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NEWMAN & NEWMAN

NO.07-35487

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JAMES S. GORDON, a married individual doing business as gordonworks.com;
OMNI INNOVATIONS LLC, a Washington Limited Liability Corporation,

Plaintiffs/Appellants,

v.

VIRTUMUNDO INC., A Delaware Corporation doing business as
adknowledgmail.com; SCOTT LYNN, an individual; JOHN DOES, I-X,

Defendants/Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CV-06-00204-JCC
The Honorable John C. Coughenour
United States District Court Judge

**STATE OF WASHINGTON'S MOTION TO FILE LATE AMICUS CURIAE
BRIEF**

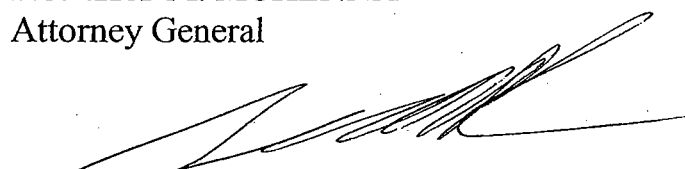
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The State of Washington, by and through its Attorney General, Robert M. McKenna, hereby moves the Court to permit the filing of its amicus curiae brief in the above-entitled matter beyond the time limit imposed by Federal Rule of Appellate Procedure 29(e). The State bases its Motion on FRAP 29 (e), which provides that the Court may, in its discretion, grant leave for a filing made more than 7 days after the appellant's brief is filed. This Motion supported by the attached Declaration of Counsel.

RESPECTFULLY SUBMITTED this 12 day of November, 2007.

ROBERT M. MCKENNA
Attorney General



SHANNON E. SMITH, WSBA #19077
Senior Counsel

Certificate of Service

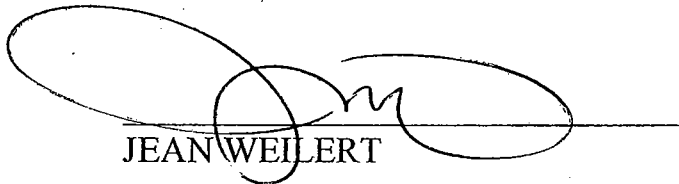
I certify that on this date I have caused a true and correct copy of State of Washington's Motion To File Late Amicus Curiae Brief to be served, via First Class Mail, on:

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Executed this 8th day of November, 2007, at Seattle, Washington.


JEAN WEILERT

Received

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NEWMAN & NEWMAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CV-06-00204-JCC
The Honorable John C. Coughenour
United States District Court Judge

**DECLARATION OF SHANNON SMITH IN SUPPORT OF STATE OF
WASHINGTON'S MOTION TO FILE LATE AMICUS CURIAE BRIEF**

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Shannon Smith, being first duly sworn upon oath, deposes and says:

I am the attorney for the State of Washington, am over the age of eighteen and am competent to testify in this matter

On October 1, 2007, a month before Appellant's opening brief was due, Appellant filed it with the Court and sent a copy to the State. At that point, the State had not yet begun drafting its brief, and could not submit a completed, fully-researched amicus curiae brief within 7 days of appellant's filing as required by FRAP 29(e). The State had assumed that Appellant would file his brief on November 1, 2007, as allowed by the court, and planned its brief drafting schedule accordingly.

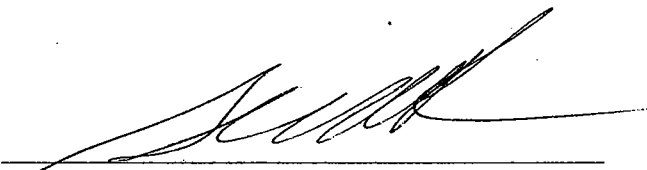
The State has submitted its Brief of Amicus Curiae together with the Motion herein. The briefing schedule ordered by the Court requires Appellees to submit their answering brief by December 3, 2007. The State's submission of a late Brief of Amicus Curiae will not prejudice Appellees, insofar as they will have essentially the same amount of time to review and respond to the State's brief as if it had been filed shortly after Appellant's brief was originally due. Had Appellant filed his brief on November 1, 2007, as allowed by the Court, Appellees would have had approximately one month to answer. As it is, Appellant's unanticipated early filing has given Appellees an extra month of response time. Accordingly,

Appellees have been benefitted by Appellant's early filing and will not be prejudiced by the State's late filing.

Federal Rule of Appellate Procedure 29(a) permits a state to file a Brief of Amicus Curiae without consent of the parties or leave of the Court. FRAP 29(e) allows the Court to grant leave for filing outside of the time limits it imposes on an amicus curiae. Given the circumstances of Appellants' early filing and the lack of prejudice to Appellees, the State of Washington requests that the Court accept its late filing of the Brief of Amicus Curiae.

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

Dated this 7th day of November, 2007.



SHANNON E. SMITH, WSBA #19077
Senior Counsel

Certificate of Service

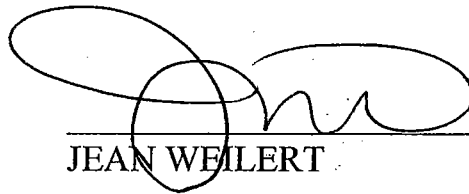
I certify that on this date I have caused a true and correct copy of the
Declaration of Shannon Smith In Support of State of Washington's Motion to File
Late Amicus Curiae Brief to be served, via First Class Mail, on:

Timothy Walton
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Executed this 8th day of November, 2007, at Seattle, Washington.



A handwritten signature in black ink, appearing to read 'JW', is written over a horizontal line. The signature is stylized with large loops and a cursive-like flow.

JEAN WEILERT

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AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON

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I. IDENTITY OF AMICUS CURIAE

The State of Washington (“State”) submits this brief as amicus curiae pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. Rule 29(a) authorizes states to file an amicus curiae brief without obtaining the consent of the parties or leave of the Court.

II. INTEREST OF THE AMICUS CURIAE

The State is interested in this appeal because of the potential for harm to the public interest. Amicus curiae takes no position on the merits of this case, but is concerned that the opinion could be read so broadly as to preempt the provisions of Washington’s Commercial Electronic Mail Act (“CEMA”), Wash. Rev. Code § 19.190. The State has an interest in protecting consumers from unfair and deceptive commercial email practices. Since its passage in 1998, the State has filed seven lawsuits under the provisions of CEMA.¹ CEMA, in conjunction with the Washington Consumer Protection Act, Wash. Rev. Code § 19.86 (“CPA”), permits the State to file enforcement actions against senders of deceptive email on behalf of the citizens of Washington as violations of the CPA. The State’s

¹*State v. Heckel*, 143 Wash. 2d 824, 24 P.3d 404 (2001); *State v. Sam Khuri d/b/a Benchmark Print Supply*, King Co. Sup. Ct. No. 99-2-03549-6SEA; *State v. Meltzer & Meltzer*, King Co. Sup. Ct. No. 02-2-20523-2SEA; *State v. Haberli*, King Co. Sup. Ct. No. 02-2-35691-5SEA; *State v. A-Plus Imaging*, King Co. Sup. Ct. No. 03-2-38254-0; *State v. Secure Computer*, United States District Court, W.D. Wash., No. CV06-0126RSM; *State v. Avtech-Computer*, United States District Court, W.D. Wash., No. CV04-2171RSM.

enforcement authority pursuant to CEMA and the CPA is central to assuring the State's ability to bring effective actions on behalf of its citizens; however, the district court's ruling jeopardizes that authority by ruling that key provisions of CEMA are preempted by the CAN-SPAM Act of 2003 (Controlling the Assault of Non-Solicited Pornography and Marketing Act), ("CAN-SPAM"), 15 U.S.C. §§ 7701-7713.

The State's enforcement authority under CEMA is vital to the statute's effectiveness. Due to the nature of deceptive email, individual citizens often lack the technical expertise or the incentive to undertake litigation themselves. The State has sought to protect the thousands of citizens in Washington who may have received deceptive commercial electronic mail ("spam"), but who alone, would rarely consider taking action.

CEMA protects consumers in several ways. First, it prohibits misrepresenting or obscuring the point of origin or transmission path of an electronic mail message ("email"), Wash. Rev. Code § 19.190.020(a); and second, it prevents senders of email from including false or misleading information in the subject line, Wash. Rev. Code § 19.190.020(b). In addition, a violation of Wash. Rev. Code § 19.190.020 is a per se violation of the Consumer Protection Act, Wash. Rev. Code § 19.190.100. The Washington legislature found that "the

practices covered by [CEMA] are matters vitally affecting the public interest,” and that “a violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for *the purpose of applying the consumer protection act.*” Wash. Rev. Code § 19.190.100 (emphasis added).

The State has a significant interest in using CEMA to bring enforcement actions against deceptive spammers with the standards of proof provided under the statute. While the CAN-SPAM Act provides for state Attorneys General to sue spammers for certain specified practices, CEMA complements the federal law by providing for additional relief, such as (1) civil penalties for the State; (2) an additional measure of damages for harmed consumers; and (3) a private right of action under State law when the federal law affords no relief to individual consumer litigants. This additional relief acts as a further deterrent to spammers, and gives individual consumers a litigation tool when they otherwise would have none.

The State asks this Court to hold that CEMA is consistent with CAN-SPAM. The district court held that when a plaintiff has not explicitly alleged and proved that CEMA violations are “material,” the plaintiff’s CEMA claims are preempted by CAN-SPAM. The district court’s ruling thereby unnecessarily restricts the

State's ability to protect its consumers from deceptive spam. By adding "materiality" to the elements of CEMA, and seemingly preempting all actions that do not allege and prove this element, the district court's decision could be read to limit the reach of existing Washington law and the additional relief it affords. The State has an interest in protecting its citizens and assuring that its regulation of deceptive spam is preserved in accordance with Congress's intent.

III. THE WASHINGTON COMMERCIAL ELECTRONIC MAIL ACT

The Washington State Legislature enacted CEMA in 1998 to address the burgeoning problem of "fraudulent or misleading" email messages that cause network congestion and impose costs on computer users and Internet service providers. Senate Bill Report, ESHB 2752, February 24, 1998. Wash. Rev. Code § 19.190.020 reads in full:

(1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that:

(a) Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or

(b) Contains false or misleading information in the subject line.

(2) For purposes of this section, a person knows that the intended

recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

Wash. Rev. Code § 19.190.100 reads in full:

The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW.

IV. ARGUMENT

The district court's ruling whittles down the application of CEMA, holding that it only can be applied to fact patterns that allege "material falsity or deception." Order at 20. The district court finds that actions that are predicated on the language of the statute itself, i.e. actions that simply allege a misrepresented or obscured point of origin, or allege "immaterial error" are preempted. *Id.* It further reasons that because a violation of CEMA does not require "materiality," an element included in a violation of CAN-SPAM which the court appears to equate with "falsity or deception," CEMA conflicts with the federal law. *Id.*

The district court seemingly finds that CEMA is preempted as applied to the particular set of facts before it, but also finds that with a different set of facts, CEMA would not be preempted. Under this ruling, it is difficult to know whether

CEMA is preempted because it does not contain a materiality requirement on its face like CAN-SPAM, or whether CEMA claims are preempted *only* if the plaintiff does not allege and prove materiality. The court states:

Accordingly, while claims actually alleging falsity or deception under CEMA would not be preempted, Plaintiffs' claims here—for at best, “incomplete” or less than comprehensive information—are for immaterial errors that may not be litigated under state law. Order at 20.

It therefore rules that “Plaintiffs’ CEMA claims are preempted.” *Id.*

The State is concerned that the district court’s decision will result in preemption of the relevant portions of CEMA that do not require a showing of materiality, thus effectively preempting the provisions of the statute at Wash. Rev. Code § 19.190.020(a) and (b) *as written*, and imposing an additional element of proof in order to show a violation of those provisions.

A. CAN-SPAM does not preempt CEMA.

Preemption of state law by federal law occurs by operation of the Supremacy Clause of the United States Constitution. U.S. Const. Art. IV, cl. 2.

1. CAN-SPAM does not expressly preempt CEMA.

CAN-SPAM supersedes “any statute, regulation, or rule of a State...that expressly regulates the use of electronic mail to send commercial messages, *except to the extent that any such statute, regulation or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached*

thereto.” 15 U.S.C. § 7707(b)(1) (emphasis added). The relevant portions of CEMA prohibit commercial electronic mail from “misrepresent[ing] or obscur[ing] any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or contain[ing] false or misleading information in the subject line.” Wash. Rev. Code § 19.190.020(1)(a)-(b). In short, CEMA prohibits “falsity or deception in any portion” of a piece of spam and falls directly within the plain language of CAN-SPAM’s savings clause.

As the district court explained, preemption is not a remedy to be accepted lightly. Order at 16. There is both a “presumption that Congress does not cavalierly preempt state-law causes of action” and a requirement that courts “start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress.*” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added). The presumption against preemption is stronger when Congress expressly saves a certain class of statute from preemption and when the state law in question fits into the plain language of Congress’s savings clause. Because CEMA prohibits “falsity or deception” in commercial electronic mail, this Court should find that CAN-SPAM does not preempt CEMA, even though CEMA, as written, does not require “material” falsity or deception.

This rule is consistent with decisions of other federal courts that have considered CAN-SPAM's preemption of state anti-spam laws. In *Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523 (D. Md. 2006), the court was asked to determine whether CAN-SPAM preempted Maryland's Commercial Electronic Mail Act ("MCEMA"). Importantly, MCEMA is "essentially identical to" CEMA and, in fact, the "Maryland General Assembly modeled MCEMA on the Washington law." *Id.* at 532. The *Beyond Systems* court reasoned that, because of the presence of CAN-SPAM's savings clause, "insofar as a statute is not inconsistent with CAN-SPAM, it will not be deemed preempted." *Id.* (citing *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714, 722–24 (1963) (upholding state statute barring discriminatory hiring by airlines despite essentially identical federal statute)). The court continued its analysis stating that "it is readily apparent that MCEMA—which prohibits use of a third party's Internet domain name or electronic mail addresses without the permission of the third party, or which contains false or misleading information about the origin or the transmission path of the commercial electronic mail, or which contains false or misleading information in the subject line that has the capacity, tendency, or effect to deceive the recipient—is in no way inconsistent with CAN-SPAM." *Id.* at 538 (emphasis in original). Exactly like CEMA, MCEMA

“supplements the federal law. It does not frustrate the goals of the federal legislation; in fact it furthers them.” *Id.* Because CEMA is substantially identical to MCEMA, this Court should apply the same preemption analysis and find that CEMA is not preempted by CAN-SPAM.

Notably, when state anti-spam statutes do not address falsity or deception, district courts are quick to apply CAN-SPAM’s preemption clause. For example, in *Facebook, Inc. v. ConnectU, LLC.*, 498 F. Supp. 2d 1087 (N.D. Cal. 2007), a district court was faced with two California statutes² that regulated the collection of email addresses for commercial purposes but did not “purport to regulate false or deceptive email, or require such falsity or deception as an element of the statutory violation.” *Id.* at 1094. Accordingly, the court properly found that the statutes were preempted by CAN-SPAM and dismissed those claims.

2. CEMA is not preempted under field preemption or conflict preemption.

Field preemption is inconsistent with any statutory scheme that reserves power to the states. In the case of anti-spam laws, the CAN-SPAM Act clearly and unequivocally leaves to the states the power to regulate commercial email that contains false or deceptive information. Therefore, with respect to false and deceptive commercial email, Congress plainly has not occupied the field.

² California Business and Professions Code sections 17529.4 and 17538.45.

When a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” it is preempted by the conflict preemption doctrine. *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that federal immigration law preempted a Pennsylvania law requiring registration of legal aliens because the state law may have resulted in “inquisitorial practices and police surveillances that might affect our international relations.”). When a state and federal law do not directly conflict, courts must make two separate determinations: (1) what the purpose of the federal law is, and (2) whether the state law hinders that purpose. *See, e.g., Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992) (preempting Illinois state worker protection law because of federal approval guidelines in the Occupational Safety and Health Act); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm’n*, 441 U.S. 190 (1983) (holding that a California moratorium on the construction of nuclear power plants was not preempted because its motivation was economics, not safety).

The district court characterized Congress’s purpose in two ways. First, it noted that Congress could not have intended to allow states to enact laws prohibiting “mere error” (as opposed to “material falsity or deception”), because this would have “created a loophole so broad that it would virtually swallow the

preemption clause itself.” Order at 19 (citing *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 355 (4th Cir. 2006)). The court’s characterization comports with its analysis of Congressional purpose—by looking at information contained in CAN-SPAM’s legislative history, the court determined that Congress was most interested in the creation of “one national standard” for purposes of labeling, formatting, or specific content of unsolicited commercial email. S. Rep. No. 108-102, at 21–22. The district court points out, however, that Congress assumed that “statutes target[ing] fraud or deception” would be saved. Order at 19.

The creation of “one national standard,” however, does not mean Congress intended all senders of unsolicited commercial email be painted with the same brush for all practices. A broader look at the congressional record bears this out. Congress’s concern about assuring a “national standard” was aimed primarily at “legitimate businesses” that seek to comply with labeling, formatting, and content requirements. During the hearings for the Act, the point was made that “statutes that prohibit fraud and deception in email do not raise the same concern (of consistency), because they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway.” Rep No. 108-102 at 21-22, 108th Cong., 1st session 2 (2003), *reprinted in* 2004 USSCAN 2348, 2349,

cited in Comment, Preemption of State Spam Laws by The Federal CAN-SPAM Act, 72 U. Chi. L. Rev. 355 (2005). This strikes at the heart of the matter—if CEMA targets legitimate businesses trying to comply with relevant laws then it is likely preempted; but if CEMA targets only behavior that legitimate business would not engage in, then it is consistent with CAN-SPAM and should not be preempted. As previously discussed, CEMA targets only false or deceptive conduct in the sending of commercial email, and since “no legitimate business” requires deception to operate, CEMA is consistent with and can co-exist, as written, with CAN-SPAM.

When Congress intends to limit or condition the relief granted by a federal statute, it has explicitly done so. For example, in the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, Congress permits private rights of action, but requires that they be instituted in state court and limits the amount of damages that can be sought. 47 U.S.C. § 227(b)(3). Clearly, Congress can and has conditioned and limited the terms of its own consumer protection legislation. In the case of CAN-SPAM, however, rather than limiting state authority over deceptive email, the CAN-SPAM savings clause permitting state regulation is very broad, reaching “*any* such statute, regulation or rule” (emphasis added). By examining what Congress has done in other consumer protection statutes such as

the TCPA, it is clear that, while Congress could have imposed limitations or otherwise qualified its grant of authority to the states, it did not do so. To the contrary, by its own language, it chose *not* to limit state regulation that prohibits falsity or deception in a commercial email.

The dual regulation of deceptive email set forth in CAN-SPAM and CEMA is consistent with many regulatory schemes where federal law provides the “floor” of protection and states are allowed to expand upon that protection. For example, the Washington statute regulating automatic dialing and announcing devices (“ADAD”), Wash. Rev. Code § 80.36.400, prohibits all uses of ADADs for the purposes of “encouraging a person to purchase property, goods, or services.” Wash. Rev. Code § 80.36.400 (1)(b). The Washington statute therefore provides more protection over and above the floor created by the federal TCPA, which does not wholly prohibit the use of ADADs for commercial purposes. 47 U.S.C. § 227(a)(2)(B)(ii). This additional stringency of the state law does not conflict with Congress’s goals. Similarly, within CAN-SPAM, Congress has provided for causes of action only where the falsity or deception are material, but Washington remains free to expand upon that protection as long as it does not interfere with Congress’s intent. Because Congress wished to create a uniform set of standards

for legitimate businesses, and CEMA does not disrupt that uniformity, CEMA should not be preempted.

B. The *Mummagraphics* decision is a case of limited relevance because of key differences between CEMA and the Oklahoma statute.

The district court relied heavily on the Fourth Circuit's decision in *Omega World Travel, Inc. v. Mummagraphics, Inc.* In that case, the Fourth Circuit declared that an Oklahoma statute regulating email³ was preempted because it resulted in a "strict liability" standard that would have interfered with Congress's desire to create a unified set of regulations for commercial email. *Mummagraphics*, 469 F.3d at 356. Borrowing from the Fourth Circuit, the district court applied the same analysis to Washington's CEMA and found that the plaintiff's claims alleged activity that, in the district court's view, did not amount to "material" falsity or deception, the standard required under CAN-SPAM. However, the *Mummagraphics* analysis is not a good fit for review of CEMA because CEMA, unlike the Oklahoma statute, does not impose a "strict liability" standard. Instead, CEMA contains an "unfair or deceptive" standard, which is an important distinction between the two statutes.

Rather than apply the *Mummagraphics* holding to CEMA, the district court should have analyzed CEMA under Washington's well-developed deceptiveness

³ Okla. Stat. tit. 15, § 776.1A.

standard and found that the emails sent by Virtumundo were not sufficiently deceptive under CEMA to survive summary judgment. This would have been preferable to preempting the law whenever the federal “materiality” standard has not been met. As previously discussed, there is nothing inherently inconsistent about CEMA and CAN-SPAM and the two can exist in harmony without harming the federal interest in a unified standard.

The *Mummagraphics* court was able to find that the Oklahoma statute imposed “strict liability” because the Oklahoma courts had not interpreted the statute and the facial language seemed to indicate that it went beyond the common law definitions of fraud or deception. 469 F.3d at 353. This is not the case for CEMA. Under Washington consumer protection law, the subject line of an email is deceptive only if it has the “capacity to deceive a substantial portion of the public.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 785, 719 P.2d 531 (1986) (holding that plaintiffs need not show that the act in question was intended to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public). The other substantive portion of CEMA prohibits misrepresenting or obscuring the point of origin or transmission path of an email. Both terms are inherently inconsistent with a faultless “strict liability” regime because, as generally used, both imply a certain level of deceptive

conduct by the actor. Such standards are therefore not “strict liability” and do not hamper the efforts of legitimate businesses to comply with the law. As such, there is no reason to find that CEMA conflicts or interferes with Congress’s purposes as enacted in CAN-SPAM.

The federal preemption language saves statutes that regulate “deception.” Washington’s law does just that—Washington case law, which is the background against which CEMA should be interpreted, prohibits unfair “or deceptive” practices. *See* Wash. Rev. Code § 19.86.020 (declaring unfair or deceptive acts or practices in the conduct of any trade or commerce to be unlawful); Wash. Rev. Code § 19.190.030 (declaring violation of CEMA to be a violation of Washington’s Consumer Protection Act); *see e.g.*, *Hangman Ridge*, 105 Wash. 2d at 785. Washington case law does not say that inconsequential or inadvertent errors automatically rise to the level of deceptiveness as is assumed by the district court. *See Travis v. Washington. Horse Breeders Ass’n*, 111 Wash. 2d 396, 406, 759 P.2d 418 (1988) (holding pattern of misrepresentations and advertisements in the sale of horses to be deceptive); *Micro Enhance v. Coopers & Lybrand*, 40 P.3d 1206, 1219 (Wash. Ct. App. 2002) (holding that accounting firm’s failure to abide by its “prompt local decision making” advertisement did not engage in deceptive act).

Under the Washington CPA, violations do not occur in a vacuum without measuring whether they are actually deceptive. Had the district court examined Washington case law, it would have found that the federal and state standards for deception are not dissimilar. While “materiality” is not listed as an element, capacity to deceive a substantial portion of the public is required in order to prove a Consumer Protection Act violation. Irrelevant errors do not rise to the level of deception under the CPA. *See Hangman Ridge*, 105 Wash. 2d at 785; *Hiner v. Bridgestone/Firestone, Inc.*, 959 P.2d 1158, 1163 (Wash. Ct. App. 1998) (holding that “implicit in the definition of ‘deceptive’ is the understanding that the actor misrepresented something of *material* importance” (emphasis in original)). Oklahoma case law may have different underpinnings, though the Fourth Circuit was unable to locate any interpretation of Oklahoma’s anti-spam statute. At a minimum, the district court should have reviewed the standard for deception under Washington law or at least taken notice of the difference.

To be sure, there are some Washington statutes that clearly delineate what is per se illegal. Statutes such as the Washington Commercial Telephone Solicitation Act have very clear prohibitions that automatically rise to the level of deception, for example, the prohibition against telemarketers calling consumers before 8:00 a.m. or after 9:00 p.m. Wash. Rev. Code § 19.158.040(2). To that extent, there

may be some statutes that could be said to create a standard of “strict liability.” But CEMA is not one of them. CEMA contains broad language which must be interpreted by the court, prohibiting the misrepresenting or obscuring of information that identifies an email’s point of origin.

Furthermore, “misrepresenting” and “obscuring” are not the terms of strict liability. There are numerous cases under Washington trade practice law that construe the meaning of “misrepresentation,” and when it constitutes an actionable violation. *See, e.g., McCrae v. Bolstad*, 101 Wash. 2d 161, 676 P.2d 496 (1984) (holding that misrepresentation occurs when in the sale of real estate, a broker or seller fails to disclose all material facts not reasonably ascertainable to the buyer); *Indoor Billboard of Washington v. Integra Telecom of Washington, Inc.*, ___ P.3d ___, 2007 WL 3025836 (Wash. 2007) (holding that when there has been an affirmative misrepresentation of fact in order to prove a CPA violation there must be a causal link between the misrepresentation and the plaintiff’s injury); *Edmonds v. John L. Scott Real Estate, Inc.*, 942 P.2d 1072 (Wash. Ct. App. 1997) (holding that a misrepresentation made only to one person can have the capacity to deceive when it is made in a standard form contract). Similarly, whether something is “obscured” is a matter of interpretation; a court may well find, as did the district court, that requiring an extra step to determine the identity of the email

sender essentially does not obscure the email's point of origin. Accordingly, the district court prohibits an inquiry under state law that it makes under federal law, under the mistaken belief that the inquiry under state law would be qualitatively different. Perhaps it might have been in Oklahoma. It would not have been so in Washington.

Under Washington law, courts are free to make their own determination of deceptiveness, *Potter v. Wilbur-Ellis Co.*, 814 P.2d 670, 674 (Wash. Ct. App. 1991) (holding that whether a particular act is unfair or deceptive is reviewable as a question of law). This Court could simply find that the plaintiff's claims fail to meet the standard of deceptiveness under Washington law, thus affirming the district court's grant of summary judgment to defendants, without potentially damaging Washington's legitimate interest in protecting its own consumers from spam.

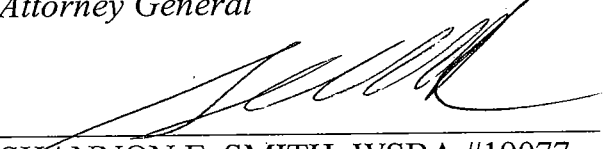
V. CONCLUSION

The Court should reverse the district court's decision to the extent it preempts CEMA. Amicus curiae takes no position on the merits of Appellant's case, but is concerned that the opinion could be read so broadly as to preempt the provisions of CEMA. The district court extended the reach of its decision in a manner that would substantially inhibit the State's ability to protect its consumers.

Congress intended that the states' statutes regulating spam be preserved as part of a system that complements federal law. Washington's statute clearly fulfills that congressional purpose, and accordingly, it should not be preempted. Further, the district court could have granted summary judgment in favor of defendants without preempting CEMA.

RESPECTFULLY SUBMITTED this 7th day of November, 2007.

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

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I certify that on this date I have caused 2 true and correct copies of the Amicus Curiae Brief of the State of Washington to be served, via First Class Mail, on:

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