BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

In the Matter of	)	
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CAN-SPAM Act Rulemaking - Comment	)	Project No. R411008
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COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA AND ONLINE PUBLISHERS ASSOCIATION

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The Newspaper Association of America ("NAA") and Online Publishers Association ("OPA") hereby submit their comments in response to the Federal Trade Commission's ("Commission" or "FTC") *Notice of Proposed Rulemaking* ("NPRM") regarding possible criteria to be used in determining the "primary purpose" of electronic mail.[1]

NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members publish nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers. OPA is an industry trade organization of online content publishers whose purpose is to represent its members on issues of importance with the press, government, public, and advertising community. OPA members are some of the most trusted and well-respected content brands on the Internet.

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[1] *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Notice of Proposed Rulemaking,* 69 *Fed. Reg*. 50,091 (Aug. 13, 2004) ("*NPRM*").

I. INTRODUCTION

As NAA's comments on the Commission's *Advance Notice of Proposed Rulemaking*[2] stated, newspapers today are increasingly adapting their traditional journalistic news and information services to the Internet. Newspapers rely on the Internet to distribute electronic versions of their newspapers, e-newsletters, and other content services to subscribers; to communicate with subscribers via email about their service; to notify subscribers of special offers; and to send emails in response to search requests. At the same time, new online-based content providers, such as members of OPA, have emerged, some with offline sister companies and others that largely exist solely on the Internet. OPA members both generate original content and republish content published offline by sister publishers. Both NAA and OPA members have a keen interest in this proceeding.

NAA and OPA appreciate that the Commission and its staff face a difficult challenge in developing defensible criteria for determining whether to classify certain email messages as "commercial" and therefore subject to the CAN-SPAM Act. Nevertheless, NAA and OPA respectfully submit that the agency has not adequately addressed the magnitude of the constitutional issues raised by its proposed "net impression" test to determine the "primary purpose" of so-called "dual purpose" emails disseminated by newspaper publishers and other legitimate news media.[3] The *NPRM* mentions the First Amendment in cursory fashion and then assumes it away, noting only that the Constitution raises no absolute bar to regulation of commercial speech. The *NPRM* then proceeds to take a test designed to evaluate the truth of *indisputably* commercial messages—the "net impression" test—and tries to turn it into a test to

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[2] *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Advance Notice of Proposed Rulemaking*, 69 *Fed. Reg.* 11,776 (Mar. 11, 2004).

[3] For the purposes of these comments, the terms "news publisher" or "publisher" refer not only to publishers of traditional print dailies but also to other publishers of news and other editorial content.

classify an electronic news communication as commercial or not. This is improper and, as applied to news media emails, lacks any basis in recognized constitutional analysis.

The fundamental constitutional point is as old as the Nation: news publishing is fully protected under the First Amendment's free speech and free press clauses regardless of whether the communications also contain advertising or not. Like nearly all of the legitimate news media today, the newspapers that the Founders sought to protect in drafting the First Amendment contained both the publishers' editorial voices and messages from advertisers. Neither the text of the Amendment nor its history provides the government scope to distinguish between a "pure" editorial communication from a news publisher and an editorial communication from the same publisher that also conveys advertisements. In the centuries since the Bill of Rights was adopted, courts have consistently declined to downgrade publishers' speech and press rights simply because advertising also appears in newspaper pages or, more recently, the electronic equivalent of these pages. The reason is a simple one: indirect efforts to regulate advertiser speech through direct regulation of the news media impermissibly burdens a publisher's right to disseminate fully protected editorial content.

News publishers do not forfeit their longstanding constitutional rights when they speak via electronic means rather than on paper. The FTC therefore cannot dismiss the ramifications of its classification test here. The language of, and intent behind, the CAN-SPAM Act is plainly directed at harms traceable to messages generated by some sellers of goods and services. The unstated assumption of the FTC's proposal is that the electronic speech to be regulated is the product of one voice, *i.e.*, a commercial enterprise motivated by the desire to make a sale, even if that voice couples the "buy my product" message with some noncommercial content. Although these kind of mixed messages may present classification problems for the FTC, publishers' ad-

supported electronic news communications do not—because they are not "mixed" in this fashion. The publisher's electronic message transmits multiple messages, in the form of editorial content and advertisements, from voices motivated by different interests. Because the publisher is in ultimate control of the dissemination, however, its fully protected editorial interests predominate. The FTC therefore would be justified in exempting publishers' ad-supported electronic news communications from the CAN-SPAM requirements.

If the Commission does not effectively implement such an exemption, it faces daunting prospects in justifying to a reviewing court its adoption of a test for classifying emails that could subject ad-supported and other legitimate emails sent by news media to CAN-SPAM Act content regulation. In particular, the Act would regulate the labeling of the email's subject line (an important issue for newspaper newsletters), the relative location of advertising and editorial content, and even compel certain speech.

Treatment of publishers' electronic news communications as commercial messages under CAN-SPAM would trigger so-called "strict scrutiny" analysis—a test that places a nearly impossible burden on government regulators to satisfy. In this case, the FTC would have to identify a legitimate government interest being served in subjecting publishers' advertising-supported news communications to the CAN-SPAM strictures, explain why the interest is "compelling" in this context, and demonstrate that the agency's implementing rules are the least restrictive means of satisfying the interest. While NAA and OPA do not believe that the Commission could possibly meet this standard, it is clear that the agency has yet to even *try* to grapple with the legal standard. The Commission has completely failed to show that its proposed "net impression" test for classifying emails can be applied constitutionally to news media that send emails containing both editorial and promotional content.

It would be extraordinary for a reviewing court to apply any First Amendment review standard other than strict scrutiny to FTC regulation of legitimate electronic news communications. Yet even under the commercial speech standard, the Commission still would face formidable legal hurdles. To justify regulation of these ad-supported electronic news publications under the *Central Hudson* "intermediate scrutiny" standard, the FTC would have to not only identify the legitimate government interest being served but also provide some tangible proof that the identified harm is "real" with respect to news media publishers' communications—as well as show that applying the regulations to these communications would directly advance that interest in a narrowly tailored fashion. For even this somewhat less exacting standard, the Commission has collected none of the evidence required to mount its case.

To avoid unnecessarily raising these constitutional tangles, the Commission must implement the CAN-SPAM Act in a manner that targets the actors who spurred Congress to act: indisputably commercial speakers who abused the electronic medium to directly spur sales of their own products. Wherever the FTC may draw its classification lines for the purpose of CAN-SPAM, it should make clear that the statute does not apply to electronic news communications issued by *bona fide* newspaper publishers and similar news media, whether the editorial content is supported by advertising or not.

Other aspects of the NPRM are of related concern to news media. First, in order to avoid imposing undue burdens when regulating "commercial" emails, the Commission must make clear that "commercial" emails containing advertisements from multiple advertisers have only one sender—the transmitter. For similar reasons, the Commission should clarify that, in the case of "forward-to-a-friend" emails, the "sender" (if there is one) is the forwarding friend, not the originating transmitter or conveying website.

Finally, the Commission should clarify its implicit decision that emails which a recipient has requested, or for which he or she has subscribed by submitting an email address, should be classified as "transactional or relationship" messages. The traditional delivery of a newspaper in response to a subscription fulfills the subscriber's request on an ongoing basis; there is no principled basis for treating online publishing any differently. The transmission of an email that a recipient has requested or to which he or she has subscribed is the delivery of the requested service.

II. THE FIRST AMENDMENT REQUIRES THE FEDERAL TRADE COMMISSION TO IMPLEMENT THE CAN-SPAM ACT CONSISTENT WITH THE FULLY PROTECTED RIGHTS OF THE ADVERTISING-SUPPORTED NEWS MEDIA

The discussion below is designed to provide the Commission with an overview of the constitutional analysis that it must undertake before it attempts to promulgate CAN-SPAM regulations that would apply to publishers' electronic news communications that transmit both editorial content and advertiser messages. This review demonstrates that the FTC can and should exempt such communications from CAN-SPAM obligations because they cannot properly be classified as "commercial" and therefore subject to Commission authority. Regardless of how it resolves the classification issue, however, the FTC still lacks any factual basis to justify—under any potentially relevant First Amendment analysis—the application of CAN-SPAM obligations on publishers' electronic news communications.

A. The FTC Must Bear in Mind the Fundamental First Amendment Principles That Constrain Its Regulatory Authority

As the FTC well understands, modern constitutional jurisprudence recognizes that the First Amendment severely limits the government's ability to use speech constraints to advance even the most legitimate of public policy interests. The agency should not lull itself into

believing that generic references to the existence of permissible commercial speech regulation voids constitutional objections to broad implementing rules that would pull publishers' ad-supported electronic news communications into the ambit of the statute.

Since the time of the nation's founding, freedom of speech has been recognized as one of "the preeminent rights of Western democratic theory" and the "touchstone of individual liberty."[4] Similarly, the freedom of press has been described as "one of the greatest bulwarks of liberty."[5] Because of its place in the functioning of our democracy, the First Amendment guarantees the right to communicate and receive information free from governmental interference. In those limited instances when government regulation can be justified, the burden of proof lies on the government—not the speaker—to provide evidence to show that any speech restraints as applied to individually situated speakers is both necessary and well tailored to its purpose. All government agencies have a responsibility to insure that their actions comply with the First Amendment, even when the action involves implementing an Act of Congress.[6]

First Amendment values are both personal and societal. On a personal level, "[t]he constitutional right of free expression is ... intended to remove governmental restraints from the arena of public discussion ... in the belief that no other approach would comport with the premise

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[4] Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 20.2, at 243 (3d ed. 1999); *see also Cox v. Louisiana*, 379 U.S. 559, 574 (1965) (characterizing freedom of speech as a "basic and fundamental" right); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (describing freedom of speech as the "matrix, the indispensable condition, of nearly every other form of freedom"), *overruled on other grounds sub nom. Benton v. Maryland*, 395 U.S. 784 (1969).

[5] *McConnell v. FCC*, 540 U.S. 93, 362 (2003) (quoting the declaration of Rhode Island upon the ratification of the Constitution. 1 J. Elliot, Debates on the Federal Constitution 335 (1876).

[6] *See, e.g., Continental Air Lines, Inc. v. DOT*, 843 F.2d 1444, 1455-56 (D.C. Cir. 1988) ("[I]t cannot be gainsaid that, in carrying on its interpretive function, an agency must be mindful of the higher demands of the Constitution.").

of individual dignity and choice upon which our political system rests."[7] The right to speak out is not compromised by the fact that the speaker may be a corporate news publisher.[8]

On a societal level, freedom of speech and of the press ensure that citizens have access to information with which they can, *inter alia*, educate themselves about political, scientific, social, or other issues of the day, expose government corruption, or make informed decisions concerning the products they purchase.[9] By shielding such communications from government interference, the First Amendment "serves significant societal interests wholly apart from the speaker's interest in self-expression"[10] and thus "protects interests broader than those of the party seeking their vindication."[11]

Thus, the content at the very center of publishers' electronic news communications is the fuel that powers our democratic system of government. Because the fully protected rights of both news publishers and readers are at stake here, the FTC must be especially sensitive to the likelihood that its CAN-SPAM regulations as applied to publishers' electronic news communications may be constitutionally infirm even if they purport to target only commercial

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7 *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

8 *First Nat'l Bank of Boston v. Bellotti*, 435 U.S 765, 784 (1978) (observing that First Amendment does not support "the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation"); *accord N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (corporate publisher of paid advertising accorded equal rights to public advocate advertiser).

9 *See Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (observing that First Amendment "protects the public's interest in receiving information" (citations omitted)); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("[I]t is now well established that the Constitution protects the right to receive information and ideas." (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943))).

10 *Pac. Gas & Elec. Co.* 475 U.S. at 8.

11 *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

messages. The Supreme Court has expressed continuing concern about restrictions that operate in a manner that "chills" lawful communications.[12]

In this vein, additional grounds for caution also stem from the inclusion in the CAN-SPAM Act of a private right of action on the part of Internet services providers. It is quite conceivable that an ISP that also offers its own informational content could file a CAN-SPAM lawsuit against an online publisher's emails to disadvantage its competitor for its own business purposes. An ISP conceivably could bring a private enforcement action against a publisher for allegedly illegal emails, with the intent of discouraging the publisher from using email. News content publishers have no corresponding right under the CAN-SPAM Act to sue ISPs, and this imbalance could create a chilling effect on news media speech.

B. The Framers Drafted the First Amendment Against the Backdrop of a Colonial Press Heavily Dependant on the Transmission of Advertisers' Messages Alongside Editorial Messages

In implementing the CAN-SPAM ACT, the FTC must recognize that e-newsletters and other advertiser-supported electronic news media messages are the direct descendants of the advertiser-supported colonial press that the First Amendment was designed to protect. It is useful to understand that the First Amendment arose in the context of newspaper publisher communications that might be characterized as "mixed" or "dual purpose"—and that the mixture then, as now, did not lead to diminished speech and press protection.[13]

Newspapers bearing a mix of editorial content and advertising messages circulated in colonial America long before most of the Framers were born. The first successful newspaper,

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[12] *See Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 134 (1975).

[13] One need not adopt a strict "originalist" approach to constitutional interpretation to appreciate that the First Amendment's historical setting offers important interpretative clues to its meaning today. *See 44 Liquormart v. R.I.*, 517 U.S. 484, 495-496 (1996) (Stevens, J., plurality).

the *Boston Newsletter*, hit the streets with an inaugural issue on April 24, 1704, that promised to publish the news regularly as long as the publisher could attract advertising to fund the paper's operations.[14] Colonial newspapers, like their modern counterparts, filled the bulk of their column inches with advertising that subsidized, in whole or in part, the publisher's newsgathering and dissemination efforts.[15] Noted journalism historian Frank Luther Mott reports that "[a]dvertising represented the chief profit margin in the newspaper business" in the 18th Century.[16] That same economic structure remains intact today—and is fundamental to newspapers' current efforts to transition into digital media. Moreover, the Framers were accustomed to seeing advertising prominently featured on the front pages of their era's newspapers. Mott reported that "[m]ost dailies in these years used page one for advertising, sometimes saving only one column of it for reading matter."[17]

Yet neither the mix of voices reflected in the colonial newspaper nor the characteristic prominence given to advertising messages dissuaded the Framers from fashioning a broad constitutional guarantee of freedom of speech and of the press. Consequently, there is no basis in the Amendment's history for distinguishing a newspaper publisher's product as "commercial"

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[14] Boston Newsletter, Apr. 24, 1704, *reprinted in* James P. Wood, *The Story of Advertising*, at 45 (1958). The publisher announced that "[t]his Newsletter is to be continued Weekly, and all Persons who have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c., to be Sold or Let; or Servants Run-Away; may have the same inserted at a Reasonable Rate." *Id*. The following week's issue included paid ads seeking the return of two lost anvils and offering a "a very good Fulling Mill to be Let or Sold" in Oyster Bay, N.Y. *Id*.

[15] James P. Wood, *The Story of Advertising*, at 85 (1958). Newspapers of the colonial and Revolutionary eras "were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." *See also* Lawrence C. Wroth, *The Colonial Printer*, at 234 (1938) (more than half of standard colonial newspaper devoted to ads); A. Lee, *The Daily Newspaper In America*, at 32 (1937) (in 1766, 70% of the *New-York Mercury* filled by advertising). Modern newspapers typically aim for a ratio of roughly 70% advertising to 30% editorial content in their print editions. C. Fink, *Strategic Newspaper Management*, at 43 (1988).

[16] Frank L. Mott, *American Journalism – A History of Newspapers in the United States Through 250 Years: 1690-1960*, at 56 (3d ed. 1963).

[17] *Id*. at 157. The front pages of Boston, New York and Philadelphia broadsheet were devoted almost exclusively to advertising. *Id*.; *see also* Wood at 85.

or "noncommercial"—or "predominately commercial" or "predominantly noncommercial"—based on the amount of advertising it may contain or the location of an advertisement on either a paper or an electronic page.

Some scholars have located the Framers' reverence for a free, advertising-supported press in "the property-based view of liberty held by the Framing generation," particularly James Madison.[18] Regardless of whether all Framers shared Madison's view of the nature of liberty, they certainly witnessed for themselves the part that advertising-supported newspapers had played in rousing revolutionary fervor among colonial Americans. Publishers emerged as a political force first in opposition to the Stamp Act of 1765—which taxed newspaper publishers on a per-ad basis and so was widely viewed as a British assault on press freedom—and eventually to the continuation of British governance itself.[19] Recent historians have pointed out that the 18th Century press grew strong enough to become a revolutionary force only after colonial business and industry were sufficiently developed to engage in the advertising that supported newspaper operations.[20]

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[18] Madison and other key Framers were especially influenced by John Locke's *Second Treatise on Government*. *See* Daniel E. Troy, *Advertising: Not Low-Value Speech*, 16 Yale J. on Reg. 85, 93 (1999). Under this conception, advertising has high constitutional value both because it funds the dissemination of political and other news and because ads have their own informational merit. *Id*.

[19] *See* Arthur Schlesinger, Sr., *Prelude to Independence: The Newspaper War on Britain 1764-1776*, at 68 (1966); Frank Presbrey, *The History and Development of Advertising*, at 119 (1929).

[20] Edwin Emery & Michael Emery, *The Press and America*, at 18-19 (1978). Of course, it should be noted that the ranks of both the Founders and the Framers included the most famous newspaper publisher of the colonial era: Benjamin Franklin. Early in his publishing career, Franklin stirred up local controversy with a slurring aside about the preachers of Philadelphia—a fracas that inspired him to pen what was at that time "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, "Printers and the American Revolution" in *The Press and the American Revolution*, at 20 (B. Bailyn & J.B. Hench, eds., 1980). Franklin's "*Apology for Printers*," originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, declared "Printers are educated in the Belief that when Men differ in opinion, both Sides ought equally to have the Advantage of being heard by the Public." *An Apology for Printers* (1731), reprinted in 2 Writings of Benjamin Franklin 172, at 176 (1907).

The historical underpinnings of the First Amendment do not permit the FTC to disregard the fully protected speech rights of today's news media simply because their electronic publications, like their colonial forbearers, contain advertiser messages as well as editorial content. Furthermore, neither the text nor the legislative history of the CAN-SPAM Act suggests that the Commission should construe the statute as requiring such regulation.[21]

C. The FTC Must Confront Its Obligation to Classify Publishers' Advertising-Supported Electronic News Communications As Fully Protected Speech That Falls Outside the Ambit of the CAN-SPAM Act

The *NPRM* recites that the Commission is "mindful of First Amendment limitations, but believes that the law is clear that commercial content generally may be regulated without violating the First Amendment."[22] That truism is irrelevant to the task now confronting the Commission. In implementing CAN-SPAM, the FTC must determine whether a publisher's electronic news communication is appropriately classified *as* "commercial" in the first instance. Only *after* the classification determination is made would the issue of appropriate regulation, if any, arise.

The fundamental question facing the FTC is how it should identify "commercial speech" for purposes of the CAN-SPAM Act, particularly those electronic communications that transmit both noncommercial and commercial content. Presumably the Commission will receive no serious objections to treating as "commercial" those messages that satisfy the traditional definition: speech that "does no more than propose a commercial transaction"[23] and exempting from regulation any transmission that contains no such commercial pitch.

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21 Comments of NAA, Project No. R411008, at 5-6 (Apr. 20, 2004) ("Comments of NAA").

22 *NPRM* at 50,099.

23 *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

First Amendment jurisprudence also appears to afford the Commission reasonable discretion to apply, in appropriate circumstances, CAN-SPAM obligations to emails sent by commercial enterprises that incorporate both "buy my product" messages and informational content in one transmission. Under the so-called *Bolger* factors for identifying commercial speech, the FTC may take into account whether (1) the speech at issue is conceded to be an advertisement; (2) the speech refers to a particular product; and (3) the speaker has an economic motive.[24]

Regulation of at least some "mixed" or "dual purpose" communications from a single speaker may comport with Congressional intent when the sender is a commercial enterprise that offers some non-speech good or service for sale to the public. The statute appears premised on the strong if unstated assumption that the speech to be regulated under CAN-SPAM is the product of one voice, *i.e.*, a business enterprise motivated primarily by financial desires to drive sales.[25] The legislative history suggests that the harms that Congress sought to address through the Act were traceable to messages generated by some such sellers.[26]

Although the Commission may confront treacherous First Amendment shoals in trying to classify some such "dual purpose" communications for the purposes of imposing CAN-SPAM obligations, it should harbor no illusions that news publishers' electronic news communications fall into this category. E-newsletters, digital newspapers and other advertising-supported

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[24] *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

[25] Legislative history confirms that Congress did not intend for the Act to reach emails with editorial content. For example, while the House of Representatives was considering the Senate CAN-SPAM Act, Representative James Sensenbrenner (R-Wisc.) noted that "the legislation concerns only commercial and sexually explicit email and is not intended to intrude on the burgeoning use of email to communicate for political, news, personal, and charitable purposes."

[26] Lawmakers drafted the CAN-SPAM Act to prevent commercial fraud and deception and also—though the goal is murkier—to discourage commercially motivated harassment and abuse of transmission services funded by others. See CAN-SPAM Act § 2(a), 15 U.S.C. § 7701 (2004).

electronic communications disseminated by *bona fide* news publishers do not fit the Act's "one speaker, multiple purposes" paradigm. Rather, in keeping with the centuries-old format of their print predecessors, these new communication vehicles serve primarily to transmit the editorial voice of the publisher, accompanied by the voices—and financial support—of various advertisers. The publisher sends the transmission, but it is not (typically) the seller of the goods or services that may appear in advertisements adjacent to the editorial content. Accordingly, the publisher is not proposing a commercial transaction through its electronic communication, nor does it satisfy either the first or third *Bolger* factor for identifying a speaker subject to commercial speech regulation.[27]

Moreover, any FTC effort to classify publishers' ad-supported electronic news communications as commercial speech—and therefore subject to CAN-SPAM obligations—would fly in the face of decades of precedent to the contrary. Multiple appellate courts have explicitly rejected the notion that news publishers lose their constitutional status as fully protected noncommercial speakers simply because their publications present advertiser messages alongside editorial content.[28] Courts also have repeatedly held that the position and number of ads in a newspaper or shopper is irrelevant to their status under the First Amendment.[29] This determination is completely consistent with the advertising-laden front pages of the newspapers

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[27] The Supreme Court's recent failure to grapple with the finer points of "inextricably intertwined" commercial and noncommercial messages has no bearing on the FTC's implementation of the CAN-SPAM Act. *See Nike v. Kasky*, 539 U.S. 654 (2003) (dismissing on procedural grounds *Nike v. Kasky*, 27 Cal. 4th 939 (Cal. Sup. Ct. 2002)). The speaker at issue in the case was a manufacturer and seller of athletic shoes, and the messages at issue were the sellers' own speech concerning its manufacturing practices abroad.

[28] *See, e.g., Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992) (noting that a newspaper is not commercial even when including advertising matter because it contains speech about matters of highest public concern); *Miller v. Laramie*, 880 P.2d 594 (Wyo. 1994).

[29] *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 (3d Cir. 1982) ("[t]he line between commercial and noncommercial speech for first amendment purposes cannot be drawn by some magic ratio of editorial to advertising content").

that the Framers read.[30] To hold otherwise could effectively subject all news media vehicles, regardless of format, to a lesser standard of constitutional protection because essentially all viable news media depend, to one degree or another, on advertiser support for their existence.[31] Such a bizarre outcome would turn the intention of the Constitution's Framers on its head.

For these reasons, the Commission would face significant constitutional hurdles in even attempting to draw publishers' ad-supported electronic news communications into the purview of the CAN-SPAM obligations. Therefore, the FTC would be warranted—both as a matter of constitutional law and enforcement discretion—in simply and clearly exempting such transmissions from its implementing rules. No purpose would be served in expending scarce administrative resources on regulating communications that do not fit within any existing definition of commercial speech. The Commission should conclude that any legitimate publisher's news transmissions fall outside the agency's authority here, regardless of whether they also contain advertiser messages.

D. The FTC Cannot Satisfy Its Burden to Justify CAN-SPAM Regulation of Publishers' Ad-Supported Electronic News Communications Under Any Potentially Relevant Standard of First Amendment Review

If the Commission declines to exempt publishers' news communications from CAN-SPAM obligations, its constitutional obligations will not end. To the contrary, the agency then must prepare to defend any rules applicable to such transmissions against likely First Amendment challenge. The discussion below demonstrates that the agency currently has offered nothing to meet its evidentiary burden—not only under the level of constitutional review

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30 *See* Mott, *supra* note 17 and accompanying text.

31 *See* Fink, *supra* note 15, at 43.

consistently accorded to the fully protected speech of the news media but even under the lesser, but still formidable, intermediate scrutiny analysis applicable to commercial speech.

1. The FTC Lacks Any Foundation Here That Could Satisfy "Strict Scrutiny" Review of Burdens Imposed on Publishers' Fully Protected Speech and Press Rights

If the Commission were to classify a publisher's electronic news communications as commercial for the purposes of the CAN-SPAM Act, it is highly unlikely that a reviewing court would agree. Bound by existing precedent, courts should—and likely would—subject the FTC regulations to the "strict scrutiny" analysis applied to restraints on "core" political, news, and informational messages. Sophisticated government regulators appreciate that application of the highest level of First Amendment to a speech restraint is tantamount to invalidation of that rule.[32] For the Commission and its staff, therefore, it is not news that strict scrutiny "leaves few survivors."[33]

To prevail in strict scrutiny review, the government must prove that its actions further a compelling government interest and that there are no alternative means of advancing that interest that would restrict less speech.[34] In this case, the FTC would be required to first identify with particularity precisely what harms its CAN-SPAM implementing rules were devised to address

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[32] *See, e.g., Miller v. Johnson*, 515 U.S. 900, 920 (1995) (recognizing strict scrutiny as the "most rigorous and exacting standard of constitutional review"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (citation omitted)); *see also, e.g., Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (striking down restrictions on speech concerning qualifications of public office candidates); *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992) (striking down regulation of political speech in a public forum); *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) ("Core political speech occupies the highest, most protected position ....").

[33] *See, e.g., City of L.A. v. Alameda Books, Inc*., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

[34] *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Indeed, while false statements may play no useful role in public debate, the First Amendment even tolerates some risk of falsehood to avoid spilling restrictions over into any protected speech. *See, e.g, N.Y. Times Co. v. Sullivan*, 376 U.S. 270, 279-81 (1964) (protecting false statements not made with "actual malice" against libel plaintiff).

when applied to advertising-supported electronic news communications—even if the Act itself is rather vague on this prong of the analysis. The agency also must proffer evidence to prove that the government interest in regulating the presentation and content of publishers' news transmissions is truly compelling and that the agency had reviewed and discarded all other potential alternatives to a "compelled speech" obligation.

With respect to the first prong of the test, the CAN-SPAM Act lists several broad "determination(s) of public policy" in support of new speech restraints: "there is a substantial government interest in regulation of *commercial* electronic mail on a nationwide basis," "senders of *commercial* electronic mail should not mislead recipients as to the source or content of such mail," and "recipients of *commercial* electronic mail have a right to decline to receive additional commercial electronic mail from the same source."[35] The first assertion relates to Congress' power to regulate interstate commerce but identifies no harm to be addressed. The second is a variant on the government's recognized interest in preventing the dissemination of fraudulent or deceptive advertising. The third appears to advance a "privacy" concern about commercially motivated emails that may annoy—or even harass—email recipients or take unfair commercial advantage of transmission systems whose costs are borne by others.

When analyzing these interests in the context of the ad-supported news communications of publishers, these justifications for the proposed CAN-SPAM regulations fall of their own weight. With respect to the first identified interest, the government as a general proposition may have a cognizable interest in preventing fraudulent or deceptive advertising. But it is the editorial voice of the news publisher that predominates in the messages that would be at issue in an "as applied" challenge to FTC rules here, and the agency to date has collected no evidence to

[35] CAN-SPAM Act § 2(b), 15 U.S.C. § 7701 (emphasis added).

show that publishers' transmissions facilitate or encourage the production and dissemination of fraudulent commercial messages by email. Indeed, online publishers are forthright in identifying themselves as the senders of their transmission, truthfully identify the general subject of their communications, and regularly weed out plainly problematic advertising from their publications. Moreover, to the degree that advertiser messages that appear in publishers' electronic news communications might raise fraud issues, the FTC—and other government regulators—are fully authorized to pursue the advertiser directly.[36] Existing authority to police fraud, however, cannot justify blanket disclosure obligations imposed directly on the news publisher as an indirect means of punishing the offending advertiser.

As for the harassment concern cited by lawmakers, there is no evidence to show that this concern is even real—much less "compelling"—in the context of publisher-disseminated electronic news communications. Lawmakers pointed to commercial motivation as the source from which this concern seems to spring. But publishers' transmissions are motivated by journalism, not by a desire on the part of the publisher itself to sell the goods or services touted in the advertiser messages appearing alongside the editorial content. Publishers also understand that they must cultivate good interactive relationships with their electronic as well as their print readers on an ongoing basis. The FTC cannot simply assume that electronic transmissions under the control of news media necessarily contribute to the harassment concern. If the harm cannot be traced to the publishers' ad-supported transmissions, no speech restriction could possibly satisfy the strict scrutiny standard.

[36] For example, the First Amendment is no bar to false advertising cases brought against the advertiser under Section 5 of the FTC Act, even when those ads appear in the news media. The nature of the medium—print, electronic, or otherwise—also raised no impediment to such enforcement actions.

Even if a court invalidates the CAN-SPAM Act's regulation of publishers' electronic news communications, the prospect of compelled disclosures here—and the attendant litigation efforts involved in removing them—is likely to chill newspaper publisher efforts to move their fully protected editorial content to the new medium. Uncertainty and the probable practical complications of abiding by such rules, as discussed below in Sections III and IV, may well deter commercial advertisers from providing the necessary financial support for new and innovative electronic vehicles for disseminating news and information. Such an outcome would be contrary to the federal government's stated policy of promoting the expansion of the Internet.[37] The FTC should avoid unjustified impingements on this new means of delivering high-value speech to newspaper audiences.

2. The FTC Lacks Even the Slightly Lesser Factual Foundation It Would Need to Satisfy "Intermediate Scrutiny" Review Here

Even if a reviewing court were, aberrantly, to rule that the CAN-SPAM Act restraints could be evaluated under the "intermediate scrutiny" analysis applied to commercial speech, the FTC still has no assurance of ultimate victory. The so-called *Central Hudson* test has become increasingly difficult for government regulations implicating speech to survive.[38] At a minimum, agencies attempting to justify restraints under *Central Hudson* must muster concrete evidence to support their line-drawing efforts, a task that the Commission has not even begun.

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[37] For instance, in Section 706 of that legislation, Congress directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[37] Accordingly, the FCC has adopted promoting Internet access as a policy goal. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability* 15 FCC Rcd. 20913, at ¶ 2 (2000) (noting that "[w]ith advanced telecommunications capability consumers can take advantage of advanced services that allow residential and business consumers to create and access content, sophisticated applications, and high-bandwidth services"). In fact, the CAN-SPAM Act itself notes that electronic mail is a "convenient and efficient" means of communication. CAN-SPAM Act § 2(a)(1), 15 U.S.C. § 7701.

[38] *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

The FTC hardly needs to be reminded of the four prongs of the *Central Hudson* analysis. As a general conceptual matter, it is not unlike the strict scrutiny test—in both instances, the analytical factors are relatively consistent: they include the substantiality of the government's interest, the degree to which the regulation effectively advances the government's interest, and the extent to which the regulation targets only the speech that is justifiably regulated. Consequently, the dearth of evidence noted in the preceding section for CAN-SPAM regulations as applied to newspaper publishers' ad-supported electronic communications is also relevant to the intermediate scrutiny analysis. And while that test may demand slightly less of government regulators, it nonetheless requires considerably more factual support than the FTC has mustered to date.

The threshold question under *Central Hudson* is whether the speech at issue is false or misleading. Even raising the inquiry illustrates how oddly the commercial speech analysis would fit here. The editorial content of the publisher communication at issue here cannot be deemed to be false or misleading commercial speech—it cannot be classified as commercial and is highly unlikely to be found false or misleading in any case. And while it is possible that an advertiser message accompanying the publisher's fully protected speech might be deemed false or misleading,[39] a reviewing court would not stop the First Amendment analysis at this

[39] Courts have been particularly loathe to credit unsupported claims that speech is "potentially" false or misleading, even when the communications are indisputably commercial in nature. *See, e.g., In re R.M.J.*, 455 U.S. 191, 203 (1982). The regulator must proffer some evidence to substantiate the claim of deception. *See, e.g., Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994) ("[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden . . . ."). As noted in Section II.D.1, the FTC lacks any such evidence here. Only "inherently misleading" commercial messages could stop the First Amendment analysis cold, and there can be no suggestion here that publishers' electronic transmissions could possibly create an environment conducive to the dissemination of inherently deceptive or misleading advertiser messages. Moreover, even the "inherently misleading" concept for justifying suspension of First Amendment review is in some doubt. *Compare Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (Stevens, J., plurality opinion) *with id*. at 112 (Marshall, J. and Brennan, J., concurring).

juncture.[40] To do so would have an obvious chilling effect on the publishers' right to disseminate its own editorial messages and on recipients' rights to receive them.

Accordingly, the FTC could regulate publishers' ad-supported electronic news communications under *Central Hudson* only if by doing so it would advance a "substantial" government interest and only if "the regulation directly advances the government interest asserted" and is "not more extensive than is necessary to serve that interest."[41] Imposition of CAN-SPAM content burdens on publishers' ad-supported electronic news communications would likely fail every one of these prongs of the analysis.

These comments already have addressed the FTC's lack of any evidence that newspaper publisher electronic communications create any "real" harm with respect to dissemination of false or deceptive commercial emails.[42] The *NPRM* offers nothing, not even insufficient, "speculation or conjecture," to buttress a claim of harm;[43] draws no "direct advancement" link between the identified harm and the regulation of publisher speech here;[44] and makes no attempt

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[40] *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *see also Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1990) (referring to the "heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public" (citing *In re R.M.J.*, 445 U.S. 191, 203 (1982))).

[41] *Cent. Hudson*, 447 U.S. at 566.

[42] *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

[43] *Id.*

[44] To satisfy this prong, the FTC would be required to demonstrate that restrictions on publishers' electronic speech "will in fact alleviate [the asserted harm] to a material degree." *Id*. at 770-71 (emphasis added); *accord Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995); *Ibanez*, 512 U.S. at 143. "A regulation cannot be sustained if it provides only ineffective or remote support for the government's purpose or if there is little chance that the restriction will advance the State's goal." *Lorillard*, 533 U.S. at 566 (internal quotations and citations omitted). Imposing CAN-SPAM obligations on publishers' electronic news communications would be an exceedingly indirect means of addressing harms traceable to an advertiser.

to contend that mandates applied to the newspaper publisher rather than the advertiser would satisfy the "narrowly tailored" prong.[45]

Turning to the rather vaguely defined Congressional concern about harassment and/or unfair advantage "harms" that might be linked to commercial emails, the FTC again has none of the necessary factual support to justify CAN-SPAM regulation of publisher's electronic news transmissions. The NPRM does not show that newspaper publishers generate such harms, that burdening newspaper publishers' speech would directly advance—or even affect—efforts to restrain the abusive commercial emailers who cause the harms, or that such regulation could possibly be tailored enough to satisfy the intermediate scrutiny standard.

In sum, there appears to be no reason for the FTC to conclude that it could apply CAN-SPAM obligations on newspaper publishers' advertising-supported electronic news communications in any manner that could withstand First Amendment review. The analyses above offer the Commission further justification for simply exempting such communications from the implementation of the Act.

III. TO AVOID REGULATORY BURDENS, THE COMMISSION MUST CLARIFY WHO IS A "SENDER"

The Commission invites comment on what changes should be made to the proposed rule to minimize any cost to the industry or consumers.[46] One important change is a clarification as to what party will be deemed the "sender" of a "commercial" email that contains "commercial" content from more than one advertiser. Another is appropriately classifying a "forward-to-a-

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[45] The Court has explained that this means that a regulator must "carefully calculat[e] the costs and benefits associated with the burden on speech imposed" by the regulation at issue. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993); *accord Lorillard*, 533 U.S. at 562. While the fit between the end and means need not be "perfect," *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989), a demonstrable degree of precision is required. The Court appears to be interpreting this prong more strictly in recent cases. *Compare Fox*, 492 U.S. at 476-81 *with Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-374 (2002).

[46] *NPRM* at 50,104.

friend" email. Although NAA and OPA understand that the Commission may have deferred these issues until a subsequent *Notice of Proposed Rulemaking*, NAA and OPA respectfully submit that this "primary purpose" phase of the proceeding provides an opportunity to construe the Act in a manner that avoids serious constitutional and practical obstacles.

A. There Should Be Only One "Sender" of An Email That Contains Multiple Advertisements

As for the issue of who is the "sender" of a multiple advertiser "commercial" email, numerous parties have already commented on the substantial practical difficulties that would arise if each advertiser were deemed a sender. If each advertiser included in an email were deemed a "sender" for purposes of the CAN-SPAM Act requirements, then those responsible for emails with multiple advertisers would be obligated to maintain records as if each advertiser had sent the email, to purge each email transmission list against each advertisers' do-not-email list, and to engage in a bewildering exchange of opt-outs and purges among all advertisers. This would impose a nearly impossible and an unreasonable burden on speech and commerce via email.

Consider the possibility that a newspaper were to distribute an email containing the same promotional material as appears as run-of-press advertisements in the pages of the same day's printed newspaper.[47] To require the newspaper to "scrub" its own lists and the lists of all its advertisers before sending each email would pose an incalculable burden on news media. What's more, not only would timely compliance be logistically impossible, many consumers would be placed on "opt out" lists for emails that they wanted to continue to receive because a do-not-email request really addressed for one advertiser apparently would apply to *all*

[47] This discussion would apply equally to any email subject to regulation as "commercial" under the CAN-SPAM Act.

advertisers. This could result in a recipient being added, inadvertently, to the opt-out lists for many unintended advertisers. Thus, such an interpretation of a "multiple sender" situation would interfere with the both the senders and the receivers desire to receive these emails. To avoid these problems, the FTC should define the "sender" of an email with multiple advertisements as the transmitter of that email.

B. The Publisher Is Not A Sender of A "Forward-To-A-Friend" Email

Similarly, as NAA commented on the *Advance Notice of Proposed Rulemaking*, where a recipient or website visitor chooses to forward material without any incentive from the newspaper, that individual is determining the email's content and destination, not the newspaper. Thus, in such "forward-to-a-friend" scenarios, a publisher that may have originated the initial email, or that maintains the website through which such an email is forwarded, should not be deemed the "sender" of such an email as a practical reality. Indeed, NAA's and OPA's opening comments showed why such emails should not be considered "commercial" at all,[48] either because the advertiser had not "procured" the forwarding or because a forwarding website was merely engaged in routine transmission.

The constitutional considerations set forth in these comments provide an additional reason for this clarification. Such a result would not, in the case of indisputably "commercial" speech, be "narrowly tailored" to address the problem that the CAN-SPAM Act was enacted to address. A genuine forwarding friend is plainly not a spammer, and construing the Act to reach such "friends" would not in any sense be the "least restrictive" or "narrowly tailored" alternative.

In each case, these problems would arise if the CAN-SPAM Act were construed to apply to a scenario for which it was never intended. The Commission should avoid this problem at this

[48] Comments of NAA at 13-14; Comments of OPA, Project No. R41108, at 10-12 (Apr. 20, 2004).

stage of its rulemaking by narrowly tailoring its regulations to address the specific problem that led to the Act, and to avoid unnecessary and undesirable outcomes.

IV. THE COMMISSION SHOULD RECOGNIZE THAT REQUESTED EMAILS ARE TRANSACTIONAL OR RELATIONSHIP MESSAGES WITHOUT FURTHER INQUIRY

Section 316.3(a)(2) of the Commission's proposed rule would appear to regulate the relative position, presentation, and format of emails that fall within one of the statutory categories of "transactional or relationship" messages that also happen to contain advertising. NAA reiterates its position in its initial comments that requested emails logically fit into the category of "transactional or relationship" messages and the fact of the request should be dispositive of the email's status as "transactional or relationship" with no need for further inquiry into the format or arrangement of the email.

The Commission appears to recognize that where a recipient has requested an email, the delivery of the email in satisfaction of that request should fall within the category of "transactional or relationship" messages. The transmission of these types of emails is a classic example of fulfillment of a transaction (*i.e.*, the delivery of a requested newsletter) or, alternatively, as part of a voluntary relationship between the recipient (who has requested/registered/subscribed to the email) and the transmitting entity. The dispositive factor is the recipient's request; it is immaterial whether or not the request is accompanied by a payment. The relationship is identical to that of a subscription – whether paid or free, the subscription creates a relationship that a publisher satisfies or "fulfills" by sending the requested material. There is no need for a further inquiry into the format of the email's content; it is the request/subscription/registration that establishes the relationship.

At the present, newspapers and other online publishers send their online registrants/subscribers a variety of emails. Examples include newsletters, automated email alerts,[49] and special offer emails,[50] and renewal notices.[51] As the Commission seems to suggest, these emails are sent due to the relationship between the requesting/subscribing/registering recipient and the publisher, and as such satisfy either of two definitions of a "transactional or relationship" email under the CAN-SPAM Act and Section 316.3 (b)(3) of the proposed rules.

One, they may be regarding as "facilitat[ing]" or "complet[ing]" a "commercial transaction that the recipient has previously agreed to enter into with the sender." In particular, the recipient has agreed to receive – inherent in the act of signing up for – the emails. The transmission of the expected email to that customer completes the contemplated transaction by fulfilling a request. This is the case regardless of whether monetary consideration is exchanged.

Two, subscription emails, by their very nature, qualify under the fifth category of "transactional or relationship" emails. They are sent to "deliver . . . services [the delivery of an email is a service] . . . that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender" and in connection with which the recipient has supplied an email address. The "primary purpose" of the responsive email is to

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[49] "Automated email alerts" provide alerts, generated by a search engine feature, relating to topics of the consumer's preferences. For example, a consumer may request automated email alerts of breaking news in a field of interest to the him or her, or of newly-added classified listings in an area of interest, such as for an automobile or job opportunity. Although as a technical matter the publisher sends the email to the consumer in these cases, it does so as a service in response to the consumer's request. The publisher does not select the content of the email; it merely acts as a conduit for the forwarding of certain searchable criteria that a consumer has requested, in effect, to have sent to him or herself.

[50] "Special offer" emails are requested by readers desiring to be informed of special deals advertised by local businesses, such as discounts on tickets to local events or restaurants. These emails are sent to recipients who asked the publisher to send them and who are entitled to receive them according to the terms of their requests.

[51] Renewal notices are classic examples of "account statement" emails, and thus fit squarely within the definition of "transactional or relationship" emails. Again, no inquiry into the presentation of the email's content is necessary or appropriate.

meet the desire of the recipient to receive it, and accordingly is "transactional or relationship" under the Act.

The Commission should clarify that requested emails are "transactional or relationship" per se and that no further inquiry is necessary under its CAN SPAM rules in these cases. For example, any investigation under a FTC "net impression" test would simply be unnecessary and inappropriate. The subscription itself should provide sufficient evidence of the fact of the relationship.

V. CONCLUSION

For the reasons outlined above, NAA and OPA believe that the CAN-SPAM Act simply does not apply to the majority of emails sent by newspapers and other online news content providers. While NAA and OPA appreciate the difficult task facing the Commission, by adopting the approach recommended in these comments, the Commission will focus enforcement of the Act on unwanted spam emails without improperly infringing upon the First Amendment freedoms of online publishers or unduly impeding their ability to provide valuable email services.

Respectfully submitted,

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