disadvantages of the Fifth Circuit's Plain Text Approach in Determining Congressional Intent

Both the *Nixon* and *White Buffalo Ventures* courts initially looked for congressional intent in the language of the statutory provisions at issue.[168] In *Nixon*, the Court looked at the plain meaning of section 254 of the Telecommunications Act to determine if Congress intended for state subdivisions to fall under this definition.[169] Similarly, the Fifth Circuit scrutinized the language of the CAN-SPAM Act's exemption and preemption provisions to determine what Congress intended to do for public universities.[170]

Beyond this, both analyses diverge. The *Nixon* Court, in looking for congressional intent, adopted a "broader frame of reference" that looked beyond the plain text of section 247 to such things as policy considerations, statutory structure, and legislative history.[171] Conversely, the Fifth Circuit focused exclusively on the text of the exemption and preemption provisions to determine congressional intent.[172] In fact, the Fifth Circuit specifically declined at one point to allow policy considerations to impact its holding.[173]

The Fifth Circuit's plain text approach certainly has its merits. When interpreting the scope of an express preemption provision, the plain text should be the primary focus.[174] Additionally, policy considerations are

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168. *See Nixon*, 541 U.S. at 131-33 (examining the meaning of "any entity" at the outset before a full-blown inquiry into congressional intent); *White Buffalo Ventures*, 420 F.3d at 371-72 (reviewing the text of the preemption and exemption provisions at the start of the preemption analysis).

169. *Nixon*, 541 U.S. at 132-33 (concluding that the plain text meaning of "any entity" is insufficient "[t]o get at Congress's understanding").

170. *White Buffalo Ventures*, 420 F.3d at 372-73 (analyzing the interplay of the exemption and preemption provisions as applied to public universities under the CAN-SPAM Act).

171. *See Nixon*, 541 U.S. at 133 ("To get at Congress's understanding, what is needed is a broader frame of reference . . . ."). As part of this broader frame approach, the Supreme Court looked at policy considerations, statutory structure, and legislative history. *Id.* at 133-38, 141. This approach mirrors the sweeping review advocated by Justice White in *Mortier*. *See supra* note 40.

172. *See supra* notes 134, 140-43 and accompanying text (describing the Fifth Circuit's step-by-step textual analysis that eventually led to a rejection of the preemption argument). The Fifth Circuit's preemption approach parallels that of Justice Scalia where the plain text of a statute should determine congressional intent, not legislative history. *See supra* note 39.

173. *See White Buffalo Ventures*, 420 F.3d at 373 n.13 (declining to interpret the CAN-SPAM Act's exemption provision under the rationale that it is "unusual policy" for private educational institutions to filter spam, but not public educational institutions). Proponents of a plain text approach also disapprove of using policy considerations to justify a preemption holding. *See Nixon*, 541 U.S. at 141 (Scalia, J., concurring) (rejecting policy arguments to justify the majority's holding).

174. *See supra* note 35 and accompanying text.

better left to legislative bodies and should not factor into a preemption holding.[175] The plain text of the CAN-SPAM Act's exemption provision is broad and applies to almost any entity that provides Internet service, including public universities.[176] Because the statutory language is so ambiguous, any inquiry into legislative history—a tool which is inherently unreliable—would be fruitless and unnecessary.[177]

The Fifth Circuit's plain text approach, however, also has shortcomings, primarily failing to consider all relevant sources of congressional intent.[178] First, other CAN-SPAM provisions suggest that Congress did not intend for *all* entities providing Internet access, public and private alike, to qualify as ISPs.[179] In the findings section of the statute, Congress explicitly referenced educational and nonprofit institutions as being separate from ISPs.[180] Because this distinction is not made in the exemption provision,[181] a negative inference is created that Congress did not intend for universities or nonprofits to be an ISP exempt from the CAN-SPAM Act.[182]

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175. *See supra* note 173.

176. *See supra* note 114. The definition of Internet access service is also very broad and can legitimately be construed to apply to any entity providing Internet access. *See supra* note 147 and accompanying text; *see also White Buffalo Ventures*, 420 F.3d at 373 ("[W]e are hard-pressed to find that providing e-mail accounts and e-mail access does not bring UT within the statutory definition borrowed from the Internet Tax Freedom Act.").

177. *See supra* note 40 and accompanying text; *see also* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring) (positing that in statutory interpretation, courts "should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports").

178. *See White Buffalo Ventures*, 420 F.3d at 370-73 (relying exclusively on the text of the CAN-SPAM Act's exemption and preemption provisions in holding that preemption did not occur).

179. *See infra* notes 180-82 and accompanying text.

180. *See* 15 U.S.C. § 7701(a)(6) (Supp. III 2003) ("The growth in unsolicited commercial electronic mail imposes significant monetary costs on *providers of Internet access service*, businesses, and *educational and nonprofit institutions* that carry and receive such mail, as there is a finite volume of mail that such providers, businesses, and institutions can handle without further investment in infrastructure." (emphasis added)). This same distinction was made in the Senate committee report that accompanied the original draft of the CAN-SPAM Act. *See* S. REP. NO. 108-102, at 3 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2348, 2349 ("[T]he sheer volume of SPAM is threatening to overwhelm not only the average consumer's in-box, but also network systems of *ISPs*, businesses, *universities, and other organizations*." (emphasis added)).

181. *See* 15 U.S.C. § 7707(c).

182. The Supreme Court has endorsed using negative inferences to determine congressional intent. *See, e.g.*, Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 261 (2004) (Souter, J., dissenting) (using negative implication to interpret a provision of the Clean Air Act); Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Second, the CAN-SPAM Act's regulatory scheme suggests that Congress intended for the ISP exemption to have some limits.[183] In the congressional findings, Congress stated that the purpose of the CAN-SPAM Act was to provide a "nationwide" regulatory scheme because of "different [state] standards and requirements."[184] Any interpretation of the ISP exemption that incorporates state subdivisions—a category that includes public universities[185]—directly conflicts with the statutory intent to provide uniform regulations at the state and federal level.[186] The CAN-SPAM Act's enforcement mechanisms also suggest that Congress viewed ISPs as entities separate from state and federal governments and their subdivisions.[187] Congress specifically provided ISPs a *private* right of action to bring civil suits against violators of the CAN-SPAM Act.[188] This right of action is distinct from the rights of action that Congress provided to federal and state plaintiffs to enforce the CAN-SPAM Act.[189]

The legislative history also demonstrates that Congress viewed ISPs as private entities that should be free to regulate spam without restraint.[190]

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183. *See infra* notes 184-89 and accompanying text. Using a statute's regulatory scheme to determine congressional intent is a generally accepted method of statutory construction. *See supra* note 36.

184. *See* 15 U.S.C. § 7701(a)(11), (b)(1).

185. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 373 (5th Cir. 2005) (noting that the "suggestion" that a public university is not a state subdivision "is incorrect and requires little explanation"), *cert. denied*, 126 S. Ct. 1039 (2006).

186. *See id.* at 373 (admitting that a fair reading of the preemption provision must necessarily include public universities as state subdivisions).

187. *See infra* notes 188-89 and accompanying text.

188. 15 U.S.C. § 7706(g).

189. *Compare id.* § 7706(a)-(e) (providing various civil and criminal enforcement measures to federal agencies, including the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission), *with id.* § 7706(f) (granting states and state agencies the power to bring civil actions and recover damages against violators of the CAN-SPAM Act).

190. In hearings before Senate and House committees, witnesses characterized ISPs as private entities that filter spam without government restraint. *See House Judiciary Spam Hearings*, *supra* note 11, at 23-24 (statement of Joseph Rubin, Senior Director of Public and Congressional Affairs and Executive Director of Technology and e-Commerce, U.S. Chamber of Commerce) (arguing that federal legislation combating spam should not impact ISPs that are private networks); *see also House Energy and Commerce Spam Hearings*, *supra* note 104, at 44-45 (statement of Ira Rubinstein, Associate General Counsel, Microsoft Corp.) (positing that ISPs, as separate from the government, should be allowed to filter spam under federal law). Not surprisingly, this paradigm of ISPs as private entities regularly appeared in statements by members of Congress. *See, e.g.*, 149 CONG. REC. H12860 (daily ed. Dec. 8, 2003) (statement of Rep. Sensenbrenner) (discussing how the filtering capabilities of ISPs and consumers are more effective than the actions of the government in stopping the flow of spam); 149 CONG. REC. S13,020 (daily ed. Oct. 22, 2003) (statement of Sen. McCain) ("Internet service provider [sic] are the businesses caught in the middle, forced every day to draw distinctions between what they perceive as legitimate e-mail and what is spam.").

In hearings leading up to the CAN-SPAM Act, private ISPs advocated that they had an important role to play in combating spam.[191] To do this, private ISPs requested that Congress allow them to continue unfettered filtering of spam,[192] and to give them a civil cause of action under the CAN-SPAM Act.[193] Congress, in turn, trumpeted private ISPs as important players in the spam war,[194] and provided for their requests in the CAN-SPAM Act.[195]

2. The Presumption Against Preemption Controls in the Absence of Clear Congressional Intent

Regardless of whether the Fifth Circuit's plain text approach is correct, without clear and convincing evidence of congressional intent, the presumption against preemption controls.[196] This raises the issue of whether the Fifth Circuit properly employed the presumption against preemption.

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191. *See, e.g., House Energy and Commerce Spam Hearings*, *supra* note 104, at 44 (statement of Ira Rubinstein, Associate General Counsel, Microsoft Corp.) (recommending a balanced approach to fight spam that includes private ISPs developing sophisticated filtering technology to stop the flow of spam).

192. *See id.* at 34 (statement of Charles Garry Betty, President and CEO, EarthLink) ("[Earthlink] support[s] the provision in several bills which note that they place no restrictions on an ISP's current ability to block spam on behalf of its customers."); *see also* Letter from Bill Gates, Chairman and Chief Software Architect, Microsoft Corp., to the U.S. Senate Commerce Comm. (May 21, 2003), *available at* http://www.microsoft.com/presspass/misc/Billgspam05-21-03.mspx (arguing that federal legislation should include "[e]xpress language that preserves the right of ISPs to combat spam").

193. *See House Energy and Commerce Spam Hearings*, *supra* note 104, at 34 (statement of Charles Garry Betty, President and CEO, EarthLink) ("[Earthlink] support[s] the provision in various bills that note that ISPs have a right of action to pursue legal action against spammers."); Letter from Bill Gates to the U.S. Senate Commerce Comm., *supra* note 192 (noting that any spam law should provide "[e]ffective Internet service provider . . . enforcement that allows ISPs to prosecute spammers on behalf of their customers").

194. *See, e.g., Spam (Unsolicited Commercial E-Mail): Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2003), *available at* http://commerce.senate.gov/hearings/index.cfm?cong=108&sessn=1&subc=999 (follow "Spam (Unsolicited Commercial E-Mail)" hyperlink) [hereinafter *Senate Commerce, Science, and Transportation Spam Hearing*] (statement of Sen. Charles Schumer) (advocating that Congress should "give law enforcement officials, ISPs and others a wide variety of tools to fight spam"); 149 CONG. REC. H12,860 (daily ed. Dec. 8, 2003) (statement of Rep. Sensenbrenner) ("Ultimately, spam will be stopped by a combination of new technology, consumer awareness, ISP filtering, and trusted sender systems for legitimate senders of commercial e-mail . . . .").

195. The CAN-SPAM Act exempts ISPs from the federal regulatory scheme, 15 U.S.C. § 7707(c) (Supp. III 2003), and provides a civil cause of action for ISPs. *Id.* § 7706(g)(1).

196. *See supra* note 53 and accompanying text (noting that the presumption against preemption can only be overcome if there is clear and convincing evidence).

In *Nixon*, the Supreme Court applied the presumption against preemption because a state regulatory power was at issue.[197] The Court used the presumption to hold against preemption in the absence of clear congressional intent.[198] The Fifth Circuit in *White Buffalo Ventures* used the presumption against preemption in the same manner, holding that the presumption overcame ambiguous statutory language.[199]

However, unlike the *Nixon* Court, the Fifth Circuit never identified a state power that triggered the presumption against preemption.[200] Implicit in the Fifth Circuit's use of the presumption against preemption is the holding that a spam regulation is a legitimate effectuation of a state power.[201] The Fifth Circuit arguably could have held that the power to regulate spam is part of Congress' commerce power, not a state power.[202] The Fifth Circuit's implicit holding, however, is supported by precedent.[203] Not only did the *Nixon* Court recognize a state's right to regulate its internal networks,[204] but dormant commerce clause decisions have recognized the power to prohibit spam and protect state consumers as a legitimate state police power.[205]

B. The Commercial Speech Holding—Opening the Door for Government Entities to Constitutionally Prohibit Spam

The Fifth Circuit's commercial speech analysis in *White Buffalo Ventures* raises again the question of whether a state can constitutionally prohibit spam.[206] In its commercial speech analysis, the Fifth Circuit fo-

197. Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) (finding the presumption against preemption applicable because preemption would encroach "on the States' arrangements for conducting their own governments").

198. *Id.* at 140-41.

199. *See supra* note 134 and accompanying text.

200. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 372 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006).

201. *Cf. id.* at 369.

202. *See* Sabra-Anne Kelin, *State Regulation of Unsolicited Commercial E-Mail*, 16 BERKELEY TECH. L.J. 435, 451 (2001) (arguing that state spam prohibitions violate the dormant commerce clause). Augmenting this argument is Congress' finding in the CAN-SPAM Act that "there is substantial government interest in regulation of commercial electronic mail on a *nationwide* basis." 15 U.S.C. § 7701(b)(1) (Supp. III 2003) (emphasis added). Also relevant is the committee report from the Senate Committee on Commerce, Science, and Transportation, which posits that the CAN-SPAM Act is an effectuation of Congress' commerce power to regulate spam. *See* S. REP. NO. 108-102, at 1-2 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2348, 2348-49.

203. *See infra* text accompanying notes 204-05.

204. *See supra* note 197.

205. *See supra* notes 55-57 and accompanying text.

206. Prior to the enactment of the CAN-SPAM Act, the constitutionality of state spam prohibitions as commercial speech restrictions was a hot topic. *See, e.g.*, Joshua A. Marcus, Note, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 255 (1998) (analyzing First Amendment issues dealing with spam);

cused on the second and fourth prongs of the *Central Hudson* test: the substantial state interest test and the less burdensome alternative test.[207]

In regard to the substantial state interest test, the Fifth Circuit offered little explanation for upholding UT's interest in keeping its server clear of spam and protecting e-mail users.[208] This holding is subject to criticism.[209] Even without filters, spam may not have as much of an impact on bandwidth capacity as the public is led to believe.[210] Additionally, some studies have shown that spam is an effective marketing tool and less of an annoyance to e-mail users than in the past.[211]

Conversely, studies also support the Fifth Circuit's findings that unfiltered spam can impact bandwidth capacity[212] and that e-mail users continue to disfavor spam.[213] Under the privacy burden analysis, these burdens arguably outweigh any commercial speech benefit arising from unfiltered spam.[214]

Gary S. Moorefield, Note, *Spam—It's not Just for Breakfast Anymore: Federal Legislation and the Fight to Free the Internet from Unsolicited Commercial E-mail*, 5 B.U. J. SCI. & TECH. L. 10 para. 9 (1999) (discussing First Amendment issues). However, after the CAN-SPAM Act, focus shifted away from state regulations to the preemptive effect of the CAN-SPAM Act. *See* Alepin, *supra* note 68, at 66 (explaining how the CAN-SPAM Act shifted attention from state to federal regulations). In the wake of *White Buffalo Ventures*, focus will likely shift again to the constitutionality of a complete ban on spam.

207. *See supra* notes 135-43 and accompanying text.

208. *See White Buffalo Ventures*, 420 F.3d at 374-75 ("[W]e acknowledge as substantial the government's gatekeeping interest in protecting users of its email network from the hassle associated with unwanted spam. Also substantial is the 'server efficiency' interest . . . .").

209. *See infra* notes 210-11 and accompanying text.

210. *See* Bayesian Spam Filters, http://www.kantor.com/usatoday/bayesian_spam_filters.shtml (last visited Feb. 13, 2007) (arguing that spam on an Internet server does not consume enough bandwidth to crash a network).

211. *See* S. REP. NO. 108-102, at 2 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2348, 2349 (noting a Direct Marketing Association report that found 37% of consumers purchased a product as a result of a spam advertisement); *see also* Fallows, *supra* note 13, at 3-4 (noting that in 2005, 67% of e-mail users found spam annoying or disturbing, a 10% drop from the 2004 all-time high).

212. *See* Jeff Mackie, *McAfee Creates Security Alliance*, COMPUTER DEALER NEWS, Aug. 5, 2005, *available at* 2005 WLNR 13207975 (noting that McAfee's general manager and senior vice president in Canada still believes that spam can negatively impact bandwidth and storage); *see also* Joel Snyder, *Symantec Slows Spam at the Edge*, NETWORK WORLD, Apr. 11, 2005, at 56, 56 (arguing that an ISP that receives large amounts of spam hourly is wise to purchase additional spam protection beyond their filter system to ease the burden on network bandwidth).

213. *See* Fallows, *supra* note 13, at 3-4. Although consumers are growing less annoyed with spam, a significant number still find spam annoying and are therefore still distrustful of e-mail. *See id.* (noting that in 2005, 67% of e-mail users found spam annoying or disturbing and 53% found e-mail less trustworthy as a result of spam).

214. *Compare* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 374-75 (5th Cir. 2005) (holding that substantial interests exist both in protecting users from the "hassle" of spam and protecting the efficiency of UT's servers), *cert. denied*, 126 S. Ct.

Regarding the fourth prong of *Central Hudson*, the Fifth Circuit first held that no alternative regulation exists to protect e-mail users from spam.[215] Studies increasingly show that the most effective way to stop spam from reaching e-mail accounts is with advanced filters.[216] One option is to block fraudulent spam, but allow all legitimate spam.[217] Current ISP practices, such as "white-listing," suggest that this is a viable alternative.[218]

In regard to UT's argument that server efficiency warranted a ban on spam, the Fifth Circuit held that a less restrictive alternative existed, namely, that UT could allow spam on its network during off-peak hours.[219] Here, the court limited its analysis to the effect of White Buffalo's spam on UT's network during off-peak hours.[220] The court could have taken an aggregate approach, however, and considered how all unfiltered spam affects UT at off-peak hours.[221] Current studies estimate

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1039 (2006), *with* Missouri v. Am. Blast Fax, Inc., 323 F.3d 649, 655 (8th Cir. 2003) (concluding that a substantial interest exists in protecting fax recipients from unsolicited fax advertisements).

215. *White Buffalo Ventures*, 420 F.3d at 376.

216. *See, e.g.*, *Winning the War on Spam*, ECONOMIST, Aug. 20, 2005, at 50 (noting that filtering technology is one of the primary reasons why spam on MessageLabs' e-mail servers fell from 83% of all e-mail in 2004 to 67% of all e-mail in early 2005); FTC SUBJECT LINE LABELING REPORT, *supra* note 154, at 12 (noting that ISPs are beginning to stem the tide of spam through advanced blocking and filtering technology). Microsoft has announced that its Hotmail filters can now block 95% of all spam that it receives. FTC SUBJECT LINE LABELING REPORT, *supra* note 154, at 12; *see also* Bill Gates, Preserving and Enhancing the Benefits of Email—A Progress Report (June 28, 2004), http://www.microsoft.com/mscorp/execmail/2004/06-28antispam.mspx.

217. *See* FTC SUBJECT LINE LABELING REPORT, *supra* note 154, at 11 (explaining that current technology allows ISPs to allow legal spam to enter their servers without being filtered).

218. *See id.* (noting that ISPs use "whitelists" that allow them to enter IP addresses of legitimate spam senders). As far back as the CAN-SPAM Act, ISPs used white-lists to filter some spam but allow other spam to enter their networks. *See generally Senate Commerce, Science, and Transportation Spam Hearing*, *supra* note 194 (testimony of Ronald Scelson, Scelson Online Marketing) (arguing that ISPs act as censors in determining what spam will enter their networks). In fact, reports have shown that some of the largest ISPs are providers of spam, and employ policies restrictive of spam *except their own*. *See House Energy and Commerce Spam Hearings*, *supra* note 104, at 64 (statement of Chris Murray, Legislative Counsel, Consumers Union) (noting that ISPs send spam and desire regulatory schemes that allow them to filter everyone else's spam except their own).

219. *See White Buffalo Ventures*, 420 F.3d at 376. The Fifth Circuit did not specifically hold that off-peak hour regulations are, in fact, viable; rather, it held that UT, as the party moving for summary judgment, failed to prove that off-peak regulations were "economically infeasible." *Id.* at 372.

220. *See id.* at 376 ("There is record testimony that White Buffalo can send a restricted volume of email at off-peak times, so as not to impede server efficiency.").

221. *See* Missouri v. Am. Blast Fax, Inc., 323 F.3d 649, 654-55 (8th Cir. 2003) (using an aggregate model to hold that unsolicited faxes burden individual fax recipients); *see also*

that spam accounts for approximately 60% to 80% of all e-mail.[222] Even if just a fraction of this is legitimate spam,[223] this volume of e-mail could be enough to impact a server, even at off-peak hours.[224]

III. A POLICY PROPOSAL FOR PUBLIC ISPS SEEKING TO CHART A COURSE IN THE POST-*WHITE BUFFALO VENTURES* REGULATORY WORLD

The Fifth Circuit's decision in *White Buffalo Ventures* opens the door for a public ISP to prohibit spam on its network outside of the CAN-SPAM Act.[225] A public ISP would benefit from this policy because a network without spam would, in theory, be more efficient[226] and draw in new businesses and consumers.[227]

A public ISP, however, should refrain from instituting a spam prohibition under the Fifth Circuit's holding.[228] Although the Fifth Circuit's

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State v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 890-91 (Minn. 1992) (focusing on unsolicited pre-recorded messages as an invasion of privacy).

222. *See supra* note 12.

223. *See* FTC SUBJECT LINE LABELING REPORT, *supra* note 154, at 13 (citing industry experts who believe that "most spammers" in today's Internet world send spam that "range from marginally legal to quite illegal"); *see also Senate Commerce, Science, and Transportation Spam Hearing*, *supra* note 194 (testimony of Sen. McCain) (noting that in 2003, studies estimated that two-thirds of all spam contained some deceptive information).

224. The legitimate spam industry is massive; some figures place the value of the industry at two billion dollars with estimates that it might grow to be as valuable as eight billion dollars. *See House Energy and Commerce Spam Hearings*, *supra* note 104, at 54 (statement of Kenneth Hirschman, Vice President & General Counsel, Digital Impact). Considering the threat spam poses to bandwidth, the sheer amount of legitimate spam could impact server efficiency. *Cf.* Thomas Crampton, *Build a Better Spam Trap and . . . Spam Multiplies*, INT'L HERALD TRIB., Jan. 24, 2006, at 1 (considering the threat spam poses to bandwidth and that filtering could block legitimate e-mails).

225. *See supra* notes 145-52 and accompanying text. This statement is made with one caveat. Even if the CAN-SPAM Act does not block a public ISP from regulating spam, the dormant commerce clause still could block state spam regulations. *See supra* note 202 and accompanying text. Courts that have addressed this issue have tended to allow states to regulate spam unhindered by the dormant commerce clause. *See* Ferguson v. Friendfinders, Inc., 94 Cal. App. 4th 1255, 1266 (2002); State v. Heckel, 24 P.3d 404, 413 (Wash. 2001). This issue, however, is beyond the scope of this Comment.

226. *See* Gregg Keizer, *Spam Costs Businesses Worldwide $50 Billion*, INFORMATIONWEEK, Feb. 23, 2005, *available at* http://informationweek.com/story/showArticle.jhtml?articleID=60403016 (noting that in time wasted, spam imposes an annual cost of $170 per mailbox on the average business). Additionally, a spam-free network would result in a significant reduction of frustration for e-mail users. *See supra* note 213 and accompanying text (noting that a significant number of e-mail users still find spam annoying or disturbing).

227. *See supra* note 10 and accompanying text (noting that cities and municipalities construct public networks to provide high-speed, efficient networks for local businesses and residents).

228. *See generally infra* Part III.A-C.

holding remains valid law,[229] it is arguably flawed and would fail as a legal argument to support a public ISP's spam prohibition.[230] Instead, a public ISP should adopt a hands-off approach that allows private companies to filter spam without regulatory burdens.[231] This will encourage private companies to invest in filtering technology, the one approach that has proven effective in slowing the proliferation of spam.[232] This hands-off approach will ensure that a public ISP remains separate from private e-mail providers, and thus avoids any future problems of state action.[233]

A. Public ISP Spam Regulations Would Fail Judicial Scrutiny: Congress Intended for the CAN-SPAM Act to Preempt All Governmental Spam Regulations

The Fifth Circuit's rationale in *White Buffalo Ventures* fails to accurately identify Congress' intent concerning the scope of the CAN-SPAM exemption and preemption provisions.[234] The Fifth Circuit analyzed the preemption and exemption provisions separately under a rigid textual approach and concluded that the status of a public university was ambiguous.[235] However, by taking a step back and analyzing both provisions within the overall framework of the statute,[236] a clear intent emerges that Congress intended to preempt all state-level regulations and limit the exemption provision to private parties.[237]

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229. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 126 S. Ct. 1039 (2006) (denying the petition for certiorari filed by White Buffalo Ventures on January 9, 2006).

230. *See infra* Part III.A.

231. *See infra* Part III.B; *see also CAN-SPAM Act: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004), *available at* http://commerce.senate.gov/hearings/index.cfm?cong=108&sessn=1&subc=999 (follow "CAN-SPAM Act" hyperlink) [hereinafter *Senate CAN-SPAM Act Hearing*] (statement of Sen. John McCain) ("In the long run . . . I continue to believe that dynamic, market-based efforts have a far better chance at defeating the ever-changing, global technological maneuvers of spammers than anything we can write into our static laws.").

232. *See Senate CAN-SPAM Act Hearing*, *supra* note 231 (statement of Ted Leonsis, Vice Chairman, America Online, Inc., and President, AOL Core Service) (testifying that America Online's significant investment in spam technology is rooted in the partnership that exists between the government and the ISP industry in fighting spam).

233. *See infra* Part III.C.

234. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 372 (5th Cir. 2005) (declining to infer preemption because of "Congress's apparent failure to contemplate" the scope of the CAN-SPAM exemption provision), *cert. denied*, 126 S. Ct. 1039 (2006).

235. *See supra* notes 131-34 and accompanying text.

236. *See supra* note 36 and accompanying text (noting that all jurists support looking beyond statutory text to some degree or another as necessary to ascertain congressional intent).

237. *See infra* notes 238-48 and accompanying text.

This intent is most evident within the text of the CAN-SPAM Act itself.[238] Congress did not intend for all Internet providers, public and private alike, to fall under the statutory term "provider of Internet access"; why else would Congress segregate ISPs from other Internet providers in its findings section?[239] Additionally, Congress separated the ISP cause of action from the federal and state enforcement provisions.[240] Congress also explicitly provided that the preemption provision extends not only to the states, but also to *all state subdivisions*.[241] Thus, under a fair reading of the CAN-SPAM Act in its entirety, it is clear that Congress intended to exclude state-level agencies and subdivisions from the scope of the ISP definition, and thus exclude them from the exemption provision.[242]

The CAN-SPAM Act's legislative history provides further insight into congressional intent.[243] Congress viewed legitimate spam as a commercially valid form of speech[244] and intended for the preemption provision to have a sweeping effect on state laws that curtailed legitimate spam.[245] Additionally, Congress intended for the exemption provision to be limited to private parties.[246] Thus, the exemption provision is not an escape

238. *See supra* notes 179-89 and accompanying text.

239. *See supra* notes 180-82 and accompanying text. Negative inference is a widely recognized tool of statutory construction to determine legislative intent. *See supra* note 182.

240. *See supra* notes 188-89 and accompanying text; *see also* John E. Brockhoeft, *Evaluating the CAN-SPAM Act of 2003*, 4 LOY. L. & TECH. ANN. 1, 22-25 (2004) (breaking down the CAN-SPAM Act's enforcement provisions into three sections: enforcement by the FTC and other federal agencies, enforcement by states, and enforcement by ISPs).

241. *See* 15 U.S.C. § 7707(b)(1) (Supp. III 2003) ("This chapter supersedes any statute, regulation, or rule of a State or *political subdivision of a State* that *expressly regulates* the use of electronic mail to send commercial messages . . . ." (emphasis added)). This statutory structure mirrors the pre-CAN-SPAM paradigm where private ISPs were allowed to filter spam without government interference. *See supra* notes 100-01 and accompanying text.

242. *See supra* notes 238-41 and accompanying text.

243. *See supra* notes 191-95 and accompanying text.

244. *See* S. REP. NO. 108-102, at 2 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2348, 2349 ("[L]egitimate businesses . . . wish to use commercial e-mail as another channel for marketing products or services."); *see also* 149 CONG. REC. S15,946 (daily ed. Nov. 25, 2003) (statement of Sen. Leahy) (arguing that legitimate commercial spam must be protected under the CAN-SPAM Act); 149 CONG. REC. S13,125 (daily ed. Oct. 23, 2003) (statement of Sen. Feingold) ("I am pleased . . . that the [CAN-SPAM Act] . . . allow[s] legitimate commercial e-mail to continue to be sent.").

245. *See* S. REP. NO. 108-102, at 21, 2004 U.S.C.C.A.N. at 2365 (explaining that the CAN-SPAM preemption provision is designed to "creat[e] . . . one national standard" of spam regulation).

246. *See supra* note 190 and accompanying text. Other legal analysts support this interpretation of CAN-SPAM ISPs as private entities. *See* Adam Hamel, Note, *Will the CAN-SPAM Act of 2003 Finally Put a Lid on Unsolicited E-mail?*, 39 NEW ENG. L. REV. 961, 989 n.240 (2005) ("Critics of CAN-SPAM were disappointed that Congress limited private-party standing to ISPs."); *see also* Sullivan & de Leeuw, *supra* note 16, at 903

hatch for state-level Internet providers to filter legitimate spam outside of the CAN-SPAM Act.[247] Rather, it is a statutory recognition that private ISPs, *as private entities*, should be allowed to decide what flows onto their servers.[248]

The Fifth Circuit's failure to correctly identify this congressional intent is partially due to the fact that a public university regulation was at issue.[249] Public universities have traditionally provided e-mail services, and prohibiting them from regulating spam would adversely affect the expectations of users of university e-mail services.[250]

A court that reviewed a public ISP spam prohibition, however, would not face these concerns—striking down such a prohibition would not change the status quo as private e-mail providers would continue to filter spam under the CAN-SPAM Act exemption.[251] Under an unbounded statutory approach, the court would likely identify the clear congressional intent: to preempt all governmental spam regulations at the state level.[252] Any presumption against preemption, triggered by a public ISP's effectuation of its police power to protect e-mail users,[253] would be overcome in light of this congressional intent.[254]

B. Preemption Aside, a Spam Prohibition, Although Constitutionally Valid, Is an Imprudent Policy Choice

Notwithstanding the legality of a spam regulation, a public ISP should avoid a spam prohibition on policy grounds.[255] This seems counterintuitive; why not ban spam when the Fifth Circuit's commercial speech hold-

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("[P]rivate parties, such as ISPs, have started bringing civil litigation based on the CAN-SPAM Act . . . .").

247. *See supra* note 245 and accompanying text.

248. *See supra* note 192 and accompanying text (citing statements by ISP industry representatives indicating that any federal spam law must include an exemption provision confirming the right of private ISPs to filter all spam, legitimate and fraudulent alike).

249. *See infra* note 250 and accompanying text.

250. Although the Fifth Circuit claimed that policy considerations did not "drive [its] determination," it openly acknowledged that "[i]t would be an unusual policy to allow private, but not public, educational institutions to act as custodians for the interests of its online community." *See White Buffalo Ventures*, 420 F.3d 366, 373 n.13 (5th Cir. 2005).

251. *See supra* note 114 and accompanying text.

252. *See supra* notes 238-48 and accompanying text; *see also* 15 U.S.C. § 7707(b)(1) (Supp. III 2003) ("[The CAN-SPAM Act] supersedes *any statute, regulation, or rule of a State or political subdivision of a State* that expressly regulates the use of electronic mail to send commercial messages." (emphasis added)).

253. *See supra* notes 201-05 and accompanying text. In the Internet age, protecting users of a public ISP from the harmful effects of spam is a legitimate state police power. *See* State v. Heckel, 24 P.3d 404, 411-12 (Wash. 2001); *see also* Ferguson v. Friendfinders, Inc., 94 Cal. App. 4th 1255, 1266-69 (2002).

254. *See supra* note 53 and accompanying text.

255. *See infra* notes 262-70 and accompanying text.

ing allows such a regulation?[256] The Fifth Circuit's commercial speech analysis can reasonably be applied to municipal spam regulations.[257] Moreover, empirical evidence buttresses this analysis.[258] First, research indicates that a substantial state interest exists in outlawing spam because of the significant burden it imposes on networks and e-mail users.[259] Second, studies show that a reasonable means-ends connection exists between prohibiting spam and easing the burden of spam on networks and e-mail users.[260]

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256. *See supra* Part II.B.

257. A public ISP has the same state interest in prohibiting spam as a public university, namely, to protect servers and e-mail users. *See* Moorefield, *supra* note 206, para. 41 (arguing that a state has a substantial interest in banning spam to "ensur[e] the Internet's continued viability" and protect e-mail recipients from the burden of spam). In fact, a state would probably have a greater interest in banning spam than a university because of the significant costs that spam imposes on businesses, *see infra* note 259, a concern clearly not present for university servers.

258. *See infra* notes 259-60 and accompanying text.

259. As to the burden on servers, ISPs expend significant resources filtering spam to protect their servers from crashing and to ensure user productivity. *See Winning the War on Spam*, *supra* note 216 (estimating that spam costs American businesses three billion dollars per year on technology and lost productivity); *see also supra* note 212 and accompanying text (noting that spam attacks can still slow a server). As to the burden on e-mail users, studies show that spam is still a significant cost and annoyance. *See supra* note 213 and accompanying text.

260. In applying the fourth prong of *Central Hudson*, the Fifth Circuit was correct that a clear means-ends fit exists between prohibiting spam and protecting e-mail users. Studies increasingly show that filters are the only effective means of controlling the flow of spam to e-mail accounts. *See supra* note 216 and accompanying text. Additionally, other policies that target spam are proving to be ineffective. The CAN-SPAM Act has done little to impact spam flow. *See* Cara Garretson, *Settlements Prove that Spam Laws Have Teeth*, NETWORK WORLD, Aug. 15, 2005, at 12, 12 (pointing out that "[d]espite a few high-profile settlements, CAN-SPAM and other laws are not having the desired effect on curtailing unwanted e-mail"). Additionally, the CAN-SPAM opt-out scheme has produced widely varying results as to its effectiveness. *See Senate CAN-SPAM Act Hearing*, *supra* note 231 (statement of Timothy Muris, Chairman, Federal Trade Commission) (noting that in a 2002 study, the FTC found that 63% of opt-out links in spam messages did not function properly). *But see* FED. TRADE COMM'N, TOP ETAILERS' COMPLIANCE WITH CAN-SPAM'S OPT-OUT PROVISIONS: A REPORT BY THE FEDERAL TRADE COMMISSION'S DIVISION OF MARKETING PRACTICES 1 (2005), *available at* http://www.ftc.gov/reports/optout05/050801optoutetailersrpt.pdf (concluding that the top hundred spam retailers have "substantially complied with all of the CAN-SPAM Act's opt-out provisions").

However, the court was incorrect that a state spam prohibition designed to protect servers would fail the fourth prong of the *Central Hudson* test. *See* White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366, 375-76 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1039 (2006). The court applied the "least restrictive" test in arriving at its holding, *id.* at 374-75, instead of the "narrowly tailored" test, the proper standard for conducting a means-ends analysis. *See supra* note 65 and accompanying text. Under this standard, any alternative spam policy that allows legitimate spam to flow onto a network, even at off-peak hours, could impact server efficiency. *See supra* notes 221-24 and accompanying text.

However, three compelling policy considerations should dissuade public ISPs from prohibiting spam.[261] First, any citywide spam prohibition would be impossible to enforce.[262] For example, federal authorities already have trouble locating and prosecuting spammers;[263] a local public ISP with limited resources would have little to no chance of success. Enforcement would also be difficult as to businesses and private e-mail providers. Filtering spam is already a difficult task; penalizing private entities for inadequate filtering would only drive them away from public ISPs.[264]

Second, any spam prohibition would likely engender hostility with e-mail providers, the one group that is proving effective in subduing spam.[265] Private e-mail providers are equipped with the filtering technology necessary to stop the majority of spam, both fraudulent and legitimate.[266] Evidence shows, however, that these providers white-list certain legitimate spam, allowing it to reach user in-boxes.[267] As such, to comply with a spam prohibition, a private e-mail provider would have to change its filters to stop *all* spam from flowing into user accounts, *but* only for those users operating on the public ISP. Instead of imposing regulatory hurdles on private e-mail providers, a public ISP's spam policy should encourage private parties to continue developing more effective filtering

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Even if this connection is somewhat attenuated, the risk of a server crashing justifies a spam prohibition as a "reasonably tailored" measure.

261. *See infra* notes 262-70 and accompanying text.

262. *See Senate CAN-SPAM Act Hearing*, *supra* note 231 (statement of Sen. John McCain) (noting that only eight spam cases were filed under the CAN-SPAM Act in the first five months of the Act's operation and concluding that government authorities alone have little hope in stopping spammers).

263. *See supra* note 262.

264. *See House Energy and Commerce Spam Hearings*, *supra* note 104, at 43-44 (statement of Ira Rubinstein, Associate General Counsel, Microsoft Corp.) (arguing that private ISPs cannot be expected to stop all spam and would disfavor spam laws that penalize ISPs for allowing spam through filters).

265. *See supra* note 260 (noting that the CAN-SPAM Act enforcement scheme and opt-out schemes are proving ineffective in combating spam).

266. *See supra* note 216 and accompanying text; *see also* Crayton Harrison, *The Battle for Your Inbox*, DALLAS MORNING NEWS, Aug. 14, 2005, at 1D (noting that businesses and ISPs with advanced filtering technology are helping reduce the flow of spam into e-mail accounts); POSTINI, ANTI-SPAM PRODUCT NOT WORKING? WHAT MORE COMPANIES ARE SWITCHING TO . . . AND WHY 2 (2005), *available at* http://www.postini.com/whitepapers/ (noting that one of Postini's top products, the Postini Perimeter Manager, stopped 97% of all spam in one test). Some reports predict that filters will eventually block all spam as algorithms get better and better. *See* Zeller, *supra* note 12.

267. *See* FTC SUBJECT LINE LABELING REPORT, *supra* note 154, at 11 (describing the white-list process by which private ISPs allow legitimate e-mail to reach e-mail users).

technology that will, in the end, decrease the amount of spam that reaches user in-boxes.[268]

Finally, a public ISP's spam prohibition arguably creates a nexus of activity between the state and private e-mail providers sufficient for a finding of state action.[269] This would create constitutional issues beyond commercial speech, particularly equal protection concerns.[270]

C. Crafting ISP Regulations to Ensure that Private E-mail Providers Stay Private—The Problem of State Action

As discussed above, a public ISP should adopt a hands-off approach to avoid the state action issue.[271] Public ISPs have already instituted regulations for users of public networks relating to Internet use and liability.[272] They are also considering regulations that will apply to e-mail providers, such as security measures limiting access to registered participants.[273] The

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268. *See* Zeller, *supra* note 12 (positing that private companies will continue refining algorithms that stop spam, thereby decreasing, over time, the amount of spam reaching in-boxes). Some industry experts are so optimistic that advanced filters will stop spam that they predict spam will be completely eradicated in the near future. *See* The Economist: War on Spam Can be Won via Technology and Courts (March 12, 2004), http://www.ebusinessforum.com (follow "Thought Leadership" hyperlink; search for "War on Spam Can be Won") (noting that Bill Gates predicted in early 2004 that spam would be eliminated by 2006). Other experts are more hesitant and predict that spammers will always find a way to infiltrate even the best filters. *See* Harbaugh, *supra* note 13 (noting that even the best filters still allow five percent of all spam to reach user e-mail accounts).

269. *See infra* Part III.C. A spam prohibition, as a commercial speech restriction, is the same thing as the state commanding a private utility to bar certain forms of speech from the public airwaves. *See* Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1295 (9th Cir. 1987) (finding state action in a county attorney asking a telephone company to prohibit adult entertainment calls on its phone lines).

270. ISP black-list and white-list policies are susceptible to equal protection challenges because they selectively choose which e-mails enter ISP networks. *See* FTC SUBJECT LINE LABELING REPORT, *supra* note 154, at 11 (describing the ISP white-list and black-list process). Even more problematic on equal protection grounds is evidence that private ISPs allow their own spam to reach their customers while blocking spam from other Internet sources. *See Senate CAN-SPAM Act Hearing*, *supra* note 231 (testimony of Ronald Scelson, Scelson Online Marketing).

271. *See infra* notes 272-78 and accompanying text.

272. *See, e.g.*, BVU OptiNet, Privacy Policy, http://go.bvub.com/inside_about_us.htm (last visited Feb. 13, 2007) (noting that as part of Bristol Virginia Utilities' privacy policy, subscriber information is required, and consumer name and address information may be disclosed to third parties); Ashland Fiber Network, Acceptable Use Policy, http://www.ashlandfiber.net/acceptable.htm (last visited Feb. 13, 2007) (noting that spammers are prohibited from using the public Internet for Ashland, Oregon); Spanish Fork Community Network, Website Policies and Disclaimer, http://www.sfcn.org/sfcn/disclaimer.htm (last visited Feb. 13, 2007) (warning that there is "no reasonable expectation of privacy" using the public network and that all activities are subject to the city's monitoring).

273. *See, e.g.*, BVU OptiNet, *supra* note 272 (requiring all Internet users to register with the city's Internet provider). For a general discussion of public ISPs seeking to im-

more a public ISP regulates, however, the closer it comes to triggering the doctrine of state action.[274] This would be disastrous for a public ISP. Assuming that public ISPs are subject to the CAN-SPAM Act,[275] e-mail providers acting as state actors would be prohibited under the CAN-SPAM Act from filtering any legitimate spam.[276] This would result in an increase of spam into user e-mail accounts,[277] and amplify the already difficult task of distinguishing fraudulent spam from legitimate spam.[278]

To trigger the state action doctrine, a public ISP would have to regulate in such a way that a nexus of activity exists between the public ISP and e-mail provider.[279] Not surprisingly, the case law is bereft of Internet state action analyses employing the nexus test.[280] However, state action cases involving utility companies demonstrate that regulations, by themselves, are insufficient to support a finding of state action.[281] The bar is high concerning the amount of contacts necessary for a nexus to exist;[282] even grants of monopoly power and tariff restrictions have been rejected as regulations sufficient for a nexus.[283]

Thus, a public ISP has significant room to maneuver in regulating its network without exposing e-mail providers to treatment as a state ac-

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prove network security, see Louis Aguilar & Deborah Sherman, *Wi-Fi Users Vulnerable to Hackers at DIA, Elsewhere*, DENVER POST, May 14, 2004, at 1C (reporting on susceptibility of public Internet users to hackers seeking financial and personal identity information); Larry Seltzer, *Wireless Access: The Next Great Municipal Crisis*, EWEEK, June 23, 2005, http://www.eweek.com/article2/0,1759,1830998,00.asp (noting that public ISPs seek to stop spammers from hijacking their networks to proliferate spam).

274. *See infra* notes 279-83 and accompanying text.

275. *See supra* Part III.A.

276. *See supra* note 237 and accompanying text (noting that state subdivisions under the CAN-SPAM preemption clause are prohibited from filtering legitimate spam).

277. *See* FTC SUBJECT LINE LABELING REPORT, *supra* note 154, at 11 (noting that although private ISPs employ white-list policies, most ISPs generally prohibit unsolicited commercial e-mail).

278. *See* Symantec Corp., How Filtering Techniques Can Screen Out Spam (May 10, 2005), http://enterprisesecurity.symantec.com/article.cfm?articleid=5666&EID=0 (explaining that fraudulent spammers increasingly avoid filters by hijacking URLs of legitimate companies).

279. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974). The "nexus" test is the only relevant state action standard because the courts have already rejected the public function standard as applied to private ISPs. *See* Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 456 (E.D. Pa. 1996) (concluding that private ISPs are not public actors exercising a traditional state power).

280. *See supra* Part I.A.3. This comes as no surprise because federal and state governments have, more or less, adopted a "hands off" approach to the Internet. *See supra* note 101 and accompanying text.

281. *See supra* note 88 and accompanying text.

282. *See Jackson*, 419 U.S. at 350-51 (holding that heavy regulations by the state are not sufficient by themselves to constitute the nexus required for state action).

283. *See supra* note 91.

tor.[284] Still, adopting a hands-off policy from the beginning will serve as a useful guidepost for future regulatory decisions and ensure that e-mail providers will continue to filter spam without the problem of state action.[285]

IV. CONCLUSION

On the surface, the Fifth Circuit's preemption and commercial speech holdings in *White Buffalo Ventures* appear to be gold mines for a public ISP seeking to prohibit spam on a public server. However, both holdings are empty promises for a public ISP serious about constructing a viable long-term spam policy. The preemption holding misinterprets Congress' intent concerning the CAN-SPAM exemption and preemption provisions as Congress intended for public entities to be preempted by the CAN-SPAM Act. The commercial speech holding, although constitutionally sound, leads to an unenforceable spam prohibition with the potential of angering private e-mail providers—the most important ally in fighting spam. Instead of following in the wake of *White Buffalo Ventures*, a public ISP should chart its own course: stay out of spam regulation, encourage the private industry to continue advancements in the filtering technology, and create Internet regulations that avoid state action problems.

284. *See supra* notes 281-83.
285. *See supra* notes 231-33 and accompanying text.