13-15263, 13-15267

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**JOHN DOE; et al.,**

Plaintiffs - Appellees,

**v.**

**DAPHNE PHUNG; et al.,**

Intervenors - Appellants,

**KAMALA D. HARRIS, Attorney General of the State of California,**

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:12-cv-05713-TEH
Honorable Thelton E. Henderson, Judge

# EXCERPTS OF RECORD
## Volume I -- III

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# TABLE OF CONTENTS


| Docket Entry | Description | Page |
|---|---|---|
| | **Volume I of III [ER0001 to ER0113]** | |
| 78 | Order Granting Plaintiffs' Motion for a Preliminary Injunction | ER0001-ER0021 |
| 74 | Transcript of Proceedings Held on December 17, 2012, Before Judge Thelton E. Henderson | ER0022-ER0107 |
| 71 | Order with Questions for Counsel for December 17 Hearing | ER0108-ER0113 |
| | **Volume II of III [ER0114 to ER0414]** | |
| 95 | Notice of Preliminary Injunction Appeal Filed by Defendant Kamala D. Harris | ER0114-ER0115 |
| 93 | Notice of Preliminary Injunction Appeal Filed by Intervenors Daphne Phung and Chris Kelly | ER0116-ER0120 |
| 89 | Declaration of Linda Schweig Re Notice of Preliminary Injunction to California Law Enforcement Agencies Filed by Defendant Kamala D. Harris | ER0121-ER0124 |
| 80 | Answer in Intervention Filed by Interveners Daphne Phung and Chris Kelly | ER0125-ER0134 |
| 67 | Declaration of Hanni Fakhoury in Support of Plaintiffs' Reply in Support of Motion for Preliminary Injunction and Plaintiffs' Objections to Evidence Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0135-ER0154 |
| 66 | Plaintiffs' Objections to Defendants' and Proponents' Objections to Evidence Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0155-ER0165 |

## TABLE OF CONTENTS


| Docket Entry | Description | Page |
|---|---|---|
| 65 | Plaintiffs' Reply in Support of Motion for Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0166-ER0193 |
| 60 | Answer of Defendant Attorney General to Plaintiffs' Class Action Complaint for Declaratory and Injunctive Relief Filed by Defendant Kamala D. Harris | ER0194-ER0205 |
| 58 | Interveners' Joinder in Defendant Harris' Objections to the Declaration of David G. Post Filed by Interveners Daphne Phung and Chris Kelly | ER0206-ER0207 |
| 57 | Interveners' Request for Judicial Notice in Support of Opposition to Motion for Preliminary Injunction; Declaration of Brian Metzker Filed by Interveners Daphne Phung and Chris Kelly | ER0208-ER0252 |
| 56 | Declaration of Sharmin Bock in Support of Interveners' Opposition to Motion for Preliminary Injunction Filed by Interveners Daphne Phung and Chris Kelly | ER0253-ER0259 |
| 55 | Interveners' Opposition to Motion for Preliminary Injunction Filed by Interveners Daphne Phung and Chris Kelly | ER0260-ER0290 |
| 54 | Objections of Defendant Kamala D. Harris To Declaration of David G. Post in Support of Plaintiffs' Motion for Preliminary Injunction Filed by Defendant Kamala D. Harris | ER0291-ER0319 |
| 54 | Declaration of Linda Schweig in Support of Opposition by Defendant Kamala D. Harris to Plaintiffs' Motion for a Preliminary Injunction | ER0321-ER00332 |

## TABLE OF CONTENTS


| Docket Entry | Description | Page |
|---|---|---|
| 54 | Declaration of Robert Morgester in Support of Opposition by Defendant Kamala D. Harris to Plaintiffs' Motion for a Preliminary Injunction | ER00333-ER00337 |
| 54 | Opposition by Defendant Kamala D. Harris to Plaintiffs' Motion for a Preliminary Injunction | ER00338-ER00357 |
| 36 | Order Granting Temporary Restraining Order and Order To Show Cause as to why a Preliminary Injunction Should not Issue Signed by the Honorable Thelton E. Henderson | ER0358-ER0361 |
| 26 | Declaration of Charlene Steen in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0362-ER0369 |
| 24 | Declaration of Karl Hanson in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0370-ER0414 |
| | **Volume III of III [ER0415 - ER0632]** | |
| 23 | Declaration of David Finkelhor in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0415-ER0480 |
| 22 | Declaration of Brian Abbott in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0481-ER0498 |
| 21 | Declaration of David Post in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0499-ER0520 |
| 20 | Declaration of Janice Bellucci in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform | ER0521-ER0548 |

## TABLE OF CONTENTS


| Docket Entry | Description | Page |
|---|---|---|
| | Sex Offender Laws, John Doe, Jack Roe | |
| 18 | Supplemental Declaration of Jack Roe in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0549-ER0550 |
| 17 | Declaration of Jack Roe in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0551-ER0556 |
| 16 | Declaration of John Doe in Support of Motion for Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0557-ER0560 |
| 8 | Memorandum of Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0561-ER0594 |
| 1 | Class Action Complaint for Declaratory and Injunctive Relief Against Defendants City of Alameda and Kamala D. Harris Filed by California Reform Sex Offender Laws, John Doe, Jack Roe | ER0595-ER0614 |
| | Civil Docket for Case #3:12-cv-05713-TEH | ER0615-ER0632 |

Dated: April 10, 2013

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE, et al.,

Plaintiffs,

v.

KAMALA D. HARRIS, et al.,

Defendants.

NO. C12-5713 TEH

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

This matter came before the Court on December 17, 2012, on Plaintiffs' motion for a preliminary injunction. Plaintiffs challenge several provisions of the Californians Against Sexual Exploitation Act ("CASE Act" or "Act") that require registered sex offenders to provide certain information concerning their Internet use to law enforcement. Having carefully considered the parties' written and oral arguments, the Court now GRANTS preliminary injunctive relief for the reasons explained below.

## I. BACKGROUND

On November 6, 2012, California voters approved the CASE Act, which appeared on the ballot as Proposition 35, with approximately 81% of the vote. Ex. D to Intervenors' Req. for Judicial Notice at 1.[1] Plaintiffs John Doe, Jack Roe,[2] and the non-profit organization California Reform Sex Offender Laws filed this action on behalf of present and future

[1]The Court GRANTS Intervenors' unopposed request for judicial notice in its entirety.

[2]The Court granted the two individual plaintiffs' unopposed motion to proceed anonymously during the pendency of the preliminary injunction motion on November 15, 2012.

United States District Court
For the Northern District of California

California sex offender registrants the following day, when the Act was to take effect.[3] *See* Cal. Const. art. II, § 10(a). They contend that California Penal Code sections 290.014(b) and 290.015(a)(4)-(6), as enacted by the CASE Act, violate Plaintiffs' First Amendment rights to free speech and free association. They further contend that the provisions are void for vagueness under the Fourteenth Amendment.

California's sex offender registration program is governed by California Penal Code section 290 *et seq.* The CASE Act added the following items to the list of information registrants must provide "upon release from incarceration, placement, commitment, or release on probation":

> (4) A list of any and all Internet identifiers established or used by the person.
>
> (5) A list of any and all Internet service providers used by the person.
>
> (6) A statement in writing, signed by the person, acknowledging that the person is required to register and update the information in paragraphs (4) and (5), as required by this chapter.

Cal. Penal Code § 290.015(a). In addition, items (4) and (5) must be reported as part of the annual registration process. *Id.* § 290.012(a).

The Act defines "Internet service provider" as "a business, organization, or other entity providing a computer and communications facility directly to consumers through which a person may obtain access to the Internet," except for any "business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution." *Id.* § 290.024(a). "Internet identifier" is defined as "an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication." *Id.* § 290.024(b).

[3]California has over 75,000 registrants, excluding those who are incarcerated and those who have been deported. Cal. Dep't of Justice, *Cal. Sex Registrant Statistics* (Jan. 10, 2013), http://www.meganslaw.ca.gov/statistics.aspx?lang=ENGLISH.

United States District Court
For the Northern District of California

The CASE Act also added a provision that requires registrants to notify law enforcement within 24 hours of any changes in the Internet information subject to registration:

> If any person who is required to register pursuant to the Act adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 24 hours. The law enforcement agency or agencies shall make this information available to the Department of Justice.

*Id.* § 290.014(b). This section further requires all registrants to "immediately provide" the required information to law enforcement upon the effective date of the Act. *Id.*

Following a telephonic hearing, the Court granted Plaintiffs' motion for a temporary restraining order ("TRO") on November 7, 2012, and enjoined "Defendant Kamala Harris and her officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with her . . . from implementing or enforcing California Penal Code sections 290.014(b) and 290.015(a)(4)-(6), as enacted by Proposition 35, or from otherwise requiring registrants to provide identifying information about their online speech to the government." Nov. 7, 2012 Order at 3. Pursuant to the parties' agreement, the Court explicitly applied this order "to all California state and local law enforcement officers and to all members of the putative class, i.e., to all persons who are required to register under California Penal Code section 290, including those whose duty to register arises after the date of this order." *Id.*

On November 14, 2012, the Court entered a stipulation and order deleting the application of the TRO to "all California state and local law enforcement officers," but providing that "the California Department of Justice and local law enforcement will not require registrants to submit the information covered by the TRO so long as the TRO remains in effect." Nov. 14, 2012 Stip. & Order ¶ 3. The parties further agreed that the TRO would remain in effect "until the Court issues its ruling on Plaintiffs' Motion for a Preliminary Injunction or January 11, 2013, whichever occurs first," *id.* ¶ 4, and that "any preliminary injunctive relief granted by the Court will apply both to the named Plaintiffs and to all

United States District Court
For the Northern District of California

persons who are required to register under California Penal Code § 290, including those whose duty to register arises during the pendency of the TRO and any preliminary injunctive relief," *id.* ¶ 2. In addition, the parties agreed that this matter would be litigated as a facial challenge unless and until Plaintiffs provide the Attorney General with at least 45 days notice that they intend to raise an as-applied challenge. *Id.* ¶ 6.

Chris Kelly and Daphne Phung, the proponents of Proposition 35, moved to intervene on November 12, 2012. Although the Court did not grant the motion to intervene until January 10, 2013, Intervenors filed a written opposition and addressed the Court at oral argument. Thus, they were fully heard on Plaintiffs' motion for a preliminary injunction.

## II. LEGAL STANDARD

To obtain a preliminary injunction, Plaintiffs must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of the preliminary injunction; (3) the balance of equities tips in their favor; and (4) the issuance of the preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A stronger showing on one of these four elements may offset a weaker showing on another, but the movant must nonetheless "make a showing on all four prongs." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

## III. DISCUSSION

### A. Likelihood of Success on the Merits

The Court first considers Plaintiffs' likelihood of success on the merits. Because the Court finds Plaintiffs likely to succeed on their First Amendment speech claim for the reasons discussed below, it does not address whether Plaintiffs are likely to succeed on any of their remaining claims.

#### 1. First Amendment Legal Principles

This case concerns the First Amendment's protection of the right to speak anonymously online. *See In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir.

United States District Court
For the Northern District of California

2011). It is undisputed that speech by sex offenders who have completed their terms of probation or parole enjoys the full protection of the First Amendment. Rep. Tr. at 21:11-15 (Plaintiffs), 51:4-10 (government), 51:23-24 (Intervenors); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking down New York law that sought to interfere with criminals' profiting from works describing their crimes). The provisions at issue here are not outright bans on anonymous online speech, but they may still violate the First Amendment if they impermissibly burden such speech: "[T]he distinction between laws burdening and laws banning speech is but a matter of degree . . . . Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (internal quotation marks and citation omitted).[4]

Plaintiffs here challenge the CASE Act as facially overbroad. Although Plaintiffs bear the burden of demonstrating a likelihood of success on the merits under the preliminary injunction standard, the government ultimately "bears the burden of proving the constitutionality of its actions" whenever it seeks to restrict speech. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000).

To succeed on a facial overbreadth challenge under the First Amendment, a plaintiff must demonstrate either "that no set of circumstances exists under which [the statute] would be valid," or that "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal quotation marks and citations omitted). The Court's inquiry is not limited to the application of the challenged provisions to the particular plaintiffs before it, as "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally

[4]That the challenged provisions were enacted by voter initiative does not alter the constitutional analysis. "The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194 (1999) (internal quotation marks and citation omitted).

protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). However, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Plaintiffs urge the Court to subject the challenged provisions to strict scrutiny because they discriminate against registrants as a class of speakers. However, strict scrutiny is only required where "speaker-based laws . . . reflect the government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). Here, the Act reflects no such preference and operates without regard to the message that any registrant's speech conveys. The challenged provisions are therefore content-neutral, and intermediate scrutiny applies. *Id.* at 662; *see also Doe v. Shurtleff*, 628 F.3d 1217, 1223 (10th Cir. 2010) (applying intermediate scrutiny to Utah reporting requirement that said "nothing about the ideas or opinions that [registrants] may or may not express, anonymously or otherwise" and were not "aimed at suppressing the expression of unpopular views" (internal quotation marks, alteration, and citation omitted)).

Under intermediate scrutiny, a law must "'be narrowly tailored to serve the government's legitimate, content-neutral interests.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1566 (2012) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). "To satisfy this standard, the law need not be the least speech-restrictive means of advancing the Government's interests"; the test is whether "the means chosen . . . burden substantially more speech than is necessary to further the government's legitimate interests." *Turner*, 512 U.S. at 662 (internal quotation marks and citation omitted). The "essence of narrow tailoring" is to "focus[] on the source of the evils the [government] seeks to eliminate . . . and eliminate[] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7.

**2. Construing the Statute**

Before determining whether a challenged provision violates the First Amendment, a court must first construe the provision; "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). In doing so, the Court must consider the government's "own implementation and interpretation," but it is "not required to insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Comite*, 657 F.3d at 946 (internal quotation marks and citations omitted). Instead, the court may impose a limiting construction only if a provision is, on its face, "readily susceptible" to such a construction. *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (internal quotation marks and citation omitted). Applying these principles to this case, the Court finds that the reporting requirements for "Internet service providers" and "Internet identifiers" are readily susceptible to the narrowing constructions discussed at oral argument and advanced by the government.[5]

**a. "Internet service provider"**

The CASE Act defines "Internet service provider" as a "business, organization, or other entity providing a computer and communications facility directly to consumers through which a person may obtain access to the Internet," excluding any "business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution." Cal. Penal Code § 290.024(a). Pursuant to § 290.015(a)(5), a person subject to the reporting

[5]The government and Intervenors also suggest that, in construing the reporting requirements, the Court may look to the federal standards for state sex offender registry and notification systems developed under the Sex Offender Registration and Notification Act ("SORNA"). *See* 42 U.S.C. § 16915a(a) (providing for collection of "those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate"); Nat'l Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030-01 at 38,055 (July 2, 2008) (U.S. Attorney General guidelines for state registries to include "all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings"). The Court does not find it necessary to rely on SORNA for this purpose because, as discussed below, it finds the construction of the statutes proposed by the government and Intervenors to be supported by the statutes' plain language. Neither the government nor Intervenors argue that SORNA affects the Court's analysis on any other issue.

United States District Court
For the Northern District of California

requirements must, upon registration, provide to law enforcement "[a] list of any and all Internet service providers used by the person." At oral argument, the government stated that the plain language of the Act limits this requirement to only "Internet service providers with which the registrant has an open account at the time of the registration." Rep. Tr. at 48:2-15; *cf. id.* at 49:2-5 (noting Intervenors' agreement). Plaintiffs acknowledged that it would be permissible for the Court to construe the statute in this manner, *id.* at 17:15-18:1, and the Court now does so. Reading section 290.015(a)(5) to exclude providers that are only accessed or used by the registrant, as opposed to those with which the registrant has an account, is consistent with both the common understanding of "Internet service provider" and California Penal Code section 290.014(b), which requires a registrant to update law enforcement only when he or she "adds or changes his or her *account* with an Internet service provider" (emphasis added).

**b. "Internet identifier"**

The CASE Act's definition of "Internet identifier" – "an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication" – is also readily susceptible to a construction that avoids many of the potential problems suggested by Plaintiffs. *Id.* § 290.024(b).[6] The Act may be reasonably interpreted to require reporting only of Internet identifiers actually used to post a comment, send an email, enter into an Internet chat, or engage in another type of interactive communication on a website, and not identifiers a registrant uses solely to purchase products or read content online. *See* Rep. Tr. at 63:8-16 (Intervenors suggesting this rule); *id.* at 64:22-24 (government focusing on "interactive communications" as the test for whether an Internet identifier must be reported); *id.* at 37:5-8 (Plaintiffs saying that it would be

[6]Plaintiffs expressed fear that law enforcement may subsequently decide to require registrants to report the websites associated with their Internet identifiers. However, as Plaintiffs acknowledge, the Act's language requires the reporting only of Internet identifiers and not associated websites. Mot. at 22-23.

reasonable to interpret the Act to "count[] once you actually use that account to post something").[7]

This interpretation raises the question of when a registrant must report an Internet identifier that could potentially be used for interactive communication but that the registrant initially uses only to view content or make a purchase online. At oral argument, the government assured the Court that it would not require a registrant to report such an identifier upon creating it, but that a registrant would have to report the identifier within 24 hours of first using the identifier to engage in interactive communication. Rep. Tr. at 65:21-66:11. The Court finds this construction to be reasonable.

Consistent with the above discussion, the Court construes the challenged provisions as requiring registrants to report: (1) "Internet service providers" with which the registrant has a current account at the time of registration or with which the registrant later creates an account, and (2) "Internet identifiers" that are actually used by the registrant to engage in interactive communication with others, within 24 hours of the registrant's first use of the identifier for interactive communication.

**3. Narrow Tailoring**

The Court now turns to whether Plaintiffs are likely to succeed in showing that the challenged provisions, as just construed, fail to satisfy the First Amendment under intermediate scrutiny. This requires the Court to determine whether the provisions are "narrowly tailored to serve the government's legitimate, content-neutral interests." *Comite*, 657 F.3d at 947 (internal quotation marks and citation omitted).

The CASE Act's stated purposes include "combat[ing] the crime of human trafficking" and "strengthen[ing] laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to track and prevent online sex offenses

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[7]The government suggested that blog usernames need not be reported as long as the blog did not permit interactive comments. Rep. Tr. at 63:17-19. The Court declines to interpret the statute in this fashion since the government has not explained why a registrant's use of his or her own non-interactive blog to comment should be distinguished from his or her posting the same comment on a different website. However, this deviation from the government's proposed construction is not material to the Court's First Amendment analysis.



United States District Court
For the Northern District of California

and human trafficking." CASE Act § 3(1), (3). The Act's text also expresses an interest in "deter[ring] predators from using the Internet to facilitate human trafficking and sexual exploitation." *Id.* § 2(6). Plaintiffs do not dispute that these are legitimate government interests. *Cf., e.g., Doe v. Jindal*, 853 F. Supp. 2d 596, 805 (M.D. La. 2012) ("There can be no doubt that the state has a wholly legitimate interest in protecting children from sex offenders online.").

It is not difficult to imagine situations in which having registrants' Internet identifiers would advance these interests. For instance, if a registered sex offender used a social networking site to recruit victims for human trafficking, being able to match the Internet identifier used to do the recruiting against a database of registered Internet identifiers could help to identify the perpetrator.[8] *Cf.* Bock Decl. ¶ 10 (describing trafficking case of twin girls recruited through a social networking site). Likewise, a database of Internet identifiers could be used to identify the perpetrator of a sex offense – assuming that the person were a registrant[9] – who used an anonymous Internet account to make contact with his or her victim. *Cf. id.* ¶ 11 (describing case of a person who raped four women he contacted via Craigslist, including a teenage victim "whose pimp had been trafficking her"). Although the government has not presented any real-life examples involving the use of Internet information in a sex offender registry to prevent or solve a crime,[10] the Court finds that the challenged provisions could conceivably advance the legitimate purposes of the Act. It now turns to the question of whether they are narrowly tailored to achieving those purposes.

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[8]This assumes that the re-offending registrant complied with the Internet reporting requirements enacted by the CASE Act.

[9]Plaintiffs' unchallenged statistics suggest that "most online predators" – approximately 96% – "are not registered offenders and have no prior record." Finkelhor Decl. ¶ 18.

[10]The government argues that it cannot provide such examples from California because the challenged provisions have not yet gone into effect. However, neither the government nor Intervenors responded to Plaintiffs' observation that data from other jurisdictions where Internet registration requirements are in effect could shed light on the potential impact of such requirements in California.

Defendants and Intervenors assert that *Shurtleff*, 628 F.3d 1217, in which the Tenth Circuit upheld a reporting requirement in Utah, is persuasive authority that the CASE Act should survive scrutiny under the First Amendment. In *Shurtleff*, the challenged statute required a registrant "to provide all 'Internet identifiers and the addresses [he] uses for routing or self-identification in Internet communications or postings.'" *Id.* at 1221 (footnote omitted) (alteration in original) (quoting Utah Code Ann. § 77-27-21.5(14)(i) (West 2008)). An Internet identifier was defined as "'any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication.'" *Id.* at 1221 n.1 (quoting Utah Code Ann. § 77–27–21.5(1)(j)). The district court found that the original statutory scheme violated the First Amendment because it "contained no restrictions on how the [state] could use or disseminate registrants' Internet information, implicating protected speech and criminal activity alike." *Doe v. Shurtleff*, Case No. 1:08-CV-64-TC, 2009 WL 2601458, at *1 (D. Utah Aug. 20, 2009).

The Utah legislature subsequently amended the statute to limit state officials' use of the information to "investigating kidnapping and sex-related crimes, and . . apprehending offenders. . . ." *Shurtleff*, 628 F.3d at 1221 (internal quotation marks omitted) (quoting Utah Code Ann. § 77-27-21.5(2) (West Supp. 2010)). The legislature simultaneously amended the state's public records act "to designate certain information provided by an offender, including internet identifiers, as private."[11] *Id.* (citing Utah Code Ann. § 63G-2-302(1)(m)). This meant that the information could "only be disclosed in limited circumstances such as when requested by the subject of the record, or pursuant to a court order or legislative subpoena," and could be shared "between different government entities and their agents" only if the entity receiving the record placed "the same restrictions on disclosure of the record as the originating entity." *Id.* at 1221 n.4 (internal quotation marks omitted) (citing Utah Code Ann. §§ 63G-2-201(5), 63G-2-202, and quoting Utah Code Ann. § 63G-2-206). The Tenth Circuit "read this language, as did the district court, as only allowing state actors

[11]The legislature also amended the statute to remove "any requirement that offenders disclose their passwords." *Shurtleff*, 628 F.3d at 1221.

to look beyond the anonymity surrounding a username in the course of an investigation after a new crime has been committed," and further interpreted the statute "as permitting sharing only among law-enforcement agencies, not the public at large." *Id.* at 1225. The court consequently found no First Amendment problem: "Although this narrow interpretation may still result in the disclosure of Mr. Doe's online identifiers to state officials," the court reasoned, "such identification will not unnecessarily interfere with his First Amendment freedom to speak anonymously." *Id.*

In California, sex offender registration statements are not subject to "inspection by the public or by any person other than a regularly employed peace officer or other law enforcement officer," Cal. Penal Code § 290.021, but a law enforcement entity may disclose registrants' information to the public "by whatever means the entity deems appropriate, when necessary to ensure the public safety based upon information available to the entity concerning that specific person," *id.* § 290.45(a)(1). With any such disclosure, the entity must include "a statement that the purpose of the release of information is to allow members of the public to protect themselves and their children from sex offenders." *Id.* § 290.45(a)(2). These California statutes do not contain the safeguards present in the amended Utah statutes and are closer to the pre-amendment Utah statutes initially found unconstitutional by the district court in *Doe v. Shurtleff*, Case No. 1:08-CV-64-TC, 2008 WL 4427594 (D. Utah Sept. 25, 2008).

They are also similar to a Georgia statute – struck down by the district court in *White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010) – that permitted disclosure of registrants' Internet information "to law enforcement agencies for law enforcement purposes" and to the public as "necessary to protect the public" without any other limitations. *Id.* at 1309 (quoting O.C.G.A. § 41-1-12(o)). This Court agrees with the *White* court, which found the lack of statutory protections on disclosure to be troubling:

> It is conceivable, if not predictable, that a person in law enforcement might determine that Internet Identifiers for offenders ought to be released so that the public can search for and monitor communications which an offender intends to be

> anonymous. That these anonymous communications might well be on a matter of public policy, political speech, or other protected speech squarely implicates the First Amendment. . . . The prospect that Internet Identifiers, as currently defined, may be released to the community has an obvious chilling effect.

*Id.* at 1310-11.[12]

While the government asserted at oral argument that there has to be "some kind of nexus" between the use of an Internet identifier and criminal activity before law enforcement can access information related to a registrant's Internet identifier, Rep. Tr. at 54:23-55:15, the Court "cannot simply presume the [government] will act in good faith and adhere to standards absent from the [statute's] face." *Comite*, 657 F.3d at 946-47 (internal quotation marks, alteration, and citation omitted). Here, Plaintiffs have no guarantee that their pseudonyms will be safeguarded from public dissemination because neither the CASE Act nor any other California statute requires the nexus asserted by the government at the hearing. Their right to speak anonymously will therefore be chilled.

This chilling effect is heightened because, unlike in the Utah or Georgia cases, the disclosure of a registrant's identity – at least to law enforcement, and potentially to the public as well – will occur either before he or she speaks or, at maximum, within 24 hours after speaking and potentially while the speech is ongoing. *Cf. Shurtleff*, 628 F.3d at 1225 (finding that disclosure "would generally occur, if at all, at some time period following Mr. Doe's speech and not at the moment he wished to be heard"); *White*, 696 F. Supp. 2d at 1294 (noting that the Georgia statute required registrants to provide updated information within 72 hours). A contemporaneous disclosure requirement poses a greater burden on speech than an after-the-fact disclosure requirement because it "connects the speaker to a particular message directly." *ACLU v. Heller*, 378 F.3d 979, 991-92 (9th Cir. 2004). When a California registrant wants to speak online, he or she must use either a previously reported Internet identifier – in which case the disclosure to law enforcement would have occurred

[12]The Georgia statute defined "Internet Identifier" as "E-mail addresses, usernames, and user passwords," and further defined "username" as "a string of characters chosen to uniquely identify an individual who uses a computer or other device with Internet capability to gain access to e-mail messages and interactive online forums." *White*, 696 F. Supp. 2d at 1295 (quoting O.C.G.A. § 42-1-12(a)(16)(K) & (a)(21.1)).

prior to the speech – or a new identifier that must be reported within 24 hours, regardless of whether any conversation using the identifier has concluded. Because it results in a risk of more contemporaneous disclosure, this reporting requirement is even more problematic than the 72-hour reporting requirement found to be unconstitutional in *White*. It likewise creates a far greater chilling effect on anonymous speech than the statute upheld in *Shurtleff*, especially when combined with the lack of statutory protections on the information's disclosure to other law enforcement agencies and the public.

Registrants' speech may also be chilled because failure to comply with sex offender registration requirements, including the Internet provisions, is punishable by up to three years in state prison. Cal. Penal Code § 290.018(a)-(c). This potential punishment may deter registrants from speaking at all if they are uncertain about whether they have to report a particular Internet identifier to law enforcement and, if so, whether they will be able to file any such report within the required 24-hour period. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter the[] exercise [of First Amendment rights] almost as potently as the actual application of sanctions."). The uncertainty surrounding what registrants must report – and the resultant potential chilling effect – is greater in this case because the Court's interpretation of the Act is not definitive guidance to registrants about what they must report. While the Court construed the Act's provisions for purposes of determining whether they violate the First Amendment, this Court's interpretation is not binding on state courts, where the registrants would face prosecution for failure to register. *See Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001) ("[I]t is solely within the province of the state courts to authoritatively construe state legislation.").

The CASE Act provisions' chilling effect might be justifiable if the provisions were narrowly tailored, but – at least at this stage of the proceedings – the government has not persuaded the Court that they are. For the reasons discussed below, the Court finds that the provisions apply both to more speakers and more speech than is necessary to advance the government's legitimate purposes.

First, the Court is not persuaded that burdening the anonymous speech rights of all 75,000 registered sex offenders is narrowly tailored to the government's interest in fighting online sex offenses. The government already classifies registrants using a risk-assessment tool known as Static-99. Using this instrument, the State has classified the majority of registrants released on parole after 2005 as posing a "low" or "moderate-low" risk of re-offending. Abbott Decl. ¶ 9. The government has not sufficiently explained why these individuals ought to be treated differently from non-registrants who are not required to report Internet-identifying information to authorities. This fact is not altered by Intervenors' reliance on Plaintiffs' data that "[p]edophiles who molest boys and rapists of adult women have recidivism rates of 52% and 39% respectively," or that the overall average recidivism rate for registrants in all risk categories is between 14% and 20%. *Id.* ¶ 15. The issue is not whether registrants recidivate, which Plaintiffs do not dispute. Instead, the problem is that the government has not explained why the collection of Internet-identifying information from registrants who present a low or moderately low risk of re-offending, and a potentially even lower risk of re-offending online,[13] is narrowly tailored to the Act's purposes. Based on the State's own existing risk assessments, the uniform application of the CASE Act appears overbroad.[14]

At oral argument, the government asserted that Static-99 cannot be used to limit the number of registrants who must report Internet-identifying information because the CASE Act's "Internet identifier registration requirements serve[] a different purpose" than Static-99's purpose of "estimat[ing] the risk that a person might pose when they are released

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[13]No party or intervenor presented any evidence concerning the rate by which registered sex offenders re-offend using the Internet. The only statistical evidence presented on the prevalence of Internet use in the commission of sex offenses was from a national study of 2006 arrests, which indicated that only approximately 1% of sex offenses against children involved the Internet or other technology. Finkelhor Decl. ¶ 12.

[14]Even if the Act were applied only to the registrants deemed to pose a higher risk by the State's Static-99 tool, this, too, could still be insufficiently tailored because it considers only the risk of re-offending, not the risk of committing a sex offense online – which is the CASE Act's stated focus. However, the challenged provisions currently apply to all registrants, regardless of risk, and the Court therefore need not and does not decide this question.

to the community." Rep. Tr. at 76:19-77:1. The purpose of the CASE Act's new registration requirements is, according to the government, "to be able to find somebody if we need to." *Id.* at 77:1-2. However, the government has not explained how being able to find all registered sex offenders using Internet identifiers – regardless of the registrants' risk of re-offending as determined by the government's own assessment tool – is narrowly tailored to achieving the Act's legitimate interest in combating online sex offenses or human trafficking.

In addition, even as to registrants who may legitimately be required to register Internet-identifying provisions based on their risk of recidivism, the challenged provisions appear to extend to too much speech. When asked at oral argument what kinds of communications it would be "most helpful for law enforcement to be able to monitor," the government referred to *White v. Baker*, stating that the court there said that "Internet chatting and social networks and chat rooms . . . were the most helpful, that mostly involved the exploitation of children." Rep. Tr. at 75:1-8. Indeed, the *White* court found that online solicitation for sexual exploitation "generally do[es] not occur in communications that are posted publicly on sites dedicated to discussion of public, political, and social issues." 696 F. Supp. 2d at 1310. The government has not shown the utility of requiring registration of Internet identifiers used for this type of public commentary.

Nonetheless, the CASE Act provisions extend to all such websites, and registrants are likely to be chilled from engaging in legitimate public, political, and civic communications for fear of losing their anonymity. As a Nebraska district court forcefully stated, a requirement that sex offenders report to the government all communications on blogs and websites "puts a stake through the heart of the First Amendment's protection of anonymity [and] surely deters faint-hearted offenders from expressing themselves on matters of public concern." *Doe v. Nebraska*, Case No. 8:09CV456, 2012 WL 4923131, at *28 (D. Neb. Oct. 17, 2012); *see also White*, 696 F. Supp. 2d at 1310 (concluding that a requirement was overbroad because it included communications that did not "reasonably present a vehicle by which a sex offender can entice a child to have illicit sex"). This Court agrees. Applying the

registration requirements to all Internet forums, even those types that have not been shown to pose any reasonable risk of leading to an online sex offense or human trafficking, creates a significant chilling effect on Plaintiffs' protected speech.[15]

In short, at this preliminary stage of the proceedings, the government, with the Intervenors' support, has failed to show that the CASE Act's reporting requirements are narrowly tailored to serve its legitimate interests. The challenged provisions have some nexus with the government's legitimate purpose of combating online sex offenses and human trafficking, but "[t]he Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. On the current record, the Court concludes that Plaintiffs are likely to establish that the challenged provisions, when combined with the lack of protections on the information's disclosure and the serious penalty registrants face if they fail to comply with the reporting requirements, create too great a chilling effect to pass constitutional muster. While the government may be able to demonstrate narrow tailoring in subsequent proceedings, it has not done so here. Accordingly, the Court concludes that Plaintiffs are likely to succeed on their First Amendment free speech claim.

### B. Remaining Preliminary Injunction Factors

To warrant injunctive relief, Plaintiffs must also show that they are likely to suffer irreparable harm in the absence of an injunction and demonstrate that the public interest and balance of equities weigh in their favor. As discussed below, the Court finds that Plaintiffs have sufficiently established all of these factors.

First, neither the government nor Intervenors dispute that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction. Indeed, the Supreme Court long ago

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[15]The Court recognizes that, like the challenged provisions here, the Utah statutes upheld by the Tenth Circuit in *Shurtleff* applied broadly to all Internet forums and all registered sex offenders. However, as discussed above, the chilling effect of the Utah statute was diminished, if not eliminated, by the statutory restrictions on disclosure and the lack of a relatively contemporaneous reporting requirement.



United States District Court
For the Northern District of California

explained that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Second, the Ninth Circuit has "consistently recognized the 'significant public interest' in upholding free speech principles," *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009), and has further observed that "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and citation omitted).

Third, based on the present record, the government has not demonstrated that the CASE Act's impact on public safety is sufficient to overcome the interest – both to Plaintiffs and to the public – in avoiding infringement of Plaintiffs' First Amendment rights. As the Supreme Court has explained, "[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech," nor may the government "prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245, 253 (2002) (internal quotation marks and citation omitted). In this case, the government has not provided any evidence regarding the extent to which the public safety might be enhanced if the additional registration requirements went into effect. Plaintiffs' evidence – as yet undisputed – indicates that only 1% of arrests for sex crimes against children are for crimes facilitated by technology, Finkelhor Decl. ¶ 12, and that registered sex offenders are involved in only 4% of these arrests, *id.* ¶ 18. While the Court does not minimize the significance of any single crime, the record at this stage of the proceedings suggests that the potential usefulness of the Internet registration information is limited to a very small portion of the universe of sex offenses and online sex offenses. Moreover, enjoining the Internet registration requirements enacted by the CASE Act would not prevent the government from investigating online sex offenses, as it could still employ other mechanisms to do so. *See, e.g., Doe v. Shurtleff*, 2008 WL 4427594, at *9 (noting that, even in the absence of an Internet registration requirement, "investigators of internet crime already have tools to unmask anonymous internet suspects, such as investigative subpoenas"). Against the government's weak showing of the utility of registrants' Internet

information if the Act is not enjoined, the Court must weigh the likely and substantial chilling of Plaintiffs' First Amendment rights discussed above. Having done so, the Court concludes that both the balance of equities and the public interest weigh in favor of granting injunctive relief.

### C. Application of Injunction to Local Law Enforcement

Finally, the Court must address whether any injunctive relief binds local law enforcement officials in California or only the Attorney General. The parties agreed that local law enforcement officials would not enforce the challenged provisions during the pendency of the temporary restraining order, but the government now argues that an injunction against the Attorney General cannot bind local law enforcement agencies or personnel. For support, the government cites a single California appellate case from seventy years ago for the proposition that "the California Constitution does not contemplate absolute control and direction of sheriffs" by the Attorney General. Gov't Opp'n at 9 (citing *People v. Brophy*, 49 Cal. App. 2d 15, 28 (1942)).

The government's argument is beside the point. Federal Rule of Civil Procedure 65(d)(2) provides that an injunction will bind the parties, as well as "the parties' officers, agents, servants, employees, and attorneys," and "[o]ther persons who are in active concert or participation with" these individuals. Even if the Attorney General does not have absolute control and direction over local law enforcement, it cannot be disputed that, as to the collection of sex offender registration data, local law enforcement at least acts "in active concert or participation with" the Attorney General, if not as her agent. *See, e.g.*, Cal. Penal Code § 290.015(b) (requiring local law enforcement agencies to forward registrants' information to the Department of Justice[16] within three days of registration); Schweig Decl. ¶ 3 (describing the collection of sex offender registration data as a "collaborative effort"

[16] "The Attorney General is head of the Department of Justice." Cal. Gov't Code § 12510.



United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

involving, among others, the California Department of Justice and local law enforcement agencies).

However, Federal Rule of Civil Procedure 65(d)(2) also provides that an injunction only binds persons "who receive actual notice of it by personal service or otherwise." To ensure that all local law enforcement officials who are responsible for collecting registered sex offenders' information are bound by this order, the Court will order the Attorney General to provide actual notice to all such officials. This requirement does not preclude the parties from further meeting and conferring to attempt to reach agreement that local law enforcement will not enforce the enjoined provisions as long as the Court's order granting preliminary injunctive relief remains in effect.

## IV. CONCLUSION

The Court does not lightly take the step of enjoining a state statute, even on a preliminary basis. However, just as the Court is mindful that a strong majority of California voters approved Proposition 35 and that the government has a legitimate interest in protecting individuals from online sex offenses and human trafficking, it is equally mindful that "[a]nonymity is a shield from the tyranny of the majority," and that Plaintiffs enjoy no lesser right to anonymous speech simply because they are "unpopular." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). The record before the Court does not establish that the Internet registration requirements enacted by the CASE Act are narrowly tailored to the Act's legitimate purpose of combating online sex offenses and human trafficking. While the government may be able to make the necessary showing at a later stage of these proceedings, it has not yet done so, and the Court therefore concludes that Plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment free speech claim.

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United States District Court
For the Northern District of California

Accordingly, with good cause appearing for the reasons stated in this order, Plaintiffs' motion for a preliminary injunction is GRANTED. IT IS HEREBY ORDERED that:

1. Defendant Kamala Harris and her officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with her, are enjoined from implementing or enforcing California Penal Code sections 290.014(b) and 290.015(a)(4)-(6), as enacted by the CASE Act.[17]

2. Defendant Harris shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statutes or from otherwise collecting registered sex offenders' information. The government shall file a declaration establishing proof of such notice on or before **January 28, 2013**. Alternatively, the parties may file on or before that date a stipulation and proposed order that local law enforcement will not enforce the enjoined provisions even in the absence of receiving actual notice.

**IT IS SO ORDERED.**

Dated: 01/11/13

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

[17] A careful reader may observe that the Court has omitted the phrase, "or from otherwise requiring registrants to provide identifying information about their online speech to the government," from the temporary restraining order. Nov. 7, 2012 Order at 3. This should not be interpreted as the Court's permission to attempt an end run around the preliminary injunction entered today. The Court removed this language out of an abundance of caution that the scope of its injunction not reach too broadly.

Pages 1 - 85

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE THELTON E. HENDERSON, JUDGE

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| JOHN DOE, et al., | ) | |
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| Plaintiffs | ) | |
| | ) | |
| v | ) | NO. CV 12-5713 TEH |
| | ) | |
| KAMALA D. HARRIS, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

San Francisco, California
Monday, December 17, 2012

**TRANSCRIPT OF PROCEEDINGS**

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(Appearances continued on next page.)

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Monday, December 17, 2012

10:16 A.M.

**P R O C E E D I N G S**

**THE CLERK:** Calling case 12-5713, *Doe versus Harris*. Counsel, please come forward and state your appearance for the record.

**MR. FAKHOURY:** Good morning, your Honor. Hanni Fakhoury of the Electronic Frontier Foundation on behalf of the plaintiffs.

**MR. RISHER:** Good morning, your Honor. Michael Risher of the ACLU of Northern California, also for plaintiffs.

**MS. LYE:** Good morning, your Honor. Linda Lye for the ACLU, also for plaintiffs.

**MR. TIEN:** Good morning, your Honor. Lee Tien, Electronic Frontier Foundation, also for the plaintiffs.

**MR. HARRISON:** Good morning, your Honor. James Harrison on behalf of proposed intervenors.

**MS. PRINZING:** Margaret Prinzing on behalf of proposed intervenors.

**MR. WILSON:** Good morning, your Honor. Robert Wilson, Office of the Attorney General for the Attorney General.

**MR. SOUTHWORTH:** Good morning, your Honor. Pete Southworth also from the Attorney General's Office.

**THE COURT:** Good morning to all of you. Welcome.

You've received some questions that I am interested

in, and during the course of this proceeding I'll ask that you answer those.

You may be seated.

I'll ask that you answer those questions to the best of your ability. And it's my practice, having told you that, that if you don't answer I'll assume the worst in terms of why you didn't answer it.

We have two motions. Let's proceed first and argue the motion to intervene. Let's do that first, and I'm primarily -- argue the motion as you came prepared to argue it, but I'm -- well, let's go -- let's proceed with the moving party.

**MR. HARRISON:** Good morning, your Honor, James Harrison on behalf of proposed intervenors --

**THE COURT:** Let me ask you to stand at the mike here, Counsel, and everyone.

**MR. HARRISON:** Good morning, your Honor. James Harrison on behalf of proposed intervenors. With me here today in court is proposed intervenor Chris Kelly, along with my law partners Margaret Prinzing and Karen Getman.

Your Honor, we have requested leave to intervene, both as of right as well as permissive intervention. I think the briefs explain in great detail why we believe that intervention as of right is appropriate.

However, the Court has focused its questions on

permissive intervention, so with the Court's permission I'd like to address those questions, and if the Court has other questions with respect to intervention as of right I'm happy to entertain them.

**THE COURT:** Okay.

**MR. HARRISON:** The Court has asked whether proposed intervenors meet the test for permissive intervention. And as the Court knows, there's three parts to that test: One, an independent grounds for jurisdiction; two, a timely motion; and three, that the claim or defense shares a common question of law or fact with the main motion.

The Ninth Circuit has made clear that intervenors do not need to show any independent jurisdictional ground when they are not raising new claims. In other words, where the case presents a federal question nothing more is required. And that's the *Freedom from Religion Foundation versus Geithner* case, 644 F.3rd 836.

With respect to the second factor, timeliness; proposed intervenors filed their motion five days after this case was filed. So even plaintiffs concede it was a timely motion.

With respect to whether proposed intervenors share a common question of law and fact with the main motion, in fact the question is identical, and that is whether the state can collect information from registered sex offenders regarding

their Internet identifiers and Internet service providers for the purpose of investigating and preventing online sex crimes and human trafficking consistent with the First Amendment.

The other factors that the courts evaluate with respect to permissive intervention also militate towards granting it. Adequacy of representation is one of them; undue delay or prejudice is another; and the third is whether intervenor will significantly contribute to the development and adjudication of the case.

Proposed intervenors meet each of these.

With respect to the adequacy of representation, first, as the Court is aware, the California Supreme Court has considered at length the case of whether the state adequately represents the interests of the proponents of a ballot measure, and it has concluded that even where the state is defending the ballot measure, that it does not fully represent the interests of the proponents.

And it also recognized that intervention by the proponents of the ballot measure serves the purpose of ensuring the judicial fairness of the process, the appearance of fairness, and providing the Court with all of the arguments that can be articulated in defense of the constitutionality of the measure.

**THE COURT:** Defendants have raised the Article Three, that you fall short on the Article Three requirement. What's

your response?

**MR. HARRISON:** Sure. With respect to Article Three, your Honor, the Ninth Circuit --

**THE COURT:** I mean plaintiffs.

**MR. HARRISON:** Right. The Ninth Circuit has not resolved the question as the Court alluded to, as to whether third party standing is required for permissive intervention.

But even assuming it were required, your Honor, we believe that proposed intervenors satisfy it here, because the California Supreme Court has found that the proponents of a ballot measure represent the voters when they appear as intervenors in a case. So just as the state has standing to defend the law, so too would intervenors.

In *Arizonans for Official English* the Court in analyzing the question of whether the proponents of a ballot measure had standing in that case noted that Arizona law did not confer on them any right or responsibility to defend a measure, and on that basis expressed grave doubts about whether the intervenors in that case had standing.

Here at the request of the Ninth Circuit the California Supreme Court has considered at length whether proposed intervenors have the right to defend the state, and had found that California courts had uniformly granted proposed intervenors the right to intervene to defend the law.

And on that basis we believe that even if third

party standing were required, the California Supreme Court has found such standing exists for purposes of California law, and the Ninth Circuit in the *Perry* case said that it would rely on the state's determination of that issue as to whether or not the plaintiffs -- excuse me -- the proposed intervenors could proceed.

Obviously, the question that's before the U.S. Supreme Court now, your Honor, is slightly different because in both of the cases in which the court granted cert, the original defendant chose not to appeal the case.

So the issue in that case appears to be whether intervenors have Article Three standing to pursue an appeal when the original defendant has decided not to appeal -- not the question of whether an initiative's proponents have an interest in defending an initiative sufficient to support intervention.

And in fact, the U.S. Supreme Court in *Diamond versus Charles* has acknowledged that there may be a difference between standing for purposes of intervention and standing for purposes of pursuing an appeal.

In that case the Court said that the intervenor's right to continue to pursue a case in the absence of a party on whose side it joined a case is contingent upon a showing that the intervenor has Article Three standing. The Court didn't reach the question of whether Article Three standing

was required for intervention as of right, but the case at least suggests that there may be a difference.

Obviously that issue will be resolved by the U.S. Supreme Court in the Prop Eight case, but for present purposes I think it's sufficient to say that that question is not before the U.S. Supreme Court and plaintiffs -- excuse me -- proposed intervenors here demonstrated both that they have a protectable interest for purposes of Section 24 as well as Article Three standing if the Court believes it's required in order to intervene in this case.

**THE COURT:** Okay.

**MR. HARRISON:** Thank you, your Honor.

**MR. FAKHOURY:** Good morning, again, your Honor. I'll begin by addressing the question the Court posed about the standing issue, and I think it's important to be clear that the uncertainty about Article Three standing is about intervention as of right.

So in *Prete v. Bradbury* the Ninth Circuit made clear that there was some disagreement among the circuit courts about the need to find an independent Article Three standing basis to allow intervention when the Court was looking at Rule 24(a), intervention as of right.

But when it comes to permissive intervention it's clear and the Ninth Circuit has been clear that there has to be an independent basis of jurisdiction.

And in our papers we referenced both *EEOC versus Pan Am World Airways* and *EEOC versus Nevada Resort Association,* and both cases have made really clear that under Rule 24(b) for permissive intervention there must be an independent basis for jurisdiction.

I think related to that, your Honor, is when you actually look at the Supreme Court's grant of cert in the *Perry* case, I think it actually provides a stronger reason why this Court should deny intervention, and that is, when the state fails to defend an initiative on appeal, or when the state fails to defend the initiative, in any court proceeding there's a stronger reason to allow the proponents of a ballot initiative to stand in place of the state.

And that's precisely what the California Supreme Court held in the *Perry* decision and which the Ninth Circuit eventually adopted in its *Perry* decision that is now on review to the Supreme Court.

Here, however, obviously the state is present. Beyond that, they've adequately -- or they do adequately represent the interests of the intervenors in two ways.

First there's -- as we've explained in our papers there's a presumption that when the state is involved in the suit and actually is defending the measure there's a presumption that the -- that they share the same ultimate objective as the sponsors of the initiative.

And there's a second presumption that says that when the party to a litigation is the government body charged with representing the interests of intervenor there's an assumption there's this adequacy of representation.

So in effect, there's two presumptions here that show that the state adequately represents two interests of the intervenors in this case, and therefore intervention is unnecessary.

The proponents have made a number of arguments in -- mainly in their reply belief explaining why intervention should be granted, but I would note that those are strategic differences. There are strategic differences whether to oppose the motion for anonymity. There are strategic differences about which arguments to focus on before your Honor in the substantive pleadings. But the Ninth Circuit again has been very clear that strategic differences are not enough to overcome the presumption of adequacy or enough to show that parties' representation is inadequate.

Even -- and I noted this that in the reply brief the proponents claim that the state failed to raise arguments about the plaintiffs failing to demonstrate no circumstances in which Proposition 35 could be constitutionally applied, but then admit in a footnote that the state actually did raise that argument, albeit in an abbreviated form.

So that's not enough to show that there's

inadequate representation, your Honor. There's adequate representation here and therefore formal intervention is unnecessary.

We've made clear in our papers, your Honor, that the plaintiffs have no objection to the proponents filing an amicus brief. There's no problem with the proponents providing their expertise in the area to the state, whether that's through helping them find expert witnesses or providing suggested arguments.

And again, an amicus brief is the appropriate avenue for the intervenors to express their thoughts, opinions and overall feelings about this lawsuit.

**THE COURT:** Let me ask you, given those concessions you are willing to make, what's the vice of their intervening? What more does intervention give them that we shouldn't -- that you don't want in the case?

**MR. FAKHOURY:** Well, it's really a matter of ensuring that the litigation proceeds efficiently.

**THE COURT:** I always thought that was something me and my clerks worry about. We get more papers to read. We are willing to do it. It's my broad discretion to allow me to let them in.

**MR. FAKHOURY:** Well, your Honor, you certainly have discretion, and all we've -- I think what our focus is on, all we've -- our focus is on alerting the Court that in exercising

this discretion the Court obviously has to consider the adequate representation.

Again, as I think we have made clear in our papers, we think the state is doing an adequate job representing their interests. They've very zealously defended the constitutionality of Prop 35. We have no doubt they are going to continue to do so throughout the course of the litigation.

Yes, the Court obviously has discretion, and I'm sure the Court will exercise it wisely. But again, we would just urge the Court to deny intervention, and I would be happy to answer any other questions the Court has at this time.

**THE COURT:** I don't have any more.

**MR. FAKHOURY:** Thank you, your Honor.

**THE COURT:** Thank you, Counsel.

I'm going to take this under submission. I'm inclined to grant the motion, and in that regard I am going to allow the movers for intervention to participate in this hearing. But I haven't ruled yet. And I'll know how to sort that out if I rule against you.

So with that, let's proceed with the main motion here. The moving party may proceed on that.

**MR. RISHER:** Thank you, your Honor. Michael Risher from the ACLU. I will be handling this portion of the argument.

Without further adieu I'll address the Court's written questions, unless you'd like me to proceed in some other way?

**THE COURT:** No. That's fine, Counsel.

**MR. RISHER:** The first question relates to whether this Court has the authority to narrow the statute to make it constitutional.

And the answer is no.

The Supreme Court in *Grayned v. City of Rockford* said, "It is not within our power to construe and narrow state laws."

Instead, the Ninth Circuit in the *California Teacher Association* case -- both are cited in our briefs -- said that:

> "This Court must use traditional schools as statutory construction to determine the statute's allowable meaning."

Now, of course, this Court would be required to accept a state court's authoritative construction of the statute, but as the U.S. Supreme Court said in a case that we haven't cited yet, *Virginia versus American Book Sellers Association*, Reporter 484 U.S. 383, on page 395 made it clear that:

> "As the Attorney General does not bind the state courts or local law

enforcement authorities, we are unable to accept her interpretation of the law as authoritative."

That's the same here in California. As we pointed out in our briefs, the Attorney General can't simply tell local law enforcement what to do; can't tell local prosecutors what to do.

There is, of course, a competing doctrine which says that every court must avoid constitutional questions, and therefore there is language in the cases -- American -- the *California Teachers Association*, the *Comite* case that says, yes; the Court should adopt the constitutional construction of the statutes, but it cannot do so by adding language to the statute, by taking language out of the statute, and it cannot do so by ignoring the usual tools of statutory construction.

There seems to be a little bit of tension between these two doctrines, but what I take from it is that the court should look at the statute, give it its most natural reading. In cases of true ambiguity the court should use the more constitutional reading and reject the one that is unconstitutional. But aside from that, the Court simply looks at the language and interprets it as it would any other statute.

The -- and I think that makes sense, because as the Supreme Court pointed out, if this Court were to interpret the

statute very narrowly and uphold it on that basis there would be no restriction on California courts, California officials interpreting it more broadly and implementing it in a way that's plainly unconstitutional.

The one solution, of course, would be certification to the California Supreme Court. However, California Rule of Court 8.548 does not allow a district court to certify the question.

The other possible solution would be to allow the state courts to sort it out. But the Supreme Court has made it clear that when it says that the Court should adopt a "readily available interpretation," it's talking about an interpretation of the law that a state court in a single proceeding might come up with.

And to the contrary, where you have a law like this, one where there are many, many vague provisions, many questions that would have to be -- or many words would have to be construed narrowly, what you would end up with in the state courts is a succession of prosecutions, and the First Amendment will not tolerate that.

That's made clear in *Dombrowski*. That's made clear in another case that we didn't cite: *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569, and in the *American Book Sellers* case.

So I think at this point this Court's both responsibility and the limit on its authority is to read the

statute as written.

The -- and I should add, specifically the Court asked about the definition of "Internet service provider." There are many unanswered questions about that. We've raised them in our brief -- what's covered, whether it's an Internet cafe, it seems to be pretty clear what that is. Whether it's all traditional Internet service providers, whether it is something like Best Buy.

There are simply too many questions about the scope of the definition of "Internet service provider," for this Court to use the tools that it is authorized to use to resolve them. The statute is overbroad, it's unconstitutionally vague, and it's unconstitutional for those two reasons.

The Court's second question was much more specific: Would it be permissible for the Court to construe the requirement to provide a list of any and all Internet service providers used by the person as only requiring Internet service providers that are currently used or have an open account.

If the government advances this construction, I think that is a permissible construction of the law. It's completely vague as to whether it's currently used. I mean, if they want to clarify they should say "currently used."

That is an area where the Court could legitimately construe that statute as only applying to accounts that are

currently open.

That does raise the problem that I just alluded to: There's nothing that requires state courts, state local law enforcement to adopt that.

So it could be that we have a ruling from this Court that the statute is constitutional because it's only current accounts, and then state law enforcement and courts reach a different conclusion.

The simple possibility that that would happen is a problem under the First Amendment because of the chilling effect that could have. We need an authoritative construction from a state court that that's the case before anyone can be sure of what he or she must report.

The Court's third question was whether the scienter requirement mitigates some of these problems. And it certainly is preferable to a strict liability offense, which would in itself raise serious constitutional questions. But it may mitigate them. It certainly does not resolve them, and for a few distinct reasons.

Going back to what the Supreme Court has said about First Amendment cases, in *Dombrowski*, 380 U.S. at 487, it said, quote:

> "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution

unaffected by the prospect of a success or failure."

*NAACP* says similar things where a prosecution -- where the threat of sanctions may deter the exercise of First Amendment rights.

And in *Ashcroft v. ACLU* dealing with Internet speech the Court was very clear -- this is 542 U.S. at 670 to 671:

> "Where a prosecution is a likely possibility yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial."

Now here we are not talking about an affirmative defense, but the requirement that the government eventually prove scienter is really -- is cold comfort to anyone who might be caught up in this law.

The -- first of all, California courts have made clear that probable cause to arrest, probable cause to institute a prosecution, even to hold someone to answer, does not require that the government have or the police a prima facia case.

Probable cause, as *Maryland v. Pringle* made clear in holding when the Supreme Court held that if the police finds some drugs hidden in a car they can arrest all the occupants of the car, the government doesn't need to have

specific evidence that the person have the knowledge in that case or the knowledge in this case.

So a registrant who doesn't know he has to register a particular screen name or ISP, doesn't know that it falls within the definition, can lawfully be arrested and prosecuted.

Now, yes, the government has the burden to prove beyond a reasonable doubt that he knew of his duty to register. As a former public defender I can only imagine a registrant who might have a strike or two, who might be looking at serious time, knowing that if he goes to trial the jury is going to find out that he is a registered sex offender. If he takes the stand to show that he didn't know, to say that he didn't know, he may well be impeached with the fact of his prior convictions.

The prosecutor will be able to bring in a piece of paper that the registrant is required to sign under Section 290.015(a)16, where the registrant has acknowledged his duty to comply with his registration requirements.

Jurors are not going to be sympathetic to that defense, and yes, there's a chance you can prevail with that sort of defense.

But it would be unwise, to say the least, for someone in that situation to go to trial and risk spending years in prison based on his being able to convince the jury

that he didn't understand his duty to register. Jurors will say, "Well, you should have played it safe. You know you're in this peril."

So the scienter requirement is important, but it's certainly not dispositive -- far from it. The risks of prosecution are simply too great.

The next question the Court addressed to us is whether speech by sex offenders is entitled to the same level of First Amendment protection as anybody else, and what types of speech could be prohibited by the government.

And I think the answer is someone who has been convicted of an offense of whatever type, has completed his term of imprisonment or supervised release or probation or parole, is absolutely entitled to the same First Amendment rights as everybody else.

When you look at cases from various courts -- the Ninth Circuit included -- that address free speech rights of persons on probation or parole the Court never suggests that the mere fact of the conviction somehow extinguishes or limits those rights. It's the fact that the person is currently being supervised. And just as they are subject to a search clause, just as they are subject to restrictions on their movements, their First Amendment rights can be limited because they are serving a sentence.

Once they are done, they are not subject to search

and seizure anymore, they are not subject to the types of limitations on the First Amendment that could be imposed on a parolee.

The Supreme Court's closest case on this I think is *Simon and Schuster* dealing with the Son of Sam Law. People in that case, most of them, had been convicted of crimes or at least admitted crimes as part of -- in the book. That was a triggering requirement for the law.

The Supreme Court never suggested that the fact that people had been convicted of crimes somehow made it okay for the government to impose these restrictions. The restrictions there were simply that they couldn't immediately profit on the sales of books related to their crimes.

If, in fact, the Supreme Court had been inclined to create some sort of exception for people convicted of crimes, we think they would have taken that opportunity in *Simon and Schuster* to do it.

To the contrary, if you look at more recent cases like *United States v. Stevens*, which we cite in our brief, involving the animal cruelty videos; *Brown versus Entertainment Association*, which we don't cite, but it's a recent case involving violent video games, the Supreme Court has made it crystal clear in those cases it is not going to expand the categories of unprotected speech beyond obscenity -- *Brandenburg* standards. Speech that is used, in

fact, to commit a crime such as conspiracy or attempt.

And similarly, I think it's made clear that because there is no historical precedent for stripping people of their First Amendment rights simply because they've been convicted of some crime long ago, it's not going to expand exceptions to the First Amendment to allow the government to do that.

And for good reason. If we could strip people who have been convicted of their First Amendment rights, we as a society would lose a perspective on the criminal justice system from those who have a unique perspective, who have been subject to it, who can tell us about prison conditions, who can tell us about the difficulties they face reentering society.

We lose an important viewpoint if the government can restrict those people from speaking. We lose an important viewpoint here if, in fact, registrants are chilled from speaking about their experiences with the criminal justice system and the registration system. They have the same First Amendment rights as does everybody as soon as they successfully complete parole or probation or whatever supervised release they have.

The Court's next question is whether the government can legitimately use the Internet-related information to monitor registrant's speech in the absence of a specific criminal

investigation, whether surveillance is a permissible purpose.

The statute needs to be clear that surveillance is a permissible purpose under the statute. The California Sex Offender Management Board report makes it clear that law enforcement agencies do engage in this sort of surveillance. There's certainly no restriction in the statute on the government's ability to use registration information to engage in surveillance.

Now, of course, under the First Amendment and its protections for anonymous speech that is, in fact, prohibited, but the statute purports to allow it.

And that's related to the Court's next question, which is if surveillance is not permitted by the statute, what says so? And the reality is there's nothing in the statute that disallows surveillance. There is nothing in the statute that disallows the government from disseminating that information to the public, although it can't use the Internet to do that.

In fact, the purpose of 290 -- Section 290 has been repeatedly -- the courts have repeatedly said is to allow the police to conduct surveillance on registrants. That's the entire purpose of registration. And there's nothing in the statute that limits that longstanding purpose with respect to the information the registrants would have to provide under the CASE Act.

The Court's next question is if such surveillance is

permissible, what makes it permissible not with respect to people who are not on probation or parole? I think I've addressed the statutory basis for that.

And do the cases upholding sex offender registration generally stand for the proposition that sex offenders can be subject to speech surveillance?

No. And the Tenth Circuit said so in *Doe v. City of Albuquerque* where the government said, "Well, we can keep registrants out of our public libraries because look at all these other cases that have upheld registration requirements and disclosure requirements."

And the Tenth Circuit quite sensibly said, "Those cases don't involve the First Amendment. The First Amendment is different." The fact that you can put -- and this goes to the second part -- information about somebody on the Internet doesn't mean you can restrict his free speech rights.

And the Ninth Circuit when it upheld Washington State's registration laws in *Russell v. Gregoire* -- we cite this in our brief, but it's also 124 F.3rd at 1094 -- made clear that the reason -- and discussed in the U.S. Supreme Court case, *Doe v. Alaska* -- the reason it was upholding these registration and notification requirements is because it only involved information that was already a matter of the public record for all of us: license plate numbers, your names, the various aliases you might use.

Residence, they said was close to the line. But again, where you live, your residence is something that the government knows. The Post Office knows where you live. The Post Office doesn't and shouldn't be able to know what online speech we would like to engage in anonymously, what online discussion forums we are involved in, and I'll get to what is exactly covered by this law in a moment.

So those other cases are not relevant to this. This is a First Amendment case, and the First Amendment is different.

So the next question is one that's -- assume for the purpose of argument that there's no risk of public disclosure of the RSO's Internet identifiers. Is that the end of the First Amendment claim?

And the answer is "no" for two distinct reasons. First of all, anonymity is concerned with official retaliation, retaliation by the government; and second of all, just the reporting requirements impose a burden.

To take those in order, when the U.S. Supreme Court first started looking at anonymous speech and the right to it in *Talley v. California* it set forth several distinct reasons that anonymity is a constitutional right. And the first one it listed, the one it discussed most in *Talley*, where, as the dissenters point out, there was absolutely no evidence or even reason to think that the -- I don't know -- that Ms. or

Mr. Talley would face any social ostracism or social retaliation for advocating a boycott, which is what she was doing.

Instead the U.S. Supreme Court focused on the history of official retaliation under the Crown and in other governments where people's concern was that if they didn't write anonymously or sued anonymously the government would retaliate against them.

So that is completely separate from disclosure. It doesn't depend on disclosure.

Similarly in *Shelton v. Tucker* -- we cite it in our brief, but it's 364 U.S. at 486 -- which involved requiring public teachers to turn over information about their association with various groups, the Supreme Court said, and I quote:

> "Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy."

First Amendment rights are fragile. The Supreme Court has told us this many times.

Here we don't have an employment relationship. We have something that puts registrants in an even more vulnerable position. They face numerous ways in which the

police could retaliate against them, if they were so -- the government in general, if they were so inclined --

**THE COURT:** If they were what?

**MR. RISHER:** There are many ways that the police or the government in general can retaliate against registrants, even without releasing their Internet information to the public.

The government, for example, could simply release -- put up posters, as we know it has done in the past, saying that "So and so is a registered sex offender. Beware." That's entirely within it's authority to do. We know that 39 percent of the responding agencies in that survey have done something like that. If they didn't like a particular registrant, well, they could do that.

Registrants are not popular among law enforcement. They are not popular among the general public. Many law enforcement agencies would simply prefer not to have them living in their jurisdiction, and it's very easy to subject them to all sorts of retaliation, which affects not just their jobs, as in *Shelton v. Tucker*, but their entire lives.

Law enforcement, as Charlene Steen notes in her declaration, can make a registrant's life unbearable. She doesn't say that, but that's I think the effect of what she does say.

These are people who may face official retaliation, and that is, under the Supreme Court's opinions in *Talley* and

in *McIntyre*, a separate reason to protect anonymity, putting aside any disclosure to the public.

Also --

**THE COURT:** If an RSO by definition has to register, why isn't all of this true right there without, what is this? They can retaliate when they register? "Ah, we got one. Let's get them." What's the difference in this legislation? What does it add to the ability to retaliate?

**MR. RISHER:** It adds the ability to retaliate based on protected speech, and that's the difference. It doesn't -- it may not -- assuming for a moment that the government cannot release any information related to Internet use, it -- the government retains the same ability to make a registrant's life difficult, to put it in a neutral way, by releasing a variety of information to the public, by increasing the surveillance on him, by going to his employer and talking to people.

But now the government can do that based on its monitoring of an offender's Internet speech, which is something it couldn't do before.

And that makes it categorically different, because in general the government can certainly take all sorts of steps with respect to a registrant -- with any of us -- that don't violate the constitution. They may inconvenience us, but we don't have a right not to have the government do that, unless it is doing it because of First Amendment protected

activity. So it's retaliation for protected speech that makes this different.

And the final thing I'll say here, unless the Court has more questions -- and I'm happy to address them on this topic -- in *Perry v. Schwarzenegger*, 591 F.3rd 1147, the Ninth Circuit -- we discussed this in our brief -- the Ninth Circuit considered throughout whether a protective order that limited -- that was of course disclosure of political affiliations of people who were involved either on the for or the against Proposition Eight's same sex marriage ban. And the Ninth Circuit said, no, that information need not be turned over in discovery because it's protected by the First Amendment. Conditional privilege.

And yes, a protective order that prevented it from being disseminated beyond the lawyers involved in the case would mitigate these concerns, but they wouldn't mitigate it enough to make it permissible.

So we have the Ninth Circuit saying that even very, very limited disclosure that's not going to go beyond a very small group of people still is the type of disclosure that the First Amendment protection is for, not -- in that case confidential campaign communications; in this case anonymity.

So the next question is what limitations are there on the means by which law enforcement can disseminate an RSO's Internet identifiers and ISPs to the public?

There's also, how do law enforcement entities determine that public dissemination is necessary to ensure the public safety?

I can't answer that second one. It doesn't seem that there are any standards that say what that exactly is supposed to mean. We know that it is routinely -- information is routinely disseminated.

As to the first part of that question, Section 290.45 says they can disseminate that information. Quote:

> "By whatever means the entity deems appropriate when necessary to ensure the public safety based upon information available to the entity concerning that specific person."

Certainly the Attorney General's office on their website and local law enforcement interpret that to allow them to release information. It's impossible to say exactly -- for me to say what the internal decision making is.

What I can say is that there's no limitation on what information can be released. Subsection B of 290.45 says: "Information may be provided -- may include but is not limited to," and then lists a whole bunch of information.

So it's clear that they can provide, in addition to the list of things which are name, aliases, gender, race,

description, any other information they want to provide, which necessarily includes the information that's been collected under here.

And Subsection D says that they are immune from civil liability if they act in good faith. Presumably that would not cover situations where they -- where they -- the registrant was able to show retaliation. Again that's maybe cold comfort to someone whose life might be upended by having information -- the information, that is the sex offender, or information related to his Internet use released.

So I'm happy to -- if the government has a better explanation of what information can be released to respond to that.

The next series of questions relates to whether specific online user names or ISPs would have to be reported. And some of them are very clear and some of them are borderline.

The first one is online banking user name, and that depends on your bank. So I think the answer is for Wells Fargo, which I use, and does not have a chat function, the answer is no.

However, I did some research and found that perhaps the biggest bank in California in terms of customers, Bank of America, does have a user help chat option that is -- probably counts as a chat room under the definition of an Internet identifier, and most definitely counts as instant

messaging if you look at paragraphs 30 to 32 of the Post declaration. He describes exactly what those two terms mean in common parlance. And for that bank at least there's actually two potential Internet identifiers that you might have.

So I have printouts of the website that I've given to the intervenors and the government. If you'd like to -- I can hand them up if you'd like.

**THE COURT:** If you could do that, yeah.

**MR. RISHER:** Yes.

(Whereupon, counsel hands the documents to the clerk.)

**MR. RISHER:** The second one is Best Buy.

**THE COURT:** Thank you, Counsel.

**MR. RISHER:** So at the bottom of this first page this talks about, how do I start a chat section? This is for the record a printout of the "Bank of America Frequently Asked Questions; Ways to Contact Bank of America."

On the second page, "What can I chat about once I've signed into online banking?" And another heading half way down the page, "Why can't I chat with you about my existing accounts without signing into online banking?"

So the way this works is you can always chat with a representative even if you don't have an account -- an online Internet identifier. However, if you want to chat about certain

topics, your certain accounts, you need to have bank log-in, which you then use for the purpose of having that instant message or chat.

So anyone who wants to do that, ask information about their accounts through Bank of America's chat help function, that would be an Internet identifier under the terms of the statute with very little question.

There's an additional Internet identifier, however, that you have to establish whenever you chat with them, and this will become clear when I talk about Best Buy. Bank of America and most of these chat functions seem to operate the same way.

Each new chat session, help session that you want to initiate, a new box opens up. And you'll see the second page that shows a common log-in for Best Buy and requires you to put in more information -- your name, and they ask -- the name on the Best Buy form is mandatory. E-mail and phone are optional.

These are the types of transient screen names that Professor Post talks about in paragraph 64 of his declaration that squarely fall under the definition of "Internet identifier." They are names that you are establishing to engage in chatting/instant messaging -- whatever is the better way to describe that, and you have to establish a new one every time you use the function.

So if I -- this creates an enormous burden for someone who might again go into Best Buy rather than the bank, have a

problem with the product and want to engage in a series of chat helps over a day or a week. Every time that person logs in for a new chat session he is establishing -- necessarily establishing a new Internet identifier, and would have to then turn that over to the government under the plain language of this statute.

**THE COURT:** But if I'm to give Prop 35 a reasonable interpretation, how would I say that it's -- in order to reduce the threat created by resident sex offenders, this is designed to get those RSOs who are stalking bank employees? That makes no sense. Why would I give it that interpretation?

**MR. RISHER:** Because that's what the language of the statute says. And I agree with --

**THE COURT:** This is the plain language reading.

**MR. RISHER:** Yes. Yes. This is not a marginal case. There are some marginal cases. Yeah. If this were a state court you could maybe add some words or take them out, but this Court cannot do that.

So the next potential screen name is an Amazon.com user name, which is actually quite similar to -- analytically to a New York Times user name, and the -- the reviews and help forums -- Kindle help forums on Amazon.com's website clearly qualify as Internet forum discussions. Professor Post discusses that at paragraph 28, and it is 100 percent clear that somebody who is posting on one of those forums, even making comments on a

product or asking questions about it, he or she can use her Kindle that is -- that person has created an Internet identifier.

The more difficult question is whether if you simply log onto your account and are looking at a product and then look at the reviews, whether that counts as an Internet identifier. And that's the exact same issue with respect to the New York Times. Although you would likely be talking about different things.

And here the reason for the statutory ambiguity -- and I don't know what the government's position is on whether that would be required to post, because it would also apply potentially to Myspace accounts.

If you open a Myspace screen name but you never actually use it to put out information, whether you are just monitoring it, I don't know what the government's position is on whether that is something that registrant's must report.

But here's the ambiguity in the statute. The statute says you have to -- defines Internet identifiers as names -- don't use that word -- used for the purpose of Internet forum discussions, without saying whether it's used for the purpose of contributing or speaking on Internet forum discussions, or used for the purpose of reading or monitoring Internet discussions.

I think that either one of those is a reasonable

interpretation of the statute. And it's maybe the same question of, if I join a conference call but I don't speak a word, am I using my telephone system for the purpose of that conference call? I think it's inherently ambiguous.

So I think in that situation it is a reasonable interpretation of the statute to say that, no, it only counts once you actually use that account to post something, to speak.

However, there are two potential problems with that. The first one again is that we don't know how the state courts and -- yeah, how the government will interpret that. They could want it to be used if you are looking at posts on the grounds that that's part of surveillance; not just what you are saying but also what you are seeing, what you are reading.

Even if that's not an issue there becomes a difficulty, because the statutory language doesn't seem to require reporting if somebody opens an Amazon account and doesn't intend to post or doesn't post, and we say that that's not something that they must report, but then they decide to report -- excuse me -- they decide to post something on it, well, they are not changing a screen name. They are not establishing a new screen name. So it doesn't seem as if the 24-hour notification requirement would cover that situation.

So it seems that if, in fact, you interpret this law not to require notification when they simply establish the account, that they -- the purpose of the law is thwarted, because then there's no -- they don't have to report it until their next annual registration update, because they are neither establishing nor changing an account.

Maybe the government has an interpretation of the law that gets around that problem. The plain language of the statute seems to make that a paradox.

Best Buy user names is almost exactly like Bank of America. And I've submitted -- the second page I submitted was a handout from -- was a printout of the Best Buy chat log-on where again you can engage in customer service, chats/instant messaging. Every time you do so you have to establish a new user name and provide that to Best Buy. Under the plain language of the statute you would have the nonsensical duty to report that.

User names used for blogging. This is where things maybe get a little more difficult in one respect.

So there are two types of blogs -- there are more than two types of blogs -- but two general types of blogs relevant here, and Professor Post discusses them in paragraph 28 of his declaration, subparagraphs A and S.

A simple blog that allowed someone to post new information but had no interactive features would probably

not qualify as an Internet identifier. However, as Professor Post points out, most blogs do have an interactive feature, and they therefore count as online forum, Internet forum discussions, squarely covered by the statute, and many of them also have social networking functionality.

So although in theory a registrant could find a blog platform that did not allow for this interactive discussion, and have a blog without, I think, reporting that as an Internet identifier the majority of blog platforms would require that that be reported, because they are Internet forum discussions by any meaning of the term.

And finally, an old e-mail address or Myspace user name associated with an account that the RSO does not use or check, it's ambiguous. The statute does say "used or established by the registrant."

So I would -- I think there's a good argument that the better reading of the statute since "established" must mean something different than "used," that because it has been established in the past they must report it. However that's not the only reasonable reading of this statute.

If they don't have to report it, it does raise that same problem that if they resume using this it does not appear that the 24-hour notification requirement kicks in, and so that would -- to the extent that that actually has a legitimate -- that has some utility, then the statute is

underinclusive because a reading of the statute that allows this information not to be reported eviscerates that utility, if that makes sense.

**THE COURT:** Okay.

**MR. RISHER:** And the final question relates to law enforcement officers' access, need to know, right to know policy.

The statute -- I don't know what that policy is. The government, of course, is in a better position to address this. The statute clearly gives law enforcement agencies access to this information. I don't know what the Attorney General policy is.

The next one is kind of hard: What's your best argument this is a class-of-speaker regulation triggering strict scrutiny?

I hope my best argument is the one that we tried to make in the brief, but I have a slightly different version of it now, and that further research found that the Supreme Court has said this, quote:

> "The government can exclude a speaker from traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."

That's *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666 at page 677.

Okay. That certainly is scrutiny, and that's the Supreme Court -- maybe in dicta, although other cases have turned that into holdings -- saying that excluding a particular speaker from a public forum gets strict scrutiny.

The Fourth Circuit has taken that at its word. An en banc opinion called *Warren v. Fairfax County*, 196 F.3rd 186 at page 190 overturned a residency -- a restriction that prohibited nonresidents from speaking in a particular park and cited *Forbes* for strict scrutiny.

The Connecticut Supreme Court has done the same thing. A policy that excluded nonresidents from a local park said that *Forbes* required strict scrutiny. That's *Leyton v. Town of Greenwich*, 777 A.2nd at 552, a 2001 case. Also collects a number of other cases in that opinion.

So I guess maybe the best argument that we should have made is the Supreme Court has said it. And it's repeated that much more recently, albeit in cases that also involved some types of content discrimination in *Citizens United*. And it also expanded on why laws that discriminate among speakers are just as bad as laws that discriminate by content.

And, in fact, one of the fundamental reasons that we have strict scrutiny, that the courts apply strict scrutiny to content discrimination is because, as the Supreme

Court said in *Citizens United*, you don't want to drive particular viewpoints out of the public discussion.

And speaker discrimination is, as Citizens United put it:

> "Speech restrictions based on the identity of the speaker are all too often simply a means to control content."
>
> 130 Supreme Court at 899.

I mean, you look at the Minneapolis Star or the Arkansas Writers Project, if the government -- if the mayor doesn't like a newspaper -- the biggest newspaper in town, well, you pass a tax on ink and have an exemption so it only applies to a particular newspaper that's been critical of you.

It's that sort of speaker discrimination that can -- it's a more direct way of doing what the government might try to do indirectly with content discrimination of getting at disfavored speakers, speakers who have disfavored viewpoints and shutting them out of the conversation.

Although *Citizens United* does discuss content discrimination, that's not the thrust of the case. The real thrust and controversial holding of the case, of course, is that the government can't discriminate against corporations or among corporations when free speech is involved. Nobody was saying -- the corporations' complaint wasn't that other people

were -- well, it wasn't that the government was suppressing their content. It was the government was treating them differently than it was treating a media corporation or a private speaker.

Putting aside the question of corporate speech rights, it can't be that the First Amendment prohibits the government from discriminating against an individual because of its corporate structure, but it allows it to discriminate against a natural person because of who he is. I mean, that seems to be the central holding of *Citizens United*, and the Court comes back to it repeatedly, albeit mixed in with a discussion of content discrimination, and says, the First Amendment does not tolerate laws that discriminate among people.

And that makes sense, because again, what better way to drive particular view points out of the conversation than to exclude people who have them?

So if in fact -- if a state were to respond to *Citizens United* and say, "We won't do anything with content discrimination. These certain corporations that have a net profit every year of such and such are not," or "whenever they speak on the Internet they must turn that information over to the government" -- a law somewhat similar to what we have here, but instead of singling out registrants, it singles out certain corporations, disfavored corporations, unpopular corporations --

probably not as unpopular as registered sex offenders, but nevertheless unpopular, I have little doubt that under *Citizens United* the Court would have to strike that law down under strict scrutiny.

The final reason I think strict scrutiny is merited is it's clear that there's some heightened scrutiny for laws that discriminate among speakers.

And when the First Amendment is involved there are really only two levels of scrutiny. You have intermediate scrutiny that applies to all laws, whether it's *O'Brien* or *Ward*, and then the only level of scrutiny that is higher than that is strict, as far as I'm aware of, putting aside commercial speech, which isn't an issue here.

And so if it's something higher than intermediate scrutiny I think it has to be strict scrutiny. And I think that the Court has made clear that it is -- speaker discrimination raises concerns beyond time, place, and restrictions that get intermediate scrutiny, so it must get something more.

The question of -- *Buckley*, of course, dealt with public disclosure, and so why is disclosure just to the government so bad? And I think I've discussed that with respect to the prior question, but there are a couple of things that I'll add.

*Talley* and *McIntyre* both discuss official

retaliation as something different from economic boycotts or social ostracism. *Shelton v. Tucker* made that even clearer.

The -- I guess the only different thing I have to add is that *McIntyre* compares the right to anonymity in speech as the right to a secret ballot. How would we feel about a law that said the government, the police get to read our ballots that we cast in an election?

They can't disseminate them to the public, but I think we would all agree that that was a grievous infringement on the right to a secret ballot. Similarly it's an infringement on the right to anonymous speech if the government gets that information, even if they don't disseminate it.

The 24-hour reporting requirements. It's significant for two separate reasons. First of all, it is a burden in the common sense of the term. People who create new screen names, people who use Internet cafes have 24 hours to report that information to the government or face being arrested and prosecuted.

Maybe it would be very easy for them to do that in some circumstances. If they are traveling, if they can't necessarily get the information of the Internet service provider in an easy way, if they want to make a comment on a newspaper website but they just don't want to be bothered reporting that information to the government, or they are

offended that they have to report it, it becomes burdensome for them to do so. People will simply not speak, because they don't want to go through this process of reporting it to the government.

Now, we don't know exactly what the government's plans are to get that information within 24 hours. Maybe they can ameliorate that. But it's nonetheless a burden.

*Simon and Schuster* says it's an unconstitutional burden to delay payment or possibly not receive payment for books you are reading. The threat of prison if you don't report something within 24 hours seems at least as great a burden.

It also means that registrants who want to speak online for more than 24 hours must either give the police their Internet identifier long before they are done speaking, to the extent that that's a legitimate reason to distinguish between pre- and post-identification under the Tenth Circuit's ruling in *Doe*, or they have to pick a new Internet identifier every day, which of course would be incredibly burdensome.

And that I believe is the last of the questions that the Court directed to the plaintiffs. I'm sure I'll have responses to what the government has to say, but I'm also happy to address any other questions that the Court has right now.

**THE COURT:** None at this time.

**MR. RISHER:** Great. Thank you, your Honor.

**THE COURT:** How are you doing, Madame Court Reporter?

**THE REPORTER:** I'm okay. I'm all right.

**THE COURT:** You're okay?

**THE REPORTER:** Yes.

**MR. WILLIAMS:** Would you like to address the questions one after the other or each a presentation?

**THE COURT:** During the course of your presentation, just as counsel did. It's up to you.

**MR. WILSON:** May we both approach?

**THE COURT:** You may.

**MR. WILSON:** Thank you.

**THE CLERK:** Just make sure you speak into the microphone.

**THE REPORTER:** Would you identify yourself again for me? Thank you.

**MR. WILSON:** Yes, I will. Robert Wilson on behalf of the Attorney General.

**THE REPORTER:** Thank you.

**MR. WILSON:** Thank you, your Honor. Beginning with Question Number One: If the Court concludes that the CASE Act's definition of "Internet service provider" is vague or overbroad, can the Court construe the definition narrowly in order to save it?

The answer to that is yes, we say.

If so, how do you propose the Court construe it?

We would be agreeable to the manner the Court had proposed in Question Number Two, which is to limit it to Internet service providers with which the registrant has an open account at the time of the registration. And that fits exactly within the statutory definition, because it says in the statute accounts -- businesses that are providing computers and Internet access. It doesn't say "provided" or "will provide." It's the ones that are active at that time.

So there's -- I believe plaintiffs' counsel raised some ideas of ambiguity. There are no ambiguities with respect to the plain language of the statute. That's clearly -- I mean, the statute first of all says it right on its face, "providing." But the Court's proposed limiting instruction falls directly within that framework. So that's fine.

Question Number Three -- sure.

**MR. HARRISON:** If I could just briefly add a thought there, your Honor.

First of all, the Ninth Circuit has made clear that federal courts are permitted to construe ambiguous state statutes and to extrapolate their true meaning according to traditional rules of statutory construction. That's *The Center for Bioethical Reform versus LA County*, 533 F.3rd 780.

Traditional rules of statutory construction, of course, include looking beyond the text in order to ascertain

the intent of the drafters and avoiding constructions that would lead to absurd results. We agree with the Attorney General's Office that in response to Question Number Two the use of the word "account" in the statute makes clear that it only applies to ongoing contractual relationships.

**THE COURT:** Okay.

**MR. WILSON:** Robert Wilson. Question Number Three: Does 290.018's scienter element mitigate the effects of any ambiguity with regard to the CASE Act's reporting requirements?

The answer to that is yes. Because before a registrant could be prosecuted under the statute there would have to be a willful failure to not provide that information to law enforcement.

And we cited a case in our briefs by the title of *Aragon* in which a fellow moved his trailer onto the property of relatives and did not identify that as a change in address. And it was held there that that -- because of the scienter requirement he didn't know that he was required to do that. He couldn't be prosecuted for failing to register.

There's one other thing here, your Honor, that we've not found in any of the decisions, and I think it's very important. And that is, this is an unusual situation in which the registrant works hand in hand with law enforcement to fill this form out. In all cases except for the new one, the 24-hour reporting requirement in which they can submit it by mail. But

in all other cases they have to physically go to their local law enforcement agency and sit down face to face with a law enforcement officer and fill the form out.

Now, there's absolutely no way a registrant could be prosecuted for failing to register one of these things if you ask law enforcement about it and law enforcement doesn't answer or tells them it's not required.

So what makes this unusual is it's not a situation in which a person is wringing their hands over whether they were going to be prosecuted for failure to do something without having any prior contact with the law enforcement agency that would theoretically prosecute them.

You are going in there ahead of time, face to face with law enforcement, filling out a form that the Department of Justice prepares -- fill in the blanks -- and if there's any questions the registrant can simply ask.

There's absolutely no way that we can think of in which a registrant can be prosecuted for willfully failing to do that, unless -- unless he's told -- are you on a chat room or some interactive communication with the public? And we need to know that, and he willfully withholds that, that's a different story.

But it's not going to be a situation in which a registrant goes to law enforcement and is confused about whether they should put something in. They are going to

know.

So that's the reason that that mitigates the effect of any ambiguity with respect to the reporting requirements.

Question Number Four: Is speech by sex offenders entitled to the same level of First Amendment protection as speech by anyone else?

We are in agreement with plaintiffs' counsel on that. They are entitled to it. Especially when they're -- after they've served probation and parole and they are out in the public. So there's not a dispute there.

What types -- this was not answered by plaintiffs' counsel I don't recall.

What types of speech could RSOs be undertaking on the Internet that would not be fully protected under the First Amendment?

And the answer to that is criminal speech, one of which is solicitation to commit a crime. That's not protected under the First Amendment. And so -- and that applies to all of us in this room -- in this courtroom. I mean, it's the same for everybody. You cannot anonymously get on the Internet and solicit a crime and expect to be entitled to First Amendment protection for that.

**MR. HARRISON:** We certainly agree that there is no different First Amendment standard. But I do think it's important to put the sex offender registration laws themselves

in context, because plaintiffs have already lost a significant degree of anonymity under the existing law as a result of their status as convicted sex offenders.

So under existing law, for example, they are required to report their name, their aliases, their address, their photograph, their physical description, and all of this information is available to the public on the state's Megan Law website.

So what that means is that when a registered sex offender stands on a soap box in a park to make a political speech a member of the public could identify him as a registered sex offender by linking his physical appearance to his photograph and his name on Megan's Law website.

The same is true, for example, if a registered sex offender were to use an alias to submit a letter to the editor expressing his political views on an issue. A member of the public could link the author of that letter to the registered sex offender by comparing his alias to his true name on the Megan's Law website.

So to some degree Prop 35 is less intrusive of plaintiffs' right to anonymity for several reasons: One, as plaintiffs' counsel concedes, the information is not posted on the state's website; two, Prop 35 by its terms as set forth in its Statement of Findings and Declaration of Purpose restricts the use of the information to tracking and preventing online sex

crimes and human trafficking; and third, law enforcement can only make the information available to the public if it makes a determination that it's necessary to ensure public safety based upon information related to that specific sex offender.

So to the extent that reporting Internet identifiers and Internet service providers raise questions, they cast out on the entire registration system. After all, these Internet identifiers are used in public settings. It's information that is available when you go on a chat room and you communicate with someone else; your identifier is right there. So I think it's important to remember the context of the law as we discuss these issues.

**MR. WILSON:** That's a good segue I think, your Honor, to Question Number Five and to some of the ones that follow which address the question about monitoring registrants' speech.

The first question is, can we do that on the Internet? Can we legitimately do that on the Internet in the absence of a specific criminal investigation?

And the answer from our perspective is no. And so here we apply normal criminal law procedures and laws regarding surveillance. So in that regard there has to be -- and this comes from the statute itself.

The purpose of Prop 35 as articulated in the introduction, and as it fits into Section 290, the overall purpose of which is to monitor sex-related offenses against

children and women, in order to properly surveil somebody an officer has to have a specific -- has to have specific and articulable facts that are objectively reasonable. And it can't be based on mere curiosity, rumor or hunch.

So what we are saying here is that an officer cannot get -- first of all, let me draw one other distinction and that is between private communications and things like Facebook.

For private communications, even if law enforcement has the Internet identifiers, they can't get to the content of that unless the judiciary says they can. Because you have subpoena or a court order or a warrant. So there's some judicial review before a law enforcement officer can get to private communications.

The big question is, what could law enforcement do with a registrant's Internet identifier in something like Facebook?

The idea there is that the statute itself limits it to the purpose of protecting against crimes against children and kidnapping and solving those crimes once they've happened. That's the extent of the authority of law enforcement to use those Internet identifiers.

In order for them to link somebody on Facebook to a registrant there would first have to be some kind of nexus created by the open and public content of Facebook which alerts

law enforcement to the fact that a crime may be about to be committed.

For example, somebody says, "Father of a young boy looking for like minded people," or "Please -- here I am. Please meet me at such and such a location if you are under 14," or something like that. Something which triggers in law enforcement's mind that there's a problem that comes up.

And let's say that communication on Facebook, which is open to everybody in the world, is tagged by an identifier by the name of "John 54." It's an anonymous identifier. Only if something comes up which creates that nexus and cause for investigation could law enforcement legitimately go into the database. And right now they have to go through DOJ to get it by written request. Only then could they try to link or find out if John 54 is a registered sex offender or not.

But outside of that they can't use the information. And Penal Code 290.45 subjects them to criminal and monetary penalties. There are also penalties available in just normal personnel disciplinary proceedings.

And a side note here on that: When law enforcement runs somebody on a check and they do it through CLETS, the California Law Enforcement Telecommunication System, that goes through the Department of Justice and the DOJ audits those requests. And what they do is they randomly go back and say, "Officer Wilson, on such and such a day you ran a

request on Joe Smith. Explain to us why you did that and show the proof that you needed that." So there's an auditing process already in place that looks for things like that and makes officers justify them.

One other important note here, and then I'll turn it over to the intervenors, which is just like the registrants, when an officer does something on the Internet or uses a computer there's a record. There's going to be a record somewhere. It's going to be date/time stamped over who looked at what and what was looked at. And so they are just as susceptible as anybody else to being found out if is something improper has happened.

And that auditing capability that we have gives us the opportunity to go in and investigate that if somebody raises a complaint that they think they were improperly looked for by law enforcement.

This is the -- I was just asked to provide the cite. The language on the requirements for surveillance came out of CAL JUR. Let's see if I can find that for the Court.

Oh, here it is: 13 ALR 3rd 1025.

**THE COURT:** Thank you.

**MR. HARRISON:** The construction proffer by the Attorney General, your Honor, is similar to the construction that was adopted by the 10th Circuit in the *Shurtleff* case. There the Court acknowledged that the statute could be read

broadly to permit monitoring of registered sex offenders on the Internet for any purpose. But it concluded that it could read the law narrowly to permit the state to use the information only in the context of a criminal investigation.

And here, your Honor, Prop 35 itself states that the purpose is to allow law enforcement to track and prevent online sex offenses and human trafficking.

So a reading of Prop 35 that would authorize law enforcement to use the information to monitor for any purpose at all would be inconsistent with the intent of the statute.

**MR. WILSON:** I think, your Honor, that addresses Question Six and Seven together, unless you have any other questions.

Number Eight. Assume for the purposes of argument that there is no risk of public disclosure of the RSO's Internet identifiers. Is that the end of the First Amendment (as opposed to the vagueness) claim? And plaintiffs' answer to that was no. Our answer is yes; right?

Because this is -- in my mind this is exactly like the *Buckley* case where the petition circulators had to file an affidavit with the government which identified themselves and who they were and all of that but were not required to put a name tag on when they were out circulating the petitions.

That's not a chilling of speech just

because -- there's a case cite too, and perhaps my colleague here will have it. But just because the government collects information on something doesn't mean that that's a chilling of the speech.

And so we would say that is the end to the First Amendment claim.

**MR. HARRISON:** I believe counsel was referring to the Tenth Circuit's decision in *Shurtleff*, where the Court citing the U.S. Supreme Court said:

> "In none of those cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain informational gathering activities."

I would also point out in *White versus Baker*, another case in which the Court reviewed sex offender registration law in the reporting of Internet identifiers, including passwords, the Court said:

> "The mere delivery of information regarding Internet identifiers to law enforcement doesn't inhibit free speech. It's not a free speech gateway requirement and doesn't implicate the First Amendment."

And I think it's also important to note that misuse of

this information under California law is subject to both civil and criminal penalties. Plaintiffs' counsel raised a parade of potential horribles regarding misuse of the information. But that's already subject to existing sanction and could be the subject of a 1983 action if it were to occur.

**MR. WILSON:** Those penalties, your Honor, are one of the reasons -- one of the limiting -- excuse me -- one of the limitations on release of information to the public has to be for a proper purpose which is public safety directed toward a specific individual.

And the plaintiffs cited to the Sex Offender Management Board study, 39 percent of the responding agencies said that there was proactive notification. But they don't say what is released or why or what the purpose was. And of those 39 percent, actually only 22 percent of the total state agencies responded. So that 39 percent figure -- I'm not really sure how that's going to fit in.

But I think there's a more fundamental question here, which is the purpose I believe of notification to the public is to be able to locate a sex offender in the community. I don't really see how releasing Internet identifiers to the whole world is going do that. Photograph -- yes, maybe. Car, license plate -- maybe, for sure. Place where he's expected to live or lived -- those sorts of things do that. I just can't see a situation in which an officer would release Internet identifiers

to the public at large.

Now, I think there's -- it's not a think, it's a for sure, the National Center for Missing and Exploited Children has a checklist for investigators on what to do when a child is abducted. And the checklist for the first responder includes two important things that are important to that case, one of which is the investigator is supposed to check with the parents to see if the child was on the computer, to get the computer and look at it and see if there's anything suspicious about what was said or done on the computer, especially teen chat room and chat sites.

The second component that's interesting that they ask of first responders is to check to see if there are registered sex offenders in the area.

Those two things are critical to investigating the abduction of a child, and the national center has said if that child is not found within the first three hours it's not likely they are going to be found alive. So time is of the essence when that situation happens.

That's a situation that I can foresee in which law enforcement were to release Internet identifiers to the mother and father -- something of that nature; right? Limited to one person but not to the general public at large.

How do they determine that public dissemination and information about an RSO is necessary to ensure public

safety?

The determination is made I think when they are looking for somebody or they need to alert the public at large about a person who may be in the community.

But a good example of that actually happened -- I think there are two examples in San Diego in which notifications were put out regarding sexually violent predators, but nothing was released to the Internet. Nothing can be released on the Internet. It has to be done personally or by flyers or things of that nature.

**MR. HARRISON:** I would also add, another limiting factor on law enforcement's ability to release information to the public again is in Prop 35 itself which specifies that its purpose is to be used to track or prevent online sex crimes and human trafficking.

So in addition to meeting the standard imposed under existing law that law enforcement determine that the information is necessary to ensure public safety, they would also have to satisfy the requirements of Prop 35.

The Court has asked a number of questions regarding the use of online user names and identifiers, and the first question goes to an online banking user name.

As I mentioned earlier, the Court does have an obligation to use traditional rules of statutory construction to construe the law, if it finds it vague.

In this case the Court should be guided by two rules; one ascertaining the intent of the drafters, in this case the voters; and two, avoiding an obstruction -- excuse me -- avoiding a construction that would lead to an absurd rule.

The purpose of Prop 35 is to strengthen the registration laws to give law enforcement a tool to investigate and to prevent online sex crimes.

And the definition of "Internet identifier" has to be read in that context. The definition provides that a registrant has to report e-mail addresses, user names, screen names or similar identifiers used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications.

All of these are examples of interactive communications between a registrant and other members of the public. Construing the law to require a registrant to report an online bank user name or any other user name that's used in a private commercial transaction would be inconsistent with the intent of the law, because it would not support the purpose of investigating and preventing online sex crimes. That's not the forum in which they occur. They occur in forums in which other members of the public are present.

And furthermore, it would lead to an absurd result. The law enforcement authorities don't need to know the online bank user name of sex offender registrants in order to carry

out their duties under the law.

I would also just like to point out that it is reasonable to read the definition established or used to mean "identifiers" that the person actually creates him or herself as opposed to those that are automatically generated. So I will just briefly go through the others with that framework in the mind.

An Amazon.com user name would not be required unless the registrant uses that name to engage in interactive discussions on Amazon, such as by posting comments.

The same is true with the New York Times user name. If a registrant uses a user name to post comments he would have to disclose it. If all he's doing is reading content but not posting anything he would not.

Best Buy user name -- again, he would not be required to disclose it unless he uses it to post comments.

With respect to user names used for blogging, if the blog permits interaction with other users then yes, he would have to report it.

And finally we agree with plaintiffs that an old e-mail address or Myspace user name that is not currently being used would not be required to be reported.

**MR. WILSON:** A couple of brief comments on that, your Honor. Plaintiffs' counsel's other -- first let me go back a second, because I thought that the Court's questions there

harken back to the questions about monitoring; right?

So the Court might say, "Well, how could somebody who is posting something on the New York Times newspaper or Amazon or Starbucks, how could they be involved in child trafficking, or how would that fit, or how would that work, and how would law enforcement get to that?"

This goes back to the Facebook example that I mentioned, which is there has to be some nexus with criminal conduct before you can even go get the Internet identifier to figure out who this person is.

I think there have been examples. A good example is online gaming. I think there's an online game -- I don't do online gaming so I might have to defer to my son, but it's "World of War Craft" or something like that.

But essentially predators get on these online games and then they invite kids offline. "Boy, you are really good at that game. Why don't we meet about how to do this? I'll be at a Motel Six at such and such a time." That's a way in which that can happen, and that's the way it's tending to move.

And so the idea behind the examples that the Court gave are if a registrant has an intent to engage in interactive communications of that sort we would want to have that Internet identifier. Not so that we can monitor what they are doing, purchasing their groceries or their books or

whatever, no. But to create that nexus in case something bad does pop up somewhere that looks like it's suspicious and we can figure it out.

So it's not like we're going to be getting on Amazon.com and following a registrant to see everything he does or any of those other things.

Starbucks -- let me just mention Starbucks real fast. Based on some research I did a couple of days ago I think Starbucks has its own chat site but you create an account for that.

And so registering that account is not a problem of telling law enforcement every Starbucks you went to in the last six months; right? It's giving them that account name. Then you could go to every Starbucks in America if you want. If you are chatting through that account and that anonymous name to set up meetings with kids or women, then that's a problem.

But again, law enforcement is not monitoring anything without there being some nexus to some kind of possible criminal activity.

And the last point on that, plaintiffs' counsel mentioned the 24 hour requirements. What about a registrant who wants to just read something and so they are not posting stuff out but they are just reading? That would not create a problem for us, or we won't even really know, right, unless they post

something out?

But if a registrant created an account and thought, "Well, I'm going to wait 25 hours and then I'm going to get on it and post it, right, so I'm not subject to the 24-hour requirement because I'm just reading it for 24 hours, that's not going to work.

But what I'm saying here is that the 24-hour requirement is not really a problem. They could sign up an account. They don't do anything for six months, but then they start chatting on it, then we got to know about that. That's something they can do by mail just sending the form in.

Number 11 is probably mine also, your Honor.

Officers' access to registrant's information as governed by a need to know/right to know policy. What governs law enforcement officers' need to know and right to know?

We discussed that pretty much at length with respect to the civil and criminal penalties in 290. There are -- California Government Code 1990 says that a state official can't use public information for private purposes. That would subject them to disciplinary proceedings.

In the typical course of disciplinary proceedings if the conduct is egregious, that means termination right out of the gate. So those are some pretty significant penalties.

That said, in order for a law enforcement officer to query our CSAR database, that's C-S-A-R, California Sex

and Arson Registry, like a lot of computer systems you have to go through a screen, check an "agree site" or page -- face page which lays out the law and says "If you use this information improperly you can be subject to civil and criminal penalties" and that sort of thing. So they have a need to know and right to know to even get into it.

And again, presently when an officer runs a check on somebody that's subject to auditing by the Department of Justice and a request for justification on why they do that.

**MR. HARRISON:** Your Honor, could I just briefly respond to the question you posed to plaintiffs about strict scrutiny?

**THE COURT:** Which number is that?

**MR. HARRISON:** That is Number One: What's your best argument that this is a class-of-speaker regulation triggering strict scrutiny?

**THE COURT:** You may briefly.

**MR. HARRISON:** I will be very brief.

First of all, your Honor, this is not *Citizens United*. This is not a case where a restriction is based on the content of the speech or the viewpoint of a speaker. *Citizens United* involved a situation where the government was giving preferential speech rights to some noncorporate speakers at the expense of others, corporations, and it was in the context of core political speech for which First

Amendment scrutiny is particularly robust.

This case is closer to *TBS versus FCC*, where the Court concluded that the law which applied to cable operators, not network television operators, must-carry provision was neutral even though it distinguished between cable operators and others, because it made that distinction based upon the manner in which the programmers transmitted their image, not the content of the message that they carried.

This is very similar. It's a regulatory scheme that serves legitimate purposes wholly removed from the content of the registrant's speech. So strict scrutiny would not be justified here.

**MR. WILSON:** Would the Court like to continue or to take a short break?

**THE COURT:** Would you like a break?

**THE REPORTER:** Yes, I would. Thank you.

**THE COURT:** All right. We'll take a 10 minute break.

**THE CLERK:** Court is in recess for 10 minutes.

(A recess was taken at 12:15 p.m.)

**THE CLERK:** Please be seated and come to order. Court is now back in session.

**THE COURT:** Let's resume when you are ready, Counsel.

**MR. WILSON:** Thank you, your Honor. Thanks for the break.

We are at Question Number One for the defendant on

page four. And the lead in is: The overarching issue that presents itself with regard to the tailoring of this statute is how the information gained through the CASE Act's reporting requirements would help combat human trafficking and/or sex crimes?

For instance -- and Question A is directed to the state: You assert that this statute will help you protect innocent victims, particularly children from predatory Internet activities. How so?

There are three ways in which it does that, your Honor, one of which I've already mentioned, which was the abduction problem in which time is of the essence. Having that information is a critical tool for law enforcement to be able to find that child within three hours. That's the goal.

The second way in which it will protect children from predatory Internet activities is through covert operations, and that's where law enforcement engages itself in --

(Cell phone interruption)

**MR. WILSON:** I've never seen that happen to a judge.

**THE COURT:** You would be sanctioned if you did. Sorry about that.

**MR. WILSON:** That's encouraging.

So the second one I was talking about was covert operations, and that's a situation in which law enforcement might be scanning through some of the social network sites or

chat room sites looking for things in which people might want to prey upon children. And the way that they do that is presenting themselves as an underage girl or boy and arranging for meet-ups.

So if a registrant responds by the name of John 54, for example, law enforcement could scan the database and find out if that person is a registered sex offender. So that will give him some helpful information.

And that leads to the third way, really, it's runs throughout the whole statutory scheme I think. Proposition 35 gives law enforcement just one more tool that they can use to compile information to try to help solve crimes. That's the predominant purpose. And to the extent that they engage in covert operations or they see something about to happen, it can help them prevent them.

**MR. HARRISON:** You asked us, your Honor, in concrete terms how law enforcement could use sex offenders' Internet identifiers to determine whether the e-mail address for example of a person belonged to a sex offender.

Two examples, your Honor: One is provided in the declaration of Sharmin Bock. She described a case in which the mother of two 13-year-old girls contacted police because her daughters had been lured to a meeting and subsequently abducted and trafficked for sex.

The predator used the Internet to engage them, and

if she had been able to provide the Internet identifier to the police they could have requested the Attorney General's office to compare that identifier with those belonging to registered sex offenders to determine whether there was a match.

A second example is one that Rob referred to earlier, and this is a real life case involving World of War Craft. This is a circuit case in which the predator used an online game, World of War Craft to engage in communications with a teenage boy, and as a result of the interaction between the two, the predator began to send sexually explicit messages to the teen and then to threaten him.

If the predator's screen file or Internet identifier had been available to law enforcement, again, they could have compared it to the list of registered sex offenders' identifiers to determine whether there was a match, and if so, they could have used it to prevent an attempted kidnapping.

The next question you asked, your Honor, is about how law enforcement will be able to quickly identify and investigate suspects when presented with evidence that a crime involving the use of the Internet to facilitate trafficking or sexual exploitation of children has been or is about to be committed.

Again, the theory is the same. Law enforcement can use the information to check the database for a match. This is similar to how law enforcement uses the existing information

they have in their database to investigate other sexual crimes.

So, for example, when a rape occurs law enforcement will check the database to see whether any registered sex offenders live in the neighborhood in which the rape occurred. So it's a tool, as my cocounsel mentioned, that law enforcement can use to quickly initiate an investigation.

The next question you posed relates to the prophylactic purpose of requiring registered sex offenders to turn over their information, and you have asked what the fact-based evidence we have that supports this.

Unfortunately, the state obviously hasn't implemented Prop 35 yet, so we don't have any data to compare pre-Prop 35 statistics with post-Prop 35 statistics so we cannot present the Court with any factual evidence. However, the California Supreme Court recognized in *In Re Alva* that sex offender registration does have a deterrent effect.

The next question you've asked is how knowing a registrant's Internet service provider could be of use to law enforcement.

Law enforcement with that information could issue a subpoena to the Internet service provider if they have reason to believe that a registered sex offender has committed a crime to obtain information about the registrant, including the IP address linked to his account.

So, for example, police could link the e-mail

address used to facilitate human trafficking or grooming of a child to a registered sex offender. They could then check the database to determine whether the registered sex offender's Internet service provider created a match.

**MR. WILSON:** The next question, Number Two, your Honor is, is there any connection between these provisions and human trafficking?

And the answer to that is yes. The connection is that the overwhelming majority of human trafficking involves trafficking for sex related offenses and mostly children. And that's the connection between these two things.

The Attorney General just recently published a report, "The State of Human Trafficking in California," dated 2012, and we would be happy to provide that to the Court as a proffer of evidence in a supplemental declaration if the Court deems it necessary. But there is evidence out there that human trafficking is directly related to sex related offenses.

In fact, we met with a senior official of our investigative department, and she told us that -- this is hearsay, right? But she told us that the term "human trafficking" is just another term for child prostitution, and they are used interchangeably between people that are engaged in that type of business. So that's the connection.

Is there evidence that RSOs are more likely to be

human traffickers than non-RSOs?

And to that we would simply point to plaintiffs' own declarations. I think it was the declaration of Mr. Abbott who mentioned -- and counsel has some other statistics -- but Mr. Abbott mentioned that four percent are likely to reoffend, and there was a reference in there, too, that 52 percent of pedophiles of young boys are likely to reoffend. So that's the relationship, your Honor.

**THE COURT:** Okay.

**MR. HARRISON:** One other quick point in response to that question, your Honor, Prop 35 itself added to the list of crimes requiring registration, human trafficking. So that's another link. That's in an amendment to 2090(c).

Your next question goes to the use of an Internet service provider provided in an Internet cafe.

As we've discussed earlier, the definition of "Internet service provider" relates to a provider with whom a person has an account to access the Internet. So if the Internet cafe requires that the person establish an account, then the person would have to report the cafe as an Internet service provider.

On the other hand, if a person obtains cable services to watch television from Comcast but not Internet service, he wouldn't have to report Comcast.

**THE COURT:** Okay.

**MR. WILSON:** Question Number Four: What types of online communications by RSOs would it be most helpful to law enforcement to be able to monitor?

The decision in *White* addresses that. And it basically says there that it's -- Internet chatting and social networks and chat rooms were the experience that that Court had with sites that were most helpful, that mostly involved the exploitation of children.

Number Five: How can speech posted on publicly accessible (without a log-in) websites and forums such as the New York Times or the Reform website be used to commit sex crimes?

And as I mentioned earlier that's a situation in which a registrant might invite someone to go offline. Because I think the reality is, is that these offenses happen because an innocent child is groomed. So first you have to establish some sort of relationship. You can do that seemingly innocently, and then it continues from there. But that's how those things could be used.

Would somebody use the New York Times' site to do that? I don't know how probable that is, but the possibility is there.

Do you want to add anything to that?

**MR. HARRISON:** Two quick points, your Honor. We cited the case to the Court, *U.S. versus Cervini* where there the

predator actually posted child pornography on an Internet news site. Though it seems implausible, it has in fact occurred.

I think it's also important to take a look at the New York Times' privacy policy which makes clear that if readers choose to engage in public activities on a site that the information they provide can be used by other readers to send them unsolicited messages.

So again, though it may seem unlikely that it could be a forum for a predator, interactive communications on a website can lead to offline discussions as the predator attempts to groom his victim.

**MR. WILSON:** Last question, Number Six. And this is a good one. It is, could the CASE Act's goals be achieved if its registration requirements applied to a narrower class of RSOs, such as those who were at high risk of reoffending, or those who used the Internet to commit a sex offense in the past?

And our answer to that is no, and the reason is because they serve different purposes.

A risk assessment like Static-99 is used by parole officers and courts to estimate the risk that a person might pose when they are released to the community. And that information, if it's posted on Megan's website, would also help the community assess the risk that a particular person might pose.

Prop 35's Internet identifier registration

requirements serves a different purpose. The purpose of that is to be able to find somebody if we need to. They are not really related.

Now, Section 290.5 -- I believe that's the section -- of the California Penal Code is a mechanism by which individuals convicted of these offenses can be relieved of the registration requirements altogether.

So there's a mechanism in the Penal Code that allows the lower-risk offenders to exempt themselves from registration altogether. That already exists.

The way that that statute reads, though, is -- it says if you -- see, if I can get this right -- if you have not committed one of these offenses, then you can be exempted. So you have to go through that whole statute and cross-reference them to the crimes that they relate to.

But those -- in that section those are the ones that can't be exempted. Essentially they are the ones for people who have committed these offenses using fear or force or violence. So they are the harder -- harder commitments.

The registrants in California are subject to that and subject to lifetime registration, and Prop 35 is nothing more than just another location information type tool for law enforcement to use.

But they are unrelated to risk. And we should not forgo the opportunity to find someone if we need to simply

because somebody thinks that they have a low risk score. They are different purposes. And, you know -- I remember what I was going to say. Sorry.

The additional burden on the registrants is negligible, because in every case except when they were reporting by mail they have to show up in person and walk through the form with law enforcement anyway. We are talking about filling out two blanks on a four-page form that they already have to fill out.

So allowing law enforcement to gather that information to make sure that we can find them if we need to is absolutely critical. And hopefully they'll never have to use it on a lot of the people, but we need to be able to have it to make those links in case something happens.

**MR. HARRISON:** The entire premise of sex offender registration laws is that there's a danger of recidivism, and that the information recorded by registrants can be a useful tool for law enforcement to prevent and investigate sex crimes.

Plaintiffs' own statistics speak to this risk: 14 to 20 percent recidivist rate generally; 52 percent for molesters of boys, 39 percent for rapists of adult women.

The problem, your Honor, with narrowing the registration requirement is that we don't know who among that 14 to 20 percent will be the recidivists. And given the relatively light burden on sex offenders to provide two

additional pieces of information balanced against the importance to law enforcement of having access to this information to try to quickly investigate and prevent a crime if possible against children we think the balance clearly tips towards the state's interest.

**THE COURT:** And is that what I'm doing, Counsel, balancing the purpose of this legislation against the things that the plaintiffs are complaining about?

**MR. HARRISON:** Ultimately, your Honor, of course, in determining whether or not to issue a preliminary injunction, yes, that's what you are doing. And we think the balance weighs heavily in favor of the state. Thank you.

**THE COURT:** Thank you.

**MR. WILSON:** One brief comment on that, your Honor. Even if the Court decided the likelihood of success on the merits was 50/50, the balance still weighs in our favor, because simply having that information available to prevent a child abduction to help solve a crime after it's happened is a significant, significant state interest, and nobody anywhere has contested that.

So as opposed to plaintiffs' claims, we think the balance really weighs in our favor.

Thank you, your Honor.

**THE COURT:** Thank you. Let's be brief, Counsel. We've gone far beyond what I usually do on my motions. I

usually hear four or five motions in this short a period.

**MR. RISHER:** I'll be brief.

The government and the intervenors are essentially asking this Court to rewrite the law, to exclude certain websites, to add other -- to say, "No. You can't narrow it in this way. You should narrow it in this way." Ultimately they said, well, the registrant will work with the police and they will figure out what sites need to be submitted or what identifiers. That is completely contrary to the due process clause.

*Morales versus Chicago*, among other cases, says you can't give the police that sort of discretion. That's doubly true when you are talking about First Amendment freedoms.

The government and the intervenors are caught in a bind. They recognize the statute as written I think is overbroad. But the narrowing construction that they ask the Court to undertake doesn't comport with the plain language of the statute, and it introduces additional intolerable vagueness problems.

To be brief, going back to or addressing for the first item the efficacy argument, I still don't understand how this regimen is going to increase the government's ability to solve crimes more than the powers they already have.

They can submit a subpoena duces tecum to an ISP. They can submit a subpoena duces tecum to a website. It

sounds as if they are still contemplating that they will have to do that in order to use this. I just don't see the added efficacy. That is a factual question. They have a burden under *Turner*. I don't think that they have met it to show that this is effective.

Whether or not there's some balancing test, whether or not as the Supreme Court suggested in *Stevens* our First Amendment is more absolute, they haven't satisfied their burden there.

And that's particularly ironic I think that in the tiny number of cases where a registered sex offender actually plans to use an Internet identifier to commit a crime -- and remember, only four percent of online sex crimes involve registrants. But in this tiny percentage the registrant would have a Fifth Amendment right not to give the government that information that would then help the government convict him of a crime. I mean, that's the principle of the United States v Leary and other cases that government can't pick out people that it thinks are likely to commit crimes and create statutes that force them to incriminate themselves.

We are not bringing a Fifth Amendment challenge to this because our clients aren't using the Internet to commit a crime. They have no intention of doing that. The vast majority of registrants are not going to use the Internet to commit a crime. But those people that the government is

looking for who are using the Internet who are, there's the Fifth Amendment problem to enforcing the statute as *U.S. v. Leary*, which involved a tax on marijuana that Timothy Leary challenged.

The other way that you are being asked to rewrite the statute is to include protections against the misuse of this information that don't appear in any statute. Apparently they are in ALR 3rd. That's not a binding, authoritative construction of any statute that this Court can rely on.

Section 290.45 only contains penalties when someone uses this information to commit a discrete crime. That doesn't cover retaliation -- doesn't cover anything like that.

The -- one of the last things I'll say. Yes, it's true that there is a scienter requirement, which is good. But I think that the government is wrong to say that that means that people wouldn't be prosecuted.

In the *Aragon* case Mr. Aragon was prosecuted. He was convicted nearly a decade after the Supreme Court -- California Supreme Court had held that there is a scienter requirement. It didn't save him until he had already served time and got his conviction reversed on appeal.

That merely confirms that people will be prosecuted. And the fact that they might get out after a few

years because the Court of Appeals agrees that they should not have been convicted is again likely to be cold comfort.

I don't see how people can work hand in hand with law enforcement if they are simply allowed to send in a piece of paper when they develop a new Internet identifier. That seems inconsistent.

**THE COURT:** Say that again.

**MR. RISHER:** The government said, "Well, you are not going to have problems with people knowing what they have to report and what they don't have to report because they are -- they will be sitting down with a law enforcement officer determining what needs to be reported." Putting aside serious vagueness issues that raises, that's not applicable if they get a new identifier and take on a new ISP and simply want to send that in.

As to what the government can use this for, again, there's no limit in the statute that says they can't do it for surveillance. The government now notifies a community: "Such and such registrant has moved into your community. Beware." That seems completely analogous to the government notifying a community, "Such and such a registrant has this Internet identifier presumably that he uses on World of War Craft" -- although it's still not clear to me whether registrants have to submit the website they use the identifier on, or just the identifier itself. We've discussed that in our briefs. I still

don't have an answer.

But if the government can release the address, the photograph of a registrant under current law before Prop 35, surely it can release the online identification of the registrant in the same way under Prop 35, and there's nothing to stop it from doing so.

And the Penal Code does authorize local law enforcement to conduct surveillance of 290 registrants using Section 290. It's Penal Code Section 13887.1. It seems to apply mostly to more serious repeat offenders, but it specifically seems to authorize the government to conduct surveillance using 290 information. There's certainly nothing that says they can't.

There are -- there are a number of other areas I could go into. I don't think it's necessary.

Our essential argument is this law is far too broad. It's sweeps in far too many people, far too many types of Internet communications. It is impossibly vague, and the saving constructions that the government is proposing make it very vague and do not sufficiently do anything to reduce the overbreadth.

The standard for issuing a preliminary injunction in the Ninth Circuit when constitutional rights are involved or at risk is fairly clear. We have more than shown the reasonable likelihood of success on the merits that we need

to show. The harm will be irreparable. The public interest favors supporting the constitutional rights of many thousands of registrants that may have committed these crimes many years ago. Thank you.

**MR. HARRISON:** Your Honor, could I approach the podium and do it there?

**THE COURT:** Yes.

**MR. HARRISON:** The answer to the question is that nothing in Prop 35 requires that a registrant provide information regarding the websites.

**THE COURT:** Can I have the file there? Okay. I believe I saw papers for the intervenors from the firm Johansen. I meant to do this at the start.

Just by way of disclosure, Johansen, Remcho and Purcell derives from a firm once called as I said in those days "Rose and Remcho and Henderson." And I simply should disclose that I'm not going do anything untoward. In fact, I don't see anyone at the table that I know, but I want to put it on the record that I'm aware of that.

Okay. The matter is submitted, Counsel. I will be coming out with a ruling as quickly as I can.

**MR. RISHER:** Thank you.

**MR. HARRISON:** Thank you.

**MR. WILSON:** Thank you.

(The proceedings concluded at 12:40 P.M.)

**CERTIFICATE OF REPORTER**

I, CHRISTINE TRISKA, Pro-Tem Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. 12-5713 TEH, Doe et al. versus Harris et al. were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/S/ Christine Triska

Christine Triska, CSR 12826, RPR

Saturday, December 29, 2012

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE, et al.,

Plaintiffs,

v.

KAMALA D. HARRIS, et al.,

Defendants.

NO. C12-5713 TEH

ORDER WITH QUESTIONS FOR COUNSEL FOR DECEMBER 17 HEARING

This Case will come before the Court on December 17, 2012, on Plaintiffs' Motion for a Preliminary Injunction and on the Motion to Intervene filed by the official proponents of Proposition 35. The Court would like the parties to be prepared to answer the following questions at the hearing. If Proponents' motion is granted, they may respond to questions related to the Motion for a Preliminary Injunction, to the extent that their responses are not duplicative of State Defendant's responses. The parties need not submit answers in writing but shall come to the December 17 hearing prepared to address the following:

**Re: Intervention**

For Plaintiffs and Proponents

1. The Court's understanding is that the Ninth Circuit has not squarely ruled on the question of whether Article III standing is required for intervention when another party with standing on the same side as the intervenor remains in the case, and that other circuits are split. In light of this, wouldn't it be within the Court's broad discretion to grant permissive intervention?

United States District Court
For the Northern District of California

2. How, if at all, is the Supreme Court's grant of certiorari in *Perry* relevant to the Court's determination whether Proponents should be permitted to intervene?

**Re: Preliminary Injunction**

For Both Sides

1. If the Court concludes that the CASE Act's definition of "Internet service provider" is vague or overbroad, can the Court construe the definition narrowly in order to save it? If so, how do you propose the Court construe it?

2. Would it be permissible for a court to construe the requirement to provide "A list of any and all Internet service providers used by the person," § 290.015(5), as only requiring the reporting of Internet service providers with which the registrant has an open account at the time of registration?

3. Does § 290.018's scienter element mitigate the effects of any ambiguity with regard to the CASE Act's reporting requirements? Why or why not?

4. Is speech by sex offenders entitled to the same level of First Amendment protection as speech by anyone else? What types of speech could RSOs be undertaking on the Internet that would not be fully protected under the First Amendment?

5. Can the government legitimately use the Internet-related information provided under the CASE Act to monitor registrants' speech on the Internet in the absence of a specific criminal investigation? In other words, is surveillance a permissible purpose?

6. If surveillance in the absence of a specific criminal investigation is not a permissible purpose, what in the California registration system prevents local law enforcement from

United States District Court
For the Northern District of California

deciding that the best way to ensure public safety is to monitor RSOs' pseudonymous speech?

7. If such surveillance is permissible, what makes it permissible, assuming we are talking about people who are not on probation or parole? Do the cases upholding sex offender registration generally stand for the proposition that sex offenders can be subjected to speech surveillance?

8. Assume for the purposes of argument that there is no risk of public disclosure of the RSOs' internet identifiers. Is that the end of the First Amendment (as opposed to the vagueness) claim?

9. What limitations, if any, are there on the means by which a law enforcement entity may disseminate a RSO's Internet identifiers and ISPs to the public? How do law enforcement entities determine that public dissemination of information about a RSO is "necessary to ensure the public safety"?

10. I'd like both sides to weigh in on whether the following online usernames/identifiers would need to be reported:

a. Online banking username

b. Amazon.com username

c. New York Times username, if posting about an article

d. New York Times username, if user reads content but does not post

e. Best Buy username

f. Usernames used for blogging

United States District Court
For the Northern District of California

g. An old email address or Myspace username associated with an account that the RSO does not use or check

11. The Government states that law enforcement officers' access to the registrants' information is governed by a "need to know/right to know" policy. What governs law enforcement officers' "need to know" and "right to know"?

For Plaintiffs

1. What is your best argument that this is a class-of-speaker regulation triggering strict scrutiny?

2. *Buckley* dealt with public disclosure of the names of ballot initiative circulators. What case supports your position that a requirement to disclose one's name to law enforcement infringes on the right to speak anonymously, setting aside the possibility of wider disclosure/dissemination?

3. Where in the First Amendment analysis does the 24-hour reporting time issue come into play?

For Defendant

1. The overarching issue that presents itself with regard to the tailoring of this statute is how the information gained through the CASE Act's reporting requirements would help combat human trafficking and/or sex crimes. For instance:

a. State: You assert that this statute will help you "protect[] innocent victims (particularly children) from predatory Internet activities." State's Opp'n at 10. How so?

b. Proponents: You posit that "law enforcement will use sex offenders' Internet identifiers to determine whether the email address of a person who used the Internet to lure a child into human trafficking belongs to a registered sex offender." Prop's Opp'n at 1. Please

explain concretely how law enforcement will be presented with the scenario described and how the Internet identifiers will help. .

c. Proponents: you assert that "the state will be far better able to quickly identify and investigate suspects when presented with evidence that a crime involving the use of the Internet to facilitate trafficking or sexual exploitation of minors has been or is about to be committed." Prop's Opp'n at 17 & n.11. Please explain how this is so.

d. Proponents: you cite the "vital prophylactic purpose" of requiring RSOs to turn over this information because, "After all, a human trafficker who must begin turning over his Internet identifiers immediately may be deterred from online predatory conduct immediately, based on the knowledge that the police will eventually track him down." Prop's Opp'n at 24. Please explain what fact-based evidence you have that this is so.

e. How would knowing a registrant's ISP be of use to law enforcement?

2. Is there any connection between these provisions and human trafficking? Is there evidence that RSOs are more likely to be human traffickers than non-RSOs?

3. Do you contend that the requirement to report ISPs applies to ISPs that registrants use when they access the Internet from public places such as Internet cafés?

4. What types of online communications by RSOs would it be most helpful to law enforcement to be able to monitor?

5. How can speech posted on publicly accessible (without a login) websites and forums such as the New York Times or the Reform website be used to commit sex crimes?

6. Could the CASE Act's goals be achieved if its registration requirements applied to a narrower class of RSOs, such as those who were at high risk of reoffending or those who used the Internet to commit a sex offense in the past?



United States District Court
For the Northern District of California

**IT IS SO ORDERED.**

Dated: 12/13/12

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**JOHN DOE, JACK ROE, AND CALIFORNIA REFORM SEX OFFENDER LAWS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,**

Plaintiffs and Appellees,

**v.**

**KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA, AND CITY OF ALAMEDA,**

Defendants and Appellants.

Case No. 3:12-cv-05713-TEH

**PRELIMINARY INJUNCTION APPEAL**

Judge: Hon. Thelton E. Henderson
Trial Date: Not Set
Action Filed: November 7, 2012

NOTICE IS HEREBY GIVEN that KAMALA D. HARRIS hereby appeals to the United States Court of Appeals for the Ninth Circuit from the United States District Court, Northern District of California's Order Granting Plaintiffs' Motion for a Preliminary Injunction filed and entered on the docket in this action on January 11, 2013. A copy of the Order is attached hereto as Exhibit A. Attached as Exhibit B is a Representation Statement containing the names of all parties to the Order and the names and addresses of the attorneys for each party.

There are no related cases.

Dated: February 11, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
PETER K. SOUTHWORTH
Supervising Deputy Attorney General

/s/ ROBERT D. WILSON

ROBERT D. WILSON
Deputy Attorney General
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Attorneys for Interveners
Daphne Phung and Chris Kelly

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE, *et al.*,

Plaintiffs,

vs.

KAMALA D. HARRIS, *et al.*,

Defendants.

No.: C 12-5713 TEH

**NOTICE OF PRELIMINARY INJUNCTION APPEAL**

Notice is hereby given that Daphne Phung and Chris Kelly, interveners in the above-named case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from an order granting plaintiffs' motion for a preliminary injunction entered in this action on the eleventh day of January, 2013.

Dated: February 11, 2013

Respectfully Submitted,

James C. Harrison
Karen Getman
Margaret R. Prinzing
REMCHO, JOHANSEN & PURCELL, LLP

By: /S/ Margaret R. Prinzing

Attorneys for Interveners
Daphne Phung and Chris Kelly

| REPRESENTATION STATEMENT | |
|---|---|
| **Parties** | **Counsel** |
| **Plaintiffs:**<br>John Doe<br>Jack Roe<br>California Reform Sex Offender Laws<br>*(on behalf of themselves and others similarly situated)* | Michael T. Risher<br>Linda Lye<br>American Civil Liberties Union Foundation of Northern California, Inc.<br>39 Drumm Street<br>San Francisco, CA 94111<br>Phone: (415) 621-2493<br>Fax: (415) 255-8437<br>Email: mrisher@aclunc.org<br>llye@aclunc.org<br><br>Hanni Fakhoury<br>Lee Tien<br>Electronic Frontier Foundation<br>454 Shotwell Street<br>San Francisco, CA 94110<br>Phone: (415) 436-9333<br>Fax: (415) 436-9993<br>Email: hanni@eff.org<br>tien@eff.org |
| **Defendant:**<br>Kamala D. Harris, Attorney General of California | Kamala D. Harris<br>Attorney General of California<br>Peter K. Southworth<br>Supervising Deputy Attorney General<br>Robert D. Wilson<br>Deputy Attorney General<br>1300 "I" Street, Suite 125<br>P.O. Box 944255<br>Sacramento, CA 94244<br>Phone: (916) 327-7870<br>Fax: (916) 324-8835<br>Email: Robert.Wilson@doj.ca.gov |
| **Interveners:**<br>Daphne Phung<br>Chris Kelly | James C. Harrison<br>Karen Getman<br>Margaret R. Prinzing<br>Remcho, Johansen & Purcell, LLP<br>201 Dolores Avenue<br>San Leandro, CA 94577<br>Phone: (510) 346-6200<br>Fax: (510) 346-6201<br>Email: harrison@rjp.com<br>kgetman@rjp.com<br>mprinzing@rjp.com |

(00191681)

**PROOF OF SERVICE**

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On February 11, 2013, I served a true copy of the following document(s):

**Notice of Preliminary Injunction Appeal**

on the following party(ies) in said action:

Farimah Faiz — *Attorney for Defendant City of Alameda*
Senior Assistant City Attorney
Office of the City Attorney
City of Alameda
2263 Santa Clara Avenue, Room 280
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Phone: (510) 747-4750
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Email: FFaiz@ci.alameda.ca.us

☒ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☒ placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in San Leandro, California, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional messenger service for service.

☐ **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.

☒ **BY EMAIL TRANSMISSION**: By emailing the document(s) to the persons at the email addresses listed based on a court order or an agreement of the parties to accept service by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on February 11, 2013, in San Leandro, California.

Michael Narciso

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**JOHN DOE, JACK ROE, AND CALIFORNIA REFORM SEX OFFENDER LAWS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,**

Plaintiffs,

v.

**KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA, AND CITY OF ALAMEDA,**

Defendants.

Case No.: 3:12-cv-05713-TEH

**DECLARATION OF LINDA SCHWEIG RE NOTICE OF PRELIMINARY INJUNCTION TO CALIFORNIA LAW ENFORCEMENT AGENCIES**

Judge: Hon. Thelton E. Henderson
Trial Date: Not Set
Action Filed: November 7, 2012

I, Linda Schweig, declare as follows:

1. I am the Program Manager of the Violent Crime Information Center (VCIC), which includes the Sex Offender Tracking Program at the California Department of Justice (DOJ). In this capacity, it is my responsibility to supervise the sending of notices to local California law enforcement agencies involved in the registration of Registered Sex Offenders. The VCIC utilizes four methods to accomplish this goal: (1) the Megan's Law website; (2) the

California Law Enforcement Website; (3) by means of a California Law Enforcement Telecommunication System (CLETS) CLENTR; and (4) by e-mail to registering law enforcement agencies. I have personal knowledge of the matters stated in this Declaration and if sworn as a witness I could competently testify about them.

2. In response to the court's January 11, 2013 order, I prepared the following statement for dissemination:

ATTENTION: FEDERAL COURT ENJOINS COLLECTION OF E-MAIL AND SOCIAL NETWORKING INFORMATION ON REGISTRATION FORMS.

On January 11, 2013, a federal court enjoined the Attorney General and law enforcement agencies from collecting information pertaining to e-mail addresses, internet service providers, and social networking/screen names on sex offender registration forms. These fields will not appear on the 2013 DOJ registration forms (DOJ forms 8047, 8102) which are about to be released. This injunction is in effect until the lawsuit challenging these provisions of Proposition 35, the Californians Against Sexual Exploitation (CASE) Act, is decided or until further notice. (John Doe v. Kamala Harris, Northern District of California No. C12-5713 TEH). Registering law enforcement agencies should black out these fields on the 2012 forms, and should not collect this information until further notice.

3. On January 11, 2013, I posted the statement on the public Megan's Law website, effective January 15, 2013.

4. On January 14, 2013, I posted the statement on the California Law Enforcement Web (CLEW) website. The CLEW is a secure DOJ website, used by law enforcement personnel, e.g. local police and sheriff departments, to access various law enforcement related information, including training manuals, DOJ forms, or other pertinent information the DOJ needs to disseminate to the law enforcement community.

5. On January 14, 2013, I sent out a CLENTR with the above statement. A CLENTR is a message sent from the DOJ to specified law enforcement agencies via the CLETS. It is the usual practice to send notifications of important VCIC issues by CLENTR. This CLENTR was

sent to the following law enforcement agencies: all California sheriffs' offices/departments, all California local police departments, all California district attorney offices, the California Highway Patrol, and the University of California's police departments.

6. On January 14, 2013, I sent the statement via email message to all Justice Identity Manager (JIM) Administrators, who are responsible for receiving messages from the DOJ about changes to the California Sex and Arson Registry or California's registration process. Each registering agency has a designated JIM administrator whose role is to disseminate information received from the DOJ to necessary personnel within their agency.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Signed and sworn to this 28 day of January 2013 at Sacramento, California.

Linda Schweig

SA2012108623
11031960.doc

# CERTIFICATE OF SERVICE

Case Name: **Doe, John v. Kamala Harris** No. **3:12-cv-05713-TEH**

I hereby certify that on January 28, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DECLARATION OF LINDA SCHWEIG RE NOTICE OF PRELIMINARY INJUNCTION TO CALIFORNIA LAW ENFORCEMENT AGENCIES**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 28, 2013, at Sacramento, California.

| Brenda Apodaca | /s/ Brenda Apodaca |
|---|---|
| Declarant | Signature |

11026163.doc

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Attorneys for ~~Proposed~~ Interveners
Daphne Phung and Chris Kelly

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, *et al.*,

Defendants.

No.: C 12-5713 TEH

**~~[PROPOSED]~~ ANSWER IN INTERVENTION**

Pursuant to Rules 8(b) and 24(c) of the Federal Rules of Civil Procedure, interveners Daphne Phung and Chris Kelly answer the Class Action Complaint for Declaratory and Injunctive Relief ("Class Action Complaint") as follows:

1. Answering paragraph 1, interveners admit that plaintiffs have brought a challenge to a just-enacted California statute. Interveners lack knowledge or information sufficient to form a belief about whether the challenged provisions will affect persons in the particular ways alleged, but deny that the statute is unconstitutional or that it will violate the rights of the persons it regulates. Interveners further deny that the challenged provisions sweep too broadly or that the definitions do not comport with the common understanting of those terms or are unconstitutionally vague. Finally, interveners aver that the provisions of Proposition 35 speak for themselves so that no further response is necessary to allegations characterizing those provisions.

2. Answering paragraph 2, interveners admit that plaintiffs have brought claims under 42 U.S.C. section 1983 and the United States Constitution, and admit that jurisdiction is predicated on 28 U.S.C. sections 1331 and 1343.

3. Interveners admit the allegations in paragraph 3.

4. Interveners lack knowledge or information sufficient to form a belief about where the events or omissions giving rise to plaintiffs' claims will occur, and on that basis deny the allegations. Interveners otherwise admit the allegations in paragraph 4.

5. Answering paragraph 5, interveners aver that the requirements of Local Rule 3-2 speak for themselves so that no further response is necessary to those allegations that seek to describe and apply those requirements. Interveners lack knowledge or information sufficient to form a belief about the remaining alelgations in paragraph 5, and on that basis deny the allegations.

6. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 6, and on that basis deny those allegations.

7. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 7, and on that basis deny those allegations.

8. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 8, and on that basis deny those allegations.

9. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 9, and on that basis deny those allegations.

10. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 10, and on that basis deny those allegations.

11. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 11, and on that basis deny those allegations.

12. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 12, and on that basis deny those allegations.

13. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 13, and on that basis deny those allegations.

14. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 14, and on that basis deny those allegations.

15. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 15, and on that basis deny those allegations.

16. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 16, and on that basis deny those allegations.

17. Interveners lack knowledge or information sufficient to form a belief about the allegations in paragraph 17, and on that basis deny those allegations.

18. Interveners aver that the provisions of Proposition 35 speak for themselves so that no further response is necessary to those allegations that seek to describe and apply those requirements. Interveners lack knowledge or information sufficient to form a belief about the procedures for leaving a comment on plaintiff's website, and the effects that an alleged loss of anonymity may have, and on that basis deny those allegations.

19. Interveners deny that Proposition 35 violates the rights of plaintiff's members, and admit that plaintiff's complaint does not pray for damages. Interveners lack knowledge or information sufficient to form a belief about the composition of plaintiff's membership or its purpose, and on that basis deny those allegations. Interveners aver that the remaining allegations in paragraph 19 constitute legal contentions and argument that require no response.

20. The allegations in paragraph 20 constitute legal conclusions that require no response.

21. Interveners admit that Kamala Harris is the Attorney General of the State of California, but aver that the remaining allegations in paragraph 21 purport to describe constitutional and statutory provisions that speak for themselves and require no response.

22. Interveners aver that the allegations in paragraph 22 purport to describe statutory provisions that speak for themselves and require no response.

23. Interveners aver that the allegations in paragraph 23 constitute legal arguments and contentions that require no response.

24. Interveners admit that the City of Alameda is a municipal corporation organized as a charter city under the laws of the State of California. Interveners lack knowledge or information sufficient to form a believe about where plaintiff Doe resides, and on that basis deny that allegation. Interveners aver that the provisions of the Alameda Municipal Code and Proposition 35 speak for themselves so that no response is required to the remaining allegations in paragraph 24.

25. Interveners lack knowledge or information sufficent to form a belief about whether putative plaintiffs are subject to the challenged law, and on that basis deny that allegation. Interveners aver that the remaining allegations in paragraph 25 constitute legal contentions and arguments that require no response.

26. Interveners lack knowledge or information sufficient to form a belief about how numerous the putative class may be, or the particular data plaintiffs rely upon for their conclusions, and on that basis deny those allegations. The remaining allegations in paragraph 26 constitute legal arguments and conclusions that require no response.

27. Interveners aver that the allegations in paragraph 27 constitute legal contentions and arguments that require no response.

28. Interveners aver that the allegations in paragraph 28 constitute legal contentions and arguments that require no response.

29. Interveners aver that the allegations in paragraph 29 constitute legal contentions and arguments that require no response.

30. Interveners lack knowledge or information sufficient to form a belief about whether the named plaintiffs can fairly and adequately protect the putative class' interests, have interests that are antagonistic to the class, or the degree of experience or reputation of plaintiffs' attorneys, and on that basis deny those allegations. Interveners aver that the remaining allegations in paragraph 30 constitute legal contentions and arguments that require no response.

31. Interveners aver that the allegations in paragraph 31 constitute legal contentions and arguments that require no response.

32. Interveners aver that the allegations in paragraph 32 constitute legal contentions and arguments that require no response.

33. Interveners aver that the provisions of section 290 et seq. and the case law applying them speak for themselves so that no further response is necessary to those allegations that seek to describe and apply those provisions. The remaining allegations in paragraph 33 constitute legal arguments and contentions that require no response.

34. Interveners aver that the statutory provisions cited and described in paragraph 34 speak for themselves so that no further response is necessary to those allegations that seek to describe and apply those provisions. Interveners lack knowledge or information sufficient to form a belief about plaintiffs' calculations concerning the number of people required to register in California or how and whether California distinguishes between sex offenders in the manner described in the allegations, and on that basis deny those allegations. The remaining allegations in paragraph 34 constitute legal arguments and contentions that require no response.

35. Interveners aver that the statutory provisions cited and described in paragraph 35 speak for themselves so that no further response is necessary to the allegations in paragraph 35.

36. Interveners admit that this lawsuit relates to statutes that were adopted as part of a voter initiative, Proposition 35, on November 6, 2012. Interveners aver that the remaining allegations in Paragraph 35 describe the provisions of a Proposition and Constitution that speak for themselves and require no response.

37. Interveners aver that the provisions of Proposition 35 speak for themselves so that no further response is required to the allegations in paragraph 37.

38. Interveners aver that the provisions of Proposition 35 speak for themselves so that no further response is required to the allegations in paragraph 38.

39. Interveners aver that the provisions of Proposition 35 speak for themselves so that no further response is required to the allegations in paragraph 39.

40. Interveners aver that the provisions of Proposition 35 and section 290.018 speak for themselves so that no further response is required to the allegations that seek to describe and apply those provisions. The remaining allegations in paragraph 40 constitute legal arguments and contentions that require no response.

41. Interveners deny the allegations in paragraph 41.

42. Interveners deny that the registration requirements infringe upon registrants' rights to engage in anonymous online speech. Interevenors further aver that the provisions of Proposition 35 speak for themselves such that no response is required to the allegations describing those provisions. Interveners lack knowledge or information sufficient to form a belief about the 2009 survey of California law enforcement agencies, and on that basis deny the related allegations. The remaining allegations in paragraph 42 constitute legal arguments and contentions that require no response.

43. Interveners lack knowledge or information sufficient to form a belief about the "scholarly research" that plaintiffs purport to describe in paragraph 43, and on that basis deny the allegations in paragraph 43.

44. Interveners lack knowledge or information sufficient to form a belief about the California Department of Justice reports that plaintiffs purport to describe in paragraph 44, and on that basis deny the allegations in paragraph 44.

45. Interveners lack knowledge or information sufficient to form a belief about the "available data" that plaintiffs purport to describe in paragraph 45, and on that basis deny the allegations in paragraph 45.

46. Interveners deny the allegations in paragraph 46 relating to the government's ability to distinguish between registrants who pose a high risk of reoffending from those who pose less risk, and deny that Proposition 35 is overbroad. Interveners lack knowledge or information sufficient

to form a belief concerning the remaining allegations in paragraph 46, and on that basis deny those allegations.

47. The allegations in paragraph 47 constitute legal arguments and contentions that require no response.

48. Answering paragraph 48, interveners incorporate by reference paragraphs 1 through 47, above, if set forth in full.

49. Interveners lack knowledge or information sufficient to form a belief concerning the existence of a controversy between plaintiffs and the defendants named in the Class Action Complaint, but admit that there is an actual, present, and justiciable controversy between plaintiffs and interveners concerning plaintiffs' rights and duties. Interveners admit that plaintiffs assert the contention described in paragraph 49, but deny that plaintiffs' rights have been or will be violated, or that the challenged provisions are in any way unconstitutional or unlawful. Interveners lack knowledge or information sufficient to form a belief about plaintiffs' fears concerning the challenged provisions, and on that basis deny those allegations, but admit that plaintiffs seek the judicial declaration described in paragraph 49.

50. The allegations in paragraph 50 constitute legal arguments and contentions that require no response.

51. Interveners aver that plaintiffs have asserted no basis to be entitled to damages, in part because plaintiffs have suffered no loss of constitutional rights. Interveners deny the remaining allegations in paragraph 51.

**COUNT 1: VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

52. Answering paragraph 52, interveners incorporate by reference paragraphs 1 through 51 above, as if set forth in full.

53. Interveners aver that the statutory provisions cited in paragraph 53 speak for themselves so that no further response is necessary to the allegations purporting to describe those provisions. Interveners deny the remaining allegations in paragraph 53.

54. Interveners aver that the statutory provisions cited in paragraph 54 speak for themselves, so that no further response is necessary to the allegations purporting to describe those provisions. Interveners deny the remaining allegations in paragraph 54.

55. Answering paragraph 55, interveners deny that the enforcement and implementation of the challenged laws would violate plaintiffs' rights. Interveners lack sufficient knowledge or information sufficient to form a belief about defendants' intent to enforce and implement those laws against plaintiffs, plaintiff's members, or the putative class, and on that basis deny those allegations.

56. Interveners deny the allegations in paragraph 56.

**COUNT II: VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

57. Answering paragraph 57, interveners incorporate by reference paragraphs 1 through 56 above, as if set forth in full.

58. Interveners deny the allegations in paragraph 58.

59. Answering paragraph 59, interveners deny that enforcement and implementation of the challenged laws would violate plaintiffs' rights. Interveners lack sufficient knowledge or information sufficient to form a belief about defendants' intent to enforce and implement those laws against plaintiffs, plaintiff's members, or the putative class, and on that basis deny those allegations. Interveners deny the remaining allegations in paragraph 59.

**COUNT III: VIOLATION OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

60. Answering paragraph 60, interveners incorporate by reference paragraphs 1 through 59 above, as if set forth in full.

61. Interveners aver that the statutes described in paragraph 61 speak for themselves so that no further response is required to the allegations describing those provisions or their application, and deny that those provisions violate equal protection or lack sufficient justification.

62. Answering paragraph 62, interveners deny that enforcement and implementation of the challenged laws would violate plaintiffs' rights. Interveners lack sufficient knowledge or information sufficient to form a belief about defendants' intent to enforce and implement those laws against plaintiffs, plaintiff's members, or the putative class, and on that basis deny those allegations.

63. Interveners deny the allegations in paragraph 63.

**COUNT IV: EX POST FACTO LAW UNDER ARTICLE II § 10 CL. 1 OF THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

64. Answering paragraph 64, interveners incorporate by reference paragraphs 1 through 63 above, as if set forth in full.

65. Interveners aver that the statutes described in paragraph 65 speak for themselves so that no further response is required to the allegations describing those provisions or their application, and deny that those provisions violate the Ex Post Facto Clause.

66. Answering paragraph 66, interveners deny that enforcement and implementation of the challenged laws would violate plaintiffs' rights. Interveners lack sufficient knowledge or information sufficient to form a belief about defendants' intent to enforce and implement those laws against plaintiffs, plaintiff's members, or the putative class, and on that basis deny those allegations.

67. Interveners deny the allegations in paragraph 67.

**AFFIRMATIVE DEFENSES**

Interveners assert the following affirmative defenses. In asserting these defenses, interveners do not assume the burden of establishing any fact or proposition where that burden is properly imposed on plaintiffs.

**FIRST AFFIRMATIVE DEFENSE**

The Class Action Complaint fails to state a claim upon which relief can be granted against defendants or interveners.

**SECOND AFFIRMATIVE DEFENSE**

To the extent that plaintiffs bring an as-applied challenge, the claims are not ripe for adjudication.

**PRAYER FOR RELIEF**

WHEREFORE, interveners pray that:

1. The Class Action Complaint be denied.

2. That any request for attorney fees and costs of suit be denied, particularly for fees and costs incurred prior to interveners' intervention in this action.

3. That interveners be awarded costs of suit.

4. That interveners be granted such further relief as the Court may deem proper.

Dated: November 12, 2012

Respectfully Submitted,

James C. Harrison
Karen Getman
Margaret R. Prinzing
REMCHO, JOHANSEN & PURCELL, LLP

By: /S/ Margaret R. Prinzing

Attorneys for ~~Proposed~~ Interveners
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Attorneys for Plaintiffs
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on behalf of themselves and others similarly situated

**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

KAMALA D. HARRIS, *et al.*,

Defendants.

Civil Case No.: 3:12-cv-05713-TEH

**DECLARATION OF HANNI FAKHOURY IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND PLAINTIFFS' OBJECTIONS TO EVIDENCE**

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 2, 17th Floor
Judge: Hon. Thelton E. Henderson

I, HANNI FAKHOURY, declare as follows:

1. I am a Staff Attorney with the Electronic Frontier Foundation and counsel for Plaintiffs in this action. I am admitted to the bar of the United States District Court for the Northern District of California. The following facts are based on my own personal knowledge and, if called as a witness, I could and would testify competently thereto.

2. Attached to this declaration as Exhibit 1 is a true copy of webpage on the State of California's website: http://www.meganslaw.ca.gov/statistics.aspx?lang=ENGLISH (accessed December 1, 2012). This document shows the number of persons required to register under California Penal Code § 290, broken down into categories according to the amount of information that is listed as to each individual registrant on the state's Megan's Law website. 18,065 registrants are listed as "No Post (Undisclosed)." According to Exhibit 2, this means that they are "registered sex offenders that may not be displayed on the Internet site. These are registrants who have been convicted of sex offenses not listed in the above three categories [whose information is displayed on the site to various degrees under Cal. Pen. Code § 290.46(b)-(d)]."

3. Attached to this declaration as Exhibit 2 is a true copy of webpage on the State of California's website: http://www.meganslaw.ca.gov/registration%5Claw.aspx (accessed December 1, 2012). This document explains, among other topics, the categories of registrants listed on the state's Megan's Law website. (Section I, "Who Is Disclosed on the Internet Web Site"). It also states that "Local law enforcement agencies, under statutes defining the type and extent of notice allowed, may also notify their communities about the presence of designated registered sex offenders in their area. This is done only when an offender poses a risk to the public (Pen. Code § 290.45.)." (Section II, "Disclosure About Registrants by Local Law Enforcement Agencies").

4. Attached to this declaration as Exhibit 3 is a media release from the San Diego Sexual Assault Felony Enforcement (SAFE) Task Force that includes the following statement: "During 2010, SAFE conducted two public notifications, which primarily resulted from sex offenders taking up residence in the City of San Diego. … SAFE in conjunction with its partner agencies have adopted a pro-active community notification policy regarding sex offenders living in

San Diego County." I downloaded this document on December 1, 2012, from the San Diego SAFE Task Force's website at http://www.sdsafe.org/CommunityNotifications.html.

5. Attached to this declaration as Exhibit 4 is a true copy of an article on the official Proposition 35 website, written by Sharmin Bock and entitled "Vote Yes on Prop 35 to Stop Human Trafficking in California." It states that she "teamed up with advocates for victims to write Prop 35." I accessed it on December 1, 2012 from http://www.caseact.org/news/vote-yes-on-prop-35-to-stop-human-trafficking-in-california/.

6. Attached to this declaration as Exhibit 5 is a printout of the results of a search on Wikipedia for "Internet identifier," showing no article on that topic and only 10 articles that even contain the search term (accessed December 1, 2012).

7. Attached to this declaration as Exhibit 6 is a printout of the login screen for the online bank ING Direct. I accessed this site on December 1, 2012 from https://secure.ingdirect.com/myaccount/INGDirect/login.vm. I have been a customer with ING since 2010 and have used the website to login to my account almost daily for the last two years.

8. ING Direct permits customers to login to view their account by using their "customer number" in lieu of a username created by the customer. The "customer number" is "a unique number that identifies you as an ING DIRECT Customer" and is issued by the bank. *See* https://helpcenter.ingdirect.com/ingd/Topic.aspx?category=&faq=FCOMACSN03 (last accessed December 1, 2012). It is essentially the customer's account number. After entering the account number, the customer is required to enter their PIN as he would with a physical ATM machine before being able to access his account.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 3rd day of December, 2012 in San Francisco, California.

/s/ Hanni Fakhoury
Hanni Fakhoury

# Exhibit 1

# Exhibit 1

Report Information



MEGAN'S LAW

Megan's Law Home

About Megan's Law

Frequently Asked Questions

Offender Categories

How to Protect Yourself and Your Family

Facts About Sex Offenders

Sex Offender Registration and Exclusion Information

Statistics

Victim Information

Sex Offender Public Web site (NSOPW)

Official California Legislative Information

Publications

Contact Us

# California Sex Registrant Statistics

California Penal Code § 290.46 mandates the posting categories and who can be disclosed on the Public Megan's Law web site. This statute also specifies that certain registrants can apply to be excluded from public disclosure on the web site Offender Categories.

NOTE: The below statistics are acquired from the California Sex Offender Registry and are updated daily.

Statistics for: 11/29/2012

| REGISTRANT CATEGORIES | TOTAL |
|---|---|
| Full Address | 40,560 |
| ZIP Code/Conditional | 12,033 |
| Transient | 6,872 |
| In Violation | 15,487 |
| Incarcerated | 20,924 |
| Deported | 10,107 |
| No Post (Undisclosed) | 18,065 |
| Excluded | 4,562 |

The below total reflects the number of registrants displayed on the Public Megan's Law Internet site. This number does not include the total number of registrants that are No Post or Excluded.

| ON PUBLIC MEGAN'S | **62,220** |
|---|---|

The below total reflects the total number of registrants living in the community. This number does not include the number of registrants that are Incarcerated or Deported.

| IN THE COMMUNITY | **73,929** |
|---|---|

ACCESSIBILITY | SITE TOOLS | PRIVACY POLICY | CONDITIONS OF USE | © 2009 DOJ

# Exhibit 2

# Exhibit 2

Report Information



MEGAN'S LAW

Megan's Law Home

About Megan's Law

Summary of California Law On Sex Offenders

Penalties for Misuse of Sex Offender Registrant Information

Prohibition on Sex Offender Registrants Working with Minors

Sex Offender Registration and Exclusion Information

Contact Us

# Summary of California Law on Sex Offenders

## I. Who Is Disclosed on the Internet Web Site

California Penal Code § 290.46, specifies posting categories of registered sex offenders for purposes of disclosure on the Megan's Law Internet web site.

**HOME ADDRESS CATEGORY** The conviction of certain sex offenses requires that the home address of the offender be posted, along with other information about the registrant. (Pen. Code § 290.46, subd. (b).).

**CONDITIONAL HOME ADDRESS CATEGORY** The conviction of designated sex offenses, along with the conviction of any other registrable sex offense, requires that the home address be posted, along with other information about the registrant (Pen. Code § 290.46, subd. (c).).

**ZIP CODE CATEGORY** Commission of certain other sex offenses requires that information about the offender, including his or her ZIP Code and other information, but not including the home address, be posted on the web site (Pen. Code § 290.46, subd. (d).).

**UNDISCLOSED CATEGORY** There is a category of registered sex offenders that may not be displayed on the Internet site. These are registrants who have been convicted of sex offenses not listed in the above three categories. Offenders in the undisclosed category must still register as sex offenders with local law enforcement agencies, and are known to law enforcement.

**EXCLUDED CATEGORY** Finally, certain offenders can apply to be excluded from the Internet site. If the offense is a felony sexual battery (Pen. Code § 243.4(a)), or a misdemeanor annoy/molest children (Pen. Code § 647.6.), exclusion must be granted if there is no other registrable offense, or a felony child pornography (Pen. Code §§ 311.1, 311.2 subd. (b), (c), or (d), or Pen. Code §§ 311.3, 311.4, 311.10, or 311.11), where the victim was at least 16 years or older. Offenders who successfully complete probation for an offense in which the victim was their child, stepchild, sibling, or grandchild, and which did not involve either oral copulation or penetration of the victim, may also be granted exclusion. Beginning January 1, 2012, exclusion cannot be granted unless the person's risk level is low or moderate-low. Offenders in this category must also register as a sex offender with a local law enforcement agency.

**SEXUALLY VIOLENT PREDATOR** A person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

## II. Disclosure About Registrants by Local Law Enforcement Agencies

Local law enforcement agencies, under statutes defining the type and extent of notice allowed, may also notify their communities about the presence of designated registered sex offenders in their area. This is done only when an offender poses a risk to the public (Pen. Code § 290.45.).

## III. Sex Offender Registration

**Initial Registration.** Penal Code § 290 requires mandatory registration as a sex offender for persons convicted of the sex offenses listed in that section (Pen. Code § 290(c).). Even if the offense is not listed in section 290, the person may be ordered by a court to register as a sex offender if the criminal offense committed was sexually motivated (Pen. Code § 290.006.). Section 290 applies automatically to the enumerated specified offenses, and imposes on each person convicted a lifelong obligation to register.

The registrant must appear in person to register with the police department of the city in which he

or she resides, or with the sheriff's department if he or she resides in an unincorporated area or city which has no police department. The person has five working days to register after release from custody or on probation, or after coming into, or changing his or her residence within, any city or county.

**Transient Registration.** If the person has no residence address (is homeless), he or she must register within five working days after release from custody or on probation and no less than every 30 days thereafter, as a transient. Registration is with the law enforcement agency in whose jurisdiction the transient is physically present on that 30th day (Pen. Code § 290.011.).

**Campus Registration.** Any person who resides, or is living as a transient upon, or is enrolled at or employed by any university, college, community college or other institution of higher learning, must register with the campus police department, if it has one, or the police department or sheriff's department where the campus is located. In addition, the person must also register with the local law enforcement having jurisdiction over his or her residence (Pen. Code § 290.01.).

**Registration of Sex Offenders Who Come to School or Work in California.** Students and employees who reside out of state but go to school or work in California must register as sex offenders here if they are required to register in their state of residence (Pen. Code § 290.002.). An employee is defined as a person who is employed in California on a full or part-time basis, with or without compensation, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year. A student is defined as a person who is registered in an educational institution, as defined in Education Code section 22129, on a full or part-time basis. The student/employee must register in the jurisdiction where he or she attends school or is employed.

**Moves.** Registrants with residence addresses must notify the last registering agency in writing within five working days of moving, and must re-register in person if the move is to a new jurisdiction (Pen. Code § 290.013.). If a move makes a person homeless, he or she must register as a transient within 5 working days of leaving the residence address (Pen. Code § 290.011.). Transients, who re-register no less than every 30 days, need not re-register upon changing their location unless to a destination outside the state, in which case the transient must give written notification of his move to the law enforcement agency in whose jurisdiction he or she was physically present before leaving the state, within five working days of leaving. Transients who move into a residence must register at that address within 5 working days of moving there. If the registrant does not know his or her new address out-of-state, the person must still give notice of the move within 5 working days of leaving, and must mail written notice later of the new address or transient location within 5 working days of moving into the new residence (Pen. Code § 290.013.).

**Updates.** All registrants must update their registration annually, within five working days of their birthday (Pen. Code § 290.012.). Transient registrants must also update their registration no less than every 30 days, and sexually violent predator registrants must update no less than every 90 days (Pen. Code §§ 290.011, 290.012.).

**Out of State Sex Offenses.** If a sex offender was convicted in another jurisdiction including out-of-state, federal, or military court, he or she is very likely to be required to register in California, and should register in accordance with the sex offender registration law, within five working days of moving to California. If the offender is not required to register in California, the Department of Justice will notify him or her of that assessment and terminate the registration.

**Registration At More Than One Residence.** Registrants who regularly reside at more than one residence address must register at each address, regardless of the number of days or nights spent there. If the addresses are in different jurisdictions, the registrant must go to the law enforcement agency having jurisdiction over each address (Pen. Code § 290.010).

**Juvenile Sex Offender Registration.** Juveniles adjudicated of certain offenses are required to register as sex offenders upon release from the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities (Pen. Code § 290.008.). However, registrants whose offenses were adjudicated in juvenile court cannot be publicly disclosed on the Internet web site. Local law enforcement agencies may, in their discretion, notify the public about juvenile registrants who are posing a risk to the public (Pen. Code § 290.45.).

**Name Changes.** A registrant must inform the law enforcement agency with which he or she is currently registered of a name change within 5 working days (Pen. Code § 290.014.).

**Penalties for Violation of Registration Law.** There are various criminal penalties that apply to persons who fail to comply with the sex offender registration requirements. In general, a person convicted of a registrable felony sex offense who willfully violates the registration law is guilty of a felony. A person convicted of a registrable misdemeanor sex offense who violates the registration law is guilty of a misdemeanor on the first violation, and subsequent convictions for violating the registration law are felonies (Pen. Code § 290.018).

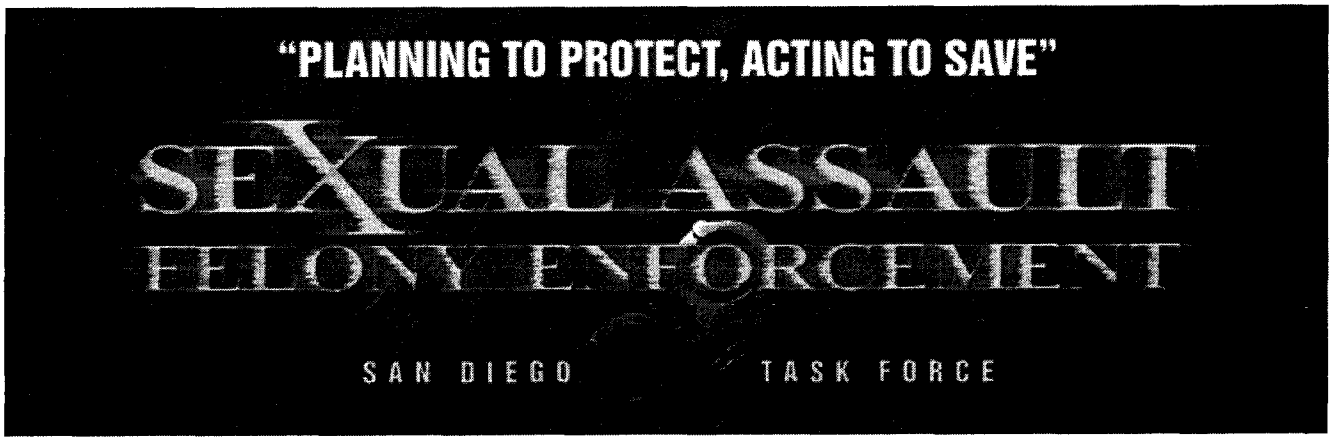
**Dismissal of Offense after Completion of Probation.** Sex offenders who successfully complete probation may apply to have the offense dismissed under Penal Code section 1203.4, but dismissal does not relieve the person from the duty to register as a sex offender (Pen. Code § 290.007).

**Relief from the Lifetime Duty to Register.** Some persons whose registrable sex offenses are nondisclosable to the public may obtain relief from the duty to register upon obtaining a certificate of rehabilitation (Pen. Code § 290.5.). All others must obtain a governor's pardon to obtain relief from the duty to register as a sex offender. A person is eligible to apply for a certificate of rehabilitation seven to ten years (depending on the registrable sex offense) after release from custody or on parole or probation, whichever is sooner. Certain registrable sex offenders are not eligible to obtain a certificate of rehabilitation (Pen. Code § 4852.01.).

ACCESSIBILITY | SITE TOOLS | PRIVACY POLICY | CONDITIONS OF USE | © 2009 DOJ

# Exhibit 3

# Exhibit 3




Home
About Us
See Us In Action
Sex Offender Statistics
Sex Offender Arrest Data
Sexually Violent Predators
Protecting Your Kids
Megan's Law
Report Offender Information
Community Notifications
Press Releases
Links
Contact Us
FAQs

# Community Notifications



In July of 1994, seven year-old Megan Kanka was raped and murdered in New Jersey by a twice-convicted sex offender who was living across the street from the Kanka's home. Although the suspect was quickly arrested and convicted, Megan's mother and father wanted to do something to help prevent similar tragedies from happening in the future. They felt there ought to be a law which would allow the police to inform the public about potentially dangerous sex offenders who may continue to pose a threat to the community, even after they have served their time in prison. California enacted such a law in September of 1996.

In tandem with the information that is posted to the Megan's Law website local law enforcement may opt to perform door-to-door community notifications on certain sex offenders. This information should be used to protect yourself and your family.

During 2010, SAFE conducted two public notifications, which primarily resulted from sex offenders taking up residence in the City of San Diego. One of the notifications was for a Sexually Violent Predator (SVP). These notifications are completed with the partnership of the community. SAFE in conjunction with its partner agencies have adopted a pro-active community notification policy regarding sex offenders living in San Diego County.


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http://www.sdsafe.org

# Exhibit 4

# Exhibit 4






# Vote Yes on Prop 35 to Stop Human Trafficking in California

**Sep 28, 2012**

Helping you make an informed choice
by Sharmin Bock

As a prosecutor who has spent over a decade fighting human trafficking, I've seen the terrible human toll of sex trafficking in California. Every day, women and children are forced to sell their bodies, on the streets and online, for the financial gain of human traffickers.

I have helped to create and lead the first of its kind unit in the nation dedicated to recovering sexually exploited children and prosecuting those who profit from selling them. Since 2006, this unit has prosecuted over 200 sex traffickers and supported the rescue of hundreds of children, some as young as 11 years old.

While our efforts have made a difference, we could've saved and prevented many more. California's current laws are simply inadequate to confront the growing problem of human trafficking within our state. A recent national study by a victims' rights group gave California an "F" grade for its weak laws dealing with child sex trafficking. Prop 35 eliminates the shortcomings of our existing law that is riddled with gaping loopholes through which children literally fall into the hands of traffickers waiting to profit from them.

Drug dealers, gangs and organized crime are moving into sex trafficking because the current penalties present very low risk for them. Grotesquely, they realize that there is no better investment than selling children these days because the profit is high and risk is low. And while children and girls are increasingly sold online, current laws against sexual exploitation have not been updated to face 21st century realities. As a 23-year veteran prosecutor and proud Californian, I know we can do better.

That's why I teamed up with advocates for victims to write Prop 35. The language of Prop 35 is carefully written to confront the growing problem of human trafficking in our state. It uses federal law as a guideline and draws on the first-hand experience of prosecutors and those who work to help victims. For too long, victims have been mistreated while traffickers escape punishment. Prop 35 protects victims in so many ways and, for the first time, clearly recognizes sex trafficking victims as victims and not "prostitutes."

Prop 35 makes critical changes to California law by:

- Increasing prison terms for all forms of human trafficking to match federal sentences.
- Requiring convicted sex traffickers to register as sex offenders.
- Requiring all registered sex offenders to disclose their internet accounts, as states such as New York already have.
- Requiring criminal fines from convicted human traffickers to fund services to help victims.
- Mandating human trafficking training for law enforcement.
- Providing trafficking victims the same level of protection rape victims have under the Rape Shield Law.
- Removing the requirement to prove force, fraud or coercion in a child sex trafficking case.

After so many years of working to stop human trafficking and strengthen our laws against this crime, it is a dream come true to see a comprehensive measure like Prop 35 on the ballot. There's no doubt that Prop 35, once passed, will save lives. That's why the measure has widespread, bipartisan support from survivors, anti-trafficking advocates, women's rights groups, child advocates, faith-based organizations to major law enforcement organizations, lawmakers, and prosecutors.

The changes embedded in Prop 35 will save lives and taxpayer resources. You may have some questions about Prop 35. Here are some answers to the questions we hear most often so you can make an informed choice.

Isn't human trafficking just an international issue?

Many think that human trafficking is a third world problem. But from my vantage point in the trenches, I can tell you that it's a universal crisis occurring in our own backyard. Domestic trafficking is no less serious when international borders are not crossed. The risk and harm to a child is the same whether she is trafficked from China or within California, where the FBI has identified San Francisco, Los Angeles, and San Diego as high intensity child sex trafficking areas. Prop 35 allows us to protect all children here in California.

Join Us

Stay informed

Email Address Go

What will Prop 35 cost?

The costs of Prop 35 are negligible. The nonpartisan Legislative Analyst Office (LAO) has reported Prop 35 will have a "minor increase in state and local criminal justice costs from increased penalties" and there would be potential one-time local costs of up to a few million statewide for police training. On the other hand, Prop 35 will generate new funds through criminal fines to pay for victims' services to help survivors recover and become vital members of our communities.

The benefit of rescuing and healing our children far exceeds the very small expense associated with Prop 35. Moreover, helping survivors turn their lives around will pay dividends for generations. When exploited girls and boys are assisted, the criminal justice system will see savings through vast reductions in future arrests and burdens on the courts. Given how strong and clear Prop 35 is, I predict that we will also see a reduction in trafficking in our state. Trafficking will no longer be easy money and convicted traffickers will be required to forfeit their assets.

The savings are huge, and will spare children yet not enslaved.

Would Prop 35 criminalize consensual behavior?

Absolutely not. Human trafficking entails profiting from the sexual exploitation of a child (who cannot legally consent to sexual conduct) or the use of force, fraud and coercion to compel an adult into forced labor or commercial sex acts against his/her will. Prop 35 is narrowly tailored and specifically states that there must be criminal intent to violate the law. Prop 35 not only requires the showing that the trafficker causes a child "to engage in a commercial sex act" but also "with the intent to effect or maintain a violation of Section," and it lists 12 different existing criminal sections in our state law.

Human trafficking is a brutal and clearly delineated crime that involves and requires proof of the criminal intent to exploit another human being for profit. Prop 35 is not something that could ever be triggered by mistake.

Prop 35 does not impact prostitution involving consensual adults. There are laws on the books against prostitution, but Prop 35 only covers cases where traffickers profit from the sexual exploitation of a child or the forced exploitation of an adult.

Why not address this in the Legislature?

Every year for the past five years, along with many others, I've been in Sacramento trying to improve our state's human trafficking law. For instance, I worked on a bill that would update our anti-trafficking law to the national standard by removing the need to prove force in child sex trafficking cases. This bill was introduced three times, and died three times. However, the exact language of this bill, which sailed through the Assembly without any opposition, is now contained in Prop 35.

While our legislators have made commendable incremental progress, our laws are still inadequate. Californians simply cannot afford to let another day go by without a comprehensive human trafficking law that protects victims and those at risk within our own state.

Does Prop 35 broaden the definition of human trafficking?

The only change that Prop 35 makes to the current definition of human trafficking is the expansion of the list of trafficking violations to include the production of child pornography. However, the distribution of child pornography would only be included if the distributor specifically caused the child to engage in the sexual act, such as if a trafficker is attempting to sell children online by making them appear in a pornographic video. There are laws on the books to fight the possession and distribution of child pornography, and Prop 35 will not augment them. Other than this specific change, Prop 35 does not change the categories of violations currently listed in state law. The measure clarifies the definition of coercion by mirroring the definition in the federal law.

Does Prop 35 unfairly limit the ability of accused traffickers to defend themselves in court?

No. Prop 35 simply levels the playing field for victims who can currently be intimidated out of their rights. The measure provides trafficked victims the same level of protection that rape victims currently receive under the Rape Shield Law. Like the federal human trafficking law, Prop 35 removes the requirement to prove force in child sex trafficking cases. Prop 35 provides victims with evidentiary protection when testifying against their traffickers. Specifically, evidence that the victims engaged in a commercial sex act (such as prostitution) as a result of being a victim of human trafficking cannot be used to prosecute them. Victims will be able to face their exploiters in a court of law without fear of prosecution, and defendants will maintain the right to mount a full defense in court.

Final Thoughts

Prop 35 gives prosecutors, police and advocates the tools we need to fight this very important fight. Prop 35 is a comprehensive and effective response to an epidemic that plagues our state and must be stopped in order to protect our children from what is – no matter how you look at it – modern day slavery. When Prop 35 passes, we will have the clearest and best human trafficking law in the country. I predict that traffickers will flee as fast as possible from our state. By voting yes on Proposition 35, you will have done your very best to protect our state's most precious resource, our children.

Let's send a clear message that California does not tolerate the sexual exploitation of women and children. Please Vote Yes on 35 this November.

[+] Share & Bookmark

Comments are closed.

## What is Proposition 35

Slated for the November 2012 Statewide General Election Ballot, Proposition 35 will strengthen penalties against Human Trafficking and improve Megan's Law against online predators.

Read the CASE Act Fact Sheet

## Quick Links

- Human Trafficking Facts Sheet
- Know: Current Laws
- Read: Cases in California
- Research: Human Trafficking Resources

## Endorsements

- Endorsers
- Supporter Statements
- Add Your Endorsement

## Related Websites

- California Against Slavery
- California Against Slavery Blog
- California Against Slavery Store
- Register to Vote in California

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Paid for by Vote Yes on 35. Stop Human Trafficking in California, a coalition of survivors, children & human rights advocates, law enforcement & community groups, sponsored by California Against Slavery and Safer California Foundation. Major funding by Chris Kelly and the Peace Officers Research Association of California.

# Exhibit 5

# Exhibit 5

# Search results

For search options, see Help:Searching.

"internet identifier" Search

Content pagesMultimediaHelp and Project pagesEverythingAdvanced

Results **1–10** of **10** for "**internet identifier**"

*The page ""internet identifier"" does not exist. You can ask for it to be created, but consider checking the search results below to see whether the topic is already covered.*
For search help, please visit Help:Searching.

### I-number
i-numbers are a type of **Internet identifier** designed to solve the problem of how any resource can have a persistent identity that never **...**
5 KB (764 words) - 02:08, 6 January 2012

### Doe v. Shurtleff
77-27-21.5, a law that requires sex offenders to register their **internet identifiers** with the state in order to "assist in investigating **...**
21 KB (3,012 words) - 22:58, 24 October 2012

### Digital object **identifier**
html Factsheet: DOI System and **Internet Identifier** Specifications. http://www. handle. net/ The Handle System. http://datacite. org/ DOI- **...**
23 KB (3,160 words) - 10:26, 30 November 2012

### History of the **Internet**
title DDN NIC | work IAB Recommended Policy on Distributing **Internet Identifier** Assignment | url http://www. rfc-editor. org/rfc/rfc1174. **...**
100 KB (14,159 words) - 13:23, 1 December 2012

### Extensible Resource **Identifier**
name EqualsDrummond - blog about XRI and **Internet identifiers** by Drummond Reed, co-chair of the OASIS XRI Technical Committee and Chief **...**
13 KB (1,880 words) - 12:44, 15 February 2012

### InterNIC
title IAB Recommended Policy on Distributing **Internet Identifier** Assignment | author Vint Cerf | date August 1990 | work RFC 1174 | url **...**
12 KB (1,672 words) - 04:16, 19 November 2012

### OpenID (section **Identifiers**)
XRI s are a new form of **Internet identifier** designed specifically for cross-domain digital identity. For example, XRIs come in two forms **...**
36 KB (5,026 words) - 23:29, 6 November 2012

### Coordination Center for TLD RU (section Technical Center of **Internet** (TCI) )

ensures stable and resilient functioning of unique systems of **Internet identifiers**, the Council of European National Top Level Domains **...**
9 KB (1,443 words) - 07:45, 16 November 2012

### California elections, November 2012

It will also require registered sex offenders to declare their "**Internet identifiers**" to the general public. Because of the latter **...**
9 KB (1,242 words) - 09:24, 18 November 2012

### Email address

RFC 3696 was written to give specific advice for validating **internet identifiers**, including email addresses. With many browsers now having **...**
24 KB (3,508 words) - 22:48, 17 November 2012

View (previous 20 | next 20) (20 | 50 | 100 | 250 | 500)

Retrieved from "http://en.wikipedia.org/wiki/Special:Search"

# Exhibit 6

# Exhibit 6

Online Banking - ING DIRECT USA - Save Your Money

Sign In

Sign in to:

Banking

Customer Number or Saver ID

Hide My Typing

Remember my Customer Number/Saver ID

Forgot your Customer Number?

Continue

Trusteer FREE Online Security Software

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Attorneys for Plaintiffs
JOHN DOE, *et al.*
on behalf of themselves and others similarly situated

**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

KAMALA D. HARRIS, *et al.*,

Defendants.

Civil Case No.: 3:12-cv-05713-TEH

**PLAINTIFFS' OBJECTIONS TO EVIDENCE AND RESPONSE TO DEFENDANTS' AND PROPONENTS' OBJECTIONS TO EVIDENCE**

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 2, 17th Floor
Judge: Hon. Thelton E. Henderson

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 1

A. This Court Should Overrule All the Objections to the Post Declaration as They Go to Weight, Not Admissibility ..... 1

B. If The Court Entertains Objections to Professor Post's Declaration, It Should Also Strike Defendants' and Intervenors' Declarations ..... 4

1. Ms. Bock's Biased Declaration Should Be Stricken as Conclusory and Lacking Factual Support ..... 5

2. The Declaration of Mr. Morgester Is Conclusory and Factually Insufficient ..... 7

3. Paragraphs 8 & 16 of Ms. Schweig's Declaration Are Irrelevant and Should Be Stricken ..... 8

CONCLUSION ..... 9

## INTRODUCTION

Defendant Harris has submitted 28 pages of objections to Professor Post's declaration, posing a multitude of boilerplate objections to nearly every paragraph of it, including those relating solely to his employment and education. *See* Gov't Objections at 3, Obj. #4 (Dkt. 54-3) (objecting to Professor Post's background and experience). The proponents join in all of these objections.[1] They object to Professor Post's description of the Internet, its size, and how it is used solely on the grounds of *relevance*, even though this information goes to the heart of the First Amendment overbreadth and narrow-tailoring issues in this case. They also claim that his testimony as to the ordinary meanings of terms such as "chat rooms," "instant messaging," and "social networking" would not aid the Court in its task, but at the same time they both claim that these terms are not vague because they have "objective and ordinary meanings." Gov't Br. at 14 (Dkt. 54); Proponents' Br. at 21 (Dkt. 55). The Court should overrule all of these objections, both because they lack merit and because this is a motion for a preliminary injunction where the Rules of Evidence do not apply and where there is no jury to be prejudiced. With respect to *all* of the evidence filed in this matter – by Plaintiffs, Defendants, and proposed Intervenors alike – the Court should simply accord each assertion the weight to which it believes the evidence is entitled.

## ARGUMENT

### A. This Court Should Overrule All the Objections to the Post Declaration as They Go to Weight, Not Admissibility.

At the outset, the Court need not take on the burden of ruling on the huge number of objections raised by Defendants, because "[r]ather than draw the Court's attention to the pertinent portions of the [Post] Declaration, Defendants have tasked the Court with poring over and ruling on boilerplate objections to statements in virtually every paragraph of the declaration...." *Fleischer*

[1] *See* Intervener's Joinder in Defendant Harris' Objections to the Declaration of David G. Post (Dkt. 58).

*Studios, Inc. v. A.V.E.L.A., Inc.*, 772 F. Supp. 2d 1135, 1137-38 (C.D. Cal. 2008), *affirmed in part, vacated in part on other grounds*, 654 F.3d 958 (9th Cir. 2011). When faced with such an overbroad laundry list of objections, the Court may simply "decline[] to rule on these matters *in toto*." *Fleischer Studios*, 772 F. Supp. 2d at 1138. Instead, the Court can simply give whatever weight to each part of the Post declaration it believes is appropriate. *See Donovan v. Quade*, 830 F. Supp. 2d 460, 468-69 (N.D. Ill. 2011) (relevancy objections during non-jury proceeding "are better directed toward the weight of the evidence, not admissibility" and the Court would assign evidence "the appropriate weight, if any.").[2]

This approach is particularly appropriate here, because in "determining whether to issue a preliminary injunction, a district court may consider hearsay and other evidence otherwise inadmissible." *Kremen v. Cohen,* 2012 WL 44999, *5 (N.D. Cal. Jan. 7, 2012) (citing *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009)). "The urgency of obtaining a preliminary injunction necessitates a prompt determination," allowing the trial court to "give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (citations omitted).[3]

There is no question that Professor Post qualifies as an expert, given his clear expertise in, and knowledge of, the Internet. *See* Post. Dec. at ¶¶ 4-5. He was recently qualified as an expert in

---

[2] Hearings where the Court sits as the finder of fact "present a much smaller danger of unfair prejudice than jury trials." *Lang v. Cullen*, 725 F.Supp.2d 925, 959-60 (C.D. Cal. 2010) (citations omitted). This is why, as the Supreme Court has noted, in "bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346 (1981).

[3] None of the cases cited by the state to support its incorrect assertion that "[e]vidence submitted to the Court on motion practice must meet all requirements for admissibility of evidence if offered at the time of trial" involve preliminary injunctions. *See* Gov't Objections at p. 1-2. *Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179 (9th Cir. 1988) involved evidence submitted in support of a motion for summary judgment. 854 F.2d at 1181-82. And *Travelers Cas. & Sur. Co. of Am. v. Telstar Const. Co., Inc.*, 252 F. Supp. 2d 917 (D. Ariz. 2003) involved various motions to dismiss brought under Federal Rule of Civil Procedure 12(b). 252 F. Supp. 2d at 922-23. These cases have no bearing on the evidence to be considered in granting or denying a preliminary injunction.

a similar case, where the court specifically noted that "Professor Post was the most thoughtful and knowledgeable of the experts" who testified. *Doe v. Nebraska*, --- F. Supp. 2d ---, 2012 WL 4923131, *26 n. 35 (D.Neb. 2012). Professor Post's testimony in *Doe v. Nebraska* came during a bench trial on the issue – where the admissibility of evidence is more closely guarded than at the preliminary injunction stage – and was similar to what he has stated in his declaration in this case. *Compare, e.g., Nebraska*, 2012 WL 4923131 at *5 (Post testified that "statutory definitions for 'chat room,' 'instant messaging,' and 'social networking web site'" were "ambiguous") *with* Post Dec. at ¶ 27 (terms "'Internet chat room discussions, instant messaging, social networking, or similar Internet communications' appears to encompass "a vast array of Internet communications on a wide range of subjects."); ¶ 30 ("the term 'Internet chat room discussions' is undefined and broad."), ¶ 35 ("The term 'social networking' is also extremely broad").

Moreover, Professor Post's declaration was not based on unsubstantiated conclusions; rather he explained the sources of his data and the reasoning behind his conclusions, including an examination of specific Internet sites and services. To the extent the Court is not convinced by specific parts of his declaration, or believes they are irrelevant or unhelpful, it can disregard or discount them. *See United States v. Brown*, 415 F.3d 1257, 1268-69 (11th Cir. 2005) (evidentiary "barriers" for expert witnesses are "more relaxed in a bench trial situation, where the judge is serving as factfinder and we are not concerned about 'dumping a barrage of questionable scientific evidence on a jury,'" since there "is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.") (quotations and citations omitted).

Finally, Professor Post's discussion of the statutory terms "Internet service provider" and "Internet identifier," is perfectly proper, because an expert may testify as to the "application of facts to terms having meaning within the ordinary vernacular." *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western Dist. of Michigan*, 46 F.Supp.2d 689, 693 (W.D.

Mich. 1999). Even at a jury trial, an expert "witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (citation omitted). When there is no jury to be confused by a witness's discussion of legal terms, there is even less reason to limit an expert's testimony in this area. *See Grand Traverse Band*, 46 F.Supp.2d at 693-94; *Miller v. City of Cincinnati*, 709 F. Supp. 2d 605, 619-20 (S.D. Ohio 2008) (prohibition of expert witness testifying on issues of law "is not applicable where the court is sitting as both a trier of fact and law."); *CFM Communications, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005) ("The concerns about admitting expert legal opinion may be lessened where, as here, a court sits as trier of fact."). To the extent the Court believes Professor Post provides improper legal conclusions, the Court should simply make its own determination of what the law is, as "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993) (internal quotation marks omitted)); *see Grand Traverse Band*, 46 F. Supp. 2d at 694.

In sum, The Court should take the same approach with Professor Post's declaration as it should the government's and proponents' witnesses: the declarations should be admitted as is, with the Court according each assertion whatever weight it merits.

**B. If The Court Entertains Objections to Professor Post's Declaration, It Should Also Strike Defendants' and Intervenors' Declarations**

Should the Court, however, ultimately strike portions of Professor Post's declaration, then Plaintiffs ask this Court to strike the declarations submitted by Defendants and Intervenors as well. Even if it does not strike them, it should accord them little weight because they consist almost entirely of conclusions, without factual support.

*1. Ms. Bock's Biased Declaration Should Be Stricken as Conclusory and Lacking Factual Support.*

Ms. Bock's declaration has no evidentiary value because it consists almost wholly of bare conclusions and vague assertions, with little data or reasoning, proffered by an interested party. As the Seventh Circuit has bluntly put it, "[e]xpert opinions are worthless without data and reasons." *Kenosha Liquor Co. v. Heublein, Inc.*, 895 F.2d 418, 420 (7th Cir. 1990); *see Williams v. Illinois*, 132 S.Ct. 2221, 239-40 (2012). Similarly, the Ninth Circuit, in reviewing a motion for a preliminary injunction, has refused to give any weight to evidence from an interested party on the grounds that the "affidavits [were] conclusory and without sufficient support in facts." *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). Nor is Ms. Bock offering such conclusions and assertions as a neutral expert; on the contrary, she herself helped write the initiative, and therefore has a *personal interest* in trying to uphold its constitutionality. *See* Fakhoury Dec. ¶ 5 & Ex. 4.[4]

Ms. Bock's declaration lacks factual support for her conclusions. Although Ms. Bock asserts that she has been involved in 276 human-trafficking cases and claims that "the vast majority" have involved the Internet, she is able to describe only one of them where she even claims that collecting Internet identifiers or Internet service providers would have allowed the police to make "an effort" to apprehend the perpetrator. *See* Declaration of Sharmin Bock, Doc. 56, at ¶¶ 5, 10 (Dkt. 56). And she describes that single case only in the most general of terms. *See id.* at ¶ 10. Ms. Bock also briefly discusses an Oregon case and asserts that if the perpetrator in that case had been a registrant, then the police would have looked to the registry to try to find him.

[4] In a September 28, 2012 article on the Proposition 35 website by Ms. Bock, entitled "Vote Yes on Prop 35 to Stop Human Trafficking in California," she writes "I teamed up with advocates for victims *to write Prop 35*." Fakhoury Dec. ¶ 5 & Ex. 4,quoting http://www.caseact.org/news/vote-yes-on-prop-35-to-stop-human-trafficking-in-california/ (last visited December 1, 2012) (emphasis added).

*See id.* at ¶ 11. In neither of these examples does Ms. Bock provide any detail that would allow the Court to evaluate these claims; not even the name of the defendant.[5]

The remainder of Ms. Bock's declaration consists of bald assertions – with no supporting data or reasoning – or pure legal conclusions. Many of the factual assertions seem exaggerated if not false. For example, her suggestion that most crimes against children occur in "public spaces, such as parks and schools," is belied by data that show that almost all such offenses are perpetrated by family members of acquaintances, *Compare* Bock Dec. at ¶ 10 *with* Declaration of David Finkelhor at ¶¶ 12-13 (Dkt. 23); Declaration of Brian Abbott at ¶ 11 (Dkt. 22). Her remarkable claim that "children … were routinely sold on Craigslist" is impossible to verify since she provides no information whatsoever to support it. *See* Bock Dec. at ¶ 13. And her claim that "many if not most" persons who are prosecuted for sex offenses have previously committed such offenses, is contradicted by data establishing that in reality only 4%-13% of sex crimes are committed by registered sex offenders. *Compare* Bock Dec. at ¶ 17 *with* Abbott Dec. at ¶ 21. Finally, Ms. Bock's claim that "Proposition 35 does not prohibit a registered sex offender from using the Internet anonymously," consists of a purely legal conclusion, without even a citation to authority. *See* Bock Dec. at ¶ 16. It is precisely the type of evidence that the state and intervenors argue is inadmissible. *See Hangarter*, 373 F.3d at 1016.

Given her personal bias in seeing a law she herself wrote being upheld, as well as her declaration's complete lack of specificity, data, or reasoning, and the exaggerations in much of her declaration, the legal conclusions in Ms. Bock's declaration should be struck in their entirety, and the remainder given little to no weight.

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[5] It appears the Oregon case referenced by Ms. Bock is *State v. Leistiko*, 282 P.3d 857 (Or. 2012), which apparently did not involve a person on the sex offender registry. Thus, her assertion that "if the information required by Proposition 35 had been available, it could have provided law enforcement with the tools needed to identify someone operating like the 'Craigslist Rapist'" is just flat wrong; it would not have helped at all. *Cf.* Bock, at ¶ 11.

*2. The Declaration of Mr. Morgester Is Conclusory and Factually Insufficient.*

Assistant Attorney General Morgester's Declaration suffers from the same problem contained in Ms. Bock's declaration: it is conclusory and bereft of any quantifiable facts or data.

When Mr. Morgester addresses the efficacy of using the information collected under Proposition 35, he only states in conclusory fashion that the information would be "useful" without outlining the concrete steps an investigator could pursue with such information. For example, he writes that having Internet identifiers and Internet service providers "available upon request is very useful in conducting an investigation," but fails to explain why it is useful or how investigators could use the information. *See* Declaration of Robert Morgester, at ¶ 12 (Dkt. 54-1). When he claims that "a number of social media sites prohibit registered sex offenders from participating on their sites" he does not bother to say which ones, or for that matter his criteria for labeling a particular website as a "social media site." *Id.* at ¶ 13.

If anybody has real information about how the government may use this information it would be Mr. Morgester. As he explains, he specializes "in technology prosecution issues," has created "training programs and training resources for federal, state, and local law enforcement officers on technology based crime issues" and "worked directly with electronic communication service providers." *Id.* at ¶¶ 2, 3, 5. And yet his declaration does not include any specifics about how registrants' Internet identifiers or ISPs would be used. This suggests either that there are no such uses currently planned, or that revealing planned uses would hurt the government's case by showing a lack of efficacy. "When a party has relevant evidence in his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Singh v. Gonzales*, 491 F.3d 1019, 1024 (9th Cir. 2007) (quoting *Int'l Union, United Automobile, Aerospace and Agric. Implement Workers of Am. (U.A.W.) v. N.L.R.B.*, 459 F.2d 1329, 1336 (1972)), *abrogated by statute on unrelated grounds,* Pub. L. No. 109-13.

"[A]n expert's declaration, full of assertions but empty of facts and reasons" is inadequate because "the judge must look behind the expert's ultimate conclusion and analyze the adequacy of its foundation." *Rose v. Union Oil Co. of California*, 1999 WL 51819, *3 (N.D. Cal. Feb. 1, 1999) (citations and quotations omitted). When an expert presents "nothing but conclusions - no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected," his declaration should be disregarded. *Mid-State Fertilizer Co. v. Exch. Nat. Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989). Most of Mr. Morgester's declaration contains only conclusions; the remainder consists of legal conclusions without citations to any legal authority.[6] For that reason, the Court should disregard it.

*3. Paragraphs 8 & 16 of Ms. Schweig's Declaration Are Irrelevant and Should Be Stricken.*

Ms. Schweig's declaration is better than Ms. Bock's and Mr. Morgester's because it contains actual factual material. But the Court should disregard her purely legal conclusion as to the meaning of Penal Code § 290.5 and make its own determination of when this statute allows an individual to be relieved of his duty to register. *See* Declaration of Linda Schweig, at ¶ 8 (Dkt. 54-2). Furthermore, her statement that she "ha[s] not been made aware of a single incident in which a law enforcement agency or officer disclosed a registered sex offender's Internet information to the public" demonstrates nothing of any relevance. *See id.* at ¶ 16. "Failure to remember or to be

[6] *See e.g.*, Morgester Dec. at ¶ 10 ("Under California law, the government cannot access the private communications associated with a registered sex offender's Internet identifiers nor can the government monitor a registered sex offender [*sic*] Internet activity without judicial authorization"); ¶ 10 ("Unlike federal law, even basic subscriber information associated with a registered sex offender's private e-mail account such as a customer's name, address, length of service, means and source of payment or any temporarily assigned network address requires judicial review prior to the government being able to access that information"); ¶ 12 ("the fact that access to information on Internet identifiers and Internet service providers maintained by the California Department of Justice associated with the subject of a criminal investigation is restricted, and possession of the information does not in and of itself provide access to content without judicial approval").

aware of factual information, like having a 'belief' in factual information, is insufficient to show a material factual dispute." *Bodney v. Pima County Sheriff's Dept.*, 2009 WL 2513786 (D. Ariz. Aug. 7, 2009) (citing *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991) and *Taylor v. List*, 880 F.2d 1040, 1045 n. 3 (9th Cir. 1989)).

## CONCLUSION

Defendants' objections to Professor Post's declaration should be overruled because the Rules of Evidence do not apply to this proceeding and because the Court may simply disregard whatever evidence is inappropriate. To the extent the Court does consider striking some or all of the declarations, it should strike paragraphs 8 and16 of Ms. Schweig's declaration, as well as the legal conclusions in the Bock and Morgester declarations. The remainder of the declarations of Ms. Bock and Mr. Morgester should be given little or no weight because they consist only of unsupported conclusions.

DATED: December 3, 2012

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

KAMALA D. HARRIS, *et al.*,

Defendants.

Case No.: 3:12-cv-05713-TEH

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 2, 17th Floor
Judge: Hon. Thelton E. Henderson

## TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. RESPONSE TO DEFENDANT'S AND PROPONENTS' MISTAKES OF LAW ..... 1

III. THE ACT VIOLATES THE FIRST AMENDMENT BECAUSE IT FAILS INTERMEDIATE SCRUTINY ..... 5

A. The Statute is Not Narrowly Tailored. ..... 5

B. *Doe v. Shurtleff* Does Not Control and Is Inconsistent with Binding Precedent ..... 7

C. The CASE Act Fails to Sufficiently Advance the Government's Interests ..... 11

IV. THE CASE ACT IS UNCONSTITUTIONALLY VAGUE ..... 14

V. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION. ..... 19

VI. AN INJUNCTION WILL BIND LOCAL OFFICIALS ..... 19

VII. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### Federal Cases

*ACLU v. Johnson*,
194 F.3d 1149 (10th Cir. 1999) ..... 20

*Art of Living Found. v. Does*,
2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) ..... 10

*Ashcroft v. Free Speech Coalition*,
535 U.S. 234 (2002) ..... 1

*Brewster v. Shasta County*,
275 F.3d 803 (9th Cir. 2001) ..... 3, 20

*Broadrick v. Oklahoma*,
413 U.S. 601 (1973) ..... 3, 6

*Buckley v. Am. Constitutional Law Found., Inc.*,
525 U.S. 182 (1999) ..... 4, 10

*California Teachers Ass'n v. State Bd. of Educ.*,
271 F.3d 1141 (9th Cir. 2001) ..... 14

*Citizens United v. Federal Election Com'n*,
558 U.S. 310, 130 S.Ct. 876 (2010) ..... 5

*City of Chicago v. Morales*,
527 U.S. 41 (1998) ..... 18, 19

*City of Lakewood v. Plain Dealer Pub. Co.*,
486 U.S. 750 (1988) ..... 3

*Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*,
657 F.3d 936 (9th Cir. 2011) ..... *passim*

*Doe v. 2TheMart.com Inc.*,
140 F. Supp. 2d 1088 (W.D. Wash. 2001) ..... 10

*Doe v. City of Albuquerque*,
667 F.3d 1111 (10th Cir. 2012) ..... 4

*Doe v. Jindal*,
853 F. Supp. 2d 596 (M.D. La. 2012) ..... 17

*Doe v. Nebraska*,
--- F. Supp. 2d ----, 2012 WL 4923131 (D. Neb. Oct. 17, 2012) ..... 16

*Doe v. Shurtleff* ("*Shurtleff I*"),
2008 WL 4427594 (D. Utah Sept. 25, 2008) ..... 7, 9

*Doe v. Shurtleff* ("*Shurtleff III*"),
628 F.3d 1217 (10th Cir. 2010) ..... *passim*

*Dombrowski v. Pfister*,
380 U.S. 479 (1965) ..... 2, 3, 14

*Elrod v. Burns*,
427 U.S. 347 (1976) ..... 19

*Houston v. Hill*,
482 U.S. 451 (1987) ..... 7

*Kenosha Liquor Co. v. Heublein, Inc.*,
895 F.2d 418 (7th Cir. 1990) ..... 12

*Klein v. City of San Clemente*,
584 F.3d 1196 (9th Cir. 2009) ..... 19

*Kolender v. Lawson*,
461 U.S. 352 (1983) ..... 19

*Melendres v. Arpaio*,
695 F.3d 990 (9th Cir. 2012) ..... 19

*Minneapolis Star and Tribune Co. v. Minnesota Commnr. Of Revenue*,
460 U.S. 575 (1983) ..... 1

*Morales v. Cate*,
2012 WL 5878383 (N.D. Cal. 2012) ..... 3

*Reno v. ACLU*,
521 U.S. 844 (1997) ..... 1

*Russell v. Gregoire*,
124 F.3d 1079 (9th Cir. 1997) ..... 4

*Santa Monica Food Not Bombs v. City of Santa Monica*,
450 F.3d 1022 (9th Cir. 2006) ..... 14

*Shelton v. Tucker*,
364 U.S. 479 (1960) ..... 9

*Sorrell v. IMS Health Inc.*,
131 S.Ct. 2653 (2011) ..... 2

*Spiegel v. City of Houston*,
636 F.2d 997 (5th Cir. 1981) ..... 19

*Talley v. California*,
362 U.S. 60 (1960) ..... 10

*Turner Broadcasting System, Inc. v. F.C.C.*,
512 U.S. 622 (1994) ..... 2, 5, 11, 13

*United States v. Baker*,
641 F.2d 1311 (9th Cir. 1981) ..... 20

*United States v. Grace*,
461 U.S. 171 (1983) ..... 11

*United States v. Stephens*,
594 F.3d 1033 (8th Cir. 2010) ..... 2

*United States v. Stevens*,
130 S.Ct. 1577 (2010) ..... 9, 18

*United States v. Wolf Child*,
--- F.3d ----, 2012 WL 5200347 (9th Cir. 2012) ..... 6

*Unites States v. Salerno*,
481 U.S. 739 (1987) ..... 2

*Wash. St. Grange v. Wash. St. Republican Party*,
552 U.S. 442 (2008) ..... 2

*Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*,
536 U.S. 150 (2002) ..... 4

*Webster v. Fall*,
266 U.S. 507 (1925) ..... 15

*White v. Baker*,
696 F.Supp.2d 1289 (N.D. Ga. 2010) ..... 5, 9

*(WIN) Washington Init. Now v. Rippie*,
213 F.3d 1132 (9th Cir. 2000) ..... 10, 11

**State Cases**

*Bearden v. U.S. Borax, Inc.*,
138 Cal. App. 4th 429 (2006) ..... 3

*Fredenberg v. City of Fremont*,
119 Cal. App. 4th 408 (2004) ..... 8

*In re Ronje*,
179 Cal. App. 4th 509 (2009) ..... 3

*Lockyer v. San Francisco*,
33 Cal.4th 1055 (2004) ..... 4

*People v. McKee*,
47 Cal. 4th 1172 (2010) ..... 5

*Robert L. v. Superior Court*,
30 Cal.4th 894 (2003) ..... 4

*Tennison v. Cal. VCGB*,
152 Cal. App. 4th 1164 (2007) ..... 20

*Weaver v. Jordan*,
64 Cal.2d 235 (1966) ..... 4

**Federal Statute**

42 U.S.C. § 16915a ..... 14, 15, 17

**State Statutes**

Cal. Gov't Code § 12510 ..... 20

Cal. Pen. Code § 290.012 ..... 20

Cal. Pen. Code § 290.014 ..... 20

Cal. Pen. Code § 290.015 ..... 3, 20

Cal. Pen. Code § 290.021 ..... 7

Cal. Pen. Code § 290.024 ..... 14, 15, 16, 18

Cal. Pen. Code § 290.045 ..... 8

Cal. Pen. Code § 290.046 ..... 6

Cal. Veh. Code § 1810.5 ..... 4

Californians Against Sexual Exploitation Act ("CASE Act") ..... *passim*

UT ST § 77-41-105(3) ..... 9

**Federal Rule**

Fed. R. Civ. P. Rule 65 ..... 20

**Constitutional Provisions**

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. IV ..... 4

## I. INTRODUCTION

The Attorney General and the Proponents have failed even to address Plaintiffs' argument that the law lacks narrow tailoring because it applies to far too much online speech. Nor, in arguing against vagueness, have they even offered any indication of what the terms are supposed to mean. The law violates the First Amendment and should be enjoined.

## II. RESPONSE TO DEFENDANT'S AND PROPONENTS' MISTAKES OF LAW

At the outset, Plaintiffs address a number of mistaken legal claims made by the government and Proponents that ignore the First Amendment nature of this case.

First, the Proponents' claim that the CASE Act does not implicate free-speech rights is plainly wrong. Nearly everything that occurs on the Internet, from emailing to participating in newsgroups to blogging, is speech. *See Reno v. ACLU*, 521 U.S. 844, 849-53, 870 (1997); Post Dec., Dkt. 21 at ¶¶ 8-17. A law that burdens instrumentalities uniquely associated with speech is subject to First Amendment scrutiny. *See, e.g., Minneapolis Star and Tribune Co. v. Minnesota Commnr. Of Revenue,* 460 U.S. 575, 581 (1983) (striking down tax on ink). The entire premise of the statute is that the government hopes to prevent registrants from engaging in speech with potential victims. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) (law intended "to keep [online] speech from children … to protect them from those who would commit other crimes" violated First Amendment); *cf.* Proponents' Opp. to Mot. for Preliminary Inj. ("Prop. Br."), Dkt. 55 at 24 (claiming that "mere collection of [Internet identifiers] serves a vital prophylactic purpose"). The reporting requirements apply only when a registrant wants to speak on the Internet; if he then fails to provide the government with his Internet identifier he is subject to criminal penalties, no matter how innocuous (or important) his speech. *See Ashcroft*, 535 U.S. at 244 ("a law imposing criminal penalties on protected speech is a stark example of speech suppression"). And the law has the effect of preventing registrants from engaging in anonymous online speech and of burdening all sorts of online speech. Thus, the law is subject to First Amendment scrutiny. *See* Plaintiffs' Mem. of Points and Authorities in Support of TRO and Preliminary Inj. ("Open.

Br."), Dkt. 8) at 17-18.[1] Even *Doe v. Shurtleff*, 628 F.3d 1217, 1222-23 (10th Cir. 2010) ("*Shurtleff III*"), which Proponents insist controls this case, applied First Amendment intermediate scrutiny, and Proponents eventually admit this Court must do the same. *See* Prop. Br. at 13.

Second, the standards for facial challenges that Proponents discuss are irrelevant because different standards apply to First Amendment cases; in fact, the Supreme Court cases they cite expressly acknowledge this. *See Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 449 n.6 (2008); *Unites States v. Salerno*, 481 U.S. 739, 745 (1987). Both *Salerno* and *United States v. Stephens*, 594 F.3d 1033 (8th Cir. 2010) involved Fifth and Eighth Amendment challenges to bail conditions, not a First Amendment challenge. *See Salerno*, 481 U.S. at 745; *Stephens*, 594 F.3d at 1038; *cf.* Prop. Br. at 8. Because this is "a facial challenge to a law's validity under the First Amendment," the challenged portions of the CASE Act is "overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (quotations omitted); *see also Wash. St. Grange*, 552 U.S. at 450 & n.6.; Open. Br. at 10-11.

Third, Proponents' suggestion that this Court should uphold this facially unconstitutional statute because state courts have not yet interpreted it again ignores First Amendment law. *See* Prop. Br. at 11-12. The danger of chilling speech means the possibility the statute might be construed narrowly at some time in the future is irrelevant:

> In considering whether injunctive relief should be granted, a federal district court should consider a statute as of the time its jurisdiction is invoked, rather than some hypothetical future date. The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition.

*Dombrowski v. Pfister*, 380 U.S. 479, 490-91 (1965). If the government believes that a state court might construe the law narrowly, it may seek a declaration to that effect, and then ask this Court to

[1] *See also, e.g., Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2664 (2011) ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.") (collecting cases); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 636-37, 661-62 (1994) (law that required cable TV systems to set aside channels for local programming implicated First Amendment); *id.* at 661-62 ("intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech").

modify the injunction. *See id.* at 491. Or, if it believes that the language of the statute is "reasonably susceptible" to a narrowing construction, it should have proffered that interpretation and asked this Court to adopt it. *See id.*; *Comite*, 657 F.3d at 946. But neither the government not Proponents have even suggested what they think the terms "Internet identifier" or "Internet service provider" ("ISP") are supposed to mean, much less how they might be interpreted narrowly so as to cure their overbreadth and vagueness problems. "[U]ntil and unless" the statute "has been authoritatively construed so as to render it constitutional," the Court must judge it as written; the Act's facial lack of tailoring and vagueness mean that "enforcement of [it] is totally forbidden." *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 & n.11 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

The government's suggestion that it will cure these problems by updating its registration form fails for this same reason (it has yet to create any form), and also an additional reason: Although Penal Code § 290.015(a)(1)[2] required registrants to provide information as specified in the government's form, the CASE Act requires registrants provide a "list" of "Internet service providers" and "Internet identifiers" as those terms are defined in the initiative. *See* §§ 290.015(a)(4), (5). The Attorney General cannot relieve registrants of the legal obligation to report statutorily enumerated categories of information simply by creating a form.[3] Nor can she prevent local law enforcement or prosecutors from demanding the categories of information that the initiative expressly requires, because she lacks any authority to order local officials not to enforce the initiative as written. *See Brewster v. Shasta County*, 275 F.3d 803, 808-09 & n.3 (9th Cir. 2001); *Morales v. Cate*, 2012 WL 5878383, at *2-3 (N.D. Cal. 2012) (issuing stays of execution because district attorneys refused to comply with Attorney General's representations to Court). In fact, local prosecutors and police *must* enforce the statute as it is written unless a court

[2] All statutory references are to the California Penal Code unless otherwise indicated.

[3] Even a formal regulation cannot "impair[] the scope of a statute." *See Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 436 (2006). In any event, the CASE Act does not give the Attorney General authority to promulgate regulations; nor does it appear that the state plans to use the lengthy notice-and-comment procedures that would be necessary to create a regulation. *See In re Ronje*, 179 Cal. App. 4th 509, 516-17 (2009).

directs otherwise. *See Lockyer v. San Francisco*, 33 Cal.4th 1055, 1082 (2004); *see also Robert L. v. Superior Court*, 30 Cal.4th 894, 900-01 (2003) (plain language of initiative controls).[4]

Fourth, the fact that registrants are already required to turn over other information such as their home addresses and license plate numbers to the police is irrelevant for two reasons. First, such information is already public information. *See Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997). In California, the police can access any person's address and license plate number. *See* Cal. Veh. Code § 1810.5. Obviously, law enforcement does not have such access to "Internet identifiers" or "Internet service providers." Second, these existing requirements do not implicate speech. "The fact that courts have upheld restrictions on sex offenders in other contexts does not compel the conclusion that [a registrant's First Amendment] challenge necessarily fails." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1121 (10th Cir. 2012). That the police can or cannot access subscriber information or a private email's content with or without a subpoena or warrant is also irrelevant: this is not a Fourth Amendment case, and the government's ability to use some other lawful method to determine an online speaker's identity does not mean it can force a speaker to identify himself. *See Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002) (fact that canvassers might be recognized does not mean they can be forced to provide identity to government).

Finally, both the California and United States Supreme Courts have rejected Proponents' argument that the Court should defer to this law because it was passed as an initiative. Prop. Br. at 5, 12. "The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194 (1999). Thus, "[t]he fact that the Act … was adopted as an initiative measure by the general electorate does not alter [a court's] approach to the claim of First Amendment infirmity." *Weaver v. Jordan*, 64 Cal.2d 235, 241 (1966). In fact, statutes adopted by initiative may be more vulnerable to constitutional challenge because the initiative process lacks

[4] Nor is it clear how the use of a form could accommodate the duty to report new "Internet identifiers" or "Internet service providers" within 24 hours, unless registrants will have to report to the police station to do so.

the fact-finding and analysis that occur in the legislative process. *See People v. McKee*, 47 Cal. 4th 1172, 1206 (2010) ("assertions, written into the findings of [ballot initiative] by those who drafted the initiative, are not the same as facts" and cannot satisfy state's burden to show constitutionality).

When the Court disregards these red herrings and applies the correct legal principles, it is clear that the CASE Act is unconstitutional.

## III. THE ACT VIOLATES THE FIRST AMENDMENT BECAUSE IT FAILS INTERMEDIATE SCRUTINY

### *A. The Statute is not Narrowly Tailored.*[5]

Under intermediate scrutiny "the Government still bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests." *Turner*, 512 U.S. at 665 (quotations and citation omitted); *see Comite*, 657 F.3d at 948. Remarkably, neither the government nor Proponents even address Plaintiffs' argument that the new law applies to far too much speech, including speech on many types of websites that could not possibly be used to commit a crime, such as newspaper comment sites and the California Reform website. *See* Open. Br. at 12-13, 19; *see also White v. Baker*, 696 F.Supp.2d 1289, 1311 (N.D. Ga. 2010) (striking down state law under strict and intermediate scrutiny because it failed to focus on "identifiers that are used in the kind of interactive communications that entice children into illegal sexual conduct" and "those sites and facilities where these kinds of interactive communications occur."). And although the government has objected to much of Professor Post's detailed explanation of this fatal flaw, even if those objections

[5] Neither the government nor the proponents have responded to Plaintiffs' argument that the Court should apply strict scrutiny because the law discriminates among speakers. Instead, they simply assert that intermediate scrutiny is appropriate because *Shurtleff III* applied it. *See* Opp. by Defendant Attorney General to Mot. for Preliminary Inj. ("Gov.'t Br.") (Dkt. 54) at 10, Prop. Br. at 13 (quoting *Shurtleff*, 628 F.3d at 1223). But *Shurtleff III* never addressed the question of speaker discrimination, or discussed the more recent cases where Supreme Court invalidated laws that favored some speakers over others. *See generally* Open. Br. at 18. There can be little doubt that registered sex offenders are a disfavored group, and the Supreme Court has made it crystal clear that the First Amendment generally prohibits laws that "impose restrictions on certain disfavored speakers." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 130 S.Ct. 876, 899 (2010). While the Court should apply strict scrutiny, *see Turner Broadcasting*, 512 U.S. at 659-61, the law, as discussed below, clearly fails even intermediate scrutiny.

were meritorious,[6] Plaintiffs need only "describe the instances of arguable overbreadth of the contested law," not prove them with admissible evidence. *Comite*, 657 F.3d at 944. Here, Plaintiffs have done that and more. That neither the government nor Proponents have even addressed this argument necessarily means they have failed to meet their burden to show the law is narrowly tailored.

The government also fails to address Plaintiffs' argument that the law is not narrowly tailored because it affects too many people; although proponents address it, their contentions miss the mark. *See* Open. Br. at 13-15. Proponents argue that because *some* registrants pose a risk of recidivism, the government can legitimately infringe upon the free-speech rights of *all* 73,900 registrants. This argument fails for two reasons.

First, "[n]ot all sex offenders are the same," and when important rights are at stake the law must distinguish among them. *United States v. Wolf Child*, --- F.3d ----, 2012 WL 5200347 at *7 (9th Cir. 2012). California, like other states, already distinguishes among registrants when making decisions about the level of supervision or amount of information available about each registrants on the website. *See* Open. Br. at 14; Abbott Dec. (Dkt. 22) at ¶¶ 8-12. Thus, the state has determined that approximately 20% of offenders who are released from prison, which necessarily excludes those granted probation or convicted of misdemeanors, present a low risk of reoffending, and more than 18,000 of the nearly 74,000 registrants living in the community were convicted of crimes that do not even merit inclusion in the Megan's-law website. *See* Abbott Dec. at ¶ 9; Fakhoury Dec., *filed herewith,* ¶¶ 2, 3 and Ex. 1, 2; § 290.46(b)-(d). The government cannot argue that assessing offender risk is not feasible because it can – and does – distinguish between offenders who pose a heightened risk from those who do not. As a result, it cannot restrict the online speech rights of *all* registrants as if they pose an equally high risk of recidivism. *See Broadrick*, 413 U.S. at 612 ("the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted").

Second, the existence of some high-risk offenders does not cure the statute of overbreadth.

[6] Plaintiffs address those objections in a separate document.

A statute is "substantially overbroad" when it "make[s] unlawful a substantial amount of constitutionally protected conduct" *even if* "it also [has] legitimate application." *Houston v. Hill,* 482 U.S. 451, 459 (1987). The data shows that the percentage of registrants who will use the Internet to commit a new crime is well under 1%.[7]

***B. Doe v. Shurtleff Does Not Control and Is Inconsistent with Binding Precedent***

Rather than explaining why the law is narrowly tailored, the government and Proponents simply claim that this law should be upheld under the Tenth Circuit's decision in *Shurtleff III*. But that case is both distinguishable and inconsistent with the law of the Ninth Circuit.

First, the CASE Act is like the Utah statute originally enjoined as unconstitutional, not the amended statute at issue in *Shurtleff III*, because it lacks the protections against disclosure that led the Tenth Circuit to uphold the amended statute. The district court in *Shurtleff* originally enjoined the law because it did *not* specify that the government could "use internet information for criminal investigations only," or "prohibit[] dissemination of that information to the public." *See Doe v. Shurtleff*, 2008 WL 4427594, *8 (D.Utah Sept. 25, 2008) ("*Shurtleff I*"). After the state legislature responded to the District Court's decision by amending the law to expressly address these flaws, the district court vacated its earlier injunction; it is that ruling that the Tenth Circuit affirmed. *See Shurtleff III*, 628 F.3d at 1221-22, 1224-25.

Unlike the amended Utah statute, California law gives the police unrestricted access to this information.[8] *Compare* Cal. Pen. Code § 290.021, Schweig Dec. (Dkt. 54-2) at ¶ 10 (registry information available "to regularly employed peace officer or other law enforcement officer"), *with*

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[7] Proponents' claim that "4% of convicted sex offenders employ[] the internet to" commit crimes against children is a complete misstatement of the evidence. Prop. Br. at 9 & n. 6. As they themselves note, 4% refers to the percentage of Internet crimes that involve registrants; because only 1% of sex crimes involve the Internet, and fewer than half of the persons convicted of sex offenses ever recidivate, the actual percentage of registrants who use the Internet to commit a new sex crime must be well under 1%. *See id.* (citing Abbott Dec. at ¶ 21; Finkelhor Dec. at ¶ 18).

[8] Assistant District Attorney Bock, who helped write the initiative, speaks of using "Internet identifiers and information regarding offenders' Internet service providers to investigate known sex offenders," *in addition to* using them to "solve online sex crimes and human trafficking cases." Bock Dec. (Dkt. 56) at ¶ 9. In other words, she hopes to use this information to "investigate" registrants even in the absence of a crime to solve.

*Shurtleff III,* 628 F.3d at 1225 (statute "only allows state actors to look beyond anonymity" "after a new crime has been committed"). The Attorney General asserts that state law restricts disclosure of registrant information only "for specified public safety purposes." *See* Gov't Br. at 10 (citing Cal. Pen. Code § 290.45(a)(1)). But even before the Legislature amended the statute to delete the need for reasonable suspicion,[9] courts interpreted it expansively to authorize wholesale disclosure so that any "parent or other concerned member of the public [can] learn" about registrants "in the general area." *Fredenberg v. City of Fremont,* 119 Cal. App. 4th 408, 421 (2004).

Data from the State also show that California police routinely share this information with the public, even when no crime has occurred. In fact, 39% of the agencies that responded to a 2009 California Sex Offender Management Board ("CASOMB") survey reported they had released information beyond what is available on the website "proactively," meaning without any indication that a crime had occurred. Steen Dec. (Dkt. 26) at ¶ 2. And the state's website specifically states that the police may "notify their communities about the presence of designated" registrants. Fakhoury Dec. at ¶ 3 & Ex. 2; *see id.* at ¶ 4 & Ex. 3 (notifications because a registrant has "tak[en] up residence in the" jurisdiction). Although the police cannot post this information on the Internet, they can use "whatever [other] means [they] deem[] appropriate" to disseminate it to the public. § 290.45(a)(1), (3). The only information about a registrant they cannot publicize is the name of a victim. § 290.45(b). There is no penalty for disclosure in violation of these laws unless the information is used to commit some other crime. *See* § 290.45(e).[10]

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[9] *See* Open. Br. at 15, n. 8.

[10] Although Ms. Schweig concludes "[t]here are significant security procedures in place which prevent improper use of a Registrant's Internet information," her declaration fails to identify any such security procedures. *See* Schweig Dec. at ¶ 12. First, although she states that "there is no mechanism the official could employ to search" the existing database for a particular screen name, this means nothing because the state has yet to upgrade its software to include screen names. *See id.* at ¶¶ 12, 14. Second, she states that requests for information in the database "can only be initiated through a written request." *See id.* at ¶ 12. This means only that the State might be able to determine after the fact that a particular request was made and by whom, but nowhere shows that the State has protocols to prevent requests for purposes other than investigation of criminal activity. Third, she states that during 20 years with DOJ, she is "not aware of a single incident in which any such improper query has been reported or investigated." *Id.* at ¶ 12. In light of the evidence from CASOMB that 39% of agencies "proactively" disseminate registrants' information to the public, without any evidence of a crime, Ms. Schweig's statement merely confirms the AG

Thus, the premise of the Tenth Circuit's holding in *Shurtleff III* – that the statute prohibited public disclosure and imposed strict limits even on the government's internal use of the registrants' Internet identifiers – is inapplicable here. *See Shurtleff III,* 628 F.3d at 1222 (amended Utah statute permitted "sharing [of internet identifiers] only among law-enforcement agencies, not the public at large, and only for the recited law-enforcement purposes"); *see also White*, 696 F. Supp. 2d at 1311 (similar law that allowed Internet information to be released "to protect the public" provided insufficient protection). Where the First Amendment creates a right to anonymity, the government cannot demand that individuals turn over information if, as here, "[t]he statute does not provide that the information it requires be kept confidential," each police department "is left free to deal with the information as it wishes" and "[t]he record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). Mere government assurances cannot save a statute that is unconstitutional on its face. *See United States v. Stevens,* 130 S.Ct. 1577, 1591 (2010).

Second, the CASE Act is far more burdensome than the one held unconstitutional in *Shurtleff I* because California law requires registrants to notify the police within 24 hours of creating or changing an "Internet identifier" or "Internet service provider." In Utah, registrants need only report their identifiers at their semi-annual registration. *See* UT ST § 77-41-105(3). This 24-hour notification requirement is itself a serious burden on all sorts of Internet speech, not present in either *Shurtleff I* or *Shurtleff III*. *See* Open. Br. at 17-18; Post Dec. at ¶¶ 63-70.

Third, proponents' distinction between pre- and post-speech identification requirements is legally and factually inapt. *See* Prop. Br. at 10. Many courts, including the Ninth Circuit, have rejected *Shurtleff III*'s odd conclusion that speakers will not be chilled if they are forced to reveal their identities only after they speak, recognizing that the "right [to speak anonymously on the Internet] would be of little practical value if … there was no concomitant right to remain anonymous after the speech is concluded." *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093

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does not view proactive dissemination as improper, and will do nothing to investigate or prevent it.

(W.D. Wash. 2001).[11] Thus, the Ninth Circuit struck down a law requiring initiative circulators to provide their names and addresses only after they had turned in their petitions for two independent reasons: first, they would continue to circulate petitions even after they turned in their first batch, and second, even this post-speech "disclosure requirement chill[ed] speech by inclining individuals toward silence." *(WIN) Washington Init. Now v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000); *see* Open. Br. at 11-12 & n.5 (collecting cases). In fact, it is difficult to square *Shurtleff III*'s view of anonymous speech with the Supreme Court's recognition that anonymity is necessary to protect against government retaliation when the government "attempt[s] to find out who was responsible for" material that had already been published. *Talley v. California*, 362 U.S. 60, 64-65 (1960).[12]

In any event, California's 24-hour rule means that registrants will often have to identify themselves to the police before they are done speaking: if they want to use the same "Internet identifier" two days in a row they will have to report it before the second day (and adopting a new "Internet identifier" every day would mean daily reporting, as well as an infringement on the right to use an expressive identifier of one's choice). Any registrant who adopts a new screen name would be reckless not to *immediately* report it to the government, lest he forget or be unable to do it later that day, and violate the law. The court in *Shurtleff III* seemed to attach great significance to the fact that under Utah law the registrants did not have to provide the information until well after they had spoken, presumably because by then the passions would have cooled. *See* 628 F.3d at 1225. That is simply not the case with the CASE Act, where registrants must report within a day. Moreover, the evidence in this case confirms that registrants reasonably fear retaliation if they have to give up their right to online anonymity, whether that happens before or after they speak. That

[11] As *2TheMart.com* explains, the case that *Shurtleff III* believed supported its during-speech/after-speech distinction, *Buckley*, was addressing the unique interests at stake during circulation of an initiative, interests which do not apply outside of that context. *See 2TheMart.com,* 140 F. Supp. 2d at 1093 (*citing Buckley*, 525 U.S. at 200).

[12] Proponents attempt to characterize *Art of Living Found. v. Does,* 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011), as supporting the Act's disclosure requirements. Prop. Br. at 10 n.7. *Art of Living* and other cases permit civil plaintiffs to unmask an anonymous online speaker only upon a predicate showing that the Doe defendant's speech is unlawful. *See Art of Living,* 2011 WL 5444622 at *7-8. The CASE Act is unconstitutional because it compels disclosure even when registrants' speech is perfectly lawful and indeed constitutionally protected.

alone is enough to show the CASE Act chills speech. *Compare WIN*, 213 F.3d at 1138, *with* Open. Br. at 7-9; Bellucci Dec. (Dkt. 20) at ¶¶ 11, 17; Steen Dec. (Dkt. 26) at ¶¶ 2-5; Doe Dec. (Dkt. 16) at ¶¶ 14-16; Roe Dec. (Dkt. 17) at ¶¶ 13-25.

### *C. The CASE Act Fails to Sufficiently Advance the Government's Interests.*

Intermediate scrutiny also demands that the government "demonstrate that the recited harms are real … and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664 (plurality); *see United States v. Grace*, 461 U.S. 171, 180-81 (1983). Here, although the government's ultimate goal of protecting children is of course important, the law is "unconstitutional because it does not sufficiently serve those public interests that are urged as its justification." *Grace*, 461 U.S. at 181.

As a threshold matter, the government concedes that it will not even be able to use the information it wants registrants to provide until next March. Gov't Br. at 5-6. It does not even argue that merely stockpiling information about registrants directly and materially advances any legitimate interest; there is absolutely no basis to require registrants to shoulder the burden of reporting information about protected speech that the government acknowledges it cannot use.[13]

More generally, the government's and Proponents' briefs provide no explanation for how the information the Act does collect advances those interests; to the contrary, they suggest that the Act fails to collect the very type of information that could be useful in furthering its stated goals. Proponents' effort to downplay the intrusiveness of the Act's registration requirements particularly underscores why the Act does not serve, directly or otherwise, its stated goal. They repeatedly assert that the Act does *not* require registrants "to disclose which websites they visit and *where they use those identifiers*." Prop. Br. at 23 (emphasis added); *see id.* ("Proposition 35 is not designed to, and will rarely have the effect of, uncovering which Internet sites are visited by registered sex offenders"). But if the Act does not require disclosure of the websites on which registrants speak, it cannot assist in "track[ing] sex offenders online" and obtaining "information on their virtual

[13] Proponents' suggestion that requiring registrants to start reporting before the government can even use the information serves a "prophylactic purpose" is sheer conjecture. *See* Prop. Br. at 24.

Internet 'whereabouts.'" Gov't Br. at 10.[14] As Professor Post explains, "without the names of the associated websites, blogs or social networking sites, however, the information being reported often may be of no practical value to law enforcement. It is difficult to imagine any practical value in merely knowing that *e.g.*, a registrant used the identifier 'Angry_User' as an Internet identifier *somewhere* on the Internet …." Post Dec. at ¶ 23.

Relatedly, there is no indication of how the information that is required to be disclosed will assist the government's investigation or prevention of crimes. As Professor Post discusses, usernames used to comment on news websites are of little "practical value" without further context. *Id.* The declaration of Mr. Morgester merely states in conclusory fashion that the information will be "useful," but nowhere even suggests, much less explains, *how* an investigator could pursue an investigation with such information. Morgester Dec. at ¶¶ 8, 11, 12. With neither data nor reasons to support its bare conclusions, Mr. Morgester's opinion does nothing to help the government meet its burden. *See Kenosha Liquor Co. v. Heublein, Inc.*, 895 F.2d 418, 420 (7th Cir. 1990) ("Expert opinions are worthless without data and reasons.").

The Bock declaration (Dkt. 56) submitted by Proponents suffers from this same problem. Although she asserts she has been involved in 276 human-trafficking cases, she is able to describe only one of them where she even claims that collecting "Internet identifiers" or "Internet service provider" information would have allowed the police to make "an effort" to apprehend the perpetrator. Bock Dec. at ¶ 10. Notably, neither the Proponents nor the government suggests that an Internet-identifier registry has ever been used to solve a crime, even though 16 states and 36 tribes apparently have them. *See* Prop. Br. at 3 and Proponents' Request for Judicial Notice ("RJN") (Dkt. 57) Ex. B. They cannot even provide one example where the information captured by Proposition 35 prevented a crime. The closest example is Ms. Bock's reference to an Oregon case where she asserts that if the perpetrator in that case had been a registrant, then the police

[14] The government, by contrast, apparently interprets the law to require registrants also to report where they use the "Internet identifiers," as Assistant Attorney General Morgester suggests that it will allow the police to "search publicly available information posted on the Internet that is directly associated to [*sic*] the [registrant's] published Internet identifiers." Morgester Dec. (Dkt. 54-1) at ¶ 11. These inconsistent interpretations of the Act underscores its vagueness. *See infra* Part IV.

would have looked to the registry to try to find him. Bock Dec. at ¶ 11. But of course, her claim is predicated on *if* the perpetrator was a registrant; in other words he was not. And in any event, Ms. Bock provides no detail that would allow the Court to evaluate these claims.[15] This complete lack of specificity, data, or reasoning means Bock's declaration fails to help the government carry its burden.[16]

Tellingly, the *only* explanation of how some kinds of Internet information could be useful to further the Act's stated goals of investigating sex offenses appears in Proponents' effort to downplay the Act's intrusiveness: they state that if law enforcement wishes to determine the identity of the "John54" who is soliciting children on a gaming website, the officer would not be able to obtain the answer simply by using the required disclosures but would instead "have to take additional steps to find out, likely by securing a subpoena, a search warrant, or judicial order." Prop. Br. at 23. In short, they admit that the information required to be disclosed by the Act does not "sufficiently serve" the purpose of investigating sex crimes and that law enforcement already has tools for identifying Internet predators when there is a predicate suspicion of criminal activity.

Finally, the proponents quote at length the United States' Attorney General's guidelines for implementing the federal law in an apparent attempt to show that collecting this information is useful. Prop. Br. at 4. But even if this type of document were sufficient to satisfy their burden (and it is not[17]), and even if it addressed provisions like those of the CASE Act's (there is no indication that it does[18]), it states only that collecting such information "may help" achieve governmental interests. *See* RJN at Exh. A, p. 3. But "'[m]ay' is a term of nearly infinite elasticity," and the government's fear or hope that something "may" occur is insufficient to satisfy

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[15] This is not surprising – even within the 4% of technology-facilitated offenses where the perpetrator is a registrant, the registry would only be useful where the perpetrator is unknown to the victim and is so unwise as to actually report to the police the Internet identifier that he plans to use to commit a crime. *See* Abbott Dec. at ¶ 21; Finkelhor Dec. at ¶ 18.

[16] Ms. Bock apparently helped write the statute. *See* Fakhoury Dec. ¶ 5, Exh. 4.

[17] Even legislative findings offered to satisfy this burden have to be "reasonable inferences based on substantial evidence." *Turner*, 512 U.S. at 666. The federal guidelines cite no evidence at all.

[18] As discussed below, *see infra* Part IV, the definitions of "Internet identifier" and "social networking" in federal and state law are not equivalent.

its narrow-tailoring burden under the First Amendment. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1041 (9th Cir. 2006). Thus, the government and Proponents have also failed to meet their burden to show that the law materially advances the interests they assert.

## IV. THE CASE ACT IS UNCONSTITUTIONALLY VAGUE

Although both the state and Proponents claim that the CASE Act gives sufficient notice to registrants of what information they are required to provide, neither of them even suggests what the terms "Internet service provider" and "Internet identifier" mean, nor do they suggest any narrowing construction to save them from unconstitutionality. *See* Gov't Br. (Dkt. 54) at 12-14; Prop. Br. at 19-22. This silence confirms that the statute is not "readily susceptible" to a narrowing construction, and is thus unconstitutionally vague. *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1147 (9th Cir. 2001); *Dombrowski*, 380 U.S. at 491.

In a stark illustration of the Act's vagueness, even the scant guidance the government and Proponents do provide on the definition of "Internet identifier" is inconsistent. The CASE Act defines "Internet identifier" as

> any electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication.

Cal. Pen. Code § 290.024(b). Proponents interpret this to refer to "a string of characters *chosen by the registrant* to 'uniquely' designate his identity when communicating with others online." Prop. Br. at 22 (citation and quotation omitted; emphasis added).[19] The state, however, claims the same term refers to "characters or symbols *used to identify* [a] person on the Internet." Gov't Br. at 14 (emphasis added).

These two definitions are not the same. Proponents' interpretation covers only usernames and identifying information created by the registrant themselves. But the state's interpretation is much broader because it captures internal account numbers or identifiers "automatically 'established' for the person and used internally or externally to enable forms of communication" on

[19] This approach appears to echo the federal definition of the term, which includes "electronic mail addresses and other designations *used for self-identification* or routing in Internet communication or posting." 42 U.S.C. § 16915a(e)(2) (emphasis added).

the Internet. *See* Post Dec. at ¶ 26. The state's interpretation – that a registrant must report not only information generated and used by the *registrant*, but also all information created by *someone else* to identify a registrant – is closer to the statutory language, which encompasses all identifiers "used for the purpose of" Internet communications, without any limitation on whether the identifier was generated by the registrant or a third party.[20]

This distinction has myriad real world implications. For example, the popular online bank ING Direct permits customers to login to view their account by using their account number in lieu of a username. *See* Fakhoury Dec. at ¶ 7-8, Exh. 6. After entering the account number, the customer is required to enter their PIN as he would with a physical ATM machine. *See id.* Under the state's interpretation of "Internet identifier," this account number – generated by ING – would have to be disclosed since it is a "character[] or symbol[] used to identify [a] person on the Internet." Gov't Br. at 14. But under Proponents' interpretation, this information would *not* have to be disclosed since it is not "'a string of characters chosen' by the registrant to 'uniquely' designate his identity when communicating with others online." Prop. Br. at 22. If the state and Proponents cannot agree on an interpretation of the statute, how can registrants know what they are and are not required to disclose to law enforcement?[21]

Even worse, both the state and Proponents baldly assert that the definitions provided by the CASE Act have "ordinary, objective meaning[s]" that "can be discerned from a dictionary," and yet provide no actual dictionary definitions for any of the terms. Prop. Br. at 21; Gov't Br. at 14.

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[20] Proponents and the government suggest that the CASE Act's definition of "Internet identifier" is similar to the federal definition. *See* Gov't Br. at 13-14; Prop. Br. at 20-21. But the CASE Act definition is broader because, at a minimum, it lacks any language limiting its scope to identifiers generated by the registrant. *Compare* Cal. Pen. Code § 290.024(b) ("used for the purpose of" Internet communication), *with* 42 U.S.C. § 16915a(e)(2) ("used for self-identification"). If the Proponents intended the CASE Act to mean the same as the federal (or some other states') law they would have copied that definition.

[21] Both the state and Proponents claim that the term "Internet identifier" as used in the CASE Act is similar to the term used in the Utah statute upheld in *Shurtleff III*. *See* Gov't Br. at 13-14; Prop. Br. at 20. But the Tenth Circuit never considered a vagueness challenge to the CASE Act since the parties never raised it, which means that decision has no precedential value at all on this issue. *See Webster v. Fall*, 266 U.S. 507, 511 (1925). In any case, the definitions are far from the same. *Compare* Cal. Pen. Code § 290.024(b) *with Shurtleff III*, 628 F.3d at 1221 n.1.

The reason for this omission is simple: neither the terms "Internet identifier" and "Internet service provider" nor the terms in the provided definitions have any consistent definitions. Not even Wikipedia has an entry for "Internet identifier." *See* Fakhoury Dec. ¶ 6 & Ex 5; *contra* Gov't Brief at 14 (these terms have "ordinary and objective meanings"). Moreover, the CASE Act's definitions of these two terms are themselves filled with terms that cannot be understood simply by looking at the dictionary and that instead have indefinite and contested meanings, leaving the "exact boundaries" of the terms "extremely difficult to determine." Post Dec. at ¶ 41.

The Act defines "Internet identifier" to include identifiers used "for the purpose of … instant messaging [and] social networking." Cal. Pen. Code § 290.024(b). Although Proponents assert "it would be incredible if plaintiffs did not understand what is meant by the terms 'instant messaging' and 'social networking,'" they never give any indication of what either term might mean. Prop. Br. at 21. Nor is it at all clear what these terms mean. For example, it is unclear whether "instant messaging," as used in the CASE Act's definition of "Internet identifier," also encompasses "text messages," sent over a cellphone network. *See* Post. Dec. at ¶ 39. The court in *Doe v. Nebraska*, --- F. Supp. 2d ---, 2012 WL 4923131 (D. Neb. Oct. 17, 2012), noted uncertainty in whether "text messages" were included in the definition of "instant messaging" because "text messages" could be sent through traditional web based "instant messaging" services like Google Talk or Yahoo Messenger. *Nebraska*, 2012 WL 4923131 at *21.[22] Similarly, it is unclear whether identifiers used to send "instant messages" over cell phone networks, which appear to be outside the scope of the CASE Act, would have to be disclosed if sent over the Internet instead. *See* Post Dec. at ¶ 40 (users often do not know whether "instant messages" are travelling over cell networks or Internet).

Meanwhile, as Professor Post explains in his declaration, there is simply "no consensus definition" of the term "social networking." Post Dec. at ¶ 35 & n. 5. Louisiana, in an ultimately unsuccessful attempt at prohibiting registered sex offenders from using social media, defined

[22] And that uncertainty existed even though Nebraska provided a statutory definition of the term "instant messaging." *Nebraska*, 2012 WL 4923131 at *21. In contrast, the CASE Act does not even define that term. *See* Post Dec. at ¶ 19.

"social networking" as a website that "(a) [a]llows users to create web pages or profiles about themselves that are available to the general public or to any other users" and "(b) [o]ffers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging." *Doe v. Jindal*, 853 F. Supp. 2d 596, 600 (M.D. La. 2012) (finding Louisiana law that prohibited registered sex offenders from "using or accessing . . . social networking websites, chat rooms, and peer-to-peer networks" unconstitutional). Meanwhile, federal law defines "social networking" similarly, but adds two extra elements: the website's users "are likely to include a substantial number of minors" and the website's "primary purpose is to facilitate online social interactions." 42 U.S.C. § 16915a(e)(1)(A)(ii)-(iii). Thus, under Louisiana law, a website that allows a person to create a profile and communicate with others – such as Amazon.com, eBay.com or Yelp – would be a "social networking" site, but those sites would not be "social networking" sites under the federal definition since the "primary purpose" of those sites is not to "facilitate online social interactions" the way a website like Facebook, Twitter or LinkedIn does. *See* Post Dec. at ¶ 36; 42 U.S.C. § 16915a(e)(1)(A)(iii). In contrast, LinkedIn, which targets a professional and therefore adult audience, presumably would not be a "social networking" site under the federal definition but would qualify under the definition provided by the Louisiana statute. *See* 42 U.S.C. § 16915a(e)(1)(A)(ii); *Jindal*, 853 F. Supp. 2d at 600. So which of these competing definitions of "social networking" does the CASE Act use? There is no way to know.

The definition of "Internet service provider" is similarly unclear. The government cavalierly states that the term is "used in everyday language." Gov't Br. at 14. But that observation merely underscores why the statute is unconstitutionally vague. The Act's convoluted but nonetheless expansive definition "would reach entities that most people would not ordinarily think of as 'Internet service providers,' potentially including" companies that sell or rent devices with networking capabilities, home or business Internet users that leave their wireless networks open for others to access, or companies that sell or rent cars with Internet-enabled mapping or other services. Post Dec. at ¶ 47. If the drafters wanted to give "Internet service provider" its everyday meaning they would not have used such tortured language. Precisely because the Act's definition

of "Internet service providers" goes far beyond the commonly held understanding of the term, "ordinary people" will be left to guess as to their legal obligations. *See City of Chicago v. Morales,* 527 U.S. 41, 56 (1998) (invalidating law because "the term 'loiter' may have a common and accepted meaning… but the definition of that term in this ordinance … does not.").

Ultimately, the state resorts to arguing that that the Court should uphold the statute because "DOJ is [in] the process of issuing new forms that will … identify any new information now required to be collected by the CASE Act." Gov't Br. at 12-13. Proponents join in, noting "it is highly unlikely that the State would implement Proposition 35 in a manner that would require registrants to report Best Buy as one of their Internet service providers." Prop. Br. at 20 n. 15.[23] But courts will "not uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly," particularly when First Amendment rights are at stake. *Stevens*, 130 S.Ct. at 1591; *see Comite*, 657 F.3d at 946-47. The need to create forms to clarify what information registrants must supply "is pertinent only as an implicit acknowledgment of the potential constitutional problems with a [] natural reading" of the statutory language. *Stevens*, 130 S.Ct. at 1591. As discussed above, until and unless the government obtains an *authoritative* construction of the statute that fixes its constitutional flaws, Plaintiffs are entitled to an injunction to protect their First Amendment rights in the face of a law that on its face both fails to "enable ordinary people to understand" what it requires and also "may authorize and even encourage arbitrary and discriminatory enforcement," as local officials may use alleged non-compliance with its vague

[23] Proponents claim Professor Post's suggestion that interpreting "Internet service provider" to include Best Buy is "absurd." Prop. Br. at p. 20 n. 16. But if the Court were to take both the state and Proponents' suggestion to look at the "dictionary" definition of the terms involved, doing so would only support Professor Post's interpretation. Prop. Br. at 21; Gov't Br. at 14. According to the CASE Act, an "Internet service provider" is "a business, organization, or other entity providing a computer and communications facility directly to consumers through which a person may obtain access to the Internet. . . ." *See* Cal. Pen. Code § 290.024(a). To "provide" means "to supply or make available (something wanted or needed)." *See* Merriam-Webster's Collegiate Dictionary, Eleventh Edition, available at www.merriam-webster.com (last accessed November 29, 2012). A "facility" is "something (as a hospital) that is built, installed, or established to serve a particular purpose." *Id.* One of the definitions of "service" is "a facility supplying some public demand" or "providing maintenance and repair." *Id.* Best Buy is thus an "Internet service provider" because it "provides" a "facility" (a computer or electronic device designed to connect to the Internet) directly to consumers "through which a person may obtain access to the Internet."

requirements to arrest and prosecute registrants whom they simply do not want to have in their communities. *Morales*, 527 U.S. at 56; *see Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

## V. THE BALANCE OF EQUITIES FAVORS AN INJUNCTION.

Proponents (but not the state) claim "the balance of hardships favors the state." Prop. Br. at 24. Even if they had standing to assert that the state will suffer hardship when the government itself declines to do so, their argument ignores the rule that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The one case Proponents cite in support of their argument *agreed* that an injunction was proper to prevent the government from requiring patrons of an adult theater to identify themselves, in violation of the First Amendment. *See Spiegel v. City of Houston*, 636 F.2d 997, 1002 (5th Cir. 1981); Prop. Br. at 24. Moreover, *Spiegel* also agreed that the injunction was in the public interest and would not damage the government because the government "could give no examples of uses it had made of such information." *Spiegel*, 636 F.2d at 1002; *accord Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). The *Spiegel* court's holding that the overbroad language of the injunction was improper because it prohibited the police from "good faith enforcement" of unrelated laws that did not violate the Constitution is not relevant here, because Plaintiffs do not seek an overbroad injunction. *See Spiegel*, 636 F.3d at 1002. Rather, they seek an injunction that prohibits the government from violating the First Amendment. And, as *Spiegel* itself makes clear, where the government is currently unable to make any use of the identifying information and has failed to show how it will ever make use of it, the public interest and balance of equities favor the Plaintiffs whose First Amendment rights will be violated if they have to turn over their Internet identifiers and ISPs to the police. *See Spiegel*, 636 F.3d at 1002; *Melendres*, 695 F.3d at 1002 (balance of equities and public interest favor injunction that prohibit constitutional violations without prohibiting government from "from enforcing valid state laws"); *see also* Temporary Restraining Order (Dkt. 36) at 2-3.

## VI. AN INJUNCTION WILL BIND LOCAL OFFICIALS

The government has stipulated that any preliminary injunction will apply to protect the

entire putative class. *See* Dkt. 48 at ¶ 2. However, it now argues that an injunction should not bind local law enforcement. Gov't Br. at 9. This is wrong for three reasons. First, and most generally, because a lawsuit against the Attorney General in her official capacity is in essence a suit against the state itself, an injunction against the Attorney General binds all officials who are exercising the state's authority. *See ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *see also United States v. Baker*, 641 F.2d 1311, 1314 n.5 (9th Cir. 1981). Second, the Attorney General has "direct supervision" over "*all* law enforcement officers in California." *Brewster*, 275 F.3d at 808-09 & n.3 (emphasis in original). Although this does not mean that she can exercise "absolute control and direction" over them, *id.*, it does mean that they are in privity with her. *See Tennison v. Cal. VCGB*, 152 Cal. App. 4th 1164, 1174-75 (2007). They will thus be bound under Rule 65. *See Baker*, 641 F.2d at 1314-15. Finally, and most specifically, local agencies will be bound because they collect registrant information on behalf of Defendant Harris. "[R]egistration of sex offenders is a collaborative effort involving … the [California] DOJ[24]… as well as local law enforcement agencies." Schweig Dec. at ¶ 3. The DOJ creates the forms that are used for registration and runs the database into which local law enforcement agencies enter registration information. *See id.* ¶¶ 13, 14; *see also* §§ 290.012(a),(d), 290.014(b); Def. Harris Answer (Dkt. 60) at ¶ 23. Because they work "in active concert or participation" with, and as "agents" of, the Attorney General, local law-enforcement agencies will be bound under Rule 65(d). *Baker*, 641 F.2d at 1314.

## VII. CONCLUSION

For these reasons, the Court should issue a preliminary injunction prohibiting Defendant Harris and all California law enforcement agencies from implementing or enforcing Cal. Penal Code §§ 290.014(b) and 290.015(4)-(6), as enacted by Proposition 35, or from otherwise requiring registrants to provide identifying information about their online speech to the government. The Attorney General should be ordered to notify local law enforcement of the injunction. *See Baker*, 641 F.2d at 1317. At most, a nominal bond should be required. *See* Proposed TRO (Dkt. 9) at 2-3.

[24] "The Attorney General is the head of the Department of Justice." Cal. Gov't Code § 12510.

DATED: December 3, 2012

Respectfully submitted,

By: */s/ Michael T. Risher*

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| **JOHN DOE, et al., on behalf of themselves and others similarly situated,**<br>Plaintiffs,<br>**v.**<br>**KAMALA D. HARRIS, et al.,**<br>Defendant Attorney Generals. | Case No.: C 12-5713 THE<br>**ANSWER OF DEFENDANT ATTORNEY GENERAL TO PLAINTIFFS' CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**<br>Dept: 2<br>Judge: Hon. Thelton E. Henderson<br>Trial Date: Not Set<br>Action Filed: November 7, 2012 |

Pursuant to Rule 8(b) of the Federal Rules of Civil Procedure, Defendant Kamala D. Harris, Attorney General of California (Defendant Attorney General), answers Plaintiffs' Class Action Complaint for Declaratory and Injunctive Relief ("Class Action Complaint") as follows:

**INTRODUCTION**

1. Answering paragraph 1, Defendant Attorney General admits that Plaintiffs have brought a challenge to a recently-enacted California statute and that Proposition 35 speaks for itself. Except as so admitted, defendant denies each and every allegation contained in the said paragraph. Defendant Attorney General specifically denies that the statute is unconstitutional or that it will violate the rights of the persons it regulates. Defendant Attorney General further

denies that the challenged provisions sweep too broadly or that the definitions do not comport with the common understanding of those terms or are unconstitutionally vague.

**JURISDICTION AND VENUE**

2. Answering paragraph 2, Defendant Attorney General admits that the complaint speaks for itself. Except as so admitted, defendant denies each and every allegation contained in the said paragraph.

3. Answering paragraph 3, Defendant Attorney General admits the allegations contained therein.

4. Answering paragraph 4, Defendant Attorney General lacks knowledge or information sufficient to form a belief about where the events or omissions giving rise to Plaintiffs' claims will occur, and on that basis denies those allegations. Defendant Attorney General otherwise admits the allegations in paragraph 4.

**INTRADISTRICT ASSIGNMENT**

5. Answering paragraph 5, Defendant Attorney General avers that the requirements of Local Rule 3-2 speak for themselves so that no further response is necessary to each and every allegation that seeks to describe and apply those requirements. Defendant Attorney General lacks knowledge or information sufficient to form a belief about the remaining allegations in this paragraph and on that basis denies each and every allegation.

**THE PARTIES: PLAINTIFFS**

6. Answering paragraph 6, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

7. Answering paragraph 7, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

8. Answering paragraph 8, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

9. Answering paragraph 9, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

10. Answering paragraph 10, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

11. Answering paragraph 11, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

12. Answering paragraph 12, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

13. Answering paragraph 13, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

14. Answering paragraph 14, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

15. Answering paragraph 15, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

16. Answering paragraph 16, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

17. Answering paragraph 17, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations contained therein, and on that basis denies each and every allegation.

18. Answering paragraph 18, Defendant Attorney General avers that the provisions of Proposition 35 speak for themselves so that no further response is necessary to the allegation that seeks to describe and apply those requirements. Defendant Attorney General lacks knowledge or information sufficient to form a belief about the procedures for leaving a comment on Plaintiff's website and on that basis denies each and every allegation. Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations concerning Plaintiffs' beliefs in an alleged loss of anonymity, and on that basis denies each and every allegation. To the extent a response is required regarding the legality of the application of Proposition 35 to the facts alleged in this paragraph, defendant denies each and every allegation contained in the said paragraph.

19. Answering paragraph 19, Defendant Attorney General denies that Proposition 35 violates the rights of plaintiff's members. Defendant Attorney General lacks knowledge or information sufficient to form a belief about the composition of plaintiff's membership or its purpose, and on that basis denies each and every allegation. Defendant Attorney General admits that plaintiff's complaint does not pray for damages. Except as expressly admitted, Defendant Attorney General denies the allegations contained therein.

**THE PARTIES: DEFENDANTS**

20. Answering paragraph 20, Defendant Attorney General avers that the allegations constitute legal conclusions that require no response.

21. Answering paragraph 21, Defendant Attorney General admits that she is the Attorney General of the State of California and the remaining allegations purport to describe statutory provisions that speak for themselves and require no response.

22. Answering paragraph 22, Defendant Attorney General avers that the allegations purport to describe statutory provisions that speak for themselves and require no response.

23. Answering paragraph 23, Defendant Attorney General admits that California law enforcement personnel will collect certain Internet identifying information under the cited statutes and that the California Department of Justice will participate in those efforts, and denies each and every remaining allegation contained therein.

24. Answering paragraph 24 Defendant Attorney General admits that the City of Alameda is a municipal corporation organized as a charter city under the laws of the State of California and that the cited statutes speak for themselves. Defendant Attorney General lacks knowledge or information sufficient to form a belief about where plaintiff Doe resides, and on that basis denies that allegation. Defendant Attorney General avers that the provisions of the Alameda Municipal Code and Proposition 35 speak for themselves so that no response is required to the remaining allegations in paragraph 24.

**CLASS ACTION ALLEGATIONS: PLAINTIFF CLASS**

25. Answering paragraph 25, Defendant Attorney General lacks knowledge or information sufficient to form a belief about whether putative Plaintiffs are subject to the challenged law, and on that basis denies that allegation. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

26. Answering paragraph 26, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the particular data Plaintiffs rely upon for their conclusions, and on that basis denies each and every allegation. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

27. Answering paragraph 27, Defendant Attorney General lacks knowledge or information sufficient to form a belief about whether putative Plaintiffs are subject to the challenged law, and on that basis denies that allegation. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

28. Answering paragraph 28, Defendant Attorney General avers that the allegations constitute legal contentions and arguments that require no response. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

29. Answering paragraph 29, Defendant Attorney General avers that the allegations constitute legal contentions and arguments that require no response. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

30. Answering paragraph 30, Defendant Attorney General lacks knowledge or information sufficient to form a belief about whether the named Plaintiffs could fairly and adequately protect the putative class' interests, have interests that are antagonistic to the class, or the degree of experience or reputation of Plaintiffs' attorneys, and on that basis denies each and every allegation. Defendant Attorney General avers that the remaining allegations constitute legal contentions and arguments that require no response. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

31. Answering paragraph 31, Defendant Attorney General avers that the allegations constitute legal contentions and arguments that require no response. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

32. Answering paragraph 32, Defendant Attorney General avers that the allegations constitute legal contentions and arguments that require no response. Defendant Attorney General avers, however, that this Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

**THE MATTERS IN CONTROVERSY**

33. Answering paragraph 33, Defendant Attorney General avers that the provisions of California Penal Code section 290 et seq. and the case law applying them speak for themselves so that no further response is necessary to each and every allegation that seeks to describe and apply those provisions. The remaining allegations constitute legal arguments and contentions that require no response. To the extent a response is required, defendant denies each and every allegation.

34. Answering paragraph 34, Defendant Attorney General avers that the statutory provisions cited and described in the paragraph speak for themselves. No further response is necessary to the allegation that seeks to describe and apply those provisions. Defendant Attorney General lacks knowledge or information sufficient to form a belief about Plaintiffs' calculations concerning the number of people required to register in California. The remaining allegations constitute legal arguments and contentions that require no response. To the extent a response is required, defendant denies each and every remaining allegation.

35. Answering paragraph 35, Defendant Attorney General avers that the statutory provisions cited and described in the paragraph speak for themselves so that no further response is necessary.

36. Answering paragraph 36, Defendant Attorney General admits that this lawsuit relates to statutes that were adopted as part of a voter initiative, Proposition 35, on November 6, 2012. Defendant Attorney General avers that the remaining allegations in the paragraph describe the challenged provisions and the California Constitution and that the provisions speak for themselves and that these allegations require no response.

37. Answering paragraph 37, Defendant Attorney General avers that the provisions of Proposition 35 speak for themselves so that no further response is required to the allegations.

38. Answering paragraph 38, Defendant Attorney General avers that the provisions of Proposition 35 speak for themselves so that no further response is required to the allegations.

39. Answering paragraph 39, Defendant Attorney General avers that the provisions of Proposition 35 speak for themselves so that no further response is required to the allegations.

40. Answering paragraph 40, Defendant Attorney General avers that the provisions of Proposition 35 and California Penal Code section 290.018 speak for themselves so that no further response is required. The remaining allegations in the paragraph constitute legal arguments and contentions that require no response.

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41. Answering paragraph 41, Defendant Attorney General denies that the new reporting requirements burden speech in any manner. The remaining allegations in the paragraph constitute legal arguments and contentions that require no response. To the extent a response is required, defendant denies each and every allegation.

42. Answering paragraph 42, Defendant Attorney General denies that the registration requirements infringe upon registrants' rights to engage in anonymous online speech. Defendant Attorney General avers that the provisions of Proposition 35 speak for themselves such that no response is required to the allegations describing those provisions. Defendant Attorney General lacks knowledge or information sufficient to form a belief about the alleged 2009 survey of California law enforcement agencies, and on that basis denies the related allegations. The remaining allegations in the paragraph constitute legal arguments and contentions that require no response. To the extent a response is required, defendant denies each and every allegation.

43. Answering paragraph 43, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the "scholarly research" that Plaintiffs purport to describe, and on that basis denies the allegations. To the extent a response is required, defendant denies each and every allegation.

44. Answering paragraph 44, Defendant Attorney General lacks knowledge or information sufficient to form a belief about which California Department of Justice reports Plaintiffs purport to describe, and on that basis denies the allegations. To the extent a response is required, defendant denies each and every allegation.

45. Answering paragraph 45, Defendant Attorney General lacks knowledge or information sufficient to form a belief about the "available data" that Plaintiffs purport to describe in the paragraph, and on that basis denies the allegations. To the extent a response is required, defendant denies each and every allegation.

46. Answering paragraph 46, Defendant Attorney General denies the non-specific allegations relating to the government's ability to distinguish between registrants who pose a high risk of reoffending from those who pose less risk. Defendant Attorney General further denies that Proposition 35 is overbroad. Defendant Attorney General lacks knowledge or information

sufficient to form a belief concerning the remaining allegations in the paragraph and on that basis denies each and every allegation. To the extent a response is required, defendant denies each and every allegation.

47. Answering paragraph 47, the allegations constitute legal arguments and contentions that require no response. To the extent a response is required, defendant denies each and every allegation.

**NEED FOR INJUNCTIVE AND DECLARATORY RELIEF**

48. Answering paragraph 48, Defendant Attorney General incorporates by reference her responses to paragraphs 1 through 47 above.

49. Defendant Attorney General admits that Plaintiffs assert the contentions described in paragraph 49, but denies that Plaintiffs' rights have been or will be violated, or that the challenged provisions are in any way unconstitutional or unlawful. Defendant Attorney General lacks knowledge or information sufficient to form a belief about the allegations concerning Plaintiffs' alleged fears, and on that basis denies each and every allegation. Defendant Attorney General admits that Plaintiffs seek the judicial declaration described in the paragraph. To the extent a response is required, defendant denies each and every allegation.

50. Answering paragraph 50, Defendant Attorney General denies each and every allegation contained therein.

51. Answering paragraph 51, Defendant Attorney General denies each and every allegation contained therein.

**COUNT 1: VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. & 1983)**

52. Answering paragraph 52, Defendant Attorney General incorporates by reference her responses to paragraphs 1 through 51 above.

53. Answering paragraph 53, Defendant Attorney General denies each and every allegation contained therein.

54. Answering paragraph 54, Defendant Attorney General denies each and every allegation contained therein.

55. Answering paragraph 55, Defendant Attorney General denies each and every allegation.

56. Answering paragraph 56, Defendant Attorney General denies each and every allegation contained therein.

**COUNT II: VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. & 1983)**

57. Answering paragraph 57, Defendant Attorney General incorporates by reference her responses to paragraphs 1 through 56 above.

58. Answering paragraph 58, Defendant Attorney General denies each and every allegation contained therein.

59. Answering paragraph 59, Defendant Attorney General denies each and every allegation contained therein.

**COUNT III: VIOLATION OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

60. Answering paragraph 60, Defendant Attorney General incorporates by reference her responses to paragraphs 1 through 59 above.

61. Answering paragraph 61, Defendant Attorney General denies each and every allegation contained therein.

62. Answering paragraph 62, Defendant Attorney General denies each and every allegation contained therein.

63. Answering paragraph 63, Defendant Attorney General denies each and every allegation contained therein.

**COUNT IV: EX POST FACTO LAW UNDER ARTICLE II § 10 CL. 1 OF THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

64. Answering paragraph 64, Defendant Attorney General incorporates by reference her responses to paragraphs 1 through 63 above.

65. Answering paragraph 65, Defendant Attorney General denies each and every allegation contained therein.

66. Answering paragraph 66, Defendant Attorney General denies each and every allegation contained therein.

67. Answering paragraph 67, Defendant Attorney General denies each and every allegation contained therein.

**DEFENSES**

In asserting the following defenses, Defendant Attorney General does not assume the burden of establishing any fact or proposition where that burden is properly imposed on Plaintiffs.

**FIRST DEFENSE**

The Class Action Complaint fails to state a claim upon which relief can be granted against Defendant Attorney General.

**SECOND DEFENSE**

To the extent that Plaintiffs bring an as-applied challenge, the claims are not ripe for adjudication.

**THIRD DEFENSE**

Plaintiffs have waived any privacy rights they may have had in the challenged Internet information by disclosing the information to third parties.

**FOURTH DEFENSE**

Plaintiffs are estopped from asserting any privacy rights they may have had in the challenged Internet information by disclosing the information to third parties.

**FIFTH DEFENSE**

Plaintiffs' Class Action Complaint is barred by the doctrine of latches.

**SIXTH DEFENSE**

The challenged statutory provisions do not implicate any of Plaintiffs' Constitutional rights.

**SEVENTH DEFENSE**

To the extent that any of Plaintiffs' Constitutional rights are implicated by the challenged statutory provisions, the invasion of rights is incidental and is outweighed by California's countervailing interest in strengthening its laws regarding sexual exploitation, including sex

offender registration requirements, to allow law enforcement to track and prevent online sex offenses and human trafficking.

**EIGHTH DEFENSE**

Plaintiffs Class Action Complaint may not be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

**NINTH DEFENSE**

Plaintiffs lack standing.

**RESERVATION OF DEFENSES**

The foregoing defenses are raised without waiver of any other defenses that might become known during this litigation. Defendant Attorney General hereby reserves her right to amend or supplement her answer to assert any other related defenses as they become available.

**PRAYER FOR RELIEF**

WHEREFORE, Defendant Attorney General prays that:

1. The Class Action Complaint be denied.
2. That any request for attorney fees and costs of suit be denied.
3. That Defendant Attorney General be awarded costs of suit.
4. That Defendant Attorney General be granted such further relief as the Court may deem proper.

Dated: November 28, 2012

Respectfully Submitted,

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PETER K. SOUTHWORTH
Supervising Deputy Attorney General

/s/ ROBERT D. WILSON

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, *et al.*,

Defendants.

No.: C 12-5713 TEH

**INTERVENERS' JOINDER IN DEFENDANT HARRIS' OBJECTIONS TO THE DECLARATION OF DAVID G. POST**

Hearing:

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 12

(The Honorable Thelton E. Henderson)

Interveners Daphne Phung and Chris Kelly hereby join defendant Attorney General Kamala Harris' objections to the declaration of David G. Post for the reasons set forth therein.

Dated: November 26, 2012

Respectfully Submitted,

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By: /S/ James C. Harrison

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, *et al.*,

Defendants.

No.: C 12-5713 TEH

**INTERVENERS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION; DECLARATION OF BRIAN METZKER**

Hearing:

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 12

(The Honorable Thelton E. Henderson)

**REQUEST FOR JUDICIAL NOTICE**

Pursuant to Rule 201 of the Federal Rules of Evidence,[1] interveners Daphne Phung and Chris Kelly request that the Court take judicial notice of the following:

1. Excerpts from the National Guidelines for Sex Offender Registration and Notification as promulgated by the U.S. Department of Justice, attached as Exhibit A to the Declaration of Brian Metzker.
2. The September 27, 2012 press release of the U.S. Department of Justice announcing that fifty-five jurisdictions have implemented the Sex Offender Registration and Notification Act ("SORNA"), attached at Exhibit B to the Declaration of Brian Metzker.
3. The Certification of Initiative for Proposition 35 as promulgated by the California Secretary of State on June 7, 2012, attached as Exhibit C to the Declaration of Brian Metzker.
4. The most recent election results from the November 2012 General Election released by the California Secretary of State, attached as Exhibit D to the Declaration of Brian Metzker.
5. Ballot pamphlet materials for Proposition 35, passed by the voters of the State of California on November 6, 2012, attached as Exhibit E to the Declaration of Brian Metzker.

Exhibit A constitutes regulations of the U.S. Department of Justice and is therefore the proper subject of judicial notice. *See City of Wichita v. United States Gypsum Co.*, 72 F.3d 1491, 1496 (10th Cir. 1996).

[1] While Rule 201(a) of the Federal Rules of Evidence applies only to "adjudicative facts," courts may freely take judicial notice of "legislative facts" such as the enactment of a legislative body or the records and reports of an administrative agency. *See* Advisory Committee Notes to Fed. R. Evid. 201(a).

Exhibit A is relevant to show the current apparatus of federal laws governing sex offender registration. These laws will continue to operate regardless of whether Proposition 35 is upheld by the Court.

Exhibit B was released publicly by the U.S. Department of Justice and is the proper subject of judicial notice as the press release of an administrative agency. *See In re American Apparel, Inc. Shareholder Litigation*, 855 F. Supp. 2d 1043, 1062 (C.D. Cal. 2012).

Exhibit B is relevant to show that more than fifty states, territories, and tribes have implemented the provisions of SORNA, as it was passed by the U.S. Congress and implemented by the U.S. Department of Justice.

Exhibit C was made publicly available by the California Secretary of State and is the proper subject of judicial notice as the record of an administrative body. *See United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008).

Exhibit C is relevant to show that Proposition 35 received the requisite number of petition signatures necessary to certify it for the next statewide general election, which occurred on November 6, 2012.

Exhibit D was made publicly available by the California Secretary of State and is the proper subject of judicial notice as the report of an administrative body. *See United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008).

Exhibit D is relevant to show that Proposition 35 will receive a sufficient number of votes for passage by the voters of the State of California and, absent court intervention, will become the duly recognized law of the State of California.

Exhibit E represents the legislative history of Proposition 35 and is the proper subject of judicial notice. *See Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1086 (2nd Cir. 1982); *Matter of Reading Co.*, 413 F. Supp. 54, 57 (D. Pa. 1976).

Exhibit E is relevant to show the legislative history of Proposition 35 and to demonstrate the existing sex offender registration requirements in place at the time of the passage of Proposition 35.

Interveners respectfully request that this Court take judicial notice of the documents listed above.

Dated: November 26, 2012

Respectfully Submitted,

REMCHO, JOHANSEN & PURCELL, LLP

By: /S/ James C. Harrison

Attorneys for Interveners
Daphne Phung and Chris Kelly

**DECLARATION OF BRIAN METZKER**

I, Brian Metzker, declare under penalty of perjury that:

1. I am a paralegal at Remcho, Johansen & Purcell, LLP, attorneys for interveners Daphne Phung and Chris Kelly in this case. I submit this declaration in support of Interveners' Opposition to Motion for Preliminary Injunction.

2. Attached as Exhibit A is a true and correct copy of excerpts from the U.S. Department of Justice's National Guidelines for Sex Offender Registration and Notification. I obtained a copy of these excerpts on Tuesday, November 20, 2012 from the U.S. Department of Justice's website at http://www.ojp.usdoj.gov/smart/guidelines.htm.

3. Attached as Exhibit B is a true and correct copy of the U.S. Department of Justice's September 27, 2012 press release announcing jurisdictions in compliance with SORNA. I obtained a copy of this press release on Tuesday, November 20, 2012 from the U.S. Department of Justice's website at http://www.ojp.usdoj.gov/smart/pressreleases.htm.

4. Attached as Exhibit C is a true and correct copy of the Certificate of Initiative for Proposition 35. I obtained a copy of this certificate on Tuesday, November 20, 2012 from files maintained by attorneys for interveners in this case.

5. Attached as Exhibit D is a true and correct copy of the most recent election results from the November 2012 General Election. I obtained a copy of these results on Tuesday, November 20, 2012 from the California Secretary of State's website at http://vote.sos.ca.gov/returns/ballot-measures/.

6. Attached as Exhibit E is a true and correct copy of the ballot pamphlet materials for Proposition 35. I obtained a copy of these materials on Tuesday, November 20, 2012 from the California Secretary of State's website at http://voterguide.sos.ca.gov/pdf/.

I declare under penalty of perjury that the foregoing is true and correct. I have firsthand knowledge of the same, and if called upon to do so I could and would testify competently thereto. Executed this 26th day of November, 2012, in San Leandro, California.

Brian Metzker

(00187190-3)

**No. C 12-5713 TEH**

# EXHIBIT A

**Interveners' Request for Judicial Notice in Support of Opposition to Motion for Preliminary Injunction; Declaration of Brian Metzker**

# THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION

## CONTENTS

I. INTRODUCTION ..... 3

II. GENERAL PRINCIPLES ..... 5

A. Terminology ..... 5

B. Minimum National Standards ..... 6

C. Retroactivity ..... 7

D. Automation—Electronic Databases and Software ..... 8

E. Implementation ..... 9

III. COVERED JURISDICTIONS ..... 11

IV. COVERED SEX OFFENSES AND SEX OFFENDERS ..... 15

A. Convictions Generally ..... 15

B. Foreign Convictions ..... 16

C. Sex Offenses Generally ..... 17

D. Specified Offenses Against Minors ..... 18

E. Protected Witnesses ..... 21

V. CLASSES OF SEX OFFENDERS ..... 21

VI. REQUIRED REGISTRATION INFORMATION ..... 26

VII. DISCLOSURE AND SHARING OF INFORMATION ..... 33

A. Sex Offender Websites ..... 33

B. Community Notification and Targeted Disclosures ..... 38

VIII. WHERE REGISTRATION IS REQUIRED ..... 41

IX. INITIAL REGISTRATION ..... 44

X. KEEPING THE REGISTRATION CURRENT ..... 49

A. Changes of Name, Residence, Employment, or School Attendance ..... 50

B. Changes in Other Registration Information ..... 52

C. International Travel ..... 53

XI. VERIFICATION/APPEARANCE REQUIREMENTS ..... 54

XII. DURATION OF REGISTRATION ..... 56

XIII. ENFORCEMENT OF REGISTRATION REQUIREMENTS ..... 58

Appendix A. Summary of Comments ..... 61

Appendix B. Title Reference to SORNA Sections ..... 92

Appendix C. Title Reference to Federal Statutes ..... 93

Index ..... 94

## I. INTRODUCTION

The Sex Offender Registration and Notification Act ("SORNA" or "the Act"), which is title I of the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248), provides a new comprehensive set of minimum standards for sex offender registration and notification in the United States. These Guidelines are issued to provide guidance and assistance to covered jurisdictions—the 50 States, the District of Columbia, the principal U.S. territories, and Indian tribal governments—in implementing the SORNA standards in their registration and notification programs.

The adoption of these Guidelines carries out a statutory directive to the Attorney General, appearing in SORNA § 112(b), to issue guidelines to interpret and implement SORNA. Other provisions of SORNA establish the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (the "SMART Office"), a component of the Office of Justice Programs of the U.S. Department of Justice. The SMART Office is authorized by law to administer the standards for sex offender registration and notification that are set forth in SORNA and interpreted and implemented in these Guidelines. It is further authorized to cooperate with and provide assistance to states, local governments, tribal governments, and other public and private entities in relation to sex offender registration and notification and other measures for the protection of the public from sexual abuse or exploitation. *See* SORNA § 146(c). Accordingly, the SMART Office should be regarded by jurisdictions discharging registration and notification functions as their key partner and resource in the federal government in further developing and strengthening their sex offender registration and notification programs, and the SMART Office will provide all possible assistance for this purpose.

The development of sex offender registration and notification programs in the United States has proceeded rapidly since the early 1990s, and at the present time such programs exist in all of the states, the District of Columbia, and some of the territories and tribes. These programs serve a number of important public safety purposes. In their most basic character, the registration aspects of these programs are systems for tracking sex offenders following their release into the community. If a sexually violent crime occurs or a child is molested, information available to law enforcement through the registration program about sex offenders who may have been present in the area may help to identify the perpetrator and solve the crime. If a particular released sex offender is implicated in such a crime, knowledge of the sex offender's whereabouts through the registration system may help law enforcement in making a prompt apprehension. The registration program may also have salutary effects in relation to the likelihood of registrants committing more sex offenses. Registered sex offenders will perceive that the authorities' knowledge of their identities, locations, and past offenses reduces the chances that they can avoid detection and apprehension if they reoffend, and this perception may help to discourage them from engaging in further criminal conduct.

Registration also provides the informational base for the other key aspect of the programs—notification—which involves making information about released sex offenders more broadly available to the public. The means of public notification currently include sex offender websites in all states, the District of Columbia, and some territories, and may involve other forms

of notice as well. The availability of such information helps members of the public to take common sense measures for the protection of themselves and their families, such as declining the offer of a convicted child molester to watch their children or head a youth group, or reporting to the authorities approaches to children or other suspicious activities by such a sex offender. Here as well, the effect is salutary in relation to the sex offenders themselves, since knowledge by those around them of their sex offense histories reduces the likelihood that they will be presented with opportunities to reoffend.

While sex offender registration and notification in the United States are generally carried out through programs operated by the individual states and other non-federal jurisdictions, their effectiveness depends on also having effective arrangements for tracking of registrants as they move among jurisdictions and some national baseline of registration and notification standards. In a federal union like the United States with a mobile population, sex offender registration could not be effective if registered sex offenders could simply disappear from the purview of the registration authorities by moving from one jurisdiction to another, or if registration and notification requirements could be evaded by moving from a jurisdiction with an effective program to a nearby jurisdiction that required little or nothing in terms of registration and notification.

Hence, there have been national standards for sex offender registration in the United States since the enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act (42 U.S.C. 14071) in 1994. The national standards from their inception have addressed such matters as the offenses for which registration should be required, updating and periodic verification of registration information, the duration of registration, public notification, and continued registration and tracking of sex offenders when they relocate from one jurisdiction to another.

Following the enactment of the Wetterling Act in 1994, that Act was amended a number of times, in part reflecting and in part promoting trends in the development of the state registration and notification programs. Ultimately, Congress concluded that the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards—the SORNA reforms, whose implementation these Guidelines concern—that would close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs. Important areas of reform under the SORNA standards include:

- Extending the jurisdictions in which registration is required beyond the 50 States, the District of Columbia, and the principal U.S. territories, to include Indian tribal jurisdictions.

- Extending the classes of sex offenders and sex offenses for which registration is required.

- Consistently requiring that sex offenders in the covered classes register and keep the registration current in the jurisdictions in which they reside, work, or go to school.

- Requiring more extensive registration information.
- Adding to the national standards periodic in-person appearances by registrants to verify and update the registration information.
- Broadening the availability of information concerning registered sex offenders to the public, through posting on sex offender websites and by other means.
- Adopting reforms affecting the required duration of registration.

In addition, SORNA strengthens the federal superstructure elements that leverage and support the sex offender registration and notification programs of the registration jurisdictions. These strengthened elements are: (i) stepped-up federal investigation and prosecution efforts to assist jurisdictions in enforcing sex offender registration requirements; (ii) new statutory provisions for the national database and national website (i.e., the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public Website) that effectively compile information obtained under the registration programs of the states and other jurisdictions and make it readily available to law enforcement or the public on a nationwide basis; (iii) development by the federal government of software tools, which the states and other registration jurisdictions will be able to use to facilitate the operation of their registration and notification programs in conformity with the SORNA standards; and (iv) establishment of the SMART Office to administer the national standards for sex offender registration and notification and to assist registration jurisdictions in their implementation.

Through the cooperative effort of the 50 States, the District of Columbia, the U.S. territories, and Indian tribal governments with the responsible federal agencies, the SORNA goal of an effective and comprehensive national system of registration and notification programs can be realized, with great benefit to the ultimate objective of "protect[ing] the public from sex offenders and offenders against children." SORNA § 102. These Guidelines provide the blueprint for that effort.

## II. GENERAL PRINCIPLES

Before turning to the specific SORNA standards and requirements discussed in the remainder of these Guidelines, certain general points should be noted concerning the interpretation and application of the Act and these Guidelines:

### A. Terminology

These Guidelines use key terms with the meanings defined in SORNA. In particular, the term "jurisdiction" is consistently used with the meaning set forth in SORNA § 111(10). As defined in that provision, it refers to the 50 States, the District of Columbia, the five principal U.S. territories—i.e., the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the United States Virgin Islands—and Indian tribes that elect to function as registration jurisdictions under SORNA § 127. (For more concerning covered jurisdictions, *see*

SORNA. Rather, that is only the case if the juvenile satisfies the criteria for required registration of juvenile delinquents under section 111(8).

## VI. REQUIRED REGISTRATION INFORMATION

Section 114 of SORNA defines the required minimum informational content of sex offender registries. It is divided into two lists. The first list, set forth in subsection (a) of section 114, describes information that the registrant will normally be in a position to provide. The second list, set forth in subsection (b), describes information that is likely to require some affirmative action by the jurisdiction to obtain, beyond asking the sex offender for the information. Supplementary to the information that the statute explicitly describes, section 114(a)(7) and (b)(8) authorize the Attorney General to specify additional information that must be obtained and included in the registry. This expansion authority is utilized to require including in the registries a number of additional types of information, such as information about registrants' e-mail addresses, telephone numbers, and the like, information concerning the whereabouts of registrants who lack fixed abodes or definite places of employment, and information about temporary lodging, as discussed below.

Whether a type of information must be obtained by a jurisdiction and included in its sex offender registry is a distinct question from whether the jurisdiction must make that information available to the public. Many of the informational items whose inclusion in the registry is required by section 114 and these Guidelines are not subject to a public disclosure requirement under SORNA, and some are exempt from public disclosure on a mandatory basis. The public disclosure requirements under SORNA and exceptions thereto are explained in Part VII of these Guidelines.

In order to implement requirements for the sharing of registration information appearing in other sections of SORNA (sections 113(c), 119(b), 121(b)—*see* Parts VII and X of these Guidelines for discussion), jurisdictions will need to maintain all required registration information in digitized form that will enable it to be immediately accessed by or transmitted to various entities. Hence, the jurisdiction's registry must be an electronic database, and descriptions of required types of information in section 114 should consistently be understood as referring to digitizable information rather than hard copies or physical objects. This does not mean, however, that all required registration information must be reproduced in a single segregated database, since the same effect may be achieved by including in the central registry database links or identification numbers that provide access to the information in other databases in which it is included (e.g., with respect to criminal history, fingerprint, and DNA information). These points are further discussed in connection with the relevant informational items.

As with SORNA's requirements generally, the informational requirements of section 114 and these Guidelines define a floor, not a ceiling, for jurisdictions' registries. Hence, jurisdictions are free to obtain and include in their registries a broader range of information than the minimum requirements described in this Part.

The required minimum informational content for sex offender registries is as follows:

- NAME, ALIASES, AND REMOTE COMMUNICATION IDENTIFIERS AND ADDRESSES (§ 114(a)(1), (a)(7)):

  - NAMES AND ALIASES (§ 114(a)(1)): The registry must include "[t]he name of the sex offender (including any alias used by the individual)." The names and aliases required by this provision include, in addition to registrants' primary or given names, nicknames and pseudonyms generally, regardless of the context in which they are used, any designations or monikers used for self-identification in Internet communications or postings, and ethnic or tribal names by which they are commonly known.

  - INTERNET IDENTIFIERS AND ADDRESSES (§ 114(a)(7)): In the context of Internet communications there may be no clear line between names or aliases that are required to be registered under SORNA § 114(a)(1) and addresses that are used for routing purposes. Moreover, regardless of the label, including in registries information on designations used by sex offenders for purposes of routing or self-identification in Internet communications—e.g., e-mail and instant messaging addresses—serves the underlying purposes of sex offender registration and notification. Among other potential uses, having this information may help in investigating crimes committed online by registered sex offenders—such as attempting to lure children or trafficking in child pornography through the Internet—and knowledge by sex offenders that their Internet identifiers are known to the authorities may help to discourage them from engaging in such criminal activities. The authority under section 114(a)(7) is accordingly exercised to require that the information included in the registries must include all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings.

  - TELEPHONE NUMBERS (§ 114(a)(7)): Requiring sex offenders to provide their telephone numbers (both for fixed location phones and cell phones) furthers the objectives of sex offender registration. One obvious purpose in having such information is to facilitate communication between registration personnel and a sex offender in case issues arise relating to the sex offender's registration. Moreover, as communications technology advances, the boundaries blur between text-based and voice-based communications media. Telephone calls may be transmitted through the Internet. Text messages may be sent between cell phones. Regardless of the particular communication medium, and regardless of whether the communication involves text or voice, sex offenders may potentially utilize remote communications in efforts to contact or lure potential victims. Hence, including phone numbers in the registration information may help in investigating crimes committed by registrants that involved telephonic communication with the victim, and knowledge that their phone numbers are known to the authorities may help sex offenders to resist the temptation to commit crimes by this means. The authority under section 114(a)(7) is accordingly exercised to require that the information included in the registries must include sex offenders' telephone

numbers and any other designations used by sex offenders for purposes of routing or self-identification in telephonic communications.

- SOCIAL SECURITY NUMBER (§ 114(a)(2), (a)(7)): The registry must include "[t]he Social Security number of the sex offender." In addition to any valid Social Security number issued to the registrant by the government, the information the jurisdiction requires registrants to provide under this heading must include any number that the registrant uses as his or her purported Social Security number since registrants may, for example, attempt to use false Social Security numbers in seeking employment that would provide access to children. To the extent that purported (as opposed to actual) Social Security numbers may be beyond the scope of the information required by section 114(a)(2), the authority under section 114(a)(7) is exercised to require that information on such purported numbers be obtained and included in the registry as well.

- RESIDENCE, LODGING, AND TRAVEL INFORMATION (§ 114(a)(3), (a)(7)):

  - RESIDENCE ADDRESS (§ 114(a)(3)): The registry must include "the address of each residence at which the sex offender resides or will reside." As provided in SORNA § 111(13), residence refers to "the location of the individual's home or other place where the individual habitually lives." (For more as to the meaning of "resides" under SORNA, *see* Part VIII of these Guidelines.) The statute refers to places in which the sex offender "will reside" so as to cover situations in which, for example, a sex offender is initially being registered prior to release from imprisonment, and hence is not yet residing in the place or location to which he or she expects to go following release.

  - OTHER RESIDENCE INFORMATION (§ 114(a)(7)): Sex offenders who lack fixed abodes are nevertheless required to register in the jurisdictions in which they reside, as discussed in Part VIII of these Guidelines. Such sex offenders cannot provide the residence address required by section 114(a)(3) because they have no definite "address" at which they live. Nevertheless, some more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives—e.g., information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations himself during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants, libraries, or other establishments that the sex offender frequents. Having this type of location information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite residence addresses. Hence, the authority under SORNA § 114(a)(7) is exercised to require that information be obtained about where sex offenders who lack fixed abodes habitually live with whatever definiteness is possible under the circumstances. Likewise, in relation to sex offenders who lack a residence address for any other reason—e.g., a sex offender who lives in a house in a rural or tribal area that has no street address—the registry must include information that

identifies where the individual has his or her home or habitually lives.

- TEMPORARY LODGING INFORMATION (§ 114(a)(7)): Sex offenders who reoffend may commit new offenses at locations away from the places in which they have a permanent or long-term presence. Indeed, to the extent that information about sex offenders' places of residence is available to the authorities, but information is lacking concerning their temporary lodging elsewhere, the relative attractiveness to sex offenders of molesting children or committing other sexual crimes while traveling or visiting away from home increases. Hence, to achieve the objectives of sex offender registration, it is valuable to have information about other places in which sex offenders are staying, even if only temporarily. The authority under SORNA § 114(a)(7) is accordingly exercised to provide that jurisdictions must require sex offenders to provide information about any place in which the sex offender is staying when away from his residence for seven or more days, including identifying the place and the period of time the sex offender is staying there. The benefits of having this information include facilitating the successful investigation of crimes committed by sex offenders while away from their normal places of residence, employment, or school attendance, and decreasing the attractiveness to sex offenders of committing crimes in such circumstances.

- TRAVEL AND IMMIGRATION DOCUMENTS (§ 114(a)(7)): The authority under SORNA § 114(a)(7) is exercised to provide that registrants must be required to produce or provide information about their passports, if they have passports, and that registrants who are aliens must be required to produce or provide information about documents establishing their immigration status. The registry must include digitized copies of these documents, document type and number information for such documents, or links to another database or databases that contain such information. Having this type of information in the registries serves various purposes, including helping to locate and apprehend registrants who may attempt to leave the United States after committing new sex offenses or registration violations; facilitating the tracking and identification of registrants who leave the United States but later reenter while still required to register (*see* SORNA § 128); and crosschecking the accuracy and completeness of other types of information that registrants are required to provide—e.g., if immigration documents show that an alien registrant is in the United States on a student visa but the registrant fails to provide information concerning the school attended as required by SORNA § 114(a)(5).

- EMPLOYMENT INFORMATION (§ 114(a)(4), (a)(7)):

  - EMPLOYER NAME AND ADDRESS (§ 114(a)(4)): The registry must include "[t]he name and address of any place where the sex offender is an employee or will be an employee." SORNA § 111(12) explains that "employee" includes "an individual who is self-employed or works for any other entity, whether

compensated or not." As the definitional provisions indicate, the information required under this heading is not limited to information relating to compensated work or a regular occupation, but includes as well name and address information for any place where the registrant works as a volunteer or otherwise works without remuneration. The statute refers to places in which the sex offender "will be an employee" so as to cover, for example, cases in which a sex offender is initially being registered prior to release from imprisonment and has secured employment that will commence upon his release, and other circumstances in which a sex offender reports an initiation or change of employment to a jurisdiction before the new employment commences. It does not mean that jurisdictions must include in their registries merely speculative information sex offenders have provided about places they may work in the future.

- OTHER EMPLOYMENT INFORMATION (§ 114(a)(7)): A sex offender who is employed may not have a fixed place of employment—e.g., a long-haul trucker whose "workplace" is roads and highways throughout the country, a self-employed handyman who works out of his home and does repair or home-improvement work at other people's homes, or a person who frequents sites that contractors visit to obtain day labor and works for whatever contractor hires him on a given day. Knowing as far as possible where such a sex offender is in the course of employment serves the same public safety purposes as the corresponding information regarding a sex offender who is employed at a fixed location. The authority under section 114(a)(7) is accordingly exercised to require that information be obtained and included in the registry concerning the places where such a sex offender works with whatever definiteness is possible under the circumstances, such as information about normal travel routes or the general area(s) in which the sex offender works.

- PROFESSIONAL LICENSES (§ 114(a)(7)): The authority under section 114(a)(7) is exercised to require that information be obtained and included in the registry concerning all licensing of the registrant that authorizes the registrant to engage in an occupation or carry out a trade or business. Information of this type may be helpful in locating the registrant if he or she absconds, may provide a basis for notifying the responsible licensing authority if the registrant's conviction of a sex offense may affect his or her eligibility for the license, and may be useful in crosschecking the accuracy and completeness of other information the registrant is required to provide—e.g., if the registrant is licensed to engage in a certain occupation but does not provide name or place of employment information as required by section 114(a)(4) for such an occupation.

- SCHOOL INFORMATION (§ 114(a)(5)): The registry must include "[t]he name and address of any place where the sex offender is a student or will be a student." Section 111(11) defines "student" to mean "an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education." As the statutory definition indicates, the

requirement extends to all types of educational institutions. Hence, this information must be provided for private schools as well as public schools, including both parochial and non-parochial private schools, and regardless of whether the educational institution is attended for purposes of secular, religious, or cultural studies. The registration information requirement of section 114(a)(5) refers to the names and addresses of educational institutions where a sex offender has or will have a physical presence as a student. It does not require information about a sex offender's participating in courses only remotely through the mail or the Internet. (Internet identifiers and addresses used by a sex offender in such remote communications, however, must be included in the registration information as provided in the discussion of "INTERNET IDENTIFIERS AND ADDRESSES" earlier in this list.) As with residence and employment information, the statute refers to information about places the sex offender "will be" a student so as to cover, for example, circumstances in which a sex offender reports to a jurisdiction that he has enrolled in a school prior to his commencement of attendance at that school. It does not mean that jurisdictions must include in their registries merely speculative information sex offenders have provided about places they may attend school in the future.

- VEHICLE INFORMATION (§ 114(a)(6), (a)(7)): The registry must include "[t]he license plate number and a description of any vehicle owned or operated by the sex offender." This includes, in addition to vehicles registered to the sex offender, any vehicle that the sex offender regularly drives, either for personal use or in the course of employment. A sex offender may not regularly use a particular vehicle or vehicles in the course of employment, but may have access to a large number of vehicles for employment purposes, such as using many vehicles from an employer's fleet in a delivery job. In a case of this type, jurisdictions are not required to obtain information concerning all such vehicles to satisfy SORNA's minimum informational requirements, but jurisdictions are free to require such information if they are so inclined. The authority under § 114(a)(7) is exercised to define and expand the required information concerning vehicles in two additional respects. First, the term "vehicle" should be understood to include watercraft and aircraft, in addition to land vehicles, so descriptive information must be required for all such vehicles owned or operated by the sex offender. The information must include the license plate number if it is a type of vehicle for which license plates are issued, or if it has no license plate but does have some other type of registration number or identifier, then information concerning such a registration number or identifier must be included. To the extent that any of the information described above may be beyond the scope of section 114(a)(6), the authority under section 114(a)(7) is exercised to provide that it must be obtained and included in the registry. Second, the sex offender must be required to provide and the registry must include information concerning the place or places where the registrant's vehicle or vehicles are habitually parked, docked, or otherwise kept. Having information of this type may help to prevent flight, facilitate investigation, or effect an apprehension if the registrant is implicated in the commission of new offenses or violates registration requirements.

- DATE OF BIRTH (§ 114(a)(7)). The authority under § 114(a)(7) is exercised to require date of birth information for registrants, which must be included in the registry. Since

date of birth is regularly utilized as part of an individual's basic identification information, having this information in the registry is of obvious value in helping to identify, track, and locate registrants. The information the jurisdiction requires registrants to provide under this heading must include any date that the registrant uses as his or her purported date of birth—not just his or her actual date of birth—since registrants may, for example, provide false date of birth information in seeking employment that would provide access to children.

- PHYSICAL DESCRIPTION (§ 114(b)(1)): The registry must include "[a] physical description of the sex offender." This must include a description of the general physical appearance or characteristics of the sex offender, and any identifying marks, such as scars or tattoos.

- TEXT OF REGISTRATION OFFENSE (§ 114(b)(2)): The registry must include "[t]he text of the provision of law defining a criminal offense for which the sex offender is registered." As with other information in the registries, this does not mean that the registry must be a paper records system that includes a hard copy of the statute defining the registration offense. Rather, the registry must be an electronic database, and the relevant statutory provision must be included as electronic text. Alternatively, this requirement can be satisfied by including in the central registry database a link or citation to the statute defining the registration offense if: (i) doing so provides online access to the linked or cited provision, and (ii) the link or citation will continue to provide access to the offense as formulated at the time the registrant was convicted of it, even if the defining statute is subsequently amended.

- CRIMINAL HISTORY AND OTHER CRIMINAL JUSTICE INFORMATION (§ 114(b)(3)): The registry must include "[t]he criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status [i.e., whether the sex offender is in violation of the registration requirement and unlocatable]; and the existence of any outstanding arrest warrants for the sex offender." This requirement can be satisfied by including the specified types of information in the central registry database, or by including in that database links or identifying numbers that provide access to these types of information in criminal justice databases that contain them.

- CURRENT PHOTOGRAPH (§ 114(b)(4)): The registry information must include "[a] current photograph of the sex offender." As with other information in the registries, this does not mean that the registry must be a paper records system that includes physical photographs. Rather, the photographs of sex offenders must be included in digitized form in an electronic registry, so as to permit the electronic transmission of registration information that is necessary to implement other SORNA requirements. (For more about the taking of photographs and keeping them current, see the discussion of periodic in-person appearances in Part XI of these Guidelines.)

- FINGERPRINTS AND PALM PRINTS (§ 114(b)(5)): The registry information must

include "[a] set of fingerprints and palm prints of the sex offender." As with other registration information, this should be understood to refer to digitized fingerprint and palm print information rather than physical fingerprint cards and palm prints. The requirement can be satisfied by including such digitized fingerprint and palm print information in the central registry database, or by providing links or identifying numbers in the central registry database that provide access to fingerprint and palm print information in other databases for each registered sex offender.

- DNA (§ 114(b)(6)): The registry information must include "[a] DNA sample of the sex offender." This means that a DNA sample must be taken, or must have been taken, from the sex offender, for purposes of analysis and entry of the resulting DNA profile into the Combined DNA Index System (CODIS). The requirement is satisfied by including information in the central registry database that confirms collection of such a sample from the sex offender for purposes of analysis and entry of the DNA profile into CODIS or inclusion of the sex offender's DNA profile in CODIS.

- DRIVER'S LICENSE OR IDENTIFICATION CARD (§ 114(b)(7)): The registry information must include "[a] photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction." The requirement can be satisfied by including a digitized photocopy of the specified documents in the central registry database for each sex offender to whom such a document has been issued. Alternatively, it can be satisfied by including in the central registry database links or identifying numbers that provide access in other databases (such as a Department of Motor Vehicles database) to the information that would be shown by such a photocopy. As noted, this requirement pertains to sex offenders to whom drivers' licenses or identification cards have been issued. It does not mean that jurisdictions must issue drivers' licenses or identification cards to sex offenders to whom they would not otherwise issue such documents in order to create this type of information for inclusion in the registry.

## VII. DISCLOSURE AND SHARING OF INFORMATION

The SORNA requirements for disclosure and sharing of information about registrants appear primarily in section 118, which is concerned with sex offender websites, and section 121, which is concerned with community notification in a broader sense and with some more targeted types of disclosures. The two sections will be discussed separately.

### A. Sex Offender Websites

Section 118(a) of SORNA states a general rule that jurisdictions are to "make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry." This general requirement is subject to certain mandatory and discretionary exemptions, appearing in subsections (b) and (c) of section 118, which are discussed below. As the later discussion explains, after the mandatory and discretionary exemptions are taken into account, the affirmative website posting requirements are limited to specified information concerning sex offenders' names, addresses or locations, vehicle

establish a system for informing the relevant jurisdictions about persons entering the United States who are required to register under SORNA. Persons with foreign sex offense convictions provide an additional class who cannot be initially registered within the normal SORNA time frame. Since they are convicted and imprisoned in a foreign country, no domestic jurisdiction would normally be in a position to register them prior to their release from imprisonment (or near the time of sentencing in case of a non-incarcerative sentence).

The procedure for initial registration of such persons is logically the same as that for other analogous classes discussed above: A jurisdiction must require a person with a foreign conviction for which registration is required under SORNA to appear in person to register within three business days of entering the jurisdiction to reside or commencing employment or school attendance in the jurisdiction. If the sex offender has not previously been registered by another jurisdiction, the jurisdiction must carry out the initial registration procedure as provided in SORNA § 117(a) when the sex offender appears. The jurisdiction must immediately forward the registration information to any other jurisdiction in which the sex offender is required to register under SORNA. If a jurisdiction is notified, by federal authorities pursuant to SORNA § 128 or otherwise, that a sex offender is entering the United States and is expected to be locating in the jurisdiction, but the sex offender fails to appear and register as required, the jurisdiction must follow the procedures discussed in Part XIII of these Guidelines for cases involving possible violations of registration requirements.

## X. KEEPING THE REGISTRATION CURRENT

There are a number of provisions in SORNA that are designed to ensure that changes in registration information are promptly reported, and that the registration information is kept fully up to date in all jurisdictions in which the sex offender is required to register:

- Section 113(a) provides that a sex offender must keep the registration current in each jurisdiction in which the sex offender resides, is an employee, or is a student.

- Section 113(c) provides that a sex offender must, not later than three business days after each change of name, residence, employment, or student status, appear in person in at least one jurisdiction in which the sex offender is required to register and inform that jurisdiction of all changes in the information required for that sex offender in the sex offender registry. It further provides that that information must immediately be provided to all other jurisdictions in which the sex offender is required to register.

- Section 119(b) provides that updated information about a sex offender must be immediately transmitted by electronic forwarding to all relevant jurisdictions.

- Section 121(b)(3) provides that immediately after a sex offender registers or updates a registration, the information in the registry (other than any exempted from disclosure by the Attorney General) must be provided to each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

- Section 128 directs the Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, to establish a system for informing relevant jurisdictions about persons entering the United States who are required to register under SORNA.

Implementation of these provisions requires the definition of implementation measures that can be carried out by the individual jurisdictions, whose collective effect will be to realize these provisions' objectives. The remainder of this Part of these Guidelines details the required implementation measures.

A. Changes of Name, Residence, Employment, or School Attendance

The in-person appearance requirements of section 113(c) described above serve to ensure—in connection with the most substantial types of changes bearing on the identification or location of sex offenders (name, residence, employment, school attendance)—that there will be an opportunity to obtain all required registration information from sex offenders in an up to date form, including direct meetings for this purpose between the sex offenders and the personnel or agencies who will be responsible for their registration. The purposes served by in-person appearances under the SORNA standards are further explained in Part XI of these Guidelines, in relation to the periodic in-person appearance requirements of section 116.

The required implementation measures for the appearances required by section 113(c)—and other information updating/sharing and enforcement provisions under SORNA as they bear on such appearances—are as follows:

- RESIDENCE JURISDICTIONS: Each jurisdiction must require a sex offender who enters the jurisdiction to reside, or who is registered in the jurisdiction as a resident and changes his or her name or place of residence within the jurisdiction, to appear in person to register or update the registration within three business days. Also, each jurisdiction in which a sex offender is registered as a resident must:
  - require the sex offender to inform the jurisdiction if the sex offender intends to commence residence, employment, or school attendance in another jurisdiction; and
  - if so informed by the sex offender, notify that other jurisdiction by transmitting the sex offender's registration information (including the information concerning the sex offender's expected residence, employment, or school attendance in that jurisdiction) immediately by electronic forwarding to that jurisdiction.
- EMPLOYMENT JURISDICTIONS: Each jurisdiction must require a sex offender who commences employment in the jurisdiction, or changes employer or place of employment in the jurisdiction, to appear in person to register or update the registration within three business days.

- SCHOOL JURISDICTIONS: Each jurisdiction must require a sex offender who commences school attendance in the jurisdiction, or changes the school attended or place of school attendance in the jurisdiction, to appear in person to register or update the registration within three business days.

- INFORMATION SHARING: In all cases in which a sex offender makes an in-person appearance in a jurisdiction and registers or updates a registration as described above, the jurisdiction must immediately transmit by electronic forwarding the registration information for the sex offender (including any updated information concerning name, residence, employment, or school attendance provided in the appearance) to all other jurisdictions in which:

    - the sex offender is or will be required to register as a resident, employee, or student; or

    - the sex offender was required to register as a resident, employee, or student until the time of a change of residence, employment, or student status reported in the appearance, even if the sex offender may no longer be required to register in that jurisdiction in light of the change of residence, employment, or student status.

- FAILURE TO APPEAR: If a jurisdiction is notified that a sex offender is expected to commence residence, employment, or school attendance in the jurisdiction, but the sex offender fails to appear for registration as required, the jurisdiction must inform the jurisdiction that provided the notification that the sex offender failed to appear, and must follow the procedures for cases involving possible violations of registration requirements, as discussed in Part XIII of these Guidelines.

Defining changes in such matters as residence and employment may present special difficulties in relation to sex offenders who lack fixed residence or employment. For example, a homeless sex offender may sleep on a different park bench each night. Or the employer of a sex offender who does day labor, working for whatever contractor hires him on a given day, may change on a daily basis. In such cases, a jurisdiction is not required to treat all such changes as changes in residence or employment status that bring into play the requirement to conduct an in-person appearance within three business days for purposes of reporting the change. Rather, as discussed in Part VI of these Guidelines, the information in the registry describing the places of residence or employment for sex offenders who lack fixed residence or employment may be in more general terms, and jurisdictions may limit their reporting requirements to changes that would entail some modification of the registry information relating to these matters.

In one respect, the foregoing procedures for updating registration information through in-person appearances do not fully ensure that registrations will be kept current with respect to residence, employment, and school attendance information, because they relate to situations in which future information about these matters is available. But that is not always the case. For example, a transient sex offender may be leaving the jurisdiction in which he is registered as a resident, but may be unable to say where he will be living thereafter. Or a sex offender registered

as an employee or student in a jurisdiction may quit his job or leave school, but may have no prospect for subsequent employment or education at the time. If such changes were not reported, the affected jurisdictions' registries would not be kept current, but rather would contain outdated information showing sex offenders to be residing, employed, or attending school in places where they no longer are. Accordingly, a jurisdiction in which a sex offender is registered as a resident, employee, or student must also require the sex offender to inform the jurisdiction if the sex offender is terminating residence, employment, or school attendance in the jurisdiction, even if there is no ascertainable or expected future place of residence, employment, or school attendance for the sex offender.

B. Changes in Other Registration Information

By incorporating the foregoing procedures into their registration programs, jurisdictions can implement the SORNA requirements for keeping the registration current in relation to name, residence, employment, and school attendance information. The registration information that sex offenders are required to provide under SORNA § 114, however, as discussed in Part VI of these Guidelines, includes as well information about vehicles owned or operated by sex offenders, temporary lodging information—i.e., information about any place in which a sex offender is staying when away from his residence for seven or more days—and information about designations that sex offenders use for self-identification or routing purposes in Internet communications or postings or telephonic communications. If changes occur in these types of information, the changes may eventually be reported as part of the periodic verification appearances required by section 116 of SORNA, as discussed in Part XI of these Guidelines. But the registration information may become in some respects seriously out of date if the verification appearances are relied on exclusively for this purpose.

For example, if a sex offender is on a yearly appearance schedule, the sex offender's motor vehicle information may be a year out of date by the time the sex offender reports at the next appearance that he has acquired a new vehicle. Temporary lodging at places away from a sex offender's residence might not be reported until long after the time when the sex offender was at the temporary location. Likewise, given the ease with which Internet addresses and identifiers and telephone numbers are added, dropped, or changed, the value of requiring information about them from registrants could be seriously undermined if they were only required to report changes periodically in the context of general verification meetings.

Hence, an additional implementation measure is necessary to keep registrations current with respect to these informational items:

- Each jurisdiction in which a sex offender is registered as a resident must require the sex offender to report immediately changes in vehicle information, temporary lodging information, and changes in designations used for self-identification or routing in Internet communications or postings or telephonic communications, and must immediately transmit such changes in the registration information by electronic forwarding to all other jurisdictions in which the sex offender is required to register.

- In addition, with respect to temporary lodging information, the residence jurisdiction must immediately transmit the information by electronic forwarding to the jurisdiction in which the temporary lodging by the sex offender takes place (if different from the residence jurisdiction), even if that is not a jurisdiction in which the sex offender is required to register.

C. International Travel

A sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States. But effective tracking of such sex offenders remains a matter of concern to the United States and its domestic jurisdictions, and some measures relating to them are necessary for implementation of SORNA.

Relevant provisions include SORNA § 128, which directs the Attorney General to establish a system for informing domestic jurisdictions about persons entering the United States who are required to register under SORNA, and 18 U.S.C. 2250(a)(2)(B), which makes it a federal crime for a sex offender to travel in foreign commerce and knowingly fail to register or update a registration as required by SORNA. To carry out its responsibilities under these provisions, the Department of Justice needs to know if sex offenders registered in U.S. jurisdictions are leaving the country, since such offenders will be required to resume registration if they later return to the United States to live, work, or attend school while still within their registration periods. Also, both for sex offenders who are convicted in the United States and then go abroad, and for sex offenders who are initially convicted in other countries, identifying such sex offenders when they enter or reenter the United States will require cooperative efforts between the Department of Justice (including the United States Marshals Service) and agencies of foreign countries. As a necessary part of such cooperative activities, foreign authorities may expect U.S. authorities to inform them about sex offenders coming to their jurisdictions from the United States, in return for their advising the United States about sex offenders coming to the United States from their jurisdictions. For this reason as well, federal authorities in the United States will need information about sex offenders leaving domestic jurisdictions to go abroad in order to effectively carry out the requirements of SORNA § 128 and enforce 18 U.S.C. 2250(a)(2)(B).

International travel also implicates the requirement of SORNA § 113(a) that sex offenders keep the registration current in all jurisdictions in which they reside, work, or attend school. If a sex offender simply leaves the country and does not inform the jurisdiction or jurisdictions in which he has been registered, then the requirement to keep the registration current will not have been fulfilled. Rather, the registry information in the domestic jurisdictions will show that the sex offender is residing in the jurisdiction (or present as an employee or student) when that is no longer the case.

In addition, a sex offender who goes abroad may remain subject in some respects to U.S. jurisdiction. For example, a sex offender may be leaving to live on an overseas U.S. military base, as a service member, dependent, or employee, or to work as or for a U.S. military

contractor in another country. In such cases, notification about the individual's status as a sex offender and intended activities abroad is of interest to federal authorities, because the presence of sex offenders implicates the same public safety concerns in relation to communities abroad for which the United States has responsibility (such as U.S. military base communities in foreign countries) as it does in relation to communities within the United States.

The following requirements accordingly apply in relation to sex offenders who leave the United States:

- Each jurisdiction in which a sex offender is registered as a resident must require the sex offender to inform the jurisdiction if the sex offender intends to commence residence, employment, or school attendance outside of the United States.

- If so informed by the sex offender, the jurisdiction must: (i) notify all other jurisdictions in which the sex offender is required to register through immediate electronic forwarding of the sex offender's registration information (including the information concerning the sex offender's expected residence, employment, or school attendance outside of the United States), and (ii) notify the United States Marshals Service and update the sex offender's registration information in the national databases pursuant to the procedures under SORNA § 121(b)(1).

SORNA does not require that all notifications to jurisdictions by sex offenders concerning changes in their registration information be made through in-person appearances. Rather, the in-person appearance requirement of SORNA § 113(c) relates to changes in name, and to changes in residence, employment, or school attendance between jurisdictions or within jurisdictions, which jurisdictions must require sex offenders to report through in-person appearances under the circumstances expressly identified in Subpart A of this Part. The means by which sex offenders are required to report other changes in registration information discussed in this Part are matters that jurisdictions may determine in their discretion.

## XI. VERIFICATION/APPEARANCE REQUIREMENTS

Section 116 of SORNA states that "[a] sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than": (i) each year for a tier I sex offender, (ii) every six months for a tier II sex offender, and (iii) every three months for a tier III sex offender. Jurisdictions accordingly must require such periodic appearances by sex offenders who reside or are employees or students in the jurisdiction, since sex offenders must register in the jurisdictions of their residence, employment, and school attendance, as explained in Part VIII of these Guidelines. As with other SORNA requirements, jurisdictions may require in-person appearances by sex offenders with greater frequency than the minimum required by section 116.

The in-person appearance requirements of section 116 further the purposes of sex offender registration and notification in a number of ways. A sex offender's physical appearance, like that of any other person, will change in the course of time. The in-person appearance

**No. C 12-5713 TEH**

# EXHIBIT B

**Interveners' Request for Judicial Notice in Support of Opposition to Motion for Preliminary Injunction; Declaration of Brian Metzker**

# Department of Justice

## Office of Justice Programs

FOR IMMEDIATE RELEASE
Thursday, SEPTEMBER 27, 2012
WWW.OJP.GOV

Office of Justice Programs
Contact: Kara McCarthy
202-307-1241

**PENNSYLVANIA, U.S. VIRGIN ISLANDS LATEST OF 55 JURISDICTIONS TO SUBSTANTIALLY IMPLEMENT PROVISIONS OF THE ADAM WALSH ACT**

WASHINGTON – The Justice Department's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) recently announced that Pennsylvania and the U.S. Virgin Islands are the latest jurisdictions to implement the Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006.

Since the passage of SORNA, which establishes a comprehensive national system for the registration of sex offenders, a total of 16 states, three territories and 36 tribes have met the requirements for implementation. The Act is named in memory of Adam Walsh, a 6-year-old boy, who was abducted from a mall in Hollywood, Fla. on July 27, 1981.

In addition to Pennsylvania and the U.S. Virgin Islands, the states of Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, South Dakota, Tennessee, and Wyoming, and the United States territories of Guam and the Commonwealth of the Northern Mariana Islands, have also substantially implemented SORNA.

"We are encouraged by the efforts of so many jurisdictions to implement SORNA's requirements, and we commend those that have substantially implemented the Act," said Linda Baldwin, Director of the SMART Office. "We are also encouraged that the vast majority of jurisdictions are committed to exchanging information in a manner that will lead to improved monitoring and tracking of sex offenders across the United States and abroad."

States and territories had until July 27, 2011, to substantially implement SORNA. Beginning in 2012, those that did not were subject to a 10-percent reduction in their Edward Byrne Memorial Justice Assistance Grant Byrne (JAG) award. The penalty will continue to be applied on an annual basis until a state or territory substantially implements SORNA.

"Fortunately, withheld JAG funding can be reallocated back to states and territories if these funds are applied toward SORNA implementation activities," added Director Baldwin. "In 2012, all but five jurisdictions (Arizona, Arkansas, California, Nebraska, and Texas) requested reallocation of their SORNA penalty to continue SORNA implementation efforts and we are pleased to announce that we have granted all of the reallocation requests received."

Thirty-six federally recognized tribes have also substantially implemented SORNA's requirements. The inclusion of tribal lands into the existing national system of sex offender registries was designed to eliminate safe havens where convicted sex offenders could avoid monitoring and registration. The tribes are: Bay Mills Indian Community, Bois Forte Band of

Chippewa, Cherokee Nation, Chitimacha Tribe of Louisiana, Comanche Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of Warm Springs, Confederated Tribes and Bands of the Yakama Nation, Fort McDowell Yavapai Tribal Council, Gila River Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Iowa Tribe of Oklahoma, Jicarilla Apache Nation, Kalispel Tribe of Indians, Kaw Nation, Keweenaw Bay Indian Community, Kickapoo Tribe of Oklahoma, Kootenai Tribe of Idaho, Little Traverse Bay Bands of Odawa Indians, Miccosukee Tribe of Indians of Florida, Mississippi Band of Choctaw Indians, Nottawaseppi Huron Band of the Potawatomi, Ohkay Owingeh, Omaha Tribe of Nebraska, Osage Nation, Pascua Yaqui Tribe, Poarch Band of Creek Indians, Prairie Band Potawatomi Nation, Pueblo of Acoma, Pueblo of Isleta, Sac & Fox of the Mississippi in Iowa (Meskwaki), Seminole Nation of Oklahoma, Tohono O'odham Nation, Upper Skagit Indian Tribe, Washoe Tribe of Nevada and California, and Winnebago Tribe of Nebraska.

Many more tribal systems are under review. Tribes that did not implement SORNA by the deadline and can show that they will be able to do so "within a reasonable amount of time," as determined by the Attorney General, were able to submit a request to the SMART Office for additional time to implement the Act.

SORNA requires jurisdictions to share information about sex offenders who are relocating between jurisdictions or are required to register in more than one jurisdiction. The Justice Department has developed an internet-based community easily accessible to registration officials that facilitates exchange of information about registered sex offenders between jurisdictions.

###

The Office of Justice Programs (OJP), headed by Acting Assistant Attorney General Mary Lou Leary, provides federal leadership in developing the nation's capacity to prevent and control crime, administer justice, and assist victims. OJP has six components: the Bureau of Justice Assistance; the Bureau of Justice Statistics; the National Institute of Justice; the Office of Juvenile Justice and Delinquency Prevention; the Office for Victims of Crime; and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. More information about OJP can be found at http://www.ojp.gov.

**No. C 12-5713 TEH**

# EXHIBIT C

**Interveners' Request for Judicial Notice in Support of Opposition to Motion for Preliminary Injunction; Declaration of Brian Metzker**

**DEBRA BOWEN** | SECRETARY OF STATE
STATE OF CALIFORNIA | ELECTIONS
1500 11th Street, 5th Floor | Sacramento, CA 95814 | Tel (916) 657-2166 | Fax (916) 653-3214 | www.sos.ca.gov

June 7, 2012

Daphne Phung
c/o James C. Harrison
and Kari Krogseng
Remcho, Johansen & Purcell, LLP
201 Dolores Avenue
San Leandro, CA 94577

Dear Ms. Phung:

Pursuant to Section 9033 of the Elections Code, the Secretary of State has certified that the certificates received from County Clerks or Registrars of Voters by the Secretary of State established that HUMAN TRAFFICKING. PENALTIES. SEX OFFENDER REGISTRATION. INITIATIVE STATUTE. (#1532) has been signed by the requisite number of qualified electors needed to declare the petition sufficient. The HUMAN TRAFFICKING. PENALTIES. SEX OFFENDER REGISTRATION. INITIATIVE STATUTE. (#1532) is, therefore, qualified for the next statewide general election.

Sincerely,

Katherine Montgomery,
Initiative Program Manager

Enclosure

RECEIVED
JUN 11 2012
REMCHO, JOHANSEN
& PURCELL, LLP

# State of California

## SECRETARY OF STATE

May 10, 2012

TO: ALL COUNTY CLERKS/REGISTRARS OF VOTERS (CCROV 12150)

Pursuant to Section 9033 of the Elections Code, I hereby certify that on May 10, 2012, the certificates received from the County Clerks or Registrars of Voters by the Secretary of State established that the HUMAN TRAFFICKING. PENALTIES. SEX OFFENDER REGISTRATION. INITIATIVE STATUTE. (#1532), has been signed by the requisite number of qualified electors needed to declare the petition sufficient. HUMAN TRAFFICKING. PENALTIES. SEX OFFENDER REGISTRATION. INITIATIVE STATUTE. (#1532) is, therefore, qualified for the next statewide general election.

**HUMAN TRAFFICKING. PENALTIES. SEX OFFENDER REGISTRATION. INITIATIVE STATUTE.** Increases criminal penalties for human trafficking, including prison sentences up to 15-years-to-life and fines up to $1,500,000. Fines collected to be used for victim services and law enforcement. Requires person convicted of trafficking to register as sex offender. Requires sex offenders to provide information regarding Internet access and identities they use in online activities. Prohibits evidence that victim engaged in sexual conduct from being used against victim in court proceedings. Requires human trafficking training for police officers. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: **Potential one-time local government costs of up to a few million dollars on a statewide basis, and lesser additional costs incurred each year, due to the new mandatory training requirements for certain law enforcement officers. Minor increase to state and local governments on the costs of incarcerating and supervising human trafficking offenders. Unknown amount of additional revenue from new criminal fees, likely not to exceed the low millions of dollars annually, which would fund services for human trafficking victims.** (11-0059)

IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California this 10TH day of May, 2012.

Debra Bowen

DEBRA BOWEN
Secretary of State

1532. Human Trafficking. Penalties. Sex Offender Registration. Initiative Statute.

| COUNTY | PETITION FILED W/COUNTY | SOS REC'D RAW | SOS REC'D RANDOM | | RAW COUNT | RANDOM SAMPLE/ FULL CHECK | VALID SIGS. | INVALID | DUP. | VALID OR PROJ. VALID | % |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. ALAMEDA | 03/29/12 | 04/17/12 | 05/03/12 | | 46,030 | 1,361 | 1,070 | 311 | 2 | 33,509 | 72.8% |
| 2. ALPINE | 03/30/12 | 04/06/12 | 04/06/12 | Random Notice: | 3 | 3 | 2 | 1 | 0 | 2 | 66.7% |
| 3. AMADOR | 04/02/12 | 04/06/12 | 04/16/12 | 04/10/12 | 561 | 500 | 410 | 90 | 0 | 460 | 82.0% |
| 4. BUTTE | 04/02/12 | 04/11/12 | 04/11/12 | Random Due: | 5,878 | 500 | 378 | 122 | 0 | 4,444 | 75.6% |
| 5. CALAVERAS | 03/30/12 | 04/05/12 | 04/23/12 | 05/22/12 | 1,109 | 500 | 399 | 101 | 2 | 880 | 79.3% |
| 6. COLUSA | 04/02/12 | 04/04/12 | 04/20/12 | | 147 | 147 | 108 | 39 | 0 | 108 | 73.5% |
| 7. CONTRA COSTA | 03/29/12 | 04/05/12 | 04/30/12 | | 23,902 | 717 | 571 | 146 | 0 | 19,035 | 79.6% |
| 8. DEL NORTE | 04/03/12 | 04/12/12 | 04/19/12 | | 11 | 11 | 10 | 1 | 0 | 10 | 90.9% |
| 9. EL DORADO | 03/29/12 | 04/04/12 | 04/17/12 | | 3,640 | 500 | 447 | 53 | 1 | 3,208 | 88.1% |
| 10. FRESNO | 03/29/12 | 04/06/12 | 04/28/12 | | 26,627 | 1,328 | 1,057 | 271 | 1 | 20,811 | 78.2% |
| 11. GLENN | 04/03/12 | 04/06/12 | | | 148 | | | | | 0 | 0.0% |
| 12. HUMBOLDT | 04/02/12 | 04/12/12 | | | 973 | | | | | 0 | 0.0% |
| 13. IMPERIAL | 03/29/12 | 04/05/12 | 04/23/12 | | 199 | 199 | 96 | 103 | 0 | 96 | 48.2% |
| 14. INYO | 03/30/12 | 04/03/12 | 04/03/12 | | 30 | 30 | 23 | 7 | 0 | 23 | 76.7% |
| 15. KERN | 03/30/12 | 04/06/12 | 04/16/12 | | 26,437 | 793 | 583 | 210 | 0 | 19,436 | 73.5% |
| 16. KINGS | 03/30/12 | 04/06/12 | 04/06/12 | | 2,534 | 500 | 343 | 157 | 0 | 1,738 | 68.6% |
| 17. LAKE | 03/30/12 | 04/05/12 | 04/16/12 | | 907 | 500 | 325 | 175 | 0 | 590 | 65.0% |
| 18. LASSEN | 03/30/12 | 04/05/12 | 04/20/12 | | 1,502 | 500 | 391 | 109 | 0 | 1,175 | 78.2% |
| 19. LOS ANGELES | 03/28/12 | 04/09/12 | 05/09/12 | | 230,410 | 6,912 | 5,240 | 1,672 | 3 | 171,441 | 74.4% |
| 20. MADERA | 03/29/12 | 03/30/12 | 04/16/12 | | 5,938 | 500 | 394 | 106 | 0 | 4,679 | 78.8% |
| 21. MARIN | 03/30/12 | 04/02/12 | 04/13/12 | | 5,780 | 500 | 429 | 71 | 2 | 4,715 | 81.6% |
| 22. MARIPOSA | 03/30/12 | 04/03/12 | 05/01/12 | | 202 | 202 | 151 | 51 | 0 | 151 | 74.8% |
| 23. MENDOCINO | 04/02/12 | 04/09/12 | 04/26/12 | | 1,260 | 500 | 442 | 58 | 0 | 1,114 | 88.4% |
| 24. MERCED | 03/29/12 | 04/02/12 | 04/11/12 | | 1,548 | 500 | 376 | 124 | 0 | 1,164 | 75.2% |
| 25. MODOC | 03/30/12 | 04/09/12 | 04/09/12 | | 50 | 50 | 38 | 12 | 0 | 38 | 76.0% |
| 26. MONO | 03/30/12 | 04/09/12 | 04/09/12 | | 10 | 10 | 9 | 1 | 0 | 9 | 90.0% |
| 27. MONTEREY | 03/29/12 | 04/03/12 | 05/08/12 | | 5,700 | 500 | 405 | 95 | 0 | 4,617 | 81.0% |
| 28. NAPA | 03/30/12 | 04/02/12 | 04/13/12 | | 3,185 | 500 | 400 | 100 | 1 | 2,514 | 78.9% |
| 29. NEVADA | 04/02/12 | 04/09/12 | 04/30/12 | | 2,088 | 500 | 424 | 76 | 0 | 1,771 | 84.8% |
| 30. ORANGE | 03/29/12 | 04/10/12 | 05/08/12 | | 65,895 | 1,977 | 1,612 | 365 | 1 | 52,652 | 79.9% |
| 31. PLACER | 03/30/12 | 04/02/12 | 04/09/12 | | 5,041 | 500 | 403 | 97 | 0 | 4,063 | 80.6% |
| 32. PLUMAS | 03/31/12 | 04/10/12 | 04/10/12 | | 203 | 203 | 168 | 35 | 0 | 168 | 82.8% |
| 33. RIVERSIDE | 03/29/12 | 04/04/12 | 05/03/12 | | 47,631 | 1,429 | 1,163 | 268 | 1 | 37,887 | 79.1% |
| 34. SACRAMENTO | 03/29/12 | 04/10/12 | 04/23/12 | | 36,252 | 1,088 | 862 | 226 | 1 | 27,645 | 76.3% |
| 35. SAN BENITO | 03/30/12 | 04/04/12 | | | 648 | | | | | 0 | 0.0% |
| 36. SAN BERNARDINO | 03/28/12 | 04/03/12 | 04/26/12 | | 66,039 | 1,981 | 1,594 | 387 | 0 | 53,138 | 80.5% |
| 37. SAN DIEGO | 03/29/12 | 04/06/12 | 04/18/12 | | 77,822 | 2,335 | 1,940 | 395 | 3 | 61,425 | 78.9% |
| 38. SAN FRANCISCO | 03/29/12 | 04/02/12 | 04/13/12 | | 17,007 | 510 | 401 | 109 | 1 | 12,293 | 72.3% |
| 39. SAN JOAQUIN | 03/29/12 | 04/10/12 | | | 14,425 | | | | | 0 | 0.0% |
| 40. SAN LUIS OBISPO | 03/29/12 | 04/03/12 | | | 9,059 | | | | | 0 | 0.0% |
| 41. SAN MATEO | 03/29/12 | 04/05/12 | 05/01/12 | | 7,433 | 500 | 394 | 106 | 0 | 5,857 | 78.8% |
| 42. SANTA BARBARA | 03/29/12 | 04/04/12 | 04/23/12 | | 5,730 | 500 | 380 | 120 | 0 | 4,355 | 76.0% |
| 43. SANTA CLARA | 03/29/12 | 04/04/12 | 04/18/12 | | 32,358 | 971 | 803 | 168 | 0 | 26,759 | 82.7% |
| 44. SANTA CRUZ | 04/03/12 | 04/09/12 | 04/19/12 | | 5,892 | 500 | 370 | 130 | 0 | 4,360 | 74.0% |
| 45. SHASTA | 03/30/12 | 04/04/12 | 04/18/12 | | 4,152 | 500 | 392 | 108 | 0 | 3,255 | 78.4% |
| 46. SIERRA | 04/02/12 | 04/06/12 | 04/06/12 | | 15 | 15 | 15 | 0 | 0 | 15 | 100.0% |
| 47. SISKIYOU | 04/02/12 | 04/04/12 | 05/01/12 | | 809 | 500 | 441 | 59 | 0 | 714 | 88.2% |
| 48. SOLANO | 03/30/12 | 04/05/12 | | | 9,807 | | | | | 0 | 0.0% |
| 49. SONOMA | 03/30/12 | 04/03/12 | 04/09/12 | | 18,383 | 551 | 430 | 121 | 0 | 14,346 | 78.0% |
| 50. STANISLAUS | 03/29/12 | 04/04/12 | 05/09/12 | | 15,134 | 500 | 412 | 88 | 0 | 12,470 | 82.4% |
| 51. SUTTER | 04/02/12 | 04/06/12 | 04/20/12 | | 1,377 | 500 | 390 | 110 | 1 | 1,069 | 77.6% |
| 52. TEHAMA | 03/30/12 | 04/03/12 | 05/02/12 | | 736 | 500 | 393 | 107 | 1 | 578 | 78.5% |
| 53. TRINITY | | | | | | | | | | 0 | 0.0% |
| 54. TULARE | 03/29/12 | 04/03/12 | 04/16/12 | | 8,790 | 500 | 365 | 135 | 0 | 6,417 | 73.0% |
| 55. TUOLUMNE | 03/30/12 | 04/03/12 | | RANGE: | 3,161 | | | | | 0 | 0.0% |
| 56. VENTURA | 03/30/12 | 04/05/12 | 04/27/12 | 110% = 555,236 | 20,616 | 618 | 479 | 139 | 0 | 15,979 | 77.5% |
| 57. YOLO | 03/29/12 | 03/29/12 | | 100% = 504,760 | 2,426 | | | | | 0 | 0.0% |
| 58. YUBA | 04/02/12 | 04/02/12 | 04/04/12 | 95% = 479,522 | 977 | 500 | 412 | 88 | 0 | 805 | 82.4% |
| TOTAL | | | | | 874,627 | 36,961 | 28,340 | 7,621 | 21 | 677,193 | |

For questions regarding this spreadsheet please contact:
Secretary of State| Elections Division (916) 657-2166
5/10/2012 10:48 AM

**No. C 12-5713 TEH**

# EXHIBIT D

**Interveners' Request for Judicial Notice in Support of Opposition to Motion for Preliminary Injunction; Declaration of Brian Metzker**

## Semi-Official Election Results

# State Ballot Measures - Statewide Results

100.0% ( 24,491 of 24,491 ) precincts partially reporting as of November 19, 2012, 5:29 p.m. (http://vote.sos.ca.gov/frequently-asked-questions/#faq-reporting)

Visit the **County Reporting Status** (http://vote.sos.ca.gov/returns/status/) page to determine when a county has submitted its latest report.

**County Results** (http://vote.sos.ca.gov#county-list)

**Other Links** (http://vote.sos.ca.gov#other-links)

**Statewide Map** (http://vote.sos.ca.gov/returns/maps/ballot-measures/)

| | | Proposition Title | Yes Votes | % | No Votes | % |
|---|---|---|---|---|---|---|
| Yes | 30 | Temporary Taxes to Fund Education | 6,329,376 | 54.7% | 5,237,633 | 45.3% |
| No | 31 | State Budget, State and Local Government | 4,234,204 | 39.4% | 6,523,298 | 60.6% |
| No | 32 | Political Contributions by Payroll Deduction | 4,965,162 | 43.7% | 6,399,531 | 56.3% |
| No | 33 | Auto Insurance Prices Based on Driver History | 5,053,222 | 45.1% | 6,140,301 | 54.9% |
| No | 34 | Death Penalty | 5,416,256 | 47.7% | 5,941,612 | 52.3% |
| Yes | 35 | Human Trafficking | 9,201,747 | 81.3% | 2,114,434 | 18.7% |
| Yes | 36 | Three Strikes Law | 7,803,974 | 69.0% | 3,504,226 | 31.0% |
| No | 37 | Genetically Engineered Foods Labeling | 5,456,051 | 47.7% | 5,990,280 | 52.3% |
| No | 38 | Tax for Education. Early Childhood Programs | 3,146,248 | 27.9% | 8,127,529 | 72.1% |
| Yes | 39 | Business Tax for Energy Funding | 6,713,565 | 60.7% | 4,342,738 | 39.3% |
| Yes | 40 | Redistricting State Senate | 7,689,493 | 72.3% | 2,945,477 | 27.7% |

## Related Links

**Quick Reference Guide** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/quick-reference-guide/)

**Proposition 30** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/30/)

**Proposition 31** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/31/)

**Proposition 32** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/32/)

**Proposition 33** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/33/)

**Proposition 34** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/34/)

**Proposition 35** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/35/)

**Proposition 36** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/36/)

**Proposition 37** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/37/)

**Proposition 38** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/38/)

**Proposition 39** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/39/)

**Proposition 40** (http://vote.sos.ca.gov//voterguide.sos.ca.gov/propositions/40/)

## County Results

**Statewide** (http://vote.sos.ca.gov/returns/ballot-measures/)

**Alameda** (http://vote.sos.ca.gov/returns/ballot-measures/county/alameda/)

**Alpine** (http://vote.sos.ca.gov/returns/ballot-measures/county/alpine/)

**Amador** (http://vote.sos.ca.gov/returns/ballot-measures/county/amador/)

**Butte** (http://vote.sos.ca.gov/returns/ballot-measures/county/butte/)

**Calaveras** (http://vote.sos.ca.gov/returns/ballot-measures/county/calaveras/)

**Colusa** (http://vote.sos.ca.gov/returns/ballot-measures/county/colusa/)

**Contra Costa** (http://vote.sos.ca.gov/returns/ballot-measures/county/contra-costa/)

**Del Norte** (http://vote.sos.ca.gov/returns/ballot-measures/county/del-norte/)

**El Dorado** (http://vote.sos.ca.gov/returns/ballot-measures/county/el-dorado/)

**Fresno** (http://vote.sos.ca.gov/returns/ballot-measures/county/fresno/)

**Glenn** (http://vote.sos.ca.gov/returns/ballot-measures/county/glenn/)

**Humboldt** (http://vote.sos.ca.gov/returns/ballot-measures/county/humboldt/)

**Imperial** (http://vote.sos.ca.gov/returns/ballot-measures/county/imperial/)

**Inyo** (http://vote.sos.ca.gov/returns/ballot-measures/county/inyo/)

**Kern** (http://vote.sos.ca.gov/returns/ballot-measures/county/kern/)

**Kings** (http://vote.sos.ca.gov/returns/ballot-measures/county/kings/)

**Lake** (http://vote.sos.ca.gov/returns/ballot-measures/county/lake/)

**Lassen** (http://vote.sos.ca.gov/returns/ballot-measures/county/lassen/)

**Los Angeles** (http://vote.sos.ca.gov/returns/ballot-measures/county/los-angeles/)

**Madera** (http://vote.sos.ca.gov/returns/ballot-measures/county/madera/)

**Marin** (http://vote.sos.ca.gov/returns/ballot-measures/county/marin/)

**Mariposa** (http://vote.sos.ca.gov/returns/ballot-measures/county/mariposa/)

**Mendocino** (http://vote.sos.ca.gov/returns/ballot-measures/county/mendocino/)

**Merced** (http://vote.sos.ca.gov/returns/ballot-measures/county/merced/)

**Modoc** (http://vote.sos.ca.gov/returns/ballot-measures/county/modoc/)

**Mono** (http://vote.sos.ca.gov/returns/ballot-measures/county/mono/)

**Monterey** (http://vote.sos.ca.gov/returns/ballot-measures/county/monterey/)

**Napa** (http://vote.sos.ca.gov/returns/ballot-measures/county/napa/)

**Nevada** (http://vote.sos.ca.gov/returns/ballot-measures/county/nevada/)

**Orange** (http://vote.sos.ca.gov/returns/ballot-measures/county/orange/)

**Placer** (http://vote.sos.ca.gov/returns/ballot-measures/county/placer/)

**Plumas** (http://vote.sos.ca.gov/returns/ballot-measures/county/plumas/)

**Riverside** (http://vote.sos.ca.gov/returns/ballot-measures/county/riverside/)

**Sacramento** (http://vote.sos.ca.gov/returns/ballot-measures/county/sacramento/)

**San Benito** (http://vote.sos.ca.gov/returns/ballot-measures/county/san-benito/)

**San Bernardino** (http://vote.sos.ca.gov/returns/ballot-measures/county/san-bernardino/)

**San Diego** (http://vote.sos.ca.gov/returns/ballot-measures/county/san-diego/)

**San Francisco** (http://vote.sos.ca.gov/returns/ballot-measures/county/san-francisco/)

**San Joaquin** (http://vote.sos.ca.gov/returns/ballot-measures/county/san-joaquin/)

**San Luis Obispo** (http://vote.sos.ca.gov/returns/ballot-measures/county/san-luis-obispo/)

**San Mateo** (http://vote.sos.ca.gov/returns/ballot-measures/county/san-mateo/)

**Santa Barbara** (http://vote.sos.ca.gov/returns/ballot-measures/county/santa-barbara/)

**Santa Clara** (http://vote.sos.ca.gov/returns/ballot-measures/county/santa-clara/)

**Santa Cruz** (http://vote.sos.ca.gov/returns/ballot-measures/county/santa-cruz/)

**Shasta** (http://vote.sos.ca.gov/returns/ballot-measures/county/shasta/)

**Sierra** (http://vote.sos.ca.gov/returns/ballot-measures/county/sierra/)

**Siskiyou** (http://vote.sos.ca.gov/returns/ballot-measures/county/siskiyou/)

**Solano** (http://vote.sos.ca.gov/returns/ballot-measures/county/solano/)

**Sonoma** (http://vote.sos.ca.gov/returns/ballot-measures/county/sonoma/)

**Stanislaus** (http://vote.sos.ca.gov/returns/ballot-measures/county/stanislaus/)

**Sutter** (http://vote.sos.ca.gov/returns/ballot-measures/county/sutter/)

**Tehama** (http://vote.sos.ca.gov/returns/ballot-measures/county/tehama/)

**Trinity** (http://vote.sos.ca.gov/returns/ballot-measures/county/trinity/)

**Tulare** (http://vote.sos.ca.gov/returns/ballot-measures/county/tulare/)

**Tuolumne** (http://vote.sos.ca.gov/returns/ballot-measures/county/tuolumne/)

**Ventura** (http://vote.sos.ca.gov/returns/ballot-measures/county/ventura/)

**Yolo** (http://vote.sos.ca.gov/returns/ballot-measures/county/yolo/)

**Yuba** (http://vote.sos.ca.gov/returns/ballot-measures/county/yuba/)

## Other Links

**Statewide Contests** (http://vote.sos.ca.gov/contests/statewide/)

**Legislative and Congressional Contests** (http://vote.sos.ca.gov/contests/district/)

**State Ballot Measures** (http://vote.sos.ca.gov/returns/ballot-measures/)

**Maps** (http://vote.sos.ca.gov/maps/)

**Close Contests** (http://vote.sos.ca.gov/returns/close-contests/)

**County Reporting Status** (http://vote.sos.ca.gov/returns/status/)

**Unprocessed Ballots Status** (http://vote.sos.ca.gov/unprocessed-ballots-status/)

**Check Status of Your Ballot** (http://www.sos.ca.gov/elections/ballot-status/)

**Certified List of Candidates** (PDF 88KB) (http://www.sos.ca.gov/elections/2012-elections/nov-general/pdf/certified-list-candidates-abbreviated.pdf)

**No. C 12-5713 TEH**

# EXHIBIT E

**Interveners' Request for Judicial Notice in Support of Opposition to Motion for Preliminary Injunction; Declaration of Brian Metzker**

PROPOSITION
# 35
# HUMAN TRAFFICKING. PENALTIES. INITIATIVE STATUTE.

OFFICIAL TITLE AND SUMMARY — PREPARED BY THE ATTORNEY GENERAL

## HUMAN TRAFFICKING. PENALTIES. INITIATIVE STATUTE.

- Increases criminal penalties for human trafficking, including prison sentences up to 15-years-to-life and fines up to $1,500,000.
- Fines collected to be used for victim services and law enforcement.
- Requires person convicted of trafficking to register as sex offender.
- Requires sex offenders to provide information regarding Internet access and identities they use in online activities.
- Prohibits evidence that victim engaged in sexual conduct from being used against victim in court proceedings.
- Requires human trafficking training for police officers.

### Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Increased costs, not likely to exceed a couple million dollars annually, to state and local governments for criminal justice activities related to the prosecution and incarceration of human trafficking offenders.
- Potential one-time local government costs of up to a few million dollars on a statewide basis, and lesser additional costs incurred each year, due to new mandatory human trafficking-related training requirements for law enforcement officers.
- Potential additional revenue from new criminal fines, likely a few million dollars annually, which would fund services for human trafficking victims and for law enforcement activities related to human trafficking.

35

## ANALYSIS BY THE LEGISLATIVE ANALYST

### BACKGROUND

***Federal Law.*** Federal law contains various provisions prohibiting human trafficking. The Federal Trafficking Victims Protection Act generally defines two types of human trafficking:

- ***Sex Trafficking***—in which persons are recruited, transported, or obtained for a commercial sex act that is induced by force or fraud or in which the victim performing the act is under age 18. An example of sex trafficking is forcing a person into prostitution.
- ***Labor Trafficking***—in which persons are recruited, transported, or obtained through the use of force or fraud to provide labor or other services. An example of this is forcing a foreign national to work for free by threatening deportation.

These laws are enforced by federal law enforcement agencies that may act independently or with state and local law enforcement agencies.

***State Law.*** Existing state law contains similar criminal prohibitions against human trafficking. Specifically, state law defines human trafficking as violating the liberty of a person with the intent to either (1) commit certain felony crimes (such as prostitution) or (2) obtain forced labor or services. Human trafficking is punishable under state law by a prison sentence of up to five years or, if the victim is under the age of 18, by a state prison sentence of up to eight years. Offenders convicted of human trafficking crimes that result in great bodily injury to the victim can be punished with additional terms of up to six years. In recent years, there have been only a few people annually sent to state prison for human trafficking crimes. As of March 2012, there were 18 such offenders in state prison.

Under existing state law, most offenders who have been convicted of a sex crime (including some crimes involving human trafficking) are required to register as sex offenders with their local police or sheriff's departments.

PROP **35** **HUMAN TRAFFICKING. PENALTIES. INITIATIVE STATUTE.**

**ANALYSIS BY THE LEGISLATIVE ANALYST** **CONTINUED**

## PROPOSAL

This measure makes several changes to state law related to human trafficking. Specifically, it (1) expands the definition of human trafficking, (2) increases the punishment for human trafficking offenses, (3) imposes new fines to fund services for human trafficking victims, (4) changes how evidence can be used against human trafficking victims, and (5) requires additional law enforcement training on handling human trafficking cases. The measure also places additional requirements on sex offender registrants.

***Expanded Definition of Human Trafficking.*** This measure amends the definition of human trafficking under state law. Specifically, the measure defines more crimes related to the creation and distribution of obscene materials depicting minors as a form of human trafficking. For example, duplicating or selling these obscene materials could be considered human trafficking even if the offender had no contact with the minor depicted. In addition, with regard to sex trafficking cases involving minors, prosecutors would not have to show that force or coercion occurred. (This would make state law similar to federal law.)

***More Severe Criminal Penalties for Human Trafficking.*** This measure increases the current criminal penalties for human trafficking under state law. For example, the measure increases the prison sentence for labor trafficking crimes to a maximum of 12 years per offense, and for sex trafficking of adults to up to 20 years per offense. Sex trafficking of minors that involved force or fraud would be punishable by up to a life term in prison. Figure 1 lists each of the measure's increases in the maximum prison sentences, sentence enhancements, and criminal fines.

In addition, the measure specifies that offenders convicted of human trafficking with previous convictions for human trafficking receive additional five-year prison terms for each of those prior convictions. Under the measure, offenders convicted of human trafficking that resulted in great bodily injury to the victim could be punished with additional terms of up to ten years. The measure also permits criminal courts to impose fines of up to $1.5 million for human trafficking offenses.

35

**Figure 1**
**Measure Increases Maximum Criminal Penalties For Human Trafficking**

| | Current Law | Proposition 35 |
|---|---|---|
| **Prison Sentence**[a] | | |
| Labor trafficking | 5 years | 12 years |
| Sex trafficking of an adult, forced | 5 years | 20 years |
| Sex trafficking of a minor without force | None[b] | 12 years |
| Sex trafficking of a minor, forced | 8 years | Life term |
| **Sentence Enhancement**[a] | | |
| Great bodily injury | 6 years | 10 years |
| Prior human trafficking offense | None | 5 years per prior conviction |
| **Fines** | Up to $100,000 for sex trafficking a minor | Up to $1.5 million for all human trafficking offenses |

[a] Actual penalty includes a range of years.
[b] Activities considered under the measure as sex trafficking of minors without force are illegal under current law but not defined as human trafficking. The penalties for these crimes vary.

*For text of Proposition 35, see page 100.*

PROP 35 HUMAN TRAFFICKING. PENALTIES. INITIATIVE STATUTE.

ANALYSIS BY THE LEGISLATIVE ANALYST

CONTINUED

***Programs for Human Trafficking Victims.*** The measure requires that the funds collected from the above fines support services for victims of human trafficking. Specifically, 70 percent of funds would be allocated to public agencies and nonprofit organizations that provide direct services to such victims. The measure requires that the remaining 30 percent be provided to law enforcement and prosecution agencies in the jurisdiction where the charges were filed and used for human trafficking prevention, witness protection, and rescue operations.

***Changes Affecting Court Proceedings.*** The measure also affects the trial of criminal cases involving charges of human trafficking. Specifically, the measure prohibits the use of evidence that a person was involved in criminal sexual conduct (such as prostitution) to prosecute that person for that crime if the conduct was a result of being a victim of human trafficking. The measure also makes evidence of sexual conduct by a victim of human trafficking inadmissible for the purposes of attacking the victim's credibility or character in court. In addition, this measure disallows certain defenses in human trafficking cases involving minors. For example, a defendant could not claim as a defense being unaware of the minor's age.

35

***Law Enforcement Training.*** This measure requires all peace officers employed by police and sheriff's departments and the California Highway Patrol (CHP) who perform field or investigative work to undergo at least two hours of training on how to handle human trafficking complaints. This training would have to be completed by July 1, 2014, or within six months of the officer being assigned to the field or investigative work.

***Expanded Requirements for Sex Offender Registration.*** This measure requires registered sex offenders to provide the names of their Internet providers and identifiers to local police or sheriff's departments. Such identifiers include e-mail addresses, user names, screen names, or other personal identifiers for Internet communication and activity. If a registrant changes his or her Internet service account or changes or adds an Internet identifier, the individual must notify law enforcement within 24 hours of such changes.

## FISCAL EFFECTS

Currently, human trafficking cases are often prosecuted under federal law, rather than California state law, even when California law enforcement agencies are involved in the investigation of the case. This is partly because these types of crimes often involve multiple jurisdictions and also because of the federal government's historical lead role in such cases. It is unknown whether the expanded definition of human trafficking and other changes proposed in this measure would significantly increase the number of state human trafficking arrests and convictions or whether most such cases would continue to be handled primarily by federal law enforcement authorities. As a result, the fiscal effects of this measure on state and local governments discussed below are subject to some uncertainty.

***Minor Increase in State and Local Criminal Justice Costs From Increased Penalties.*** The measure would result in some additional state and local criminal justice costs by increasing the criminal penalties for human trafficking. In particular, the increased prison sentences in the measure would increase the length of time offenders spend in state prison. In addition, it is possible that the measure's provisions increasing funding and training requirements for local law enforcement could result in additional human trafficking arrests, prosecutions, and convictions. This could also increase state and local criminal justice costs. In total, these new costs are **not likely to exceed a couple million dollars annually.**

PROP **35** **HUMAN TRAFFICKING. PENALTIES. INITIATIVE STATUTE.**

**ANALYSIS BY THE LEGISLATIVE ANALYST** **CONTINUED**

***Potential Increase in Local Law Enforcement Training Costs.*** As noted earlier, this measure requires that most state and local law enforcement officers receive specific training on human trafficking. Since CHP officers already receive such training, there would be no additional state costs. The fiscal impact of this requirement on local agencies would depend on the extent to which local officers are currently receiving such training and on how local law enforcement agencies chose to satisfy the measure's training requirements. Counties and cities could collectively incur costs of **up to a few million dollars on a one-time basis** to train existing staff and provide back-up staff to officers who are in training, with lesser costs incurred each subsequent year to train newly hired officers.

***Increased Fine Revenue for Victim Services.*** The new criminal fines established by this measure would result in some additional revenue, likely not to exceed a few million dollars annually. Actual revenues would depend on the number of individuals convicted of human trafficking, the level of fines imposed by the courts, and the amount of actual payments made by the convicted offenders. These revenues would be dedicated primarily to services for victims of human trafficking, but also would be used for human trafficking prevention, witness protection, and rescue operations.

35

*For text of Proposition 35, see page 100.*

## PROP 35 HUMAN TRAFFICKING. PENALTIES. INITIATIVE STATUTE.

### ★ ARGUMENT IN FAVOR OF PROPOSITION 35 ★

STOP HUMAN TRAFFICKING—YES on 35.

In California, vulnerable women and children are held against their will and forced into prostitution for the financial gain of human traffickers. Many victims are girls as young as 12.

Human trafficking is one of the fastest-growing criminal enterprises in the world, and it's happening right here on California's streets and online where young girls are bought and sold.

A national study recently gave California an "F" grade on its laws dealing with child sex trafficking.

That's why we need Proposition 35.

*Yes on 35 will:*

- Increase prison terms for human traffickers, to hold these criminals accountable.
- Require convicted human traffickers to register as sex offenders, to prevent future crimes.
- Require all registered sex offenders to disclose their Internet accounts, to stop the exploitation of children online.
- Increase fines from convicted human traffickers and use these funds to pay for victims' services, so survivors can repair their lives.

*Prop. 35 protects children from sexual exploitation.*

Many sex trafficking victims are vulnerable children. They are afraid for their lives and abused—sexually, physically, and mentally. The FBI recognizes three cities in California—Los Angeles, San Francisco, and San Diego—as high intensity child sex trafficking areas. That's why we need Prop. 35 to protect children from exploitation.

35

*Prop. 35 holds human traffickers accountable for their horrendous crimes.*

"Sex traffickers prey on the most vulnerable in our society. They get rich and throw their victims away. Prop. 35 will hold these criminals accountable. By passing 35, Californians will make a statement that we will not tolerate the sexual abuse of our children and that we stand with the victims of these horrible crimes."

—Nancy O'Malley, Alameda County District Attorney and national victims' rights advocate

*Prop. 35 helps stop exploitation of children that starts online.*

The Internet provides traffickers with access to vulnerable children. Prop. 35 requires convicted sex offenders to provide information to authorities about their Internet presence, which will help protect our children and prevent human trafficking.

*California's largest law enforcement groups urge YES on 35.*

"As those on the front lines in the fight against human trafficking, we strongly urge YES on 35 to help us prosecute sex traffickers and protect victims of sexual exploitation."

—Ron Cottingham, President, Peace Officers Research Association of California, representing 64,000 public safety members

*Crime victims and their advocates urge YES on 35.*

"Prop. 35 will protect children from human traffickers who profit from selling them on the street and online."

—Marc Klaas, crime victims' advocate and father of Polly Klaas, who was kidnapped and killed in 1993

"At 14, I ran away from a troubled home and into the clutches of a human trafficker. For years, I was trafficked and abused when I was still just a child. As a survivor of trafficking, I'm asking Californians to stand against sexual exploitation and vote Yes on 35."

—Leah Albright-Byrd, Human Trafficking Survivor

PROTECT CHILDREN FROM SEXUAL EXPLOITATION. STOP HUMAN TRAFFICKERS.

YES on 35. *VoteYeson35.com*

**LEAH ALBRIGHT-BYRD**
Human Trafficking Survivor
**MARC KLAAS,** President
KlaasKids Foundation
**SCOTT R. SEAMAN,** President
California Police Chiefs Association

### ★ REBUTTAL TO ARGUMENT IN FAVOR OF PROPOSITION 35 ★

This measure allegedly aimed at human trafficking actually threatens many innocent people:

If Proposition 35 passes, anyone receiving financial support from normal, consensual prostitution among adults—including a sex worker's children, parents, spouse, domestic partner, roommate, landlord, or others—could be prosecuted as a human trafficker, and if convicted, forced to register as a sex offender for life!

"My son, who served our country in the U.S. military and now attends college, could be labeled a human trafficker and have to register as a sex offender if I support him with money I earn providing erotic services."—Maxine Doogan

Rather than working with sex worker communities to stop real human traffickers, far-left anti-sex feminists and far-right religious conservatives who back Proposition 35 hope voters who hear "trafficking" will be deceived into supporting their futile crusade against the "world's oldest profession" by further criminalizing people connected with consensual adult prostitution. Proponents' argument that California is a "high intensity area" for trafficking is suspiciously similar to debunked claims made elsewhere: *http://www.oregonlive.com/portland/index.ssf/2011/01/portland_child_sex_trafficking.html*

Proposition 35 would create a new unfunded liability for our state, just when California's government is in fiscal crisis and numerous cities have already filed for bankruptcy. A wealthy executive supplied over 90% of Proposition 35's campaign donations—*http://www.huffingtonpost.com/2012/07/07/californians-against-sexual-exploitation-act_n_1656311.html*—but his money won't be there to fund enforcement. Traffickers footing the bill is wishful thinking—forfeiture hasn't paid for the "War on Drugs", and will never adequately fund a "War on Prostitution" either.

Vote NO on Proposition 35!

**MANUAL JIMENEZ,** CFO
Erotic Service Providers Legal, Education, and Research Project, Inc.
**NORMA JEAN ALMODOVAR**
**STARCHILD**

 ***Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.***

## PROP 35 HUMAN TRAFFICKING. PENALTIES. INITIATIVE STATUTE.

### ★ ARGUMENT AGAINST PROPOSITION 35 ★

Proposition 35 falls short of its promise, and voters ought to send it back to the drawing board.

Criminalization does not bring protection.

If passed, California will be writing another blank check to the proponents of Proposition 35. This short-sighted ballot measure relies on a broad definition of pimping. This includes: parents, children, roommates, domestic partners, and landlords of prostitutes to be labeled as sex offenders. The real goal is to gain access to asset forfeiture to benefit the endorsing law enforcement agencies and non-profits. Proposition 35 has no oversight or accountability. This will open the door to corrupt practices we've seen before in drug enforcement. *http://www.contracostatimes.com/news/ci_20549513/defendant-cnet-corruption-scandal-gets-federal-prison-sentence*

If passed, Proposition 35 will have a detrimental effect on the state budget. This statute relies on resources that criminalize adults who are arrested for prostitution indiscriminately in prostitution stings performed under the guise of rescuing children. *http://www.sfgate.com/default/article/Bay-Area-sweep-nets-child-prostitute-pimp-suspects-3661229.php*

Research shows that most teens arrested for prostitution do not have pimps; thus the idea that this statute will pay for itself is not supported by the evidence. Lost Boys: New research demolishes the stereotype *http://www.riverfronttimes.com/2011-11-03/news/commercial-sexual-exploitation-of-children-john-jay-college-ric-curtis-meredith-dank-underage-prostitution-sex-trafficking-minors/*

Proposition 35 relies on failed polices that use criminalization as a means to arrest the under-aged all the while calling it "rescue".

UN Advisory group member, Cheryl Overs on Tackling Child Commercial Sexual Exploitation *http://www.plri.org/story/tackling-child-commercial-sexual-exploitation* Don't expand these already failed polices. *http://www.traffickingpolicyresearchproject.org/*

If passed, the state will likely be required to defend this statute in court as it will likely face legal challenges due to several questionable and possibly unconstitutional provisions including the following: possibly unconstitutionally vague definition of "human trafficking" including the "intent to distribute obscene matter", possibly unconstitutionally "cruel and unusual" punishments including excessive prison terms and fines, possibly unconstitutionally inhibiting a defendant's right to introduce evidence in defense trials.

This Act will cost the state additional unspecified amounts: It would increase the workload to already over-burdened probation departments. Consider that case of Jaycee Dugard and the $20,000,000 that California had to pay her for not protecting her against a violent sexual predator. It would require training of police officers to enforce the expanded provisions of the Act. *http://www.sfbg.com/politics/2012/06/16/bringing-heat*

This misguided Proposition uses fact-less fear mongering to goad voters into gambling on future fines and fees that risk redirecting scarce state resources away from existing social services intervention programs.

Laws are being enforced. *http://blog.sfgate.com/incontracosta/2012/06/25/concord-police-assist-with-multi-agency-operation-targeting-child-prostitution/*

The policy underlying Proposition 35 was created outside the affected populations. The Proponents stand to benefit financially by getting their salaries paid "to deliver services" to consensually working sex workers. Sex workers do not want to be forced out of work via criminal laws and forced into receiving services from the proponents. Sex workers demand a voice.

Let's be clear. Criminalization of prostitution is the condition that allows exploitation. Let us instead address that issue.

Vote No on these failed policies.

Vote No on Proposition 35.

**MAXINE DOOGAN,** President
Erotic Service Providers Legal,
Education, and Research Project, Inc.
**MANUAL JIMENEZ,** CFO
Erotic Service Providers Legal,
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### ★ REBUTTAL TO ARGUMENT AGAINST PROPOSITION 35 ★

*"I was only 10 when I was first exploited by a trafficker. I suffered years of abuse, while the trafficker profited. Please stand up for women and children who are being trafficked on the streets and online. Vote Yes on 35 to stop human trafficking."*
—Withelma Ortiz, Human Trafficking Survivor

YES on 35 will FIGHT BACK AGAINST HUMAN TRAFFICKING and sexual exploitation of women and children.

A recent study gave California an "F" grade for its weak child sex trafficking laws. The FBI has designated San Francisco, Los Angeles, and San Diego as high-intensity child sex trafficking areas.

The average age when a girl is first trafficked is 12 to 14. These children should be thinking about their homework, not how to survive another night being sold.

Prop. 35 will protect children in California by increasing penalties against human traffickers, making convicted traffickers register as sex offenders, and requiring all registered sex offenders to provide information to the authorities about their Internet presence, in order to help prevent human trafficking online.

Prop. 35 helps victims put their lives back together by increasing fines against human traffickers and dedicating these funds for victims' services.

YES on 35 is SUPPORTED BY A BROAD COALITION, including:

- Children's and victims' advocates, such as KlaasKids Foundation and Crime Victims United
- California law enforcement organizations representing more than 80,000 rank and file law enforcement officers
- Survivors of human trafficking

VOTE YES on 35 to STOP HUMAN TRAFFICKING and SEXUAL EXPLOITATION OF CHILDREN.

**WITHELMA ORTIZ**
Human Trafficking Survivor
**CARISSA PHELPS**
Human Trafficking Survivor
**NANCY O'MALLEY**
Alameda County District Attorney



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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, *et al.*,

Defendants.

No.: C 12-5713 TEH

**DECLARATION OF SHARMIN BOCK IN SUPPORT OF INTERVENERS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

Hearing:

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 12

(The Honorable Thelton E. Henderson)

**DECLARATION OF SHARMIN BOCK**

I, Sharmin Bock, declare under penalty of perjury as follows:

1. I am an Assistant District Attorney, a senior prosecutor, for Alameda County.

2. I attended Occidental College, graduating Cum Laude with a degree in Philosophy and Political Theory in 1984, and I obtained my law degree from Georgetown University Law Center where I graduated Cum Laude in 1988.

3. I served as a Law Clerk for the Honorable D. Lowell Jensen in the United States District Court of the Northern District of California, before joining the Alameda County District Attorney's Office as an Assistant District Attorney in 1989.

4. Over the course of my 23-year career as a prosecutor, I have developed a specialty in cases involving sexual assault and human exploitation and trafficking ("HEAT"). I started prosecuting misdemeanor child molestation cases in 1989 and felony sexual assault cases in 1993. In 2008, I was tapped to lead the Unsolved Crimes/Cold Case Unit where I worked with law enforcement to investigate and solve, with the use of forensic evidence, old and serious cases, often involving brutal sexual assaults and murders by suspects with extensive criminal records or a history of committing serial crimes. As the Assistant D.A. in charge of Special Operations, a position I held through 2011, I was responsible for overseeing the Sexual Assault Unit, the Sexually Violent Predator Unit, the Unsolved Crimes Unit, and the County-wide taskforce responsible for monitoring registered sex offenders. As a result of the expertise I developed in prosecuting serious sexual assault cases, I developed extensive familiarity with repeat offenders and sex offenders. I have conducted countless trainings in the course of my career regarding the investigation, charging, and sentencing of sexual assault cases.

5. In 2005, I helped create the first of its kind HEAT Unit in the U.S. dedicated to rescuing victims and holding traffickers accountable. When it first began, I was the only prosecutor in the HEAT unit and prosecuted the first human trafficking case under California's human trafficking law. The HEAT Unit is now staffed by 14 employees, including prosecutors, investigators, and a victim-witness advocate. I was the HEAT Unit supervisor through 2011. HEAT Unit statistics from January 1, 2006, the effective date of California's human trafficking law, through October 31, 2012,

document that the HEAT Unit charged 276, and convicted 178 defendants, of felony human trafficking related charges, with 49 cases pending, nine in warrant status, 30 dismissed, one not guilty, and eight probation violations. In the vast majority of these cases, victims were either recruited and/or exploited online, and offenders utilized legitimate and illegitimate websites to further their victimization.

6. I am a nationally recognized human trafficking expert. As a result of my work experience, I have been asked to educate state and federal law enforcement, advocates, policy makers, and legislators across the country about the reality, impact, and effective curtailment of HEAT in America. Most recently, I helped organize, and lectured at, a federally-funded, national HEAT conference with more than 400 attendees from the law enforcement and advocacy community. I have been invited to testify before legislators in Georgia and Hawaii to help improve their laws, and at a U.S. Senate hearing in Washington, D.C., to inform federal legislative efforts. I have conducted numerous trainings throughout the state and online, from seminars to webinars, for organizations ranging from law enforcement to the California District Attorneys Association to the California State Bar.

7. In 2009, I was recognized for my work in the area of human trafficking as the recipient of the Fay Stender Award, given by the California Women Lawyers, to the woman attorney in the State of California "who has demonstrated her commitment to under represented or disadvantaged people."

8. Because the Internet has made human trafficking increasingly more virtual, invisible, and difficult to prosecute, I helped create HEAT Watch, a multi-agency response to combat HEAT by engaging all partners from police and prosecutors to advocates and community members. Because the Internet has also fueled the transitory nature of HEAT and rendered geographical boundaries meaningless, I helped create the Bay Area HEAT Coalition, a federally-funded, multi-disciplinary, and collaborative response dedicated to combatting HEAT regionally with local, state, and federal partners. I have also worked in the field with police to advise and guide HEAT investigations, occurring locally and also throughout multiple counties.

9. As a result of working in the field for 23 years, I have a deep understanding of how sexual assault and HEAT crimes occur and a full appreciation for how the Internet has changed

this dynamic and transformed the reality of how these crimes occur in the Internet era. My close working relationship with law enforcement, advising and guiding sexual assault and HEAT investigations, has enhanced my understanding of the ways in which law enforcement could use Internet identifiers and information regarding offenders' Internet service providers to investigate known sex offenders, to solve online sex crimes and human trafficking cases, and when possible, spare other possible victims.

10. By requiring registered sex offenders to provide to law enforcement information regarding their Internet identifiers and Internet service providers, Proposition 35 brings California into the modern era. Before the advent of the Internet, sexual predators would prey on children in public spaces, such as parks and schools. Today, a sexual predator need not even leave his house. For example, I prosecuted a case where twin 13-year-old girls were initially recruited on a social networking site, sold online, and eventually rescued by the Oakland Police Department after being ordered online by a police officer posing as a customer at the behest of the girls' mother. Ultimately, we were only able to apprehend the intermediary who brought the girls to the motel, not the trafficker who recruited and sold the girls online. If Proposition 35 had been in effect, as an investigative tool, we could have compared the trafficker's Internet identifier to the Internet identifiers of registered sex offenders in the area in an effort to apprehend the trafficker.

11. Similarly, if the information required by Proposition 35 had been available, it could have provided law enforcement with the tools needed to identify someone operating like the "Craigslist Rapist." In that case, an Oregon man responded to advertisements placed on the Craigslist "Casual Encounters" forum to meet four different women whom he later raped and assaulted. One of the victims was a 15-year-old girl whose pimp had been trafficking her through Craigslist. Had the offender been a Penal Code section 290 registrant and his Internet identifiers been available, this is the first place law enforcement could have turned to catch him.

12. Internet identifiers and Internet service providers represent the cyber parallel of name, alias, and home address required by existing law. For example, if there is a report of a rape in a particular neighborhood, one of the first steps an investigator takes is to look at the listings of registered sex offenders to determine whether any live or work in or near the neighborhood.

Information regarding registrants' Internet identifiers would allow us to use the same investigative techniques in the virtual world. These days, people are seemingly present online far more than they are at home. The extensive use of smart phone technology supports this conclusion.

13. The use of the Internet by sexual predators is constantly evolving. At first, predators gravitated toward social networking sites to meet, recruit, and sell victims. Children, for example, were routinely sold on Craigslist. As a result of efforts to curtail the exploitation of certain high profile social networking sites, predators have simply moved elsewhere, such as to online gaming sites, chat rooms, and other legitimate, as well as illegitimate, sites. Like a dam that diverts the flow of water rather than stopping it, these efforts have unfortunately not stopped sex offenders from using the Internet to lure and exploit victims. Instead, sex offenders have become more creative in their effort to locate victims, further challenging law enforcement in their effort to locate predators. The exponential use and growth of the Internet and its use by sex offenders would make it not only difficult, but unwise, to craft a definition of "Internet identifier" narrower than that found in Proposition 35.

14. The use of technology is perhaps the single greatest factor contributing to the proliferation of HEAT. The Internet has taken the hunt off the street and put it into the cyberworld, which is shielded from plain view and thus invisible to law enforcement. Now with the mere push of a button on a laptop or cell phone and with the aid of uber marketing on legitimate and illegitimate online forums, traffickers can recruit and sell countless more children all over the country from the comfort of their own living rooms. Because of the Internet, buyers also do not have to leave their homes to locate and purchase children for sex. From the falsely perceived safety of their homes, schools, libraries, youth centers, and smart phones, children are online and readily available to traffickers and buyers. If law enforcement does not know who these offenders are in the cyberworld, we cannot effectively investigate online crimes like human trafficking and other sexual assault crimes. Because there are so many vulnerable people online, ranging from young children to unsuspecting adults, the Internet has made victims more accessible to predators and thereby increased the magnitude of the challenge law enforcement faces in keeping those who are at risk safe from registered sex offenders as well as first-time predators.

15. It bears noting that the registration requirements apply only to individuals who

have already been convicted and who have either consented to the requirements of Penal Code section 290 or been subjected to these requirements by a court of law. Because sex offenders present a risk to society, existing law requires that they provide the law enforcement agencies with which they are registered their name, address, a current photograph, and even a sample of their DNA. With this information, law enforcement can monitor sex offenders' physical whereabouts. We can, and sometimes do, watch registered sex offenders as they walk from their house to a local park, but this information does not allow law enforcement to track their presence in the virtual world, where they are not only invisible, but also anonymous, and therefore near impossible to monitor. By requiring sex offenders to provide their Internet identifiers and their Internet service providers, Proposition 35 simply gives law enforcement the tool which they lack, but desperately need, to navigate the virtual realm where predators can stalk unsuspecting victims with anonymity and therefore impunity.

16. Proposition 35 does not prohibit a registered sex offender from using the Internet anonymously and for a lawful purpose. It does not regulate the content of any communication and only permits law enforcement to view what is already accessible to the public. Because Proposition 35 does not require the disclosure of passwords, law enforcement cannot access private communications, such as a registered sex offender's e-mail account, without a further showing. Because the cyber-realm is so vast and unchartered, law enforcement cannot investigate and solve online sex crimes, where mere minutes can make a difference in saving lives, without the ability to zero in on known predators, which the challenged provisions of Proposition 35 provide.

17. Although there is no way of knowing which sex offenders may re-offend, my experience prosecuting sexual assault cases confirms that many if not most have previously committed sex offenses. Evidence Code section 1108 recognizes that sex offenders have a predisposition and propensity to re-offend. Because Evidence Code section 1108 permits an inference of guilt based on evidence of prior sex offenses, it would defy logic and common sense to deprive law enforcement of the ability to efficiently pursue leads and effectively locate known sex offenders online through the use of their Internet identifiers and service providers. To limit law enforcement to just a name and home address would result in a 21st Century game of hide-and-seek with a very real and unacceptable cost to victims and their families.

I declare under penalty of perjury that the foregoing is true and correct. I have firsthand knowledge of the same, and if called upon to do so I could and would testify competently thereto.

Executed this 25th day of November, 2012, in San Francisco, California.

Sharmin Bock

(00186925)

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UNITED STATES DISTRICT COURT

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SAN FRANCISCO DIVISION

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No.: C 12-5713 TEH

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(The Honorable Thelton E. Henderson)

# TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

BACKGROUND ..... 3

A. Federal Law ..... 3

B. California Law And Proposition 35 ..... 4

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS ..... 7

A. Plaintiffs' Facial Overbreadth Challenge Cannot Succeed ..... 7

1. Plaintiffs cannot demonstrate there are no circumstances in which Proposition 35 can be constitutionally applied ..... 7

2. Because Proposition 35 does not regulate speech, the overbreadth doctrine does not apply ..... 9

B. Plaintiffs Fail To Demonstrate That The Statute Cannot And Will Not Be Construed To Avoid Overbreadth ..... 11

1. Intermediate scrutiny applies ..... 13

2. The State has a strong interest in collecting information about pseudonyms used by convicted sex offenders on the Internet ..... 14

3. Proposition 35 is narrowly tailored to serve the State's strong interest in enhancing its sex offender registration efforts without infringing speech ..... 15

C. The Law Is Sufficiently Clear And Definite ..... 19

D. The Law Does Not Interfere With Plaintiffs' Freedom Of Association ..... 22

II. THE BALANCE OF HARDSHIPS FAVORS THE STATE ..... 24

CONCLUSION ..... 25

## TABLE OF AUTHORITIES

**Page(s)**

**CASES:**

*American Target Advertising, Inc. v. Giani*, ..... 13
199 F.3d 1241 (10th Cir. 2000)

*Art of Living Found. v. Does I-10*, ..... 10
2011 WL 5444622, at *1 (N.D. Cal. Nov. 9, 2011)

*Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, ..... 20
18 Cal. 3d 582 (1976)

*Broadrick v. Oklahoma*, ..... 7, 11
413 U.S. 601 (1973)

*Brosnahan v. Brown*, ..... 12
32 Cal. 3d 236 (1982)

*Brown v. Socialist Workers '74 Campaign Comm.*, ..... 23
459 U.S. 87 (1982)

*Cal. Teachers Ass'n v. State Bd. of Educ.*, ..... 20, 21, 22
271 F.3d 1141 (9th Cir. 2001)

*Circuit City Stores, Inc. v. Adams*, ..... 22
532 U.S. 105 (2001)

*Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, ..... 17
657 F.3d 936 (9th Cir. 2011)

*Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dept.*, ..... 20
533 F.3d 780 (9th Cir. 2008)

*DeVita v. County of Napa*, ..... 12
9 Cal. 4th 763 (1995)

*Doe v. Jindahl*, ..... 15
853 F. Supp. 2d 596 (M.D. La. 2012)

*Doe v. Nebraska*, ..... 15
2012 WL 4923131, at *27 (D. Neb. Oct. 17, 2012)

*Doe v. Prosecutor, Marion Cnty., Ind.*, ..... 9, 15
2012 WL 2376141, at *1 (S.D. Ind. June 23, 2012)

*Doe v. Shurtleff*, ..... 10, 13, 18, 20
628 F.3d 1217 (10th Cir. 2010)

*Global Horizons, Inc. v. U.S. Dept. of Labor*, ..... 24
510 F.3d 1054 (9th Cir. 2007)

**TABLE OF AUTHORITIES: (continued)** **Page(s)**

*Grayned v. City of Rockford*, 408 U.S. 104 (1972) ..... 22

*In re Alva*, 33 Cal. 4th 254 (2004) ..... 4, 9, 14

*In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011) ..... 10

*In re Greg F.*, 55 Cal. 4th 393 (2012) ..... 21

*In re Stier*, 152 Cal. App. 4th 63 (2007) ..... 4

*Legislature v. Eu*, 54 Cal. 3d 492 (1991) ..... 12

*Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999) ..... 7

*Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958) ..... 23

*People v. Hsu*, 82 Cal. App. 4th 976 (2000) ..... 20

*People v. Singh*, 198 Cal. App. 4th 364 (2011) ..... 14

*People v. Stipo*, 195 Cal. App. 4th 664 (2011) ..... 16

*People v. Vincelli*, 132 Cal. App. 4th 646 (2005) ..... 19

*Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) ..... 23

*Robert L. v. Super. Ct.*, 30 Cal. 4th 894 (2003) ..... 5

*Shelton v. Tucker*, 364 U.S. 479 (1960) ..... 23

*Smith v. Doe*, 538 U.S. 84 (2003) ..... 3, 8, 9, 18

*Spiegel v. City of Houston*, 636 F.2d 997 (5th Cir. 1981) ..... 24

*Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) ..... 14

**TABLE OF AUTHORITIES: (continued)** **Page(s)**

*United States v. Cervini*, ..... 15
16 Fed. Appx. 865 (10th Cir. 2001)

*United States v. Forrester*, ..... 16
512 F.3d 500 (9th Cir. 2007)

*United States v. Lucas*, ..... 15
670 F.3d 784 (7th Cir. 2012)

*United States v. Peeples*, ..... 8
630 F.3d 1136 (9th Cir. 2010)

*United States v. Salerno*, ..... 8
481 U.S. 739 (1987)

*United States v. Santos*, ..... 21
553 U.S. 507 (2008)

*United States v. Simmons*, ..... 21
96 U.S. 360 (1877)

*United States v. Stephens*, ..... 8
594 F.3d 1033 (8th Cir. 2010)

*United States v. Stevens*, ..... 11
130 S. Ct. 1577 (2010)

*United States v. Tank*, ..... 17
200 F.3d 627 (9th Cir.)

*United States v. Williams*, ..... passim
553 U.S. 285 (2008)

*Virginia v. Hicks*, ..... 8
539 U.S. 113 (2003)

*Ward v. Rock Against Racism*, ..... 12, 13
491 U.S. 781 (1989)

*Wash. State Grange v. Wash. State Republican Party*, ..... 7, 11
552 U.S. 442 (2008)

*Westly v. Cal. Pub. Emps.' Ret. System Bd. of Admin.*, ..... 5
105 Cal. App. 4th 1095 (2003)

*White v. Baker*, ..... passim
696 F. Supp. 2d 1289 (D. Ga. 2010)

*Winter v. Natural Res. Def. Council, Inc.*, ..... 24
555 U.S. 7 (2008)

**TABLE OF AUTHORITIES: (continued)** **Page(s)**

**STATUTES:**

42 U.S.C. § 16901 et seq. ..... 3
42 U.S.C. § 16914 ..... 4
42 U.S.C. § 16915a ..... 4, 19, 21
42 U.S.C. § 16918 ..... 4
42 U.S.C. § 16925 ..... 3

California Government Code
§ 6254 ..... 19

California Penal Code
§ 290 et seq. ..... passim
§ 290.03 ..... 14
§ 290.014 ..... 6
§ 290.015 ..... 6
§ 290.024 ..... 6, 20, 22
§ 290.15 ..... 5
§ 290.45 ..... 19
§ 290.46 ..... 19
§ 296 ..... 5

**MISCELLANEOUS:**

Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. Law 105-277, § 1101, 112 Stat. 2681 (1998) ..... 20

## INTRODUCTION

Proposition 35 brings California's sex offender registration law into the modern era by requiring convicted sex offenders to register with local law enforcement not just their legal name and aliases, but also the screen name that they use when communicating on Internet sites. Offenders now will provide not just the physical street address of their home and place of employment, but also the address of the portal through which they enter the Internet. Courts already have ruled there is no reasonable expectation of privacy in the information shared with an Internet service provider or in an email address. Proposition 35 is fully compliant with the Constitution and federal law, which *requires* states to obtain this information. It is also virtually identical to a Utah statute upheld by the Tenth Circuit Court of Appeals in the only case on this issue to reach the appellate courts.

Plaintiffs nonetheless ask this Court for extraordinary relief – an order enjoining the State from implementing a portion of Proposition 35 on the ground that it is invalid on its face. To justify such "strong medicine," plaintiffs must show that that these provisions cannot be applied constitutionally under any circumstances. This they cannot do, because Proposition 35 does not "prohibit" or "criminalize" online anonymous speech as plaintiffs claim. Proposition 35 prohibits no one from engaging in speech anywhere on the Internet, and it does not demand that the speaker disclose his identity to his audience. In fact, Proposition 35 does not regulate speech at all. It simply demands Internet identification information from convicted sex offenders, applying to the virtual world the same rules currently applied in the physical world. Just as a police officer might use the sex offender database to determine whether a registered sex offender lives in a neighborhood in which a rape occurred, law enforcement will use sex offenders' Internet identifiers to determine whether the email address of a person who used the Internet to lure a child into human trafficking belongs to a registered sex offender. Thus, the new reporting requirement in no way limits protected speech.

Plaintiffs speculate that law enforcement agencies could misuse this information and that some registrants may refrain from speaking online because their identities could become public. Yet Proposition 35 specifies that the information is to be used by law enforcement to combat online sex offenses, and it does not authorize public disclosure of a registrant's screen names. Indeed, such information is exempt from disclosure under the California Public Records Act and may only be

released by law enforcement when disclosure is necessary to ensure public safety based upon information related to the specific registrant. Any lingering fear of disclosure in the face of these protections does not serve as a basis for invalidating the law on its face. An individual's knowledge that the government is collecting information about him does not give rise to a constitutionally-recognizable chilling effect on his speech.

But even if Proposition 35 were treated as a restriction on plaintiffs' right to anonymous speech, the law would pass muster as a content neutral rule that is narrowly tailored to achieve a substantial state interest. Plaintiffs cannot seriously dispute that California has a substantial interest in combatting online sex crimes and recidivism by sex offenders. Instead, they argue that the law reaches too many speakers and too much speech. As to plaintiffs' first point, their quibble is with the State's existing registration requirements, which define the population to which Proposition 35 applies, but the California Supreme Court long ago upheld the State's broad registration requirements against constitutional attack. With respect to their claim that Proposition 35 reaches too much speech, plaintiffs misconstrue the statute. Proposition 35 does not require an offender to reveal the websites he visits or the content of his communications. And in most business or professional communications a person uses his or her legal name, which is already on the registry. While Proposition 35 may require a sex offender to provide law enforcement with the screen name he uses when he posts something on Craigslist or engages in an online dialogue on a video game site, the scope of the law is justified by the ever-evolving nature of sex offenders' use of the Internet to meet their victims.

As to plaintiffs' claims of unconstitutional vagueness, the term "Internet identifier" is similar to that used in the Utah law upheld by the Tenth Circuit, and the definition of "Internet service provider" comes directly from federal law. The definitions in Proposition 35 are sufficiently clear and definite to survive plaintiffs' word games.

Finally, plaintiffs' argument that the balance of hardships tips in their favor ignores the critical public safety issues at stake in this litigation. Plaintiffs' own experts acknowledge the risk of recidivism among registered sex offenders and the increased use of the Internet by sexual predators. Proposition 35 provides law enforcement with a necessary tool and delaying its implementation poses a risk of severe harm to our children and other innocent victims of online sex crimes. Furthermore,

plaintiffs are subject to Proposition 35 because they have been convicted of sex crimes that require them to provide their names and addresses to law enforcement; Proposition 35 simply extends this rule to the virtual world by requesting information as to which there is no reasonable expectation of privacy. Given the public risk posed by registered sex offenders and the negligible burden imposed by Proposition 35, the balance of hardships tips decidedly in favor of the voters and the State.

## BACKGROUND

### A. Federal Law

The federal government, the District of Columbia, and each of the 50 states have adopted sex offender registration requirements. *Smith v. Doe*, 538 U.S. 84, 90 (2003); *see also* The National Guidelines for Sex Offender Registration and Notification, Ex. A to Interveners' Req. for Judicial Notice ("Interveners' RJN") at 3. The U.S. Department of Justice has explained the purpose of these requirements:

> In their most basic character, the registration aspects of these programs are systems for tracking sex offenders following their release into the community. If a sexually violent crime occurs or a child is molested, information available to law enforcement through the registration program about sex offenders who may have been present in the area may help to identify the perpetrator and solve the crime. If a particular released sex offender is implicated in such a crime, knowledge of the sex offender's whereabouts through the registration system may help law enforcement in making a prompt apprehension. The registration program may also have salutary effects in relation to the likelihood of registrants committing more sex offenses. Registered sex offenders will perceive that the authorities' knowledge of their identities, locations, and past offenses reduces the chances that they can avoid detection and apprehension if they reoffend, and this perception may help to discourage them from engaging in further criminal conduct.
>
> *Id.* at 3.

In 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA") to provide a comprehensive set of minimum national standards for sex offender registration and notification systems throughout the states.[1] *See* 42 U.S.C. § 16901 et seq. The required information includes, among other things, sex offenders' names, addresses or locations (such

[1] Prior to passage of Proposition 35, a total of 16 states had met the federal requirements for implementation. Interveners' RJN, Ex. B. California was not among them, and therefore is subject to a 10% reduction in federal law enforcement funding. *See* 42 U.S.C. § 16925(a).

as place of employment or school attended), vehicle descriptions and license plate numbers, physical descriptions, sex offenses for which convicted, and current photographs. 42 U.S.C. § 16914.

Under SORNA, states are *required* to obtain registrants' Internet identifiers and addresses. 42 U.S.C. § 16915a. The Attorney General also requires the ongoing collection of all addresses used for Internet routing purposes. Interveners' RJN, Ex. A at 52. The U.S. Department of Justice describes this requirement as follows:

> INTERNET IDENTIFIERS AND ADDRESSES (§ 114(a)(7)): In the context of Internet communications there may be no clear line between names or aliases that are required to be registered under SORNA § 114(a)(1) and addresses that are used for routing purposes. Moreover, regardless of the label, including in registries information on designations used by sex offenders for purposes of routing or self-identification in Internet communications – e.g., e-mail and instant messaging addresses – serves the underlying purposes of sex offender registration and notification. Among other potential uses, having this information may help in investigating crimes committed online by registered sex offenders – such as attempting to lure children or trafficking in child pornography through the Internet – and knowledge by sex offenders that their Internet identifiers are known to the authorities may help to discourage them from engaging in such criminal activities.
>
> *Id.* at 27.

SORNA states that jurisdictions are to "make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry," with certain mandatory exceptions, including the victim's identity and the registrant's social security number. 42 U.S.C. § 16918(b). States are prohibited from including registrants' Internet identifiers on their public sex offender websites. *Id.* § 16915a(c).

**B. California Law And Proposition 35**

California has long required post-conviction registration of persons convicted of certain sex crimes. *See* Cal. Penal Code § 290 et seq. The law, which has been upheld by the California Supreme Court, "assure[s] that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." *In re Alva*, 33 Cal. 4th 254, 264 (2004); *see In re Stier*, 152 Cal. App. 4th 63, 78 (2007). State law requires convicted sex offenders to provide law

enforcement such information as their names, aliases, birthdates, residential addresses, fingerprints, license plate numbers, current photographs, and even DNA samples. Cal. Pen. Code §§ 290.15, 296.

The explosive growth of the Internet and its use by sexual predators is not adequately addressed by the current system. After several failed attempts to secure a legislative solution, proponents Chris Kelly and Daphne Phung, proposed interveners here, gathered more than 874,000 signatures to qualify Proposition 35 for the ballot. Interveners' RJN, Ex. C. On November 6, 2012, California voters approved Proposition 35 by a margin of 81.3% to 18.7%. *Id.*, Ex. D. The measure provides law enforcement with the tools necessary to prevent, investigate, and prosecute human trafficking in the modern era. These tools include increased fines and jail time for people convicted of human trafficking; increased training for law enforcement officers; and a requirement that convicted sex offenders, including people convicted of human trafficking, provide law enforcement authorities with information regarding their Internet identifiers and Internet service providers.

The measure's Findings and Declarations explain that "[w]hile the rise of the Internet has delivered great benefits to California, the predatory use of this technology by human traffickers and sex offenders has allowed such exploiters a new means to entice and prey on vulnerable individuals in our state."[2] Proposition 35, Californians Against Sexual Exploitation Act ("Prop. 35"), § 2, ¶ 4. Thus, the purpose of Proposition 35 is "[t]o strengthen laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to track and prevent online sex offenses and human trafficking." *Id.*, § 3, ¶ 3.

The ballot arguments also reflect the voters' intent that law enforcement use the new registration information to track and prevent online sex offenses and human trafficking. Voters were told that requiring sex offenders to disclose their Internet identities would help stop the exploitation of children, provide "information to authorities about [sex offenders'] Internet presence, which will help

[2] To determine voter intent, courts consider the text of the measure "within the context of the subsequent conditions and the statement of purposes and intent and findings which are part of its enactment." *Westly v. Cal. Pub. Emps.' Ret. System Bd. of Admin.*, 105 Cal. App. 4th 1095, 1109 (2003). Courts may also consider the proponents' arguments in determining the voters' intent. *Robert L. v. Super. Ct.*, 30 Cal. 4th 894, 901 (2003).

protect our children and prevent human trafficking," and "help prevent human trafficking online." RJN, Ex. E at 46-47.

Proposition 35 thus amends California Penal Code section 290.015 to add "Internet identifiers" and "Internet service providers" to the list of information convicted sex offenders must provide to law enforcement agencies. It also expands the scope of Penal Code section 290.014, which requires registered sex offenders to report a change in name, to include a change in their Internet identifier or Internet service provider. Proposition 35 requires law enforcement agencies to make the information available to the California Department of Justice. *Id.* § 290.014(b).

Proposition 35 adds section 290.024 to the Penal Code to define its terms. "Internet service provider" is defined as:

> a business, organization, or other entity providing a computer and communications facility directly to consumers through which a person may obtain access to the Internet. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.
>
> *Id.* § 290.024(a).

The term "Internet identifier" means:

> an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication.
>
> *Id.* § 290.024(b).

Proposition 35 provides that its provisions shall be deemed to be severable if any provision of the measure, or its application to any person or circumstances, is found to be unconstitutional or otherwise invalid. Prop. 35, § 16. It also permits legislative amendment of its provisions to further its objectives. *Id.* § 15.

Finally, contrary to plaintiffs' suggestion (Pls.' Mem. of P. & A. in Support of TRO ["Pls.' Mem."] at 7-8), Proposition 35 *does not* require registered sex offenders to compile and report a list of the websites they have visited.

## ARGUMENT

## I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

### A. Plaintiffs' Facial Overbreadth Challenge Cannot Succeed

#### 1. Plaintiffs cannot demonstrate there are no circumstances in which Proposition 35 can be constitutionally applied

Plaintiffs bring a facial overbreadth challenge to Proposition 35.[3] The Supreme Court has considered "[a]pplication of the overbreadth doctrine in this manner" as "strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." [Citation.] Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" [Citation.] Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.
>
> *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008).

Plaintiffs have a particularly difficult row to hoe in asserting a facial challenge because Proposition 35 does not regulate or control *speech*; rather, it is part of a comprehensive non-punitive civil regulatory scheme. It requires the registration of a name used on the Internet, akin to the existing requirement that convicted sex offenders register their actual names and any aliases by which they are known. It requires the disclosure of the Internet service providers that serve as platforms from which sex offenders enter the Internet, akin to the disclosure of home address and place of employment by which sex offenders are located in the physical world.

Thus, in *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999), the Court held it was error to employ the facial overbreadth doctrine with regard to

[3] While the complaint also alleges that Proposition 35 is unconstitutional as applied, plaintiffs have stipulated that they will litigate this matter only as a facial challenge until further notice.

a statute that controlled access to government information because the statute did not restrict the dissemination of information one already possesses, and thus no First Amendment rights were abridged. "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

For this facial challenge to succeed, then, plaintiffs must demonstrate that "*no set of circumstances exists under which the Act would be valid.*" *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). "The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.* at 745 (citation omitted).

A recent case from the Eighth Circuit rejecting a facial challenge to a law concerning electronic monitoring of convicted child pornographers illustrates the point.

> Stephens' facial challenge . . . fails because Stephens cannot establish there are no child pornography defendants for whom a curfew or electronic monitoring is appropriate. *See Salerno*, 481 U.S. at 751, 107 S.Ct. 2095. One can imagine many defendants for whom curfew and electronic monitoring would be necessary to assure their presence at trial or ensure the safety of the community . . . *See United States v. Gardner*, 523 F. Supp. 2d 1025, 1030 n. 3 (N.D. Cal. 2007) (rejecting a similar facial attack because "[t]here are circumstances where [the Adam Walsh] Act can be applied constitutionally – e.g., where a court determines all the minimum conditions mandated by the Adam Walsh Act are in fact warranted"). District courts across this country have found curfew and electronic monitoring to be appropriate in particular child pornography trafficking cases in order to stem the risk of flight and ensure community safety.
>
> *United States v. Stephens*, 594 F.3d 1033, 1038 (8th Cir. 2010)[4]

Proposition 35 is directed only at persons who, by virtue of their status as registered sex offenders, already are subject to significant post-conviction monitoring, the constitutionality of which is no longer at issue. *Smith v. Doe*, 538 U.S. at 105-06 (upholding constitutionality of Alaska Sex

[4] *Accord United States v. Peeples*, 630 F.3d 1136, 1138 (9th Cir. 2010).

Offender Registration Act);[5] *In re Alva*, 33 Cal. 4th at 280 (upholding constitutionality of California Penal Code § 290 et seq.). Even using plaintiffs' own statistics (without conceding their validity), if 4% of convicted sex offenders employed the Internet to facilitate new crimes against children,[6] then surely the law could constitutionally be applied to them. Plaintiffs' facial challenge must therefore fail.

**2. Because Proposition 35 does not regulate speech, the overbreadth doctrine does not apply**

To have any chance of prevailing on their facial challenge, then, plaintiffs must articulate the precise nature of the *speech* at issue. Plaintiffs argue that Proposition 35 "sweeps within its prohibitions speech that is constitutionally protected anonymous online speech." Pls.' Mem. at 11. Yet nothing in Proposition 35 prohibits registered sex offenders from accessing any Internet sites or engaging in speech on the Internet, even anonymously. *Compare Doe v. Prosecutor, Marion Cnty., Ind.*, 2012 WL 2376141, at *1 (S.D. Ind. June 23, 2012) (hereafter "*Marion Cnty.*") (upholding statute prohibiting registered sex offenders from using social networking sites, instant messaging programs, and chat room programs). Moreover, plaintiffs are not being asked to reveal the actual speech they engaged in – the law does not collect information about specific webpages viewed or statements written on blogs and the like.

Plaintiffs admit that Proposition 35 requires only identifiers separated from the actual speech but argue that it is "functionally and legally equivalent" to a prohibition on anonymous online speech. Pls.' Mem. at 11. That same argument was rejected by the Tenth Circuit in upholding statutory provisions similar to those at issue here, which required the disclosure of a registered sex offender's online identifiers to state officials. In the only appellate decision yet to address the constitutionality of Internet registration statutes for sex offenders, the Tenth Circuit said that when the

[5] The Alaska Sex Offender Registration Act requires any convicted sex offender or child kidnapper to register with local law enforcement agencies and regularly verify certain identifying information. While some of that information is kept confidential, such as driver's license number and anticipated change of address, other information is made available to the public, including name, aliases, address, photograph, physical description, motor vehicle identification and description, and place of employment. *Smith v. Doe*, 538 U.S. at 90-91.

[6] According to plaintiffs' experts, a 2006 study found that "4% of persons arrested for crimes against youth victims that involved the internet were registered sex offenders." Decl. of B. Abbott ("Abbott Decl.") ¶ 21; *see also* Decl. of D. Finkelhor ("Finkelhor Decl.") ¶ 18.

registration occurs "at some time period following [plaintiff's] speech and not at the moment he wished to be heard" it does not implicate the right to anonymous speech. *Doe v. Shurtleff*, 628 F.3d 1217, 1225 (10th Cir. 2010). Similarly, a district court found that Georgia's Internet registration law for sex offenders "is not a restriction on speech, anonymous or otherwise" because it does not restrict what the individual "may say or how he might say it." *White v. Baker*, 696 F. Supp. 2d 1289, 1307-08 (D. Ga. 2010).

Nor may a regulatory scheme be brought within the ambit of the First Amendment merely by arguing that the post-hoc collection of information about a speaker deters others from speaking.[7] Again, that claim was rejected by the Tenth Circuit, relying on a passage from the Supreme Court:

> "[T]his Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. In none of those cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain [information-gathering] activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual."
>
> *Shurtleff*, 628 F.3d at 1225 (citations omitted).

In short, plaintiffs cannot demonstrate that their facial challenge implicates First Amendment speech rights, and they cannot demonstrate that there is no one as to whom the statute can constitutionally be applied. This challenge has no likelihood of success.

[7] Plaintiffs cite *Art of Living Found. v. Does 1-10*, 2011 WL 5444622, *1 (N.D. Cal. Nov. 9, 2011) for the proposition that disclosure of an anonymous online speaker's identification, even many months after the fact, may cause "irreparable harm" to the speaker's First Amendment rights. Pls.' Mem. at 11-12 & n.5. That case concerns disclosure in the context of a civil lawsuit brought against persons who had engaged in defamatory speech, copyright infringement, and the like by making anonymous negative comments about plaintiff's business. To the extent it has any relevance to this litigation, it lies in the acknowledgment that many courts have ordered disclosure of the identity of an anonymous online speaker when the need for the information outweighs the need for anonymity. *Art of Living Found.* at *4; *see In re Anonymous Online Speakers*, 661 F.3d 1168, 1179 (9th Cir. 2011) (upholding order to disclose identity of non-party anonymous speakers in commercial tort case alleging online smear campaign against business entity).

**B. Plaintiffs Fail To Demonstrate That The Statute Cannot And Will Not Be Construed to Avoid Overbreadth**

Even assuming plaintiffs could persuade the Court that their challenge implicates First Amendment speech rights, they cannot successfully demonstrate that "a 'substantial number' of [the statute's] applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Wash. State Grange*, 552 U.S. at 449 n.6 (citations omitted). That analysis begins with statutory construction.

> As we explained two Terms ago, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."
>
> *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citation omitted).

Plaintiffs ask this Court to construe this statute without benefit of implementation by the State or construction by the California state courts. That alone merits extreme caution. "Exercising judicial restraint in a facial challenge "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Wash. State Grange*, 552 U.S. at 450 (citation omitted).

In *Washington State Grange*, the Supreme Court rejected a facial challenge to an initiative that imposed a new "top-two" primary system on state elections. Noting that the challengers' claims of widespread voter confusion were speculative and that there were ways the state could implement the system to minimize confusion, the Court concluded in words that are equally applicable here:

> Respondents ask this Court to invalidate a popularly enacted election process that has never been carried out. . . . The First Amendment does not require this extraordinary and precipitous nullification of the will of the people.
>
> *Id.* at 458.

The Court's concerns about moving precipitously and without benefit of a fully fleshed-out statutory scheme are grounded in the very nature of the challenge being brought: "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613.

> [I]nvalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that it has been made criminal – has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.
>
> *United States v. Williams*, 553 U.S. 285, 292-93 (2008).

The Court must give weight to the State's own view of what the law entails. "'[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (citation omitted). "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Williams*, 553 U.S. at 307 (Stevens & Breyer, J.J., concurring) (citation omitted). Where the words themselves are unclear, "our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters." *Id.* This is especially true for statutes enacted by the voters, like Proposition 35. Under California law, it is the "solemn duty [of the courts] to jealously guard the precious initiative power. . . ." *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991). "'[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled.'" *DeVita v. County of Napa*, 9 Cal. 4th 763, 776 (1995) (citation omitted). As a result, when a ballot measure is subject to a legal challenge, courts must "resolve any reasonable doubts in favor of the exercise of this precious right." *Brosnahan v. Brown*, 32 Cal. 3d 236, 241 (1982) (emphasis omitted).

Nor is the Court bound to accept any possible interpretation proffered by plaintiffs, no matter how far-fetched.[8] "[F]anciful hypotheticals" of what the law may proscribe have little weight unless "there is a 'realistic danger'" of the feared conduct occurring. *Williams*, 553 U.S. at 301, 302 (citations omitted).

[8] Plaintiff Roe alleges that his fear of revealing his Internet identifiers has caused him to flee the State. *See* Supp. Decl. of J. Roe ¶¶ 4-5. He does not say to where he has fled. Given that federal law requires the inclusion of Internet identifier registration data to the sex offender registration systems currently operating in all 50 states, and that a number of states have already complied, it is not apparent that fleeing California addresses Mr. Roe's fear. Indeed, as discussed below, some jurisdictions have adopted far more onerous requirements than California.

> The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."
>
> *Id.* at 303 (citation omitted).

**1. Intermediate scrutiny applies**

Plaintiffs allege that Proposition 35's registration requirements are content-based because they discriminate based on one's status as a registered sex offender. Pls.' Mem. at 18. Yet those requirements are undeniably content neutral.

> The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [Citation.] Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech. [Citation.]"
>
> *Rock Against Racism*, 491 U.S. at 791-92, (emphasis in original).

In *Doe v. Shurtleff*, the Tenth Circuit rejected the plaintiff's claim that a Utah statute imposing an Internet communication registration requirement on sex offenders was a content-based restriction because it took away his "'right to choose whether to speak anonymously or under a pseudonym.'" 628 F.3d at 1223.

> On its face, [the statute] is a content-neutral regulation. The law says nothing about the ideas or opinions that Mr. Doe may or may not express, anonymously or otherwise. Neither is it aimed at 'suppress[ing] the expression of unpopular views,' [citation], but rather it is directed towards aiding the police in solving crimes. As in *Giani*, we therefore examine this law as a content-neutral regulation.
>
> *Id.*

"Content neutral regulation of protected speech is subject to 'an intermediate level of scrutiny.'" *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000) (upholding statute requiring registration of professional fundraising consultants as content neutral and therefore subject to intermediate scrutiny). The standards for intermediate scrutiny are much more likely to result in upholding a statute than if the measure were subject to strict scrutiny:

> To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less

> effectively absent the regulation.'" [Citation.] Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." [Citation.]
>
> *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

**2. The State has a strong interest in collecting information about pseudonyms used by convicted sex offenders on the Internet**

It is well-established that the State has a strong, indeed compelling interest, in registering and tracking information about convicted sex offenders. Indeed, in upholding California's lifetime registration law, the California Supreme Court, relying on similar pronouncements from the United States Supreme Court, said: "Given the general danger of recidivism presented by those convicted of criminal sexual misconduct, and the relatively minor burden registration represents, the Legislature may adopt a rule of general application for this class of offenders, and may guard against the demonstrated long-term risk of reoffense by imposing a permanent obligation on persons convicted of such crimes." *In re Alva*, 33 Cal. 4th at 279-80 (citing *Smith v. Doe*, 538 U.S. at 104). The California Legislature similarly has found that "[s]ex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." Cal. Penal Code § 290.03(a)(1).

Sexual exploitation through use of the Internet poses risks to the public that are real and palpable. "It is well-recognized in our culture that children are at risk from sexual predators who seek, using the internet, to lure them into illegal sexual conduct. The creation and sharing of pornographic images of children is a further and wide-spread abuse of innocents in our country and abroad." *White v. Baker*, 696 F. Supp. 2d at 1308;[9] *see, e.g.*, *People v. Singh*, 198 Cal. App. 4th 364 (2011) (defendant viewed profile of person posing as 12-year-old girl in Internet chat room, engaged in sexually explicit conversation with her, then arrived at an address he thought was her home).

[9] That judge noted that "use of the internet by predators seeking to engage in sexual relations with children or to engage in conduct that victimizes children sexually is pernicious. In the past five years alone, this Court has presided over seven cases where a defendant was convicted of illegal use of the internet to induce a child into sexual relations, to transmit obscene images to a person the defendant believed was a child, or to participate in the transmission of child pornography." *Id.* at 1304 n.11.

Nor are social networking or chat sites the only places where minors are at risk from sexual predators. *See, e.g., United States v. Lucas*, 670 F.3d 784, 786 (7th Cir. 2012) (upholding firearms conviction of defendant who struck up sexually explicit conversation with minor through online gaming site "World of Warcraft," then traveled from Massachusetts to Wisconsin in an elaborate scheme to kidnap him); *United States v. Cervini*, 16 Fed. Appx. 865, 866 (10th Cir. 2001) (defendant convicted of uploading child pornography to an Internet news group). The seriousness of the problem is confirmed by plaintiffs' expert, who acknowledges that "[t]here have been many prosecutions of adults during the past decade for directing sexual messages to youth" and that "these crimes represented serious threats to the well-being of young people at the hands of unscrupulous adults." (Finkelhor Decl. ¶¶ 14, 19-20.)

**3. Proposition 35 is narrowly tailored to serve the State's strong interest in enhancing its sex offender registration efforts without infringing speech**

Proposition 35 is a reasoned and narrowly tailored effort to advance the State's interest in an effective registration system for convicted sex offenders, without unduly harming those offenders' rights to engage in speech activities. Unlike statutes in Indiana and Louisiana, California's law does not ban convicted sex offenders from accessing or participating in certain types of Internet communications. *Compare Marion Cnty.*, 2012 WL 2376141, at *1 (upholding Indiana law prohibiting registered sex offenders from accessing social networking sites, instant messaging programs, and chat rooms); *Doe v. Jindahl*, 853 F. Supp. 2d 596, 599 (M.D. La. 2012) (invalidating Louisiana law prohibiting registered sex offenders from using or accessing social networking sites, chat rooms, or peer-to-peer networks). It does not require registrants to consent to a search of their computers and other communication devices. *Compare Doe v. Nebraska*, 2012 WL 4923131, at *27 (D. Neb. Oct. 17, 2012) (striking down such law). Nor does Proposition 35 require registrants to report the names of any websites to which the person has uploaded content or posted any messages or to consent to the installation of monitoring hardware and software on their computers. *Id.* at *29 ("[R]equiring Internet identifiers and addresses . . . is one thing," but compulsory updates about Internet postings "is an entirely different thing.").

Instead, Proposition 35 only requires the reporting of Internet identifiers and service providers. That requirement inflicts no new or recognizable harm on convicted sex offenders. Indeed, the courts already have found that no one has a reasonable expectation of privacy in information given to an Internet service provider. *People v. Stipo*, 195 Cal. App. 4th 664, 668-69 (2011); *see also White v. Baker*, 696 F. Supp. 2d at 1312; *cf. United States v. Forrester*, 512 F.3d 500, 509-11 (9th Cir. 2007) (no reasonable expectation of privacy in the to/from addresses of email messages or Internet provider addresses of websites visited).

Moreover, that disclosure does not unduly trample on the right to speak anonymously because it is not a precondition to speech and it does not prevent anonymous speech. For example, just as a registrant is free to engage in anonymous leafleting on a street corner notwithstanding the fact that his name is registered with law enforcement officials, so too can a registrant view and interact with any site on the Internet notwithstanding the fact that law enforcement officials have on file the screen name he is using, if any.[10]

> When the government obtains the to/from addresses of a person's e-mails or the IP addresses of websites visited, it does not find out the contents of the messages or know the particular pages on the websites the person viewed. At best, the government may make educated guesses about what was said in the messages or viewed on the websites based on its knowledge of the e-mail to/from addresses and IP addresses – but this is no different from speculation about the contents of a phone conversation on the basis of the identity of the person or entity that was dialed. . . .
>
> The government's surveillance of e-mail addresses also may be technologically sophisticated, but it is conceptually indistinguishable from government surveillance of physical mail. In a line of cases dating back to the nineteenth century, the Supreme Court has held that the government cannot engage in a warrantless search of the contents of sealed mail, but can observe whatever information people put on the outside of mail, because that information is voluntarily transmitted to third parties.
>
> *Forrester*, 512 F.3d at 510-11.

While the harm is nonexistent, the government's need is great. The requirement of disclosing one's name, whether screen name, alias, or given name, is closely tied to the government's

[10] If the site requires no identifying information from persons who view or engage with it, then there will be nothing for the registrant to report as a result of his visit there.

need for quick investigation. By requiring convicted sex offenders to register the "names" they use to communicate on the Internet and the Internet providers they use, the State will be far better able to quickly identify and investigate suspects when presented with evidence that a crime involving the use of the Internet to facilitate trafficking or sexual exploitation of minors has been or is about to be committed.[11] This is the same purpose served currently by the registration system under California Penal Code section 290. Under that system, when a sex crime involving a minor is committed, police can immediately draw up a list of prior sex offenders who reside in the area. Decl. of S. Bock ¶ 12. And when a sex crime involving a minor is committed through the Internet, the police will have a list of Internet pseudonyms to compare with the perpetrator's identifier. *Id.* ¶¶ 10-12.

Plaintiffs suggest that the statute is not narrowly tailored because it applies to some convicted sexual predators who have a lesser chance of recidivism than others, or who have not yet used the Internet to facilitate a crime, or whose crime involved children with whom they were already acquainted.[12] Plaintiffs' own experts, however, confirm that the risk of recidivism is real. "[L]ifetime sexual offense recidivism rates . . . averag[e] between 14 and 20%." Abbott Decl. ¶ 1(c). Pedophiles who molest boys and rapists of adult women have recidivism rates of 52% and 39%, respectively. *Id.* ¶ 15. Thirteen percent of persons incarcerated for sex crimes had been previously convicted of a violent sex offense. *Id.* ¶ 21. Of the registered sex offenders in the California Department of Justice

[11] *See, e.g., United States v. Tank*, 200 F.3d 627, 630-31 (9th Cir.) (describing efforts to connect defendant Tank with screen name "Cessna" used in chat room conversations of club whose members discussed, traded, and produced child pornography).

[12] Plaintiffs misstate the law by asserting that the mere existence of feasible, readily identifiable, and less restrictive alternatives "confirm[s] that the statute 'is not narrowly tailored.'" Pls.' Mem. at 14. The case plaintiffs cite sets forth a very different standard, noting that a regulation "need not be the least restrictive or least intrusive means of achieving the government's goals," as long it does not "burden substantially more speech than is necessary." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011) (internal quotations and citations omitted). Indeed, plaintiffs' acknowledgement that the law could be tailored to those who have been convicted of offenses involving the Internet or who are at a high risk of reoffending makes clear that the law can be applied constitutionally. Pls.' Mem. at 14.

database, 31% are categorized as moderate-high and high risk.[13] *Id.* ¶ 9. When looking at whether sex offenders might commit another crime, plaintiffs' own expert advises that "the period of time immediately after an offender's release from prison or jail is an important indicator of that offender's ultimate success in the community. . . . Monitoring the individual during this period . . . could be valuable in assessing whether an offender is likely to reoffend." *Id.* ¶ 18.

According to plaintiffs' experts, when the potential victim is known to the offender, the ability to track down a suspect's Internet name is an especially important investigative tool. This is because "most" of the increase in technology-facilitated sex crimes against minors in recent years has "involved offenders who used technology to facilitate sex crimes against victims they already knew face-to-face." Finkelhor Decl. ¶ 12. The "existing vulnerability" of victims of family and acquaintance offenders "is increasingly enacted and evident online . . . ." *Id.* ¶ 13.

The analysis of the Tenth Circuit is instructive here. The court rejected the claim that because the Utah statute also applied to offenders whose offenses were not sex-related, it was not narrowly tailored to its stated purpose. *Shurtleff*, 628 F.3d at 1226 (citation omitted) ("'[I]f the ordinance may be validly applied to [the plaintiff], it can validly be applied to most if not all . . . parties not before the Court.'"). That court also concluded that the Utah statute "is readily susceptible of a much narrower construction than advanced by [plaintiff]." *Id.* at 1224. That narrower construction included reading the statute "as permitting sharing only among law-enforcement agencies, not the public at large, and only for the recited law-enforcement purposes." *Id.* at 1225. Similarly, the court found the statute's provision allowing the state to use an offender's Internet identifiers "'to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders'" was limited to "only

[13] Plaintiffs may be understating the risks. In rejecting a similar argument that the Alaska sex offender registry swept too broadly, the U.S. Supreme Court allowed the state to err on the side of protecting the public because "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith v. Doe*, 538 U.S. at 103 (citing *McKune v. Lile*, 536 U.S. 24, 33-34 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.") (relying on statistics from the U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997) and Recidivism of Prisoners Released in 1983, p. 6 (1997))). Plaintiffs' own expert suggests that there were serious errors in developing Static-99, a tool used to estimate the risk posed by offenders, and that it *underestimates* the recidivism rate in all reference groups. Abbott Decl. ¶ 4.

allowing state actors to look beyond the anonymity surrounding a username in the course of an investigation after a new crime has been committed." *Id.* (citation omitted).

The reporting provisions in Proposition 35 are very similar to the requirements in Utah.[14] The information provided to law enforcement is intended to be used for the purposes of investigating online sex crimes and human trafficking. Prop. 35, § 2, ¶ 6; § 3, ¶ 3. Furthermore, contrary to plaintiffs' suggestion (Pls.' Mem. at 15), Proposition 35 does not authorize law enforcement agencies to share a registrant's Internet identifiers or Internet service providers with social networking sites or the public.[15] Indeed, under the California Public Records Act, such information is exempt from disclosure. Cal. Gov. Code § 6254(f). Similarly, federal law bars the inclusion of a sex offender's Internet identifiers on a state's public website. 42 U.S.C. § 16915a. California's existing sex offender registration law authorizes disclosure of non-public information about a registrant only in instances where law enforcement has demonstrated a public safety need related to that specific registrant. Cal. Penal Code § 290.45(a). Finally, California law authorizes a civil action for any misuse of a registered sex offender's registration information and criminal penalties if the information is used to commit a crime. *Id.* §§ 290.46, 290.45(e).

**C. The Law Is Sufficiently Clear And Definite**

Plaintiffs' claim that Proposition 35 is unconstitutionally vague has no merit. A statute comports with due process if it provides "a person of ordinary intelligence fair notice" of the proscribed behavior and provides sufficiently clear standards so as to avoid "seriously discriminatory enforcement." *Williams*, 553 U.S. at 304; *see also People v. Vincelli*, 132 Cal. App. 4th 646, 650, 654 (2005) (statute requiring sex offender to update registration when he or she "changes his or her name" provided sufficiently fair notice to defendant, who retained his name but added alias). Even where, as

[14] This case is not like *White v. Baker*, 696 F. Supp. 2d 1289, in which the court found the statute not narrowly tailored because, among other things, it required disclosure of passwords used in retail and banking transactions. *Id.* at 1310.

[15] Plaintiffs' suggestion that the release of such information could increase recidivism by cutting sex offenders off from a social network (Pls.' Mem. at 15) amounts to pure speculation both about the manner in which the State will implement the law and the manner in which offenders will respond.

plaintiffs argue here, "a law implicates First Amendment rights, the Constitution must tolerate a certain amount of vagueness." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001).

To withstand a vagueness challenge under the due process clause "'[a]ll that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *People v. Hsu*, 82 Cal. App. 4th 976, 991-92 (2000) (citation omitted) (statute prohibiting dissemination of harmful matter via Internet is not void for vagueness). When examining a state law in light of a vagueness challenge, federal courts must "determine whether the statute is 'readily susceptible' to a narrowing construction by the state courts." *Cal. Teachers Ass'n*, 271 F.3d at 1147 (citation omitted). Courts have long recognized that "enactments should be interpreted when possible to uphold their validity." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 598 (1976). *See also Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dept.*, 533 F.3d 780, 792 (9th Cir 2008) ("California courts regularly construe arguably ambiguous statutes narrowly to avoid First Amendment problems.").[16]

Here, the definitions of both "Internet service provider" and "Internet identifier" are sufficiently clear. *See* Cal. Penal Code § 290.024(a) & (b). The Act's definition of "Internet service provider" is drawn directly from federal law. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. Law 105-277, § 1101(f)(2)(A), 112 Stat. 2681 (1998) ("The term 'Internet access provider' means a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services."). With regard to the phrase "internet identifiers," it is very similar to the definition upheld by the Tenth Circuit, and to the federal definition. *Shurtleff*, 628 F.3d at 1221 n.1 (online identifier means "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet

[16] The State has not yet had the chance to implement Proposition 35, but in doing so, it is likely to address many of the concerns plaintiffs raise. For example, plaintiffs suggest that the term "Internet service provider" could include Best Buy because it sells devices that can access the Internet. Pls.' Mem. at 18; Decl. of D. Post ¶ 47. This construction is absurd, and as a result, it is highly unlikely that the State would implement Proposition 35 in a manner that would require registrants to report Best Buy as one of their Internet service providers.

communication"); 42 U.S.C. § 16915a(e)(2) ("'Internet identifiers' means electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting."). It is limited to the names a registrant uses to interact with others on the Internet, which, as plaintiffs note, is the means by which many sex offenders communicate with their victims online. Pls.' Mem. at 12.

Furthermore, the terms used in the definitions of "Internet service provider" and "Internet identifier" are used in everyday language and have an objective and ordinary meaning that can be discerned from a dictionary. *See United States v. Santos*, 553 U.S. 507, 511 (2008) ("When a term is undefined, we give it its ordinary meaning."); *In re Greg F.*, 55 Cal. 4th 393, 406 (2012) (when construing a statute, courts begin by giving the words of a statute their "plain and commonsense meaning."). For example, plaintiffs quibble with the terms "list" and "account" in the definition of Internet service provider (Pls.' Mem. at 21), arguing that these words create confusion, but the words have a common sense meaning.

The phrases plaintiffs challenge in the Act's definition of "Internet identifier" also are plain and clear to a person of ordinary intelligence. Both "instant messaging" and "social networking" have an ordinary, objective meaning and are understood in everyday language. *Cf. Williams*, 553 U.S. at 306 (words susceptible to subjective meaning, *e.g.*, "annoying" or "indecent," may render statute unconstitutionally vague.). Indeed, in a world as technologically saturated as the one plaintiffs describe, it would be incredible if plaintiffs did *not* understand what is meant by the terms "instant messaging" and "social networking."

The phrase "used for the purpose of" is so widespread and commonly understood that courts rarely have occasion to pass on its meaning, but when they do so have found the phrase sufficiently clear. *See, e.g., United States v. Simmons*, 96 U.S. 360, 363 (1877) ("allegation that the vessels were used 'for the purpose of . . .'" sufficiently advises the accused of the nature of the offence charged.). In this particular context, the phrase connotes an element of intent on the part of the registrant, which adds even greater clarity to the term. *See Cal. Teachers Ass'n*, 271 F.3d at 1154 (finding that ballot initiative's scienter requirement mitigated vagueness concerns).

Finally, the inclusion of "similar" identifiers and services in the definition of "Internet identifiers" does not create uncertainty. It is a canon of statutory construction that "'where general

words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (citation omitted). Here, the common thread among the phrases "electronic mail address," "user name," and "screen name," as used in California Penal Code section 290.024(b), is that they all encompass "a string of characters chosen" by the registrant to "uniquely" designate his identity when communicating with others online.[17] *See, e.g.*, *White v Baker*, 696 F. Supp. 2d at 1308-09.

Plaintiffs threaten a parade of horribles if the Act stands as written, but its language is not "potentially limitless." *Cal. Teachers Ass'n*, 271 F.3d at 1148. Plaintiffs' "basic mistake lies in the[ir] belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 305-06. "[T]he touchstone of a facial vagueness challenge in the First Amendment context, however, is not whether *some* amount of legitimate speech will be chilled; it is whether a *substantial* amount of legitimate speech will be chilled." *Cal. Teachers Ass'n*, 271 F.3d at 1152 (emphasis in original).

Proposition 35's language is sufficiently definite to give plaintiffs notice of what the statute requires and provides sufficiently clear guidance to officials responsible for enforcing its provisions. When read in light of the words' plain, ordinary, and everyday meaning, the purpose of the Act is clear: to require registered sex offenders to provide to law enforcement information about the identities they assume on the Internet. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (upholding anti-noise statute whose words were "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" when it was clear what the enactment "as a whole prohibits") (citation omitted).

**D. The Law Does Not Interfere With Plaintiffs' Freedom Of Association**

It simply is not true that Proposition 35 forces registrants to disclose their associations with online communities or groups. Registrants will have to disclose their Internet service provider –

[17] Likewise the phrases "Internet forum discussions," "Internet chat room discussions," "instant messaging," and "social networking," as used in the same provision, share the common thread of requiring the registrant to interact, *i.e.*, they require some sort of two-way communications.

*e.g.*, Comcast – and their Internet identifiers – *e.g.*, John54. They do not have to disclose which websites they visit and where they use those identifiers. In fact, if a law enforcement official wants to know whether the "John54" who is soliciting children through private communications on a gaming website is the same "John54" who is a registered sex offender, that official will have to take additional steps to find out, likely by securing a subpoena, a search warrant, or judicial order.[18]

Indeed, Proposition 35 is far *less* likely to result in the disclosure of registrants' associations than current registration requirements. For example, under current law, law enforcement officials know that plaintiff Roe is a registered sex offender; they know his name, his aliases, and license plate numbers; and they know what he looks like. Depending on the circumstances, other members of the community may know some of this information too. Thus, any time Roe attends a political meeting, social gathering, or any other kind of in-person meeting, Roe runs the risk that someone will recognize him as a sex offender and know his associations. The same is true every time he signs a petition and allows his name to be included on an organization's membership list.

Simply put, Proposition 35 is not designed to, and will rarely have the effect of, uncovering which Internet sites are visited by registered sex offenders. The exceptions will almost all involve instances where law enforcement is able to use an identifier to identify a particular individual who has used the Internet to facilitate a crime. Thus, the measure is narrowly drawn to achieve a strong, indeed compelling, interest in combatting online sex offenses. *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960) (Legislature can pursue legitimate, substantial interests through narrow means, even if they infringe on important rights).

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[18] Plaintiffs' cases do not address facts like these, where a statute creates the mere possibility that associations will be revealed if further steps are taken. Plaintiffs' cases involve efforts to force political organizations to directly and immediately disgorge their membership lists and political communications to the government or their political opponents. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (NAACP need not turn over its list of Alabama members to the Alabama Attorney General); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (Socialist Worker Party need not disclose its contributors to the State of Ohio); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010) (proponents of Proposition 8 must disclose internal campaign communications to opponents only upon a showing of a sufficient need that counterbalances proponents' First Amendment interests).

## II. THE BALANCE OF HARDSHIPS FAVORS THE STATE

"[W]hen . . . a party has not shown any chance of success on the merits, no further determination of irreparable harm or balancing of hardships is necessary." *Global Horizons, Inc. v. U.S. Dept. of Labor*, 510 F.3d 1054, 1058 (9th Cir. 2007). Because plaintiffs' facial challenge cannot succeed for the reasons described above, there is no need to even weigh the hardships.

Yet even if hardships are compared, plaintiffs cannot prevail. Even though the State will not be ready to use sex offenders' Internet identifiers and service providers for law enforcement purposes until March 2013, the mere collection of that information serves a vital prophylactic purpose. After all, a human trafficker who must begin turning over his Internet identifiers immediately may be deterred from online predatory conduct immediately, based on the knowledge that the police will eventually track him down. It is that harm to potential online victims that must be weighed against the potential harm to plaintiffs' speech. There is literally no way to repair the harm that could befall a woman or child who falls victim to these crimes.

If plaintiffs suffer any harm at all from delayed injunctive relief, they would suffer no more harm than they experience as a consequence of current registration requirements that mandate disclosure of their names, addresses, and the like. Moreover, if the Internet registration requirements were eventually struck down, plaintiffs could simply develop new identifiers.

Even if such a fleeting injury were deemed to be irreparable, it does not justify injunctive relief if it is outweighed by a more compelling public interest. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). In *Spiegel v. City of Houston*, 636 F.2d 997, 1000 (5th Cir. 1981), the Fifth Circuit reversed a preliminary injunction as overbroad because it elevated the privacy rights of adult theater patrons over legitimate law enforcement goals by prohibiting the police from demanding the names, addresses, and other personal information from theater patrons while enforcing state obscenity statutes. *Id.* at 1002. Although the Court acknowledged that it may be appropriate to enjoin police from demanding patrons' names in order to discourage them from patronizing adult theaters, the Court found "considerable potential harm to the public interest in the overly broad terms of the injunction" which could prevent a vice officer from asking an underage patron for proof of his age. *Id.* Similar reasoning applies here with far greater force, where the public's

interest in deterring some of the most heinous crimes imaginable outweighs a registered sex offender's desire to protect his anonymity from law enforcement while engaging in online activities.

## CONCLUSION

Proposition 35 does not restrict registered sex offenders from engaging in any lawful online communications, even anonymously. It merely requires that they report their Internet identifiers and Internet service providers – information that is the cyberworld equivalent of sex offenders' names, aliases, and addresses – to the law enforcement agencies with which they are already registered. Proposition 35 is narrowly crafted to provide law enforcement with a valuable tool to combat online sex crimes, while imposing only a minimal reporting burden on plaintiffs. Plaintiffs' motion for a preliminary injunction should therefore be denied.

Dated: November 26, 2012

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**JOHN DOE, JACK ROE, AND CALIFORNIA REFORM SEX OFFENDER LAWS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,**

Plaintiffs,

**v.**

**KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA, AND CITY OF ALAMEDA,**

Defendants.

Case No. 3:12-cv-05713-TEH

**OBJECTIONS OF DEFENDANT KAMALA D. HARRIS TO DECLARATION OF DAVID G. POST IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

| | |
|---|---|
| Date: | December 17, 2012 |
| Time: | 10:00 a.m. |
| Courtroom: | 12 |
| Judge: | The Honorable Thelton E. Henderson |
| Trial Date: | Not Set |
| Action Filed: | November 6, 2012 |

Defendant Kamala D. Harris (Defendant) objects to the Declaration of David G. Post filed in support of Plaintiffs' Motion for Preliminary Injunction. The Post Declaration is objectionable for several reasons and should be disregarded in its entirety.

Evidence submitted to the Court on motion practice must meet all requirements for admissibility of evidence if offered at the time of trial. *Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181-82 (9th Cir. 1988); *Travelers Cas. & Sur. Co. of Am. v. Telstar Const. Co.*,

*Inc.*, 252 F. Supp. 2d 917, 923 (D. Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence apply to all proceedings in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions to Rule 101). Such evidence must be relevant to the claims and defenses of the case. Fed. R. Evid. 401. Testimonial evidence must be based on facts or data a purported expert has been made aware of or personally observed. Fed. R. Evid. 703. Testimony requiring scientific, technical, or other specialized knowledge may be given only by an expert witness with the requisite knowledge, skill, experience, training, or education, and opinion testimony is not permitted of a lay person. Fed. R. Evid. 701, 702; *see also U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc.*, 296 F. Supp. 2d 1322, 1331 (S.D. Ala. 2003) (unqualified expert opinions inadmissible at summary judgment). The Post Declaration fails to meet one or more of these criteria, as set forth below.

| | **Proffered Evidence** | **Objection** |
|---|---|---|
| 1. | Post Declaration, ¶ 3a: The CASE Act's definitions of the terms "Internet service provider" and "Internet identifier" reporting requirements are ambiguous and would cause uncertainty for officials and registrants. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 2. | Post Declaration, ¶ 3b: Under reasonable and plausible readings of the statutory language, the CASE Act's "Internet service provider" and "Internet identifier" definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller and seemingly capriciously-chosen subset of those communications. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 3. | Post Declaration, ¶ 3c: Under any reading of the statutory text, the CASE Act will substantially curtail registrants' ability to engage in anonymous communication, and will require considerable and burdensome reporting even for ordinary, non-anonymous communication. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |

| | Proffered Evidence | Objection |
|---|---|---|
| 4. | Post Declaration, ¶¶ 4-5 (Background and experience) | The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist and has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999). |
| 5. | Post Declaration, ¶¶ 6-17 (Background: Size and Use of the Internet) | The witness' opinions are irrelevant. Fed. R. Evid. 402. |
| 6. | Post Declaration, ¶ 20: The phrase "any electronic mail address, user name, screen name, or similar identifier" could include almost any information a person uses to refer to himself or herself on the Internet, including:<br><br>a. A person's real name, when used as a user name, screen name, or similar identifier;<br><br>b. The word "Anonymous," when used as a user name, screen name, or similar identifier;<br><br>c. Any temporary or permanent forwarding address, such as one created on behalf of a person posting an article for sale on craigslist. (Any such address could be an "Internet identifier" regardless of whether the registrant were actually aware of its creation or existence.) | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 7. | Post Declaration, ¶ 21: The phrase "any electronic mail address, user name, screen name, or similar identifier" could also include information about other people. The natural reading of the phrase "used by the person" is "used to identify the | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a |

| | Proffered Evidence | Objection |
|---|---|---|
| | person," but there is also a possible unintended reading: "employed for any purpose by the person." Because people "use" other people's Internet identifiers when communicating with or referring to those people, an "identifier used for [the specified purposes]" could be read to include every identifier a registrant uses to communicate or even refer to another Internet user. | person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 8. | Post Declaration, ¶ 23: Without the names of the associated websites, blogs, or social networking sites, however, the information being reported often may be of no practical value to law enforcement. It is difficult to imagine any practical value in merely knowing that *e.g.*, a registrant used the identifier "Angry_User" as an Internet identifier *somewhere* on the Internet on November 7, 2012, because there may well be thousands, or hundreds of thousands, of postings across the Internet on that day with that "identifier," posted by thousands or hundreds of thousands of different people. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403. |

| | Proffered Evidence | Objection |
|---|---|---|
| | | *See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 9. | Post Declaration, ¶ 24: The disutility of this information, standing alone, may well lead law enforcement officials to demand that registrants additionally report the particular website/blog/social networking site associated with each reported username. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 10. | Post Declaration, ¶ 25: Similarly, it is unclear how the requirement to report "any and all Internet identifiers . . . used by the person" applies to a person who uses the same username (e.g. "davidgpost") for several different newspaper websites, | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The |

| | Proffered Evidence | Objection |
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| | political blogs or other services. | witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 11. | Post Declaration, ¶ 26: On many sites or services, distinct additional identifiers, such as an account number or email forwarding address may be automatically "established" for the person and used internally or externally to enable forms of communication encompassed by the definition of Internet identifier in the Act. It is unclear whether each identifier for a given service must be reported. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions |

| | Proffered Evidence | Objection |
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| | | is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 12. | Post Declaration, ¶ 27: The ordinary meanings of the terms used in the phrase "used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications" appears to encompass a vast array of Internet communications on a wide range of subjects. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 13. | Post Declaration, ¶ 28: I would describe an "Internet forum discussion" as an online site where individuals can participate in a discussion by means of posting messages or comments. As such, any site that permits comments by visitors would appear to be an "Internet forum discussion," or at the very least "similar" to an "Internet forum discussion." This would include:<br><br>a. Many, if not most, news-oriented websites, which often permit comments on at least some of the articles or other content on the site. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they |

| | Proffered Evidence | Objection |
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| | b. Many, if not most, political, legal, and current affairs sites. For example, the "Volokh Conspiracy" blog, where I am a regular contributor, permits site visitors to leave comments and to participate in a discussion about individual blog postings, using a username of the visitor's choosing.<br><br>c. Many sites promoting discussions of sensitive topics such as sexuality, alcoholism, etc. In particular, the website for California Reform Sex Offender Laws (http://californiarsol.org/), a group advocating on behalf of convicted sex offenders, includes a discussion forum.<br><br>d. Many commercial sites, such as Amazon.com or eBay.com, which allow users to post feedback on recent purchases or otherwise participate in group discussions.<br><br>e. Many entertainment sites, such as HBO.com or YouTube.com, which allow users to start, or to participate in, online discussions of the content posted at the site or other matters.<br><br>f. Many blogs, which increasingly use platforms such as WordPress or Tumblr and allow visitors to comment or otherwise contribute.<br><br>g. Most sites offering social networking functionality as described in ¶¶35-36 below. | create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 14. | Post Declaration, ¶ 29: I estimate that the number of sites falling into one or more of these categories is in the millions, if not the hundreds of millions. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702. |
| 15. | Post Declaration, ¶ 30: The term "Internet chat room discussions" is undefined and broad. The term "chat," in cyberspace jargon, generally refers to any form of online "synchronous conferencing"– applications that allow users to exchange | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant. |

| | Proffered Evidence | Objection |
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| | messages (usually text, but increasingly, these days, including video content as well) with at least one other known user, in real time. | The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 16. | Post Declaration, ¶ 31: "Instant messaging" is another name for functionality that permits users to exchange messages (text or video) to one or more other known users in real-time. As such, it is largely overlapping with "Internet chat room discussion." | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 17. | Post Declaration, ¶ 32: The Facebook "chat" function is a typical web-based chat application; when a user logs on to her Facebook account, she is presented with a list of her "friends" – other users who have accepted, or extended, a "friend request" to her in the past – who are currently logged on to their Facebook accounts, and she can choose any one of them with whom to "chat," i.e., to exchange messages one-to-one in real-time. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions |

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| | | is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 18. | Post Declaration, ¶ 33: Hundreds of thousands of ordinary commercial websites allow users to "chat" with a service representative if they have questions about the merchandise being offered for sale, a prior order, etc. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 19. | Post Declaration, ¶ 34: A number of politicians and political candidates have participated in "online town halls" where constituents can ask questions for the politician or candidate to answer in real time. Although these events may be moderated, they are otherwise functionally equivalent to any other "chat." | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire* |

| | Proffered Evidence | Objection |
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| | | *Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 20. | Post Declaration, ¶ 35: The term "social networking" is also extremely broad. In the Internet context, "social networking" has become a widely used catchphrase to define a class of online functions, spurred largely by the phenomenal popularity of such sites as Myspace, LinkedIn, Twitter, and Facebook. There is no consensus definition of the term, although it generally describes websites that allow users to create searchable profiles, and that contains mechanisms for communicating with, and linking to, other users. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 21. | Post Declaration, ¶ 36: An increasing number of web pages incorporate some form of social networking functionality in this sense. Examples include:<br><br>a. Online commerce sites such as Amazon.com and eBay.com, b. Product and business review sites such as Yelp, c. Blogging sites and services, especially those using platforms such as WordPress and Tumblr, and<br><br>d. User-generated or user-created content sites or services such as YouTube or Pinterest. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |

| | Proffered Evidence | Objection |
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| 22. | Post Declaration, ¶ 37: I estimate that the number of websites incorporating such functionality – without even considering sites that are "similar" in some unspecified manner to these sites – is in the millions, if not hundreds of millions. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 23. | Post Declaration, ¶ 38: In addition, Internet sites and services are not static; instead, they are constantly adding new functionality. Thus, even a site that does not presently fall within the scope of the Act could change its functionality so that it qualified in the future. A user of the site may or may not be aware of such changes. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 24. | Post Declaration, ¶ 39: Finally, while the Internet identifier definition sweeps | The witness' opinions are based on speculation, conjecture, or other improper |

| | Proffered Evidence | Objection |
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| | broadly in many respects, it also contains one significant exception. By restricting itself to "Internet" identifiers and communications, the definition appears to exclude identifiers used for communications over non-Internet networks – most importantly, the proprietary cellphone networks. | matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 25. | Post Declaration, ¶ 40: A substantial proportion of the billions of "instant messages" transmitted each day do not travel over "the Internet" but, instead, over one of many proprietary cellphone networks. Identifiers used for that purpose would appear to be outside the scope of the statutory reporting requirements. On the other hand, many instant messaging services do, in fact, use the Internet to handle all, or some portion, of the relevant communication. Identifiers used for those purposes would appear to be within the scope of the statute. Users of the different systems, however, may have no knowledge – and no practical way of obtaining the knowledge – about which kind of instant messaging system they are using; this information is, generally speaking, invisible to the users involved. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 26. | Post Declaration, ¶ 41: In summary, the definition for "Internet identifier" can be construed as requiring reporting of every identifier used for a vast amount of online communications. However, the exact boundaries are extremely difficult to determine, owing in part to the imprecise | The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant. |

| | Proffered Evidence | Objection |
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| | language used to define the sites and services covered by the definition. Finally, although registrants are not required to report the actual site or service where they use the reported identifiers, law enforcement may nevertheless require that registrants provide such site or service association information. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 27. | Post Declaration, ¶ 45: There are three significant differences, however, between the two statutes. First, the federal definition includes only persons "engaged in the business of" providing Internet access, while the CASE Act includes "any business . . . *or other entity*." Second, the federal definition applies only to those providing a facility through which a "customer" can access the Internet; the CASE Act applies to those providing a facility through which "a person" may access the Internet. Finally, the FCA definition excludes a "common carrier," but only "to the extent that it provides only telecommunications services"; the CASE Act excludes any entity that "provides only" such services. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 28. | Post Declaration, ¶ 46: There are a wide range of methods by which a person (or his or her device) may obtain access to the Internet:<br><br>a. Many people access the Internet via their iPhones or other "smart" mobile devices using their wireless carrier.<br><br>b. Many people access the Internet from "cyber cafés" or "Internet cafés," which typically provide computer | The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v.* |

| | Proffered Evidence | Objection |
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| | terminals and Internet access for a fee.<br><br>c. Many people access the Internet from coffee shops, airport 'hot spots,' and hotels that provide wireless or wired Internet access for a fee or at no charge.<br><br>d. Many people access the Internet using "open" wireless systems. Residential and business users may leave their wireless networks "open" so that anyone within range of the network, whether guest or stranger, can use their wireless connection to freely access the Internet. Devices that are configured to connect to "open" wireless systems may do so without notifying or requiring any activity on the part of the user.<br><br>e. Many people access the Internet from their workplaces, using their employers' systems.<br><br>f. Many people access the Internet from libraries and educational institutions; in the latter case, access may be limited to students, faculty and staff, but not necessarily. | *Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 29. | Post Declaration, ¶ 47: However, if the statute covers all entities that provide a "computer and communications facility" that allows users to access the Internet, it would reach entities that most people would not ordinarily think of as ISPs, potentially including:<br><br>a. A company that sells or rents computers, smartphones, or other devices with networking capabilities. Many businesses, such as Best Buy, Amazon.com and other electronics stores, sell devices that can access the Internet.<br><br>b. A business or home Internet user that leaves a wireless network "open" for others to use for Internet access.<br><br>c. A company that sells or rents cars with Internet-enabled mapping or other services. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, |

| | Proffered Evidence | Objection |
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| | | confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 30. | Post Declaration, ¶ 48: In many circumstances, it may be difficult if not impossible for a user to know the identity of the entity or entities "used" when communicating over the Internet.<br><br>a. An employee may use the employer's Internet access service, but that service may in turn be provided by another entity.<br><br>b. A mobile device user may not realize that her device is "roaming" on a different provider's cellular network or has connected to an open wireless network.<br><br>c. A wireless user at a coffee shop or a hotel may be using Internet access service cooperatively provided by (a) the coffee shop or hotel, (b) a traditional ISP such as AT&T, and possibly (c) an intermediary who assists the coffee shop or hotel in setting up its network and/or provides the hardware or software used to connect users to the Internet. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 31. | Post Declaration, ¶ 49: In addition, any form of online communication, including simply accessing a website, could be said to "use" the target computer's Internet service provider and the providers of any intermediary networks as well as the initiator's Internet service provider. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702. |

| | Proffered Evidence | Objection |
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| | | The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 32. | Post Declaration, ¶ 50: Furthermore, the Act does not limit Internet service providers to those entities which provide Internet access *to the registrant*. Thus, any registrant who "uses" any business which qualifies as an Internet service provider as to *any* person appears to be required to report this use. For example, a registrant who purchases a DVD at Best Buy plausibly is required to report that "use." | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 33. | Post Declaration, ¶ 51: The CASE Act's reporting requirement refers to a registrant's "account with an Internet service provider," Cal. Penal Code § 290.014(b). This can reasonably be read to imply that only entities with whom a registrant has an account must be reported, and conversely that entities with which the registrant has no account are *not* ISPs under the CASE Act. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 34. | Post Declaration, ¶ 52: If so, then cyber cafés (for which one usually pays an hourly fee), coffee shops, hotels, roommates, and open wireless home or business networks (for which no account is needed) would not be ISPs under the CASE Act, insofar as consumers can readily use these facilities to obtain Internet access without setting up an account. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 35. | Post Declaration, ¶ 53: However, by the same reasoning, libraries (for which one does not need an account) would not fall within the basic definition of ISP and thus would not need to be explicitly excluded. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 36. | Post Declaration, ¶ 54: In addition, this reading appears to be in tension with Penal | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter |

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| | Code Section 290.015(a)(5), which requires reporting of "[a] list of any and all Internet service providers used by the person" and does not imply any account requirement. | of law for the Court to decide. |
| 37. | Post Declaration, ¶ 55: It thus is unclear whether a user must report on the use of "Internet service providers" that do not provide or require an account. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 38. | Post Declaration, ¶ 56: Under the plain text of this statute, only businesses that provide *exclusively* "telecommunications services, cable services, or video services" are excluded. If a company provides Internet service at all, even if the registrant does not purchase or use such service, it is encompassed by the definition. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 39. | Post Declaration, ¶ 57: The Act's departure from the definition of Internet access provider in federal law seems to reinforce this interpretation. See ¶¶44-45. The federal definition excludes entities that would otherwise qualify "to the extent that they provide only telecommunications services," 47 U.S.C. § 151 (note), while the CASE Act exclusion is instead limited to entities that "*provide only* telecommunications . . . services." Cal. Penal Code § 290.024(b) (emphasis added). | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 40. | Post Declaration, ¶ 59: But extremely few companies would fall within the definition so construed, as the vast majority of telecommunications and cable television providers also offer some form of Internet access. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |

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| 41. | Post Declaration, ¶ 60: A more reasonable reading would be that businesses that provide only telecommunications, cable, or video services to the registrant are excluded from the definition of Internet service provider—but this reading is in tension with the plain language of the bill. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 42. | Post Declaration, ¶ 61: Thus, while a court might determine that a registrant is not required to report on his telecommunications, cable, or video services that do not involve Internet access, a cautious registrant is likely to err on the side of caution and report more than is required. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 43. | Post Declaration, ¶ 62: In summary, the "Internet service provider" reporting requirements appear to encompass a wide range of entities outside of the common understanding of that term, potentially including entities which a registrant has no way of identifying. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403. |

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| | | *See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 44. | Post Declaration, ¶ 63: The reporting provisions of the CASE Act appear to place a significant and substantial burden on the ordinary Internet user to document and submit his or her Internet usage, both because the requirements are difficult to interpret, and because they potentially encompass many, and possibly most, of the avenues through which most people in this country communicate with one another online, whether to perform their jobs, purchase goods and services, or educate or entertain themselves. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 45. | Post Declaration, ¶ 64: To comply with the reporting requirements for Internet identifiers, a registrant plausibly must document and submit each distinct identifier she uses, potentially including:<br><br>a. A transient screen name in a customer support chat,<br><br>b. A newly-chosen screen name used for expressive purposes in the context of a specific political or current events discussion,<br><br>c. A temporary forwarding email alias automatically assigned by a classified ad service, and even<br><br>d. Identifiers associated with other persons that he "uses" in order to | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, |

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| | communicate with or refer to those persons. | confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 46. | Post Declaration, ¶ 65: To comply with the reporting requirements for Internet service providers, she plausibly must document and submit each distinct provider he uses, potentially including:<br><br>a. Each wireless network he uses at a café, hotel, or other location, including every entity involved in providing Internet access through that network;<br><br>b. Each purchase of any device that can connect to the Internet; and even<br><br>c. Each "use" he makes of any entity that provides Internet access to any person. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 47. | Post Declaration, ¶ 66: It is also plausible that the actual reporting requirements could be construed much more narrowly. However, because of the significant ambiguities in the law, a registrant wishing to "play it safe" would attempt to report far more than the narrowest possible construction, particularly if there are criminal penalties for noncompliance. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant. |

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| | | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 48. | Post Declaration, ¶ 67: While the statute on its face only requires a registrant to document and submit Internet identifiers, but not the sites or services for which she creates or uses identifiers, law enforcement may nevertheless demand that registrants provide such site or service association information. Similarly, it is unclear whether she is required to report the reuse of a previously reported user name on a new service. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, |

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| | | confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 49. | Post Declaration, ¶ 68: Taken as a whole, the CASE Act's reporting requirement for "Internet identifiers" and "Internet service providers" may encompass all of the forms of online speech and mechanisms of accessing the Internet discussed above, or some vaguely-defined and apparently arbitrary subset thereof. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 50. | Post Declaration, ¶ 69: In addition, the CASE Act may require reporting not only of Internet identifiers and Internet service providers that the registrant currently uses or uses in the future, but also identifiers and providers that the registrant has used in the past. There is no guidance in the statute as to whether or not it extends to past information. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 51. | Post Declaration, ¶ 70: Exhaustively documenting all such information may be difficult if not impossible for many persons, and as a result may deter residents from participating in online communications so as to avoid the burden of reporting on such activities or the accompanying risk of criminal penalties if | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, |

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| | she fails to do so. | practices or procedures.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also, Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 52. | Post Declaration, ¶ 71: In addition, the reporting requirements of the CASE Act will prohibit or chill many forms of anonymous online speech and online association. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, |

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| | | confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 53. | Post Declaration, ¶ 72: Anonymous political speech has long contributed to important public discourse in this country. This includes both anonymous speech in the strict sense of speech having no indication of authorship at all (e.g., Thomas Jefferson's publication of Notes on the State of Virginia, published anonymously because of the radical views on a number of sensitive political matters that were expressed in the book) and pseudonymous speech (e.g., the John Jay-James Madison-Alexander Hamilton collaboration published "The Federalist" under an assumed name ("Publius")). | The witness' opinions are irrelevant. Fed. R. Evid. 402.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702. |
| 54. | Post Declaration, ¶ 73: In the modern era, the U.S. Supreme Court has recognized the importance of anonymity to political speech and association. "Under our constitution, anonymous [speech] … is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995). Courts routinely protect the identities of online speakers against discovery in litigation. *See, e.g.*, *In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010); *Highfields Capital Mgmt., LP v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999). | The witness' opinions are irrelevant. Fed. R. Evid. 402.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702. |
| 55. | Post Declaration, ¶ 74: In addition, individuals enjoy the "right to be protected from compelled disclosure by the State" of their associations and affiliations, and thus the freedom of association. *NAACP v. Alabama*, 357 U.S. 449, 458 (1958); *see also Brown v. Socialist Workers*, 459 U.S. 87, 91 (1982); *Shelton v. Tucker*, 364 U.S. | The witness' opinions are irrelevant. Fed. R. Evid. 402. |

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| | 479, 488 (1960); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159-60 (9th Cir. 2010). | |
| 56. | Post Declaration, ¶ 75: Many if not most of the online communications covered by the CASE Act allow users to participate under a pseudonym. Examples exist in all categories, from social networks (Twitter, Google+) to forums on news sites (New York Times) to user-generated content services (Flickr) to product and business review sites (Yelp). | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 57. | Post Declaration, ¶ 76: Some sites and services permit users to create a screen name without even divulging their name or other identifier to the site itself. This appears to be particularly common for sites focused on sensitive topics where contributors are particularly concerned about protecting their identity. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant. |
| 58. | Post Declaration, ¶ 77: Under the CASE Act, however, any registrant wishing to use an online pseudonym for any reason will be required to disclose his/her real identity to the government. | The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 59. | Post Declaration, ¶ 78: In addition, while the Act does not appear to require registrants to disclose the actual sites which they use, it is possible that registration agencies will nonetheless request or demand such information. See ¶¶22-24. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702. |

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| | | The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 60. | Post Declaration, ¶ 79: This is of particular concern for individuals, such as members of California Reform Sex Offender Laws, who rely on online anonymous speech to discuss political issues related to their status as a sex offender, or who exercise their right to speak anonymously in order to criticize public officials – activities for which they have a reasonable fear of retribution were their true identities to be disclosed. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 61. | Post Declaration, ¶ 80: In addition, the CASE Act does not restrict law enforcement's broad discretion to further disseminate any information it collects, creating the further possibility of retribution from private parties. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 62. | Post Declaration, ¶ 81: As a result, the CASE Act is likely to substantially chill speech by an already-vulnerable population and make it more difficult for registrants to self-organize and advocate for change in their own interest. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness' opinions are irrelevant. Fed. R. |

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| | | Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.<br><br>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.<br><br>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.<br><br>*See also*, *Daubert v. Merrell Dow Pharms,. Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-148 (1999); *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.). |
| 63. | Post Declaration, ¶ 82: The CASE Act's definitions of the terms "Internet service provider" and "Internet identifier" reporting requirements are ambiguous and would cause uncertainty for officials and registrants. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 64. | Post Declaration, ¶ 83: Under reasonable and plausible readings of the statutory language, the CASE Act's "Internet service provider" and "Internet identifier" definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller seemingly capriciously chosen subset of those communications. | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |
| 65. | Post Declaration, ¶ 84: Under *any* reading of the statutory text, the CASE Act will substantially curtail registrants' ability to engage in anonymous communication, and will require considerable and burdensome | The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.<br><br>The witness' opinions are not based on |

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| | reporting even for ordinary, non-anonymous communication. | reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.<br><br>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide. |

Dated: November 26, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
PETER K. SOUTHWORTH
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/s/ ROBERT D. WILSON

ROBERT D. WILSON
Deputy Attorney General
*Attorneys for Defendant*
*Kamala D. Harris,*
*California Attorney General*

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# CERTIFICATE OF SERVICE

Case Name: **Doe, John v. Kamala Harris** No. **3:12-cv-05713-TEH**

I hereby certify that on November 26, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**Opposition by Defendant Attorney General to Motion for Preliminary Injunction;**

**Declaration of Linda Schweig in Support of Opposition by Defendant Kamala D. Harris to Plaintiffs' Motion for Preliminary Injunction;**

**Declaration of Robert Morgester in Support of Opposition by Defendant Kamala D. Harris to Plaintiffs' Motion for Preliminary Injunction;**

**Objections of Defendant Kamala D. Harris to Declaration of David G. Post in Support of Plaintiffs' Motion for Preliminary Injunction**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On November 26, 2012, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

**VIA Golden State Overnight Mail**
**and E-Mail**
Farimah Faiz
Senior Assistant City Attorney
Office of the City Attorney
City of Alameda
2263 Santa Clara Avenue, Room 280
Alameda, CA 94501
E-Mail: FFaiz@ci.alameda.ca.us

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 26, 2012, at Sacramento, California.

| Brenda Apodaca | /s/ Brenda Apodaca |
|---|---|
| Declarant | Signature |

KAMALA D. HARRIS
Attorney General of California
PETER K. SOUTHWORTH
Supervising Deputy Attorney General
ROBERT D. WILSON
Deputy Attorney General
State Bar No. 136736
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7870
Fax: (916) 324-8835
E-mail: Robert.Wilson@doj.ca.gov
*Attorneys for Kamala D. Harris, Attorney General of California*

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**JOHN DOE, JACK ROE, AND CALIFORNIA REFORM SEX OFFENDER LAWS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,**

Plaintiffs,

v.

**KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA, AND CITY OF ALAMEDA,**

Defendants.

Case No. 3:12-cv-05713-TEH

**DECLARATION OF LINDA SCHWEIG IN SUPPORT OF OPPOSITION BY DEFENDANT KAMALA D. HARRIS TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

| | |
|---|---|
| Date: | December 17, 2012 |
| Time: | 10:00 a.m. |
| Courtroom: | 12 |
| Judge: | The Honorable Thelton E. Henderson |
| Trial Date: | Not Set |
| Action Filed: | November 6, 2012 |

I, Linda Schweig, declare and state as follows:

1. I am a Department of Justice (DOJ) Administrator II. I serve as the Program Manager of the Violent Crime Information Center (VCIC), which includes the Sex Offender Tracking Program, the California Sex and Arson Registry (CSAR), and the Investigative Services Program. My duties include: planning, organizing, and directing the activities of the VCIC;

formulating and implementing program policy; and coordinating and overseeing all program activities relating to the design, development, implementation, and/or maintenance of various statewide automated systems, within the VCIC, including CSAR. I have been with the DOJ for approximately 20 years, with the majority of that time assigned to the VCIC, holding the positions of Criminal Intelligence Specialist, Criminal Intelligence Specialist Supervisor, VCIC Field Representative, manager of both the Sex Offender Tracking Program (SOTP) and the Investigative Services Program, as well as Program Manager of the VCIC. I have personal knowledge of the matters set forth below, and, if sworn as a witness, I could competently testify about them.

2. This Declaration is submitted in support of the Attorney General's Opposition to Plaintiffs' Motion for a Preliminary Injunction.

3. California Penal Code section 290 mandates that any person convicted of a specified sex offense is required to register in the state as a sex offender. The registration of sex offenders is a collaborative effort involving numerous jurisdictions within the state, including the DOJ, the California Department of Corrections and Rehabilitation, and Department of State Hospitals, as well as local law enforcement agencies (LEAs). Sex offender registration is a non-punitive regulatory scheme designed to keep law enforcement and to some extent, the public aware of dangers.

4. The SOTP is tasked with maintaining registration information and providing assistance to all agencies involved in the registration of sex offenders to ensure that the process is accomplished as accurately and efficiently as possible.

5. The SOTP is comprised of the following: 1) Sex and Arson Registration Unit; 2) Assessment Unit; and 3) Megan's Law Section. Collectively, these units have the responsibility to maintain the CSAR database. CSAR is the central repository for California's sex offender registration information. The information collected and maintained in CSAR is used by LEAs to manage their sex offender registration records, to ensure the registration compliance of sex

offenders residing in their jurisdictions, and to assist in prosecuting sex offenders who violate Penal Code section 290.

6. Notification upon release: Any sex offender who is released, discharged, or paroled from any California penal institution where he was confined because of the commission or attempted commission of a specified offense, or is released from a California state hospital to which he was committed as either a sexually violent predator or after conviction for a registerable sex offense, must, prior to discharge, parole, or release, be informed of his duty to register by the official in charge of the place of confinement or hospital. A sex offender, who is convicted in California of the commission or attempted commission of a specified offense and is released on probation, must, prior to release or discharge, be informed of his duty to register by the probation department.

7. Notification by Court: Any sex offender who is convicted in California of the commission or attempted commission of a specified offense and is granted conditional release without supervised probation, must, prior to release or discharge, be informed of his duty to register in open court, by the court in which the person has been convicted.

8. Exemption from registration: Penal Code section 290.5 provides that a person who is required to register under Section 290 for a specified offense shall, upon obtaining a certificate of rehabilitation, be relieved of any further duty to register under Section 290 if he or she is not in custody, on parole, or on probation.

9. VCIC programs perform legislatively mandated functions relating to the identification and apprehension of persons responsible for specific violent crimes, including sex and arson offenses, and for the disappearance and exploitation of persons, especially children.

10. Information collected from registered sex offenders (Registrants) is maintained on the DOJ's CSAR. Pursuant to California Penal Code section 290.021 this information is not open to inspection by the public or any other person other than a regularly employed peace officer or other law enforcement officer and upon initial inquiry into the Registry, the user is required to acknowledge the "need to know, right to know" policy before access is permitted.

11. The CSAR user accounts are managed through the Justice Identity Management System (JIMS). Each law enforcement agency has one or more JIMS administrators. Upon application to be designated an administrator, the DOJ verifies the identification and the official agency identifier of the applicant. Once approved, JIMS administrators are responsible for administering the system for their own local law enforcement agency.

12. There are significant security procedures in place which prevent improper use of a Registrant's Internet information. A law enforcement official can only search the CSAR database by name and date of birth, Criminal Investigation and Identification Number, State Identification Number, FBI Number, CDCR or Division of Juvenile Justice Number, CSAR File Control Number, Social Security Number, Driver's License Number, or California Identification Number. For instance, if an official knew someone with a screen name of XYZ was being critical of him or her, there is no mechanism the official could employ to search for XYZ in CSAR. In the event of a child abduction or similar exigent circumstance, the DOJ has the capability to search for a screen name in CSAR but a search of this nature can only be initiated through a written request which means there is a tracking system in place. If the DOJ were made aware of an improper request for Internet information, it could link the query to the law enforcement official and take action to investigate. During my almost 20 years with the DOJ, I am not aware of a single incident in which any such improper query has been reported or investigated.

13. In June 2011, pursuant to California Penal Code section 290.015(a)(1), the DOJ began collecting e-mail addresses, screen names, and social network information from Registrants. Attached hereto as Exhibit A is a true and correct copy of our 2012 form CJIS 8102S. That form is used for the initial and updated registration by a sex offender with a law enforcement agency. That information currently is stored in the Registry. As noted in paragraph 12, this information, to the limited extent internet identifying information has been collected, is subject to DOJ's restricted access procedures. The VCIC is currently developing the security policies, practices and procedures for a CSAR graphical user interface (GUI) that is similar in nature to those used by CLETS. CLETS is the California Law Enforcement

Telecommunications System, which is used to transmit and access various types of criminal justice information. To obtain access to CLETS, an LEA must enter into an agreement with DOJ, in which the LEA agrees to certain procedures to maintain the security of the system and prevent unauthorized access. All access to CLETS by a user is logged. DOJ and/or the LEA can investigate and take appropriate action to remedy any unauthorized access. Currently, registering agencies generally enter sex offender registration information into the registry using the CLETS, but that system does not allow them to enter internet identifying information directly into the registry.

14. Currently, the DOJ is not able to accommodate the additional Internet information required by the Californians Against Sexual Exploitation Act until new forms are ready. These forms are expected to be ready for use in January 2013. In addition, the DOJ's software needs to be updated to permit transmission of the additional information and that is expected to be completed in March 2013 and will be implemented in conjunction with the release of Phase II of the CSAR GUI, Entry/Update for LEAs. That Phase will allow LEAs to enter registration information directly into CSAR via the GUI. Currently, a pilot project is underway involving seven law enforcement agencies that are beta-testing this Phase. While that process is underway, we are preparing to implement security measures for the law enforcement access to that software that are anticipated to be similar to CLETS.

15. On November 9, 2012, in response to the Court's Temporary Restraining Order, the DOJ posted the following alert on the Megan's Law Website, as well as the California Law Enforcement Website:

"FEDERAL COURT STAYS PART OF PROPOSITION 35- Human Trafficking Initiative A federal court has prohibited DOJ and local law enforcement agencies from collecting information from sex offender registrants about their Internet service providers and Internet identifiers, including e-mail addresses, screen names, and social networks. Until further notice, these fields on the registration forms (DOJ forms 8047 and 8102) should be left blank. A hearing on whether to grant a permanent stay, which would be in force until the lawsuit is decided, will be

held on November 20, 2012. Until further notice, the DOJ and LEAs will not be collecting this information from registrants." In addition to this notice, the DOJ placed all already collected Internet information into a secure location that is not accessible by law enforcement.

16. I work with local law enforcement agencies on a daily basis. I have not been made aware of a single incident in which a law enforcement agency or officer disclosed a registered sex offender's Internet information to the public.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Signed and sworn to this _____ day of November 2012 at Sacramento, California.

_____

LINDA SCHWEIG

held on November 20, 2012. Until further notice, the DOJ and LEAs will not be collecting this information from registrants." In addition to this notice, the DOJ placed all already collected Internet information into a secure location that is not accessible by law enforcement.

16. I work with local law enforcement agencies on a daily basis. I have not been made aware of a single incident in which a law enforcement agency or officer disclosed a registered sex offender's Internet information to the public.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Signed and sworn to this 26 day of November 2012 at Sacramento, California.

Linda Schweig

LINDA SCHWEIG

# EXHIBIT A

STATE OF CALIFORNIA
CJIS 8102S
(Orig. 05/2003; Rev. 01/2012)

DEPARTMENT OF JUSTICE
PAGE 1 of 4

# SEX REGISTRATION / CHANGE OF ADDRESS / ANNUAL OR OTHER UPDATE

## (Sex Offender Registration Act - 290-290.023 P.C.)

**Sex Offender Tracking Program**
**P.O. Box 903387, Sacramento, CA 94203-3870**

***PLEASE FOLLOW THESE IMPORTANT PROCESSING INSTRUCTIONS:***

- Print or type required information.
- Submit a current photograph of the registrant. Photographs can be mailed or electronically submitted via e-mail or by using the DOJ Open Image Management System available at: http://Clew.doj.ca.gov
- Have the registrant read and initial the registration requirements on pages 3 and 4 of this form.
- Verify the registrant understands the requirements.
- Provide a copy of this form to the person registering/updating registration.

**FACILITY TYPE** *(Enter alpha code in Facility Type field)*:
Day Care Center.....DC
Family Child Care Home.....FCH
Group Home.....GH
Foster Home.....FH
Adult Day Care.....AD
Adult Residential.....AR
Elderly.....EL

REASON FOR REGISTRATION *(More than one box can be checked)*:
☐ ANNUAL ☐ 30 DAY (TRANSIENT) ☐ 90 DAY (SVP) ☐ CHANGE OF ADDRESS ☐ OTHER (e.g., Initial, Additional Address)

**REGISTRATION EVENT** *(More than one box can be checked)*:

☐ INITIAL (1st 8102S in Registry)
- ☐ Residence
- ☐ Campus (Attending, Employed, Volunteer)
- ☐ Employment (Out of state resident employed in CA)
- ☐ Transient

☐ ADDITIONAL ADDRESS (Concurrent)
- ☐ Residence
- ☐ Campus (Attending, Employed, Volunteer)
- ☐ Employment (Out of state resident employed in CA)

☐ UPDATE (No Change in Registration Address)

OFFENDER HAS MOVED/CHANGE OF ADDRESS
- ☐ INTO JURISDICTION
- ☐ INTO JURISDICTION FROM OUT OF STATE
- ☐ WITHIN JURISDICTION
- ☐ OUT OF JURISDICTION
- ☐ OUT OF STATE

NOTE - If registrant has more than one registered address, specify address registrant has moved from in the space below:

☐ ABSCONDED (LEA has verified whereabouts unknown)
- ☐ DEPORTATION
- ☐ INCARCERATION
  - ☐ LOCAL ☐ CDCR ☐ DJJ ☐ DMH
  - Local INC Date:

DECEASED (Check verification source):
- ☐ Coroner Medical Examiner
- ☐ Death Certificate
- ☐ Other (Specify below and attach document)

| FULL NAME OF REGISTRANT | Last | First | Middle | Suffix |
|---|---|---|---|---|
| | | | | |

| ALIASES | DATE OF BIRTH | CII NUMBER (SID) | DRIVER'S LICENSE/I.D. NUMBER | STATE | YEAR OF EXPIRATION |
|---|---|---|---|---|---|
| | | | | | |

| FCN NUMBER | SOCIAL SECURITY NUMBER | INSTITUTION NUMBER (CDCR, DJJ [CYA], or DMH) | FBI NUMBER |
|---|---|---|---|
| | | | |

| SEX | RACE | HAIR COLOR | EYE COLOR | HEIGHT | WEIGHT | PLACE OF BIRTH |
|---|---|---|---|---|---|---|
| | | | | | | |

| SCARS, MARKS, TATTOOS, AND OTHER CHARACTERISTICS 1 | LOCATION | DESCRIPTION | PICTURE | TEXT |
|---|---|---|---|---|
| | | | | |
| SCARS, MARKS, TATTOOS, AND OTHER CHARACTERISTICS 2 | LOCATION | DESCRIPTION | PICTURE | TEXT |
| | | | | |
| SCARS, MARKS, TATTOOS, AND OTHER CHARACTERISTICS 3 | LOCATION | DESCRIPTION | PICTURE | TEXT |
| | | | | |

| HOME TELEPHONE NUMBER | WORK TELEPHONE NUMBER | CELLULAR TELEPHONE NUMBER |
|---|---|---|
| | | |

| E-MAIL ADDRESS | SCREEN NAME(S)/SOCIAL NETWORK(S) |
|---|---|
| | |

| ADDRESS Street Number and Name | Apt/Unit Number | City | State | Zip Code |
|---|---|---|---|---|
| | | | | |

| DWELLING TYPE | LICENSED FACILITY | FACILITY TYPE |
|---|---|---|
| ☐ Single Family Residence ☐ Apartment / Condominium ☐ Hotel / Motel | ☐ YES ☐ NO | |

LOCATION(S) FREQUENTED BY TRANSIENT

| ADDITIONAL REGISTRATION ADDRESS ☐ Residence ☐ Campus ☐ Employment | Street Number and Name | Apt/Unit Number | City | State | Zip Code |
|---|---|---|---|---|---|
| | | | | | |

| DWELLING TYPE | LICENSED FACILITY | FACILITY TYPE |
|---|---|---|
| ☐ Single Family Residence ☐ Apartment / Condominium ☐ Hotel / Motel | ☐ YES ☐ NO | |

| CAMPUS REGISTRATION ☐ Attending ☐ Employed ☐ Volunteer | FACILITY NAME/ADDRESS Street Number and Name | City | State | Zip Code |
|---|---|---|---|---|
| | | | | |

Rolled Right Thumbprint - If amputated, use next available finger

SIGNATURE OF REGISTRANT

DATE OF REGISTRATION/UPDATE

DISTRIBUTION: Original to Registering Agency; Copy to Person Registering

STATE OF CALIFORNIA
CJIS 8102S
(Orig. 05/2003; Rev. 01/2012)

DEPARTMENT OF JUSTICE
PAGE 2 of 4

# SEX REGISTRATION / CHANGE OF ADDRESS / ANNUAL OR OTHER UPDATE

## (Sex Offender Registration Act - 290-290.023 P.C.)

| NAME OF REGISTRANT Last | First | Middle | CII NUMBER (SID) | DATE OF REGISTRATION/UPDATE |
|---|---|---|---|---|
| | | | | |

| RELATED ADDRESS 1 (e.g., Mailing, Next of Kin) Street Number and Name | Apt/Unit Number | City | State | Zip Code |
|---|---|---|---|---|
| | | | | |

| RELATED ADDRESS TYPE 1 | RELATIONSHIP (If Next of Kin checked) |
|---|---|
| ☐ Mailing ☐ Next of Kin ☐ GPS Charging Location ☐ Other | |

| RELATED ADDRESS 2 (e.g., Mailing, Next of Kin) Street Number and Name | Apt/Unit Number | City | State | Zip Code |
|---|---|---|---|---|
| | | | | |

| RELATED ADDRESS TYPE 2 | RELATIONSHIP (If Next of Kin checked) |
|---|---|
| ☐ Mailing ☐ Next of Kin ☐ GPS Charging Location ☐ Other | |

| TYPE OF CONVICTION IF NON-CALIFORNIA OFFENSE: | ORIGINATING AGENCY CASE NUMBER (OCA) | OCCUPATION |
|---|---|---|
| ☐ Out of state ☐ Federal ☐ Military | | |

| EMPLOYER'S NAME/ADDRESS Street Number and Name | Suite/Unit Number | City | State | Zip Code |
|---|---|---|---|---|
| | | | | |

| WORK ADDRESS (If different than Employer's Address) Street Number and Name | Suite/Unit Number | City | State | Zip Code |
|---|---|---|---|---|
| | | | | |

**VEHICLES OWNED, REGISTERED, OR REGULARLY DRIVEN**

**VEHICLE #1**
☐ Registered Owner ☐ Regularly Driven

| VEHICLE IDENTIFICATION NUMBER | | | |
|---|---|---|---|
| LICENSE PLATE NUMBER | STATE | TYPE | YEAR OF EXPIRATION |
| | | | |
| VEHICLE YEAR | MAKE | MODEL | STYLE/COLOR |
| | | | |

**VEHICLE #2**
☐ Registered Owner ☐ Regularly Driven

| VEHICLE IDENTIFICATION NUMBER | | | |
|---|---|---|---|
| LICENSE PLATE NUMBER | STATE | TYPE | YEAR OF EXPIRATION |
| | | | |
| VEHICLE YEAR | MAKE | MODEL | STYLE/COLOR |
| | | | |

| REGISTERING AGENCY (*Do Not Abbreviate*) | REGISTERING OFFICER'S NAME AND TITLE |
|---|---|
| | |

| REGISTERING AGENCY'S E-MAIL ADDRESS | TELEPHONE NUMBER | ORI | MNEMONIC | DNA COLLECTED? ☐ YES ☐ NO |
|---|---|---|---|---|
| | | | | |

| PROBATION/PAROLE OFFICER | TELEPHONE NUMBER |
|---|---|
| | |

COMMENTS

Rolled Right Thumbprint - If amputated, use next available finger

SIGNATURE OF REGISTRANT

DATE OF REGISTRATION/UPDATE

DISTRIBUTION: Original to Registering Agency; Copy to Person Registering

STATE OF CALIFORNIA
CJIS 8102S
(Orig. 05/2003; Rev. 01/2012)

DEPARTMENT OF JUSTICE
PAGE 3 of 4

# SEX REGISTRATION / CHANGE OF ADDRESS / ANNUAL OR OTHER UPDATE

## (Sex Offender Registration Act - 290-290.023 P.C.)

| NAME OF REGISTRANT Last | First | Middle | CII NUMBER (SID) | DATE OF REGISTRATION/UPDATE |
|---|---|---|---|---|
| | | | | |

## REGISTRATION REQUIREMENTS - REGISTRANT IS REQUIRED TO READ AND INITIAL ALL REQUIREMENTS

1. ____ My responsibility to register as a sex offender in California is a lifetime requirement, unless imposed solely as a probation condition. (PC § 290)

2. ____ I must register in person, if I have never registered, within five (5) working days of: 1) coming into California, or 2) release from incarceration, placement, commitment, or release on probation, with the law enforcement agency having jurisdiction over my place(s) of residence or where I am physically present as a transient. (PC § 290)

3. ____ I must re-register in person, if I have previously registered, within five (5) working days, after release from incarceration, placement, or commitment that lasted 30 or more days, or within five (5) working days after release on probation. I do not have to re-register after release if I was incarcerated for less than 30 days, and I return to the last registered address, and the update of registration that is required to occur within five (5) working days before or after my birthday did not fall within that incarceration period. (PC § 290.015)

4. ____ I must annually update my registration information in person, within five (5) working days before or after my birthday, at the law enforcement agency having jurisdiction over my residence address or where I am currently present as a transient. Annual updates begin with my first birthday following registration or change of address. (PC § 290.012)

5. ____ Upon coming into, or when changing my residence address within a city and/or county in which I am residing, I must register or re-register in person, within five (5) working days, with the law enforcement agency having jurisdiction over my residence. (PC § 290, 290.013) DEFINITION: "Residence" means one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.

6. ____ If I change my registered address to a new address, either within the same jurisdiction or anywhere inside or outside of the state, I must inform the last registering agency or agencies in person within five (5) working days before or after I leave. If I do not know my new residence address or transient location I must later notify, by registered or certified mail, the last registering agency or agencies of the new address or transient location with five (5) working days of moving to the new address or location. (PC § 290.013)

7. ____ If I am registered at a residence address and become transient or if I am registered as a transient and move to a residence, I have five (5) working days within which to register in person, with the law enforcement agency having jurisdiction over the new address or to register as a transient. (PC § 290.011)

8. ____ If I have no residence address, I must register in person in the jurisdiction where I am physically present as a transient within five (5) working days of becoming transient. Thereafter, I must update my registration information in person no less than once every 30 days with the law enforcement agency having jurisdiction over the place where I am physically present as a transient on the day I re-register. I do not need to report changes of transient location within the 30-day period unless I move out of state. I must also comply with the annual requirement to update my registration. (PC § 290.011)

9. ____ If I am registered as a transient and I am moving out of state, I must inform the law enforcement agency having jurisdiction over the place where I was physically present as a transient, in person, within five (5) working days before or after I leave. I must also inform the law enforcement agency of my planned destination, residence, or transient location out of state, if known, and any plans to return to California. (PC § 290.013)

10. ____ If I move outside of California, I am required by federal law to register in the new state within three (3) working days.

**I have been notified of my duty to register as a sex offender pursuant to Penal Code sections 290-290.023 and 290.01. I have read, understood, and initialed each registration requirement specified on pages 3 and 4 of this form. I understand it is my duty to know the registration requirements, including changes to the law that may be made after I sign this form. I certify the information provided is true and accurate. I understand failure to comply with the registration requirements, providing false information on the form, or failing to provide accurate information is punishable as a criminal offense.**

Rolled Right Thumbprint - If amputated, use next available finger

SIGNATURE OF REGISTRANT

DATE OF REGISTRATION/UPDATE

DISTRIBUTION: Original to Registering Agency; Copy to Person Registering

STATE OF CALIFORNIA
CJIS 8102S
(Orig. 05/2003; Rev. 01/2012)

DEPARTMENT OF JUSTICE
PAGE 4 of 4

# SEX REGISTRATION / CHANGE OF ADDRESS / ANNUAL OR OTHER UPDATE

## (Sex Offender Registration Act - 290-290.023 P.C.)

| NAME OF REGISTRANT Last | First | Middle | CII NUMBER (SID) | DATE OF REGISTRATION/UPDATE |
|---|---|---|---|---|
| | | | | |

## REGISTRATION REQUIREMENTS - REGISTRANT IS REQUIRED TO READ AND INITIAL ALL REQUIREMENTS

11. ____ If I have ever been committed as a sexually violent predator, I must update my registration information in person, no less than once every 90 days with the law enforcement agency having jurisdiction over my residence or transient location. I must also comply with the annual requirement to update my registration in person. (PC § 290.001, 290.012)

12. ____ If I have more than one residence address at which I regularly reside (regardless of the number of days or nights I spend at each address), I must register in person, within five (5) working days at each address with the law enforcement agency having jurisdiction over each residence. If I no longer reside at a registered address, I must inform in person, the registering agency having jurisdiction over that address within five (5) working days before or after I leave. (PC § 290.010)

13. ____ If I reside or am a transient on a University of California, California State University, or community college campus, I must register in person, within five (5) working days with the local law enforcement agency having jurisdiction over the campus and additionally with the campus police. (PC § 290, 290.011)

14. ____ If I am enrolled or employed (with or without compensation) at an institution of higher learning, I must register in person, within five (5) working days of commencement of the term of enrollment or employment, with the campus police department or, if no campus police department exists, with the law enforcement agency having jurisdiction over that campus. I must also register in person with the law enforcement agency having jurisdiction over my place of residence or transient location. When I cease being enrolled or employed at that institution, I must notify in person the registering agency for the campus within five (5) working days. (PC § 290.009, 290.01)

15. ____ If I live outside of California and I am required to register in that state and I attend school or am employed in California, I must register in person with the law enforcement agency having jurisdiction over my school or employment location within five (5) working days of beginning attendance or becoming employed, in addition to registering in my state of residence. (PC § 290.002)

16. ____ I must provide proof of residence to the registering agency within 30 days of registration or re-registration at a new residence address. (PC § 290.015)

17. ____ If I am on parole or probation, I must provide proof of registration to my parole agent or probation officer within six (6) working days of release on parole or probation and proof of any change or update to my registration within five (5) working days. (PC § 290.85)

18. ____ If I change my name I must notify in person, within five (5) working days, the law enforcement agency or agencies having jurisdiction over my place of residence or place where I am required to register as a transient. (PC § 290.014)

19. ____ I understand I am required to submit DNA samples, as well as fingerprints and full palm prints. (PC § 296, 296.2)

20. ____ I may apply for exclusion from the Megan's Law Internet site if I meet the exclusion criteria. (PC § 290.46(e).) Exclusion Applications are available on the Megan's Law Internet site at: www.MegansLaw.ca.gov

**I have been notified of my duty to register as a sex offender pursuant to Penal Code sections 290-290.023 and 290.01. I have read, understood, and initialed each registration requirement specified on pages 3 and 4 of this form. I understand it is my duty to know the registration requirements, including changes to the law that may be made after I sign this form. I certify the information provided is true and accurate. I understand failure to comply with the registration requirements, providing false information on the form, or failing to provide accurate information is punishable as a criminal offense.**

Rolled Right Thumbprint - If amputated, use next available finger

SIGNATURE OF REGISTRANT

DATE OF REGISTRATION/UPDATE

DISTRIBUTION: Original to Registering Agency; Copy to Person Registering

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*Attorneys for Kamala D. Harris, Attorney General of California*

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**JOHN DOE, JACK ROE, AND CALIFORNIA REFORM SEX OFFENDER LAWS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,**

Plaintiffs,

v.

**KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA, AND CITY OF ALAMEDA,**

Defendants.

Case No. 3:12-cv-05713-TEH

**DECLARATION OF ROBERT MORGESTER IN SUPPORT OF OPPOSITION BY DEFENDANT KAMALA D. HARRIS TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Date: December 17, 2012
Time: 10:00 a.m.
Courtroom: 12
Judge: The Honorable Thelton E. Henderson
Trial Date: Not Set
Action Filed: November 6, 2012

I Robert M. Morgester, declare as follows:

1. I am a Senior Assistant Attorney General assigned to the eCrime Unit (eCU) and Privacy Enforcement and Protection Unit (PEPU) of the California Attorney General's Office. eCU's primary purpose is to investigate and prosecute multi-jurisdictional criminal organizations, networks, and groups that perpetrate identity theft crimes and technology crimes in which an

electronic device or network is used to commit a crime; an electronic device or network is used to facilitate a crime; or an electronic device, network, or intellectual property is the target of the crime. PEPU's primary purpose is to protect Californians' constitutionally-guaranteed right to privacy through civil enforcement of state and federal privacy laws, including consumer protection laws that regulate the collection and use of our personal information by new and rapidly changing technologies.

2. I have specialized in technology prosecution issues beginning in 1995 and have participated in the investigation and prosecution of hundreds of cases involving networks and the internet.

3. Since 1995 I have participated in the creation of specialized technology based crime law enforcement units and programs. I have also participated in the creation of training programs and training resources for federal, state, and local law enforcement officers on technology based crime issues.

4. I have participated in the creation of state laws governing the investigation and prosecution of technology crime.

5. Since 1995 I have worked directly with electronic communication service providers on issues relating to record retention, government access to records, and other privacy related issues.

6. The information in this declaration is based upon my own personal knowledge and experience in dealing with technology crime related investigations.

7. As relevant to my testimony, the CASE Act amends California law to require persons subject to the Act to provide law enforcement with a list of any and all Internet identifiers established or used by the person, a list of any and all Internet service providers used by the person, and a statement in writing signed by the person acknowledging that the person is required to register and update the Internet related information required by the Act.

8. Knowledge by law enforcement of the Internet service providers associated to the subject of a criminal investigation only provides information on where account information and other records associated with the account are stored.

9. Knowledge by law enforcement of both Internet identifiers and Internet service providers associated to a subject of a criminal investigation does not permit access to, or monitoring of, private communications. Under federal law, access to the content of communications is governed in part by Title III of the Ominbus Crime Control and Safe Street Act of 1968, Pen Registers and Trap and Trace Device chapter of Title 18, Electronic Communication Privacy Act and the Privacy Protection Act. California law, which is sometimes more restrictive than federal law, is codified in sections 629.50 through 637.7 of the California Penal Code.

10. Under California law, the government cannot access the private communications associated with a registered sex offender's Internet identifiers nor can the government monitor a registered sex offender internet activity without judicial authorization. Unlike federal law, even basic subscriber information associated with a registered sex offender's private e-mail account such as a customer's name, address, length of service, means and source of payment or any temporarily assigned network addresses requires judicial review prior to the government being able to access that information.

11. Having Internet identifier information is useful for searching publicly available information posted on the internet that is directly associated to the suspect's published Internet identifiers. As an example, an e-mail address published on a public Facebook page or associated to an eDating website profile could be discovered as well as the publicly available associated content.

12. Notwithstanding the fact that access to information on Internet identifiers and Internet service providers maintained by the California Department of Justice associated with the subject of a criminal investigation is restricted, and possession of the information does not in and of itself provide access to content without judicial approval, having the information available upon request is very useful in conducting an investigation. It is akin to having knowledge of the suspect's name, any aliases he or she may have used, his or her home address(es), his or her telephone number and telephone service provider, his or her fingerprint, and the license plate of his or her automobile. It is a critical starting point for conducting investigations of crimes facilitated

through the virtual world. Having this information may provide enough of a head start on the investigation to save the life of a victim in, for example, the case of abduction, or to expedite the apprehension of someone who already has committed one crime and may be intending to commit another.

13. I am aware that a number of social media sites prohibit registered sex offenders from participating on their sites. A number of these sites compare publicly available information pertaining to sex offenders, including name, address, photograph, and associated Internet identifiers against their membership records to enforce this prohibition.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Signed and sworn to this _____ day of November 2012 at Sacramento, California.

ROBERT MORGESTER

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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Signed and sworn to this 26th day of November 2012 at Sacramento, California.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

**JOHN DOE, JACK ROE, AND CALIFORNIA REFORM SEX OFFENDER LAWS, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,**

Plaintiffs,

**v.**

**KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA, AND CITY OF ALAMEDA,**

Defendants.

Case No. 3:12-cv-05713-TEH

**OPPOSITION BY DEFENDANT ATTORNEY GENERAL TO MOTION FOR PRELIMINARY INJUNCTION**

| | |
|---|---|
| Date: | Dec. 17, 2012 |
| Time: | 10:00 a.m. |
| Judge: | The Honorable Thelton E. Henderson |
| Trial Date: | Not Set |
| Action Filed: | November 6, 2012 |

## TABLE OF CONTENTS

**Page**

Introduction ..... 1
Statement of Facts ..... 2
I. Sex offender registration process ..... 2
II. The CASE Act's impact on the current registration process ..... 4
III. Security and use of sex offender registrant Internet information ..... 6
Argument ..... 8
I. Plaintiffs do not meet the heavy burden for issuance of a preliminary injunction enjoining operation of a state statute ..... 8
II. The CASE Act is facially constitutional under the First Amendment ..... 9
III. The CASE Act does not violate the Due Process Clause ..... 12
IV. The CASE Act does not implicate plaintiff's freedom of association ..... 14
Conclusion ..... 14

# TABLE OF AUTHORITIES

**Page**

**CASES**

*Alliance for the Wild Rockies v. Cottrell*
632 F.3d 1127 (9th Cir. 2011) ..... 8

*Boyce Motor Lines v. United States*
342 U.S. 337 (1952) ..... 13

*Broadrick v. Oklahoma*
413 U.S. 610 (1973) ..... 11

*Buckley v. American Constitutional Law Foundation, Inc.*
525 U.S. 182 (1999) ..... 9

*Circuit City Stores v. Adams*
532 U.S. 15 (2001) ..... 14

*Craft v. Nat'l Park Serv.*
34 F.3d 918 (9th Cir. 1994) ..... 13

*Cupolo v. Bay Area Rapid Transit*
5 F. Supp. 2d 1078 (N.D. Cal. 1997) ..... 9

*Doe v. Nebraska*
Nos. 8:09CV456,4:10CV3266,4:10CV3005 2012 WL 4923131 (D. Neb. 2012) ..... 1, 11, 12

*Doe v. Shurtleff*
628 F.3d 1217 (10th Cir. 2010) ..... passim

*In re Alva*
33 Cal. 4th 254 (2004) ..... 2

*Maryland v. King*
No. 12A48, __ U.S. __, __ S. Ct. __, 2012 WL 3064878 (Roberts, Circuit Justice 2012) ..... 9

*Mazurek v. Armstrong*
520 U.S. 968 (1997) ..... 8

*Members of Cty. Council of L.A. v. Taxpayers for Vincent*
466 U.S. 789 (1984) ..... 11

*People v. Aragon*
207 Cal.App.4th 504 (2012) ..... 13

## TABLE OF AUTHORITIES
**(continued)**

**Page**

*People v. Brophy*
49 Cal.App.2d 15 (1942) ..... 9

*People v. Edgar*
104 Cal.App.4th 210 (2002) ..... 13

*United States v. Williams*
553 U.S. 285 (2008) ..... 11, 13

*White v. Baker*
696 F. Supp.2d 1289 (N.D. Ga. 2010) ..... 1, 11, 12, 14

*Winter v. Natural Res. Def. Council, Inc.*
555 U.S. 7 (2008) ..... 8

**STATUTES**

42 United States Code
§ 16915a ..... 13

California Penal Code
§ 290 ..... 7
§ 290-295. ..... 1, 2
§ 290, subd. (b) ..... 3
§ 290.012 ..... 4
§ 290.012, subd. (a) ..... 3, 4
§ 290.012, subd. (a)(1) ..... 4
§ 290.012, subd. (d) ..... 4
§ 290.014 ..... 5
§ 290.014, subd. (a) ..... 5
§ 290.014, subd. (b) ..... 5
§ 290.015 ..... 4
§ 290.015, subd. (a) ..... 3, 4
§ 290.015, subd. (a)(5) ..... 4
§ 290.015, subd. (b) ..... 4
§ 290.015, subd (c) ..... 3
§ 290.017, subd. (a) ..... 2, 3
§ 290.017, subd. (b) ..... 3
§ 290.017, subd. (c) ..... 3
§ 290.017, subd. (d) ..... 3
§ 290.021 ..... 6
§ 290.024, subd (a) ..... 12, 13
§ 290.024, subd (b) ..... 12, 13, 14
§ 290.45 ..... 7, 8, 10

## TABLE OF AUTHORITIES
**(continued)**

**Page**

§ 290.45, subd. (a)(1) ..... 7
§ 290.46 ..... 7, 8
§ 290.5 ..... 2
§ 14200 ..... 5, 6
§ 14201.1 ..... 5, 6
§ 14202, subd. (b)(3) ..... 5, 6

Government Code
§ 6254, subd. (f) ..... 6

**CONSTITUTIONAL PROVISIONS**

U.S Constitution
First Due Process Clause ..... 12

Fourteenth Amendment ..... 9, 10, 11

California Constitution
Article V, § 13 ..... 9

**OTHER AUTHORITIES**

Californians Against Sexual Exploitation Act ("CASE Act") ..... *passim*

Proposition 35, § 3, ¶ 3 ..... 6, 10

## INTRODUCTION

On November 6, 2012, an overwhelming majority of Californians enacted Proposition 35, the "Californians Against Sexual Exploitation Act" ("CASE Act"). As relevant here, that measure will require sex offenders already subject to extensive registration requirements under the Sex Offender Registration Act (Penal Code sections 290-95) to report specified Internet identifying information. The California Department of Justice ("DOJ"), which oversees and operates the statewide registration system has, since 2011, already been collecting similar information and, over the next few months, will be making adjustments to incorporate the new requirements of the CASE Act. Though plaintiffs apparently disagree with the legislative wisdom of California's laws and procedures for tracking sex offenders generally, California's interest in implementing that program and its constitutionality is unquestionable. DOJ's practices and the CASE Act extends that vital program into the Internet.

Plaintiffs bring this action as a facial challenge to Proposition 35's requirement that registered sex offenders report, as a part of their normal registration process, any Internet identifiers they use, so they can be located and tracked if they attempt to prey upon innocent victims, particularly children. Plaintiffs now contend that these requirements are vague and overbroad and will either criminalize or chill the anonymous speech of this class of persons. As at least one plaintiff admits, California has routinely required disclosure of this information prior to Proposition 35 without any apparent confusion or chilling of anonymous speech.

Plaintiffs' motion ignores *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), the only appellate decision on the constitutionality of laws requiring sex offenders to supply their Internet identifying information to law enforcement. In that decision, the Tenth Circuit upheld a Utah essentially identical to the challenged portions of the CASE Act. The authorities relied on by plaintiffs, *Doe v. Nebraska*, --- F.Supp.2d ---, Nos. 8:09CV456,4:10CV3266,4:10CV3005, 2012 WL 4923131 2 (D. Neb. Oct. 17, 2012) and *White v. Baker*, 696 F. Supp.2d 1289 (N.D. Ga. 2010) address vastly different laws. Plaintiffs' arguments that the CASE Act's statutory definitions of the required Internet information are vague and violate due process ignore many factors: the long-standing procedures for specifying the required information on DOJ registration forms, the

scienter requirement in prosecuting failure to register items, and that the definitions are, in fact, clear. Finally, plaintiffs' own authorities indicated that their freedom of association arguments have no merit because no lists of sites or groups are required.

Particularly given plaintiffs' heavy burden to show that a statutory scheme still being implemented is facially unconstitutional, their motion for a preliminary injunction should be denied.

## STATEMENT OF FACTS

The Sex Offender Registration Act, California Penal Code Sections 290-94, mandates that certain persons convicted of specified sex offenses are required to register in the state as a sex offender. The law "assure[s] that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." *In re Alva*, 33 Cal. 4th 254, 264 (2004). As applicable here, the law "simply requires a convicted offender to provide, and to update at specified intervals, information logically calculated to assist law enforcement authorities to monitor his or her whereabouts, while it protects the offender's privacy by carefully restricting the public dissemination of this information." *Id.* at p. 289. "Given the 'frightening and high' danger of long-term recidivism by this class of offenders, the requirement has a legitimate regulatory aim." *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)).[1]

### I. SEX OFFENDER REGISTRATION PROCESS

Prior to release or parole from a jail, prison, or other place of confinement, any person subject to sex offender registration is informed of their duty to register. Schweig Dec., ¶ 6; Cal. Penal Code § 290.017, subd. (a).[2] The person must read and sign a form required by the Department of Justice ("DOJ"), stating that the duty been explained to the person. *Id.* The

[1] Given the well-established purpose, history, and constitutionality of sex offender registration statutes, it is not necessary to repeat the broader background on those issues in the Opposition Memorandum filed today by the Intervenors, the Proponents of Proposition 35. DOJ incorporates those points herein and will simply add that, contrary to the suggestion of plaintiffs, certain offenders can apply for a certificate of rehabilitation and be removed from the registration requirements. Cal. Penal Code § 290.5.

[2] Linda Schweig is the Program Manager of DOJ's Violent Crime Information Center and her declaration is filed herewith. Schweig Dec., ¶ 1.

official in charge of the place of confinement or hospital obtains the address where the person expects to reside upon release and reports it to DOJ. *Id.* Copies of the completed form are given to the person and sent to DOJ and the appropriate law enforcement agency or agencies having jurisdiction over the place the person expects to reside upon discharge, parole, or release. Cal. Penal Code § 290.017, subd. (b). When a person subject to registration is released from probation, the probation department undertakes those duties to notify the person, report the expected residence, and complete and transmit the DOJ form. Schweig Dec., ¶ 6; Cal. Penal Code § 290.017, subd. (c). In the case of a person granted conditional release without supervised probation, or discharged upon payment of a fine, they must first be informed of the duty to register in open court by the court, and the court (or a bailiff) requires the person to read and sign the DOJ form, report the expected address, and transmit the copies of the form. Schweig Dec., ¶ 6; Cal. Penal Code § 290.017, subd. (d). In all of these situations, the DOJ Form 8047 is used. Schweig Dec., ¶ 7.

The released person then has five working days to register (or re-register under certain circumstances if previously registered). Cal. Penal Code § 290.015, subd. (a). The offender must register with the police department or sheriff's office, based on their residence. Cal. Penal Code § 290, subd. (b). Thereafter, the registrant must annually register and update the required information within 5 working days of their birthday or, if they are transient, every 30 days. Cal. Penal Code § 290.015, subds. (a), (c).

The initial and updated registrations are done using DOJ Form 8102S. Schweig Dec., ¶ 13, Exh. A. Immediately prior to the passage of the CASE Act, the Sex Offender Registration Act required that the registration consist of: (1) a written statement giving information as shall be required by DOJ and giving the name and address of the person's employer, and the address of the person's places of employment; (2) fingerprints and a current photograph; (3) license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person; (4) notice to the person that they may have a duty to register in any other state if they relocate, and (5) copies of adequate proof of residence. Former Cal. Penal Code §§ 290.012, subd. (a), 290.015, subd. (a). If the person has no residence and no reasonable expectation of obtaining one

in the foreseeable future, the person can state that fact in writing. Cal. Penal Code § 290.015, subd. (a)(5).

The registering law enforcement agency forwards the initial information to DOJ within three days. Cal. Penal Code § 290.015, subd. (b). Penal Code Section 290.012, subdivision (d), anticipates that registering agencies will submit the registrations directly into the DOJ Violent Crime Information Network, which is discussed shortly.

As noted, the registration form can require such information as may be required by DOJ. Penal Code §§ 290.012, subd. (a)(1), 290.015, subd. (a). Pursuant to that authority, the DOJ started collecting information from registrants in June, 2011, concerning their email addresses and screen names/social networks. Schweig Dec., ¶ 13. Specifically, the current Form 8102S has fields to report "E-MAIL ADDRESS" and "SCREEN NAME(S)/SOCIAL NETWORK(S). *Id.* Exh. A, Page 1 of 4. Plaintiff Jack Roe acknowledges that he was required to provide this information to the sheriff's department when he registered in September, 2012. Doc. 17 (Roe Dec.), ¶ 21.[3]

## II. THE CASE ACT'S IMPACT ON THE CURRENT REGISTRATION PROCESS

While law enforcement agencies have been collecting, and DOJ has been receiving, Internet information from registrants for over a year prior to the passage of the CASE Act, the passage of that initiative measure will require some adjustments to the current registration procedures. The CASE Act amended the above-described Penal Code sections 290.012 and 290.015 to expressly require that Internet identifying information be collected during the registration process. Specifically, that initiative measure added three items to the list of identifying information that must be collected from a registrant during the initial and periodic update registrations: "a list of any and all Internet identifiers established or used by the person," "a list of any and all Internet service providers used by the person," and a signed statement that the registrant is required to register and update that information, as required by the Sex Offender Registration Act. Cal. Penal

[3] Upon issuance of the Temporary Restraining Order in this action, DOJ posted notice that law enforcement agencies should leave those fields blank and not collect that information from registrants. Schweig Dec., ¶ 15. That is important information that should be collected and available to law enforcement while this matter is litigated.

Code §§ 290.012, subd. (a) (amended eff. Nov. 7, 2012), 290.015 subds. (a)(4)-(6) (added eff. Nov. 7, 2012). In addition, the CASE Act added a new requirement to Penal Code Section 290.014, which required (and still requires) that registering agencies be informed if the registrant changes their name. Cal. Penal Code § 290.014, subd. (a). The initiative measure added a new subdivision, which requires:

> b) If any person who is required to register pursuant to the [Sex Offender Registration] Act adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 24 hours. The law enforcement agency or agencies shall make this information available to the Department of Justice. Each person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.

Cal. Penal Code § 290.014, subd. (b) (eff. Nov. 7, 2012)[4]. Thus, a registrant will be required to notify his registering agency of that information promptly, similarly to their current duty to report any name changes.

DOJ's Violent Crime Information Center is currently taking steps to implement these new requirements of the CASE Act. Various of the Center's units maintain the California Sex and Arson Registry ("CSAR"), the central state repository for sex offender registration information. Shweig Dec, ¶¶ 1, 4-5, 10; *See* Cal. Penal Code §§ 14200, 14201.1, 14202, subd. (b)(3). This program expects to have new registration forms ready for use to accommodate the new requirements by January, 2013. Schweig Dec, ¶ 14. In addition, DOJ's software is being updated to allow law enforcement agencies to enter Internet identifying information directly into the central law enforcement repository for sex offender registration information. *Id.* ¶ 14. Currently, registering agencies generally enter sex offender registration information into the registry using the California Law Enforcement Telecommunications System ("CLETS"), but that system does not allow them to enter Internet identifying information directly into the registry. *Id.* ¶ 13. DOJ is currently updating and testing an alternative to CLETS, a graphical user interface that registering agencies will be able use to input CSAR information. *Id.* ¶¶ 13-14. It is anticipated

[4] The CASE Act does not, as plaintiffs contend, require a registrant to compile "a comprehensive list" of all online forums which they have visited. Doc. 8 (Pls' Memo), at 7-8.

that the new system will be completed in March, 2013, and the updates required to allow direct entry of Internet information into CSAR will be implemented in conjunction with that comprehensive upgrade. *Id.* ¶ 14.

## III. SECURITY AND USE OF SEX OFFENDER REGISTRANT INTERNET INFORMATION

Except as otherwise provided by law, the registration statements required by the Sex Offender Registration Act are not open to inspection by the public or any person other than a regularly employed peace officer or other law enforcement officer. Cal. Penal Code § 290.021; *See* Cal. Gov't Code § 6254, subd. (f) (generally excluding certain files of DOJ and local police agencies from disclosure under the Public Records Act). Upon initial entry into the sex offender registry, a law enforcement user is required to acknowledge a "need to know, right to know' policy before access is permitted. Schweig Dec., ¶ 12. In relevant part, the CASE Act provides that it is strengthening sex offender registration requirements "to allow law enforcement to track and prevent online sex offenses." Prop. 35, § 3, ¶ 3 (operative Nov. 7, 2012).

CSAR user accounts are managed through the Justice Identity Management System, which requires an administrator for each law enforcement agency to provide verified identifying information. Schweig Dec., ¶ 11. Access to CSAR through CLETS is governed by existing security measures for that telecommunications system. *Id.* ¶ 13. All access to CLETS is logged and DOJ or the local law enforcement agency can investigate and take appropriate action to remedy any unauthorized access. *Id.* While DOJ is preparing to implement the graphical user interface access to the registry, it is also preparing security measures for that new system that are anticipated to be similar to the CLETS procedures. *Id.* ¶ 14.

Currently, a law enforcement official can only search CSAR using certain criteria that do not include Internet identifying information. Schweig Dec., ¶ 12. To the limited extent that Internet indentifying information has been collected to date (*id.* ¶¶ 13-14), a law enforcement official can only query CSAR for that information by requesting that DOJ perform a search. *Id.* ¶ 12. In the event of child abduction or similar exigent circumstance, DOJ will perform that type of search upon written request. *Id.* Because of this record of the request, DOJ could investigate if made aware of any improper request. *Id.* During almost 20 years with DOJ, the current Program

Manager for the Violent Crime Information Center is not aware of any report or investigation of any such improper request to query CSAR. *Id.* ¶¶ 12. 16.

Notwithstanding these restrictions, having the Internet identifying information that is currently collected under DOJ's practices and that will be collected under the CASE Act is very useful in conducting an investigation. Morgester Dec, ¶ 12.[5] It is akin to having knowledge of a suspect's name, aliases, address, telephone number, fingerprints, and license plates. *Id.* It is a critical starting point for conducting investigations on the Internet. *Id.* Possession of this information may provide enough of a headstart to save a victim's life. *Id.* Having Internet identifying information, however, does not permit access to, or monitoring of, private communications. *Id.* ¶ 9. Under both federal and California law (which is sometimes more restrictive), judicial authorization is required to access private communications and even basic subscriber information associated with an email account. *Id.* ¶¶ 9-10. Moreover, a number of social media sites already bar registered sex offenders, deriving their identify from publically-available records. *Id.* ¶ 13.

Plaintiffs' purported fear of public disclosure of Internet identifying information is apparently based on Section 290.45 of the Penal Code. Doc 8 (Pls' Memo.) at 15:6-11. Under that statutory provision, "any designated law enforcement entity may provide information to the public about a person required to register as a sex offender pursuant to Section 290, by whatever means the entity deems appropriate, *when necessary to ensure the public safety based upon information available to the entity concerning that specific person.*" Cal. Penal Code § 290.45, subd. (a)(1)(emphasis added). The disclosure must be accompanied by a statement that the purpose of the release of information is to allow members of the public to protect themselves and their children from sex offenders. *Id.* § 290.45, subd. (a)(2). Information not already disclosed on the statewide Megan's Law website (governed by Penal Code Section 290.46 and not implicated in this action) cannot be released on the Internet unless there is an warrant outstanding

[5] Robert Morgester is the Senior Assistant Attorney General for eCrime Unit and Privacy Enforcement and Protection Unit of the California Attorney General's Office and his declaration is filed herewith. Morgester Dec, ¶ 1.

for that person. *Id.* § 290.45, subd. (a)(3). A law enforcement entity may authorize persons and entities who receive the information under section 290.45 to disclose it to additional persons only if the entity determines that further disclosure will enhance the public safety and identifies the appropriate scope of further disclosure. *Id.* § 290.45, subd. (c)(1). A law enforcement entity may not authorize such further disclosure by its placement on an Internet Web site. *Id.* A person who receives information from a law enforcement entity may disclose that information only in the manner and to the extent authorized by the law enforcement entity. *Id.* § 290.45, subd. (c)(1). There are criminal penalties for improper use of the disclosed information. *Id.* § 290.45, subd. (e). Civil immunity for private parties is only extended to schools and childcare facilities and their employees and only extends to authorized, good faith dissemination of the information. *Id.* § 290.45, subd. (d)(2).

## ARGUMENT

### I. PLAINTIFFS DO NOT MEET THE HEAVY BURDEN FOR ISSUANCE OF A PRELIMINARY INJUNCTION ENJOINING OPERATION OF A STATE STATUTE

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995) (emphasis added by Supreme Court)). Plaintiffs seeking that remedy must establish: (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, "[a] preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal citation omitted). Nonetheless, Plaintiffs must make a showing of all four *Winter* factors even under the alternative sliding scale test. *Id.* at 1132, 1135.

In considering those factors, the Court should consider that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King,* No. 12A48, __ U.S. __, __ S. Ct. __, 2012 WL 3064878, at *2 (Roberts, Circuit Justice 2012) citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977). "A strong factual record is therefore necessary before a federal district court may enjoin a State agency." *Cupolo v. Bay Area Rapid Transit*, 5 F.Supp.2d 1078, 1085 (N.D. Cal. 1997). Finally, plaintiffs apparently contend that an injunction against the Attorney General would bind local law enforcement officials as well. Doc. 8 (Pls' Memo.), at 25. As explained, DOJ is tasked with implementing many central aspects of of the challenged laws and the Attorney General has general supervisory powers over District Attorneys and Sheriffs, but plaintiffs have cited not authority applying California law that an injunction against her could directly bind local law enforcement agencies or personnel. California law is to the contrary. See *People v. Brophy*, 49 Cal.App.2d 15, 28 (1942) (Article V, section 13, of the California Constitution does not contemplate absolute control and direction of sheriffs).

## II. THE CASE ACT IS FACIALLY CONSTITUTIONAL UNDER THE FIRST AMENDMENT

Plaintiffs' moving papers essentially ignore that the only appellate decision on the proper standards for reviewing the challenged portions of the CASE Act under the First Amendment. In *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), the court rebuffed those challenges to a very similar Utah that required certain offenders to provide Internet identifying information to law enforcement officials. While there is some right to anonymous speech on the Internet, "a state may permissibly infringe upon this right when its interest is important enough and the law is appropriately tailored to meet the stated interest." *Id.* at 1222 (citing *Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1102 (10th Cir.1997)). In evaluating these interests, the Supreme Court has suggested a distinction between the mandatory disclosure in public of a speaker's identity and the requirement that a speaker provide information to the government that could later be used to trace speech back to its source." *Id.* at 1222-23 (discussing *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

The Tenth Circuit rejected the plaintiff's argument that the Utah law was a content-based restriction because it barred completely anonymous speech by registrants. *Doe v. Shurtleff*, 628 F.3d at 1223. Like the CASE Act, "[t]he law says nothing about the ideas or opinions that Mr. Doe may or may not express, anonymously or otherwise . . . [n]either is it aimed at "supress[ing] the expression of unpopular views," . . . but rather it is directed towards aiding the police in solving crimes." *Id.* at 1223 (citing *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir.2000).) The court therefore subjected the law to intermediate scrutiny, meaning it would be upheld if "the Act (1) serves a substantial government interest and (2) is 'narrowly drawn' to serve that interest 'without unnecessarily interfering with First Amendment freedoms.' " *Id.* (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980)).

The Tenth Circuit had no doubt that states have a compelling interest in investigating kidnapping and sex-related crimes involving the Internet. *Doe v. Shurtleff*, 628 F.3d at 1223. We think it almost goes without saying and that plaintiffs would agree: protecting innocent victims (particularly children) from predatory Internet activities that may cause irreparable, lifetime harm and apprehending and prosecuting those offenders is a substantial California state interest. Thus, like the Utah law, the CASE Act must be upheld on First Amendment grounds if it is "readily susceptible to a narrowing construction that would make it constitutional." *Id.* at 1224 (citing *ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir.1999)).

Like the Utah statute, the CASE Act (Prop. 35, § 3, ¶ 3 (operative Nov. 7, 2012)) and DOJ's practices for collecting and disclosing non-public sex offender information described above both indicate that Internet identifying information is collected to track sex offenders online and to have available information on their virtual Internet "whereabouts." *Doe v. Shurtleff*, 628 F.3d at 1225. Nor, like the Utah statute, is the information subject to indiscriminate disclosure to the public. *Id.* at 1224-25. As explained above, that information could theoretically be disclosed only based on information regarding a particular individual, for specified public safety purposes, and the dissemination of that disclosed information is controlled. See Cal. Penal Code § 290.45. Plaintiffs have not even attempted to show why they fear that type of public safety disclosure regarding their personal Internet information (or regarding similar self-professed lower level

offenders not engaged in improper activities related to sex offenses involving the Internet). They thus have failed to establish both standing and the unconstitutionality of the CASE Act based on that specific procedure in the Sex Offender Registration Act.

Finally, the CASE Act, like the Utah law, is not overly broad. *Doe v. Shurtleff*, 628 F.3d at 1225.[6] To be unconstitutional under that doctrine, the law must be "substantially overbroad." *Id.*(quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800–01 (1984)). There must be a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of City. Council of L.A.*, 466 U.S., at 801. DOJ has been collecting Internet identifying information for over a year, yet has not received any legal challenge prior to this one. The challenged provisions cannot be invalidated on the grounds of a "single impermissible application." *Broadrick v. Oklahoma,* 413 U.S. 610, 630 (1973). Courts are uniform that "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008).

In construing the challenged provisions, Plaintiffs acknowledge that the CASE Act requires after-the-fact identification, and not prior speech restraint. The effect, they contend, is functionally and legally equivalent to a prohibition on pseudonymous speech online. Although Plaintiffs attempt to compare the CASE Act's Internet reporting requirements to the challenged statutes in *Doe v. Nebraska*, --- F.Supp.2d ---, Nos. 8:09CV456,4:10CV3266,4:10CV3005, 2012 WL 4923131 2 (D. Neb. Oct. 17, 2012) and *White v. Baker*, 696 F. Supp.2d 1289 (N.D. Ga. 2010) they do not point out the differences between the several statutes. The differences, which are substantial, speak volumes about the narrowness of the CASE Act's reporting requirements.

In *Doe v. Nebraska*, the registrants were required to relinquish any and all participation in certain Internet activities. 2012 WL 4923131, at * 2. The CASE Act does not require registrants

[6] The Proponent Interveners have fully briefed the inappropriateness of a facial overbreadth challenge to a statute like Proposition 35 that does not directly regulate speech. For the sake of brevity the Attorney General joins in, but does not repeat, that argument here.

to forego any participation in any specified Internet site. In *Doe*, the registrants were required to consent to a search of all the computers or electronic communication devices possessed by the person and installation of hardware or software to monitor the person's Internet usage on all the computers or electronic communication devices possessed by the person. *Id.* In *Doe*, Nebraska law also required registrants to disclose their account numbers. *Id.*, at *1. There is no such requirement in the CASE Act.

Finally, in *Doe v. Nebraska*, the registrants were required to disclose all blogs and Internet sites maintained by the person or to which the person has uploaded any content or posted any messages or information. 2012 WL 4923131, at * 1. Again, there is no such requirement in the CASE Act.

In *White v. Baker*, Georgia law required registrants to disclose their passwords which, when combined with other Internet information, may have allowed law enforcement to gain access to confidential communications without judicial supervision. 696 F. Supp.2d 1289, 1295. The CASE Act does not require disclosure of passwords and does not abrogate existing law restricting access to confidential communications absent judicial supervision.

The challenged provisions in the CASE Act are very narrowly tailored. To the extent that Plaintiffs' complaints are based on the fact that California requires lifetime registration, their complaints are not relevant to the facial validity of the CASE Act. In sum, even if the CASE Act regulated speech, which it does not, Plaintiffs cannot prove that the Internet reporting requirements are substantially overbroad.

## III. THE CASE ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Plaintiffs' arguments that the new statutory definitions of "Internet service provider" and "Internet identifier" added by the CASE Act (Cal. Penal Code , § 290.024, subdivs. (a), (b) (eff. Nov. 7, 2012)) are ambiguous (and hence violate due process) completely ignore the basics of sex offender registration. As explained in the Statement of Facts, Internet information is collected from registrants by law enforcement agencies on forms supplied by DOJ and those forms provide specific fields for specific information. See Schweig Dec., Exh. A, Page 1 of 4 (fields to report "E-MAIL ADDRESS" and "SCREEN NAME(S)/SOCIAL NETWORK(S)). DOJ is the process

of issuing new forms that will similarly identify any new information now required to be collected by the CASE Act. *Id.*, ¶ 14. Registrants will not, as Professor Post opines, sit at home pondering a parade of horrible about the potential information they must report based on the statutory language. *Cf* Doc. 21 (Post Dec.) ¶¶ 18-62.[7] Instead, they will be required to supply that information based on certain labeled fields on a DOJ form supplied to them by the registering agency.

A statute comports with due process if it provides "a person of ordinary intelligence fair notice" of the proscribed behavior and provides sufficiently clear standards so as to avoid "seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). As the United States Supreme Court has emphasized,

> few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.

*Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

Moreover, a scienter requirement in a statute may also mitigate vagueness. *Craft v. Nat'l Park Serv.*, 34 F.3d 918, 922 (9th Cir. 1994). To support a conviction of willful failure to perform an act required by Sex Offender Registration Act, there must be evidence that the defendant knew that the particular requirement applied to him. *People v. Aragon*, 207 Cal.App.4th 504, 510 (2012); *People v. Edgar* 104 Cal.App.4th 210, 212 (2002). Given the specific procedures for registering sex offender information, that forms to implement the CASE Act are still being formulated by DOJ, and the legal requirements to convict a person for failure to report a particular item, the chance of an unfair or discriminatory application of the new statutory definitions is minimal, if not non-existent.

Moreover, the statutory definitions of both "Internet service provider" and "Internet identifier" are themselves sufficiently clear, See Cal. Penal Code § 290.024, subdivs. (a), (b) (eff. Nov. 7, 2012). Regarding the Act's definition of "Internet service provider," it definition is

[7] DOJ is filing objections to the Post Declaration herewith.

similar to the one upheld by the 10th Circuit and the federal definition. *Doe v. Shurtleff*, 628 F.3d at 1221, n.1 (online identifier means "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communications"); See 42 U.S.C. § 16915a ("Internet identifiers" means electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting."). Those terms, as well as "Internet service provider" are used in everyday language and have an objective and ordinary meanings that can be discerned from a dictionary. Finally, the inclusion of "similar" identifiers and services in the enumerated list of "Internet identifiers" does not create uncertainty. "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores v. Adams*, 532 U.S. 15, 114-15 (2001). All of the enumerated items ("electronic mail address," "user name," and "screen name") used in Penal Code Section 290.024, subdivision (b) refer to characters or symbols used to identify person on the Internet. "Similar" identifying information would likewise fall into the same category.

## IV. THE CASE ACT DOES NOT IMPLICATE PLAINTIFFS' FREEDOM OF ASSOCIATION

A sex offender registration law cannot violate a registrant's freedom of association where it does not required disclosure of membership in any organizations. *White v. Baker,* 696 F.Supp.2d, at 1312. The CASE Act no more impacts a registrant's right to anonymously associate with others than other identifying information (e.g. vehicle license information) that must routinely be reported to the government.

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/ / /

## CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

Dated: November 26, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
PETER K. SOUTHWORTH
Supervising Deputy Attorney General

/s/ ROBERT D. WILSON

ROBERT D. WILSON
Deputy Attorney General
*Attorneys for Defendant Kamala Harris, Attorney General of the State of California*

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE, et al.,

Plaintiffs,

v.

KAMALA D. HARRIS, et al.,

Defendants.

NO. C12-5713 TEH

ORDER GRANTING TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

This matter came before the Court on November 7, 2012, for a telephonic hearing[1] on Plaintiffs' motion for a temporary restraining order ("TRO"). For the reasons set forth below, the motion is GRANTED.

Plaintiffs John Doe, Jack Roe,[2] and the non-profit organization California Reform Sex Offender Laws bring this action on behalf of present and future California sex offender registrants. Plaintiffs move to enjoin the implementation of several sections of the Californians Against Sexual Exploitation Act ("CASE Act"), which was enacted yesterday by Proposition 35 and takes effect today. *See* Cal. Const. art. II, § 10(a). In particular, Plaintiffs challenge the constitutionality of the newly enacted California Penal Code sections 290.014(b) and 290.015(a)(4)-(6), which require registered sex offenders to "immediately" provide the police with lists of "any and all Internet service providers" and "any and all Internet identifiers established or used" by the registrant. Plaintiffs maintain that they will suffer irreparable harm if these online information reporting requirements are enforced, including violation of their rights to free speech and association under the First Amendment,

[1]The hearing was recorded by a court reporter.

[2]The two individual plaintiffs' motion to proceed anonymously is currently pending before the Court.

United States District Court
For the Northern District of California

and due process and equal protection under the Fourteenth Amendment. They now seek a TRO while the Court considers whether to grant a preliminary injunction.

To obtain a TRO, plaintiffs must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of the TRO; (3) the balance of equities tips in their favor; and (4) the issuance of the TRO is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (setting forth standard for preliminary injunction); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995) ("The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction."). A stronger showing on one of these four elements may offset a weaker showing on another. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135 (9th Cir. 2011).

In this case, the Court finds that Plaintiffs have raised serious questions about whether the challenged sections of the CASE Act violate their First Amendment right to free speech and other constitutional rights. In addition, the balance of hardships tips sharply in favor of issuing a TRO. Defendant Harris's counsel represented to the Court that the State would be in no position to enforce the law until March 20, 2013. The harm to Defendants of a TRO therefore appears to be minimal. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("The Defendants cannot be harmed by an order enjoining an action they will not take."). Plaintiffs, by contrast, would suffer the potential loss of their "ability to speak anonymously on the Internet," which is protected by the First Amendment. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). Such "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009). Additionally, the Ninth Circuit has "consistently recognized the 'significant public interest'

United States District Court
For the Northern District of California

in upholding free speech principles," *Klein*, 584 F.3d at 1208 (9th Cir. 2009), and that "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres*, 695 F.3d at 1002 (internal quotation marks and citation omitted). The Court therefore finds that Plaintiffs have satisfied the standard for a TRO.[3]

Accordingly, with good cause appearing, IT IS HEREBY ORDERED that, pending a hearing on whether a preliminary injunction should issue, Defendant Kamala Harris and her officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with her, are HEREBY ENJOINED AND RESTRAINED from implementing or enforcing California Penal Code sections 290.014(b) and 290.015(a)(4)-(6), as enacted by Proposition 35, or from otherwise requiring registrants to provide identifying information about their online speech to the government. Pursuant to the parties' agreement, as represented by counsel at the telephonic hearing, this order applies to all California state and local law enforcement officers and to all members of the putative class, i.e., to all persons who are required to register under California Penal Code section 290, including those whose duty to register arises after the date of this order.[4]

IT IS FURTHER ORDERED that Defendant Harris shall show cause as to why a preliminary injunction should not issue enjoining her and her agents from implementing and enforcing California Penal Code sections 290.014(b) and 290.015(a)(4)-(6) or from otherwise requiring registrants to provide identifying information about their online speech to the government. The Court will construe Plaintiffs' moving papers for a TRO as a motion for preliminary injunction. Plaintiffs shall file a proof of service of their moving papers and this order on or before **November 8, 2012**. Defendants' opposition papers shall be filed on or before **November 13, 2012**, and Plaintiffs' reply shall be filed on or before **November 16,**

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[3]The Court recognizes that Defendants have not had an opportunity to be fully heard on these issues, and the Court's grant of a TRO shall not be considered any indication of the Court's views of the merits of the issues raised by Plaintiffs or whether, after further briefing, the Court will grant preliminary injunctive relief.

[4]The Court therefore need not reach the question of whether to certify the Plaintiff class at this time. Plaintiffs may, if they wish, renew their motion for class certification as a regularly noticed motion in accordance with the Court's Civil Local Rules.

**2012**. The hearing shall be held on **November 20, 2012, at 10:00 AM**, in Courtroom No. 2, 450 Golden Gate Avenue, San Francisco, CA.

Counsel for Defendant Harris represented to the Court at today's hearing that the proponents of Proposition 35 may seek to intervene in this lawsuit. If they successfully move to intervene, then their opposition to Plaintiffs' motion for a preliminary injunction shall also be due on **November 13, 2012**.

The Court sets this expedited briefing schedule based on the requirements of Federal Rule of Civil Procedure 65(b)(2), which provides that a TRO shall expire within fourteen days of the date of entry "unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension." The Court encourages the parties to meet and confer to attempt to reach agreement on an extension of the briefing and hearing schedule. The Court will entertain a stipulation and proposed order to do so, provided that the parties agree that the TRO shall remain in effect until at least seven days after the hearing on Plaintiffs' motion for a preliminary injunction. Given Defendant Harris's counsel's representation that the State of California will not be in a position to enforce the law until March 20, 2013, it appears that such an extension would result in no harm to Defendants while having the benefit of allowing the parties and this Court additional time to consider the important issues raised in this case.

Finally, the Civil Local Rules shall govern consideration of Plaintiffs' administrative motion to proceed anonymously. Any opposition or statement of non-opposition shall be filed on or before **November 13, 2012**. *See* Civ. L.R. 7-11(b). The motion will then be deemed submitted on the papers unless otherwise ordered.

**IT IS SO ORDERED.**

Dated: 11/07/12

THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT



United States District Court
For the Northern District of California

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TEH

**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

C 12 5713

JOHN DOE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, et al.,

Defendants.

Civil Case No. _____

**DECLARATION OF CHARLENE STEEN**

I, Charlene Steen, declare as follows:

1. I am a criminal psychologist specializing in sex offenders. I have assessed and treated these offenders for over 32 years in California, heading a sex offender treatment program for Solano County, and serving on both the State experimental treatment program (SOTEP) and Sexually Violent Predator panels. I have worked in prisons, jails, and outpatient. I have written 5 books and a number of articles and spoken at international, national, and local conferences on sex offenders. The information in this declaration is based upon my personal knowledge and on sources of the type which researchers in my field would rely upon in their work. If called upon to testify, I could and would competently testify thereto. A true and complete copy of my CV is attached to this declaration as Exhibit A.

2. In 2009, the California Sex Offender Management Board (CASOMB) conducted a survey of California law-enforcement agencies regarding public notifications on the presence of registered sex offenders in the community, CASOMB Recommendations Report January 2010, available at http://www.casomb.org/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf The survey found that 39% of responding agencies had conducted what the report calls "proactive notifications" and supplied information above and beyond what already appears on the public website. Id. at 57. Agencies had conducted public meetings and had distributed flyers door-to-door and at community events; one had sent a combination of media notification, flyers, and emails. Id. CASOMB specifically noted that law enforcement personnel often did not know when such notification was appropriate.

3. From reports by patients I have learned that the police have inappropriately provided information about them to the public, sometimes resulting in dire results. For example, one man who committed a one-time, one-touch sex offense about 25 years ago, called me last year. He had moved to a small Northern California community where he purchased a plumbing business. He immediately registered at the local police department. One of the officers there spread the word out in his church and in the community that he was a sex offender. As a result, he lost his business, because nobody would use him.

4. I have had other patients who have lost jobs and homes because police officers had inappropriately informed others that these people were sex offenders.

5. It is extremely difficult today for anyone who has committed a sex offense, no matter how minor, to find jobs and housing. The vast percentage of these people will never reoffend and just want to be law-abiding citizens. But when they cannot use the internet for fear of reprisals, it is just one further step in alienating them and removing all positive motivation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2 day of November 2012 in Napa, Ca.

Charlene Steen

Charlene Steen, Ph.D., J.D.

**CHARLENE STEEN, PH.D., J.D.**

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## Curriculum Vitae

**EDUCATION:**

Ph.D. in Psychology - Wright Institute, Berkeley
M.S.W. (Social Work) - California State University, Sacramento
J.D. - South Bay University College of Law (now Northrop College of Law, Inglewood)
M.A. - California State University, Long Beach

B.A. - University of California, Los Angeles

**PROFESSIONAL LICENSES:**

Licensed Psychologist - California License PSY 12169
Licensed Clinical Social Worker - California License LCS 11454 (now lapsed)
Attorney at Law - California State Bar #67675 (inactive status as of 1/93)

**PUBLICATIONS:**

*Choices: A Relapse Prevention Workbook for Female Offenders.* Brandon, Vermont: Safer Society Press, 2006.
*The Adult Relapse Prevention Workbook,* Brandon, Vermont: Safer Society Press, 2000.
*Relapse Prevention Workbook for Youth in Treatment*, Brandon, Vermont: Safer Society Press, 1993.
*Treating Adolescent Sex Offenders in the Community* (co-author), Springfield, Illinois: Charles Thomas Publishers, 1989.
"Cognitive Behavioural Treatment under the Relapse Prevention Umbrella," *Children and Young People Who Sexually Abuse,* (Edited by Calder, M.). Lyme Regis, England. Russell House Publishing, Ltd., 2005
"The Expert Witness in the Sex Offender Case," *The Sex Offender -Volume 4,* [Edited by Schwartz, B.], Civic Research Institute, Kingston, N.J., 2002.
"Case Management of Sexual Abuse Victims," *The Handbook of Forensic Sexology,* (Edited by Krivacska, J., and Money J.), Amherst, New York: Prometheus Books, 1994.
"What Do We Know About Female Sex Offenders" (2009), *California Coalition on Sex Offending Newsletter - Perspectives."*
"Treating Crime Victims: Effective Therapy for Post-Traumatic Stress Disorder," *The California Psychologist,* September, 1989.
"Treating the Lower-Risk Adolescent Sex Offender in the Community," *The State of Corrections,* American Correctional Association, 1989.
"Sex Offender Laws: The Need for More Intelligent Solutions" (2001), "Treating Sex Offenders" (1994), and "Treating Denying Sex Offenders" (1995), *California Coalition on Sex Offending Newsletter - Perspectives.*
"The Denying Sex Offender: Research and Treatment" and "Using Research to Increase Sex Offender Assessment Accuracy," in the APA/ABA joint 1999 conference compilation.

(and others)

**CONFERENCE PRESENTATIONS**:(not including individual or local workshops in the U.S. and Canada)

2011 California Coalition on Sex Offending Annual Conference ,San Francisco
2010 International Association for the Treatment of Sex Offenders, Oslo
California Coalition on Sex Offending Annual Conference, San Diego
2009: California Coalition on Sex Offending Annual Conference, Torrance
2008: California Coalition on Sex Offending Annual Conference, San Francisco
Association for the Treatment of Sexual Abusers Annual Conference, Atlanta
2007: California Coalition on Sex Offending Annual Conference, San Diego
Massachusetts Association for the Treatment of Sexual Abusers Annual Conference, Marlborough
2006: Association for the Treatment of Sexual Abusers Annual Conference, Chicago
International Association for the Treatment of Sexual Offenders, Hamburg
California Coalition on Sex Offending Annual Conference, San Francisco
Safe Communities and Safe Schools Conference (WHO), Tucson
National Defender Investigator Association National Conference, San Francisco
2005: California Coalition on Sex Offending Annual Conference, San Diego
Association for the Treatment of Sexual Abusers Annual Conference, Salt Lake City
First International Conference of Sexual Offenses, Sao Paulo, Brazil
2004: International Association on the Treatment of Sex Offenders, Athens, Greece
National Adolescent Perpetrator Network Annual Conference, Portland
2003: California Coalition on Sex Offending Annual Conference, San Diego
Association for the Treatment of Sexual Abusers Annual Conference, St. Louis
2002: Association for the Treatment of Sexual Abusers Annual Conference, Montreal
International Association for the Treatment of Sexual Offenders, Vienna
California Psychological Association Annual Conference, Pasadena
California Coalition on Sex Offending Annual Conference, Sacramento
American College of Forensic Psychologists Annual Conference, San Francisco
California Forensic Mental Health Association Annual Conference, Asilomar
National Adolescent Perpetrator Network Annual Conference, Toledo
California District Attorneys' Association Conference, Santa Barbara
2001: Association for the Treatment of Sexual Abusers Annual Conference, San Antonio
Society for the Scientific Study of Sex Annual Conference
California Coalition on Sex Offending Annual Conference, Irvine
California Psychological Association Annual Conference, Costa Mesa
National Adolescent Perpetrator Network Annual Conference, Kansas City
California Forensic Mental Health Association Annual Conference, Asilomar
National Organization of Forensic Social Workers, Philadelphia
2000: Association for the Treatment of Sexual Abusers Annual Conference, San Diego
California Coalition on Sex Offending State Conference, Emeryville
California Psychological Association Annual Conference, San Jose
International Conference on the Treatment of Sex Offenders, Toronto
National Adolescent Perpetrator Network Annual Conference, Denver
California Forensic Mental Health Association Annual Conference, Asilomar
National Organization of Forensic Social Workers, Palm Springs
1999: California Coalition on Sex Offending State Conference, Long Beach (keynote speaker)
American College of Forensic Psychologists Annual Conference, Santa Fe
Association for the Treatment of Sexual Abusers Annual Conference, Orlando
American College of Forensic Examiners Conference, New York
APA/ABA Conference on Psychological Expertise and Criminal Justice, Washington, D.C.

1998: International Conference on the Treatment of Sex Offenders, Caracas, Venezuela
Forensic Mental Health Association of California Annual Conference, Pacific Grove
Midwest Regional Network for Intervention with Sex Offenders, et al. Conference, Indianapolis, (keynote speaker)
American College of Forensic Psychology Annual Conference, San Francisco
American College of Forensic Examiners Annual Conference, Naples, Florida
Association for the Treatment of Sexual Abusers Annual Conference, Vancouver, Canada
National Adolescent Perpetrator Network Annual Conference, Winnipeg, Canada

1997: California Psychological Association Annual Conference, San Jose
American College of Forensic Psychology Annual Conference, Vancouver
National Adolescent Perpetrator Network Annual Conference, Cherry Hill
Colorado Children's Mental Health Conference, Colorado Springs (keynote speaker)
Association for the Treatment of Sexual Abusers Annual Conference, Arlington
National Defenders' Association Conference, New Haven

1996: East-West Conference on Sex Offenses, Prague, Czech Republic
Association for the Treatment of Sexual Abusers Annual Conference, Chicago
American Professional Society on the Abuse of Children Annual Conference, Chicago
Texas Sex Offender Treatment Providers Annual Conference, Huntsville (keynote speaker)
Society for the Scientific Study of Sex Annual Conference, Houston
National Council on the Abuse and Neglect of Children Annual Conference, Washington, D.C.
American College of Forensic Psychology Annual Conference, New Orleans
National Organization of Forensic Social Work Annual Conference, Chicago
National Colloquium of the American Professional Society on the Abuse of Children, Chicago
National Adolescent Perpetrator Network Annual Conference, Minneapolis
International Society for the Study of Dissociation Conference, San Francisco

1995: American College of Forensic Psychology Annual Conference, San Francisco
International Conference on Sex Offender Treatment, Amsterdam
Association for the Treatment of Sexual Abusers Annual Conference, New Orleans
National Adolescent Perpetrator Network Annual Conference, St. Louis
International Society for the Study of Dissociation Conference, Amsterdam
National Organization of Forensic Social Work Annual Conference, Reno
California Psychological Association Annual Conference, La Jolla

1994: Association for the Treatment of Sexual Abusers Annual Conference, San Francisco
National Conference on Children and Violence, Houston
California Psychological Association Annual Conference, San Francisco
Forensic Mental Health Association of California Annual Conference, Pacific Grove
American College of Forensic Psychology Annual Conference, Montreal
National Adolescent Perpetrator Network Annual Conference, Denver
International Association for Child and Adolescent Psychiatry Congress, San Francisco
American Association of Sex Educators, Counselors & Therapists Conference, Louisville

1993: International Conference on the Treatment of Sex Offenders, Minneapolis
Association for the Treatment of Sexual Abusers Annual Conference, Boston
American Association of Sex Educators, Counselors and Therapists Conference, Denver
American College of Forensic Psychology Annual Conference, Santa Fe
Forensic Mental Health Association of California Annual Conference, Pacific Grove
California Consortium for the Prevention of Child Abuse, San Diego
Male Survivors Conference, Portland

1992: Association for the Treatment of Sexual Abusers Annual Conference, Portland
National Council of Judges and National Adolescent Perpetrator Network Joint Conference, Lake Tahoe
California Psychological Association Annual Conference, San Diego
American College of Forensic Psychology Annual Symposium, San Francisco

1991: Society for the Scientific Study of Sex Annual Meeting, New Orleans
International Society for Traumatic Stress Studies Annual Meeting, Washington, D.C.
15th National Conference on Correctional Health Care, San Antonio
2nd International Conference on the Treatment of Sex Offenders, Minneapolis
American College of Forensic Psychology Annual Conference, Newport Beach
Bay Area Juvenile Sex Offender Annual Conference, Napa

1990: Midwest Conference on Child Abuse, Madison
Association for the Behavioral Treatment of Sexual Abusers Conference, Toronto
New York State and National Adolescent Perpetrator Network Conference, Albany
Male Survivors Conference, Tucson
National Conference on Sexual Addictions/ Compulsions, Minneapolis
Forensic Mental Health Association of California Annual Conference, Pacific Grove
California Psychological Association Annual Conference, San Francisco
National Child Abuse Prevention Conference, San Diego

(And many others prior to 1990)

**EMPLOYMENT**:

1997-present: Private Forensic and Clinical Practice, Napa, California, providing professional training, assessments, expert testimony, and treatment for sex and other criminal offenders; and Evaluator, California State Civil Commitment Program (to 2002).

1991-1996: Private Forensic and Clinical Practice, Napa, California, specializing in the evaluation and treatment of sex offenders and victims, other criminal offenders, and dissociatively disordered and post-traumatic stress disordered patients; Workshop Provider on sex offender assessment and treatment and sexual abuse victims; Aftercare Provider, California State Experimental Sex Offender Treatment Program; and Evaluator, California State Civil Commitment Program.

1988-1990: Private Clinical and Forensic Practice (as noted above) and Psychologist with Solano County Mental Health,Vallejo and Fairfield, California, Forensic and Outpatient Services, assessing and treating sex offenders, other criminal perpetrators, and crime and accident victims in jail, juvenile hall and outpatient; Aftercare Provider, California State Experimental Sex Offender Treatment Program; Attorney for indigent inmates at Parole Board hearings, Hearing Officer for involuntary hospitalizations, and Judge Pro-Tem, Napa Municipal Court.

1985 -1988: Community Treatment Center, Fairfield, California. Executive Director and developer of non-profit agency providing family sexual abuse treatment for Solano County, including group, individual, and family therapy, and peer support, and Coordinator of Juvenile Sex Offender Treatment Program. Concurrently: Private Therapy Practice, Napa, California, and Instructor, Chapman College, Travis AFB, California, of graduate psychology classes.

1983 - 1985: California Department of Corrections, California Medical Facility,Vacaville. Correctional Counselor, assessing, counseling, and providing case management services for offenders both in the Reception Center and on the mainline. Also taught in-service training classes on personality disorders, sexually disordered inmates, etc. National Council on Crime and Delinquency, San Francisco, California - Editor and Writer, "Criminal Justice Newsletter", biweekly national publication covering criminal justice and corrections issues.

1982 - 1983: Sexual Assault Victim Services, Napa, California. Coordinator, providing management, program development, crisis intervention, and ongoing counseling for sexual abuse victims. Concurrently, Northern California Training Center, Santa Rosa, Instructor for jail correctional officers in crisis intervention and inmate-staff relations; and Solano County Mental Health, Fairfield, California. Co-therapist for adult sex offender groups.

1980 - 1982: Solano and Napa County Mental Health Forensic Services, Napa, Fairfield, and Vallejo, California. Social Work Intern, providing therapy and hospitalization evaluations at Napa and Solano County jails and juvenile hall, therapist for adult sex and general offender groups, correctional staff training, development and preparation of Solano County's conservatorship study and manuals and of a criminal offender model reentry program.

1975 - 1980: Attorney at Law, with a focus on criminal, juvenile and mental health law, and Instructor at Napa College and at South Bay University College of Law, Napa and Carson, CA.

**PROFESSIONAL AFFILIATIONS:**

1997 on: Association for the Treatment of Sexual Abusers (formerly on the Board of Directors), International Association for the Treatment of Sexual Offenders, California Coalition on Sex Offending, Bay Area Sex Offender Treatment Network, National Adolescent Perpetrator Network, American, California, and Napa-Solano Psychological Associations, California State Bar (inactive), American College of Forensic Psychology, Forensic Mental Health Association of California, and. Diplomat, American College of Forensic Examiners Psychology Board.. (Have dropped all but the sex offender organization memberships since semi-retirement)

1985-1996: American, California, and Napa-Solano Psychological Associations,Association for the Treatment of Sexual Abusers, American College of Forensic Psychology, California Coalition on Sex Offending, Bay Area Sex Offender Treatment Network, California State Bar, American Association of Correctional Psychologists, National Adolescent Perpetrator Network, Forensic Mental Health Association of California, American Professional Society on the Abuse of Children, International Society for the Study of Dissociative Disorders, etc.

**AWARDS:**

1987: State of California Department of Social Services Certificate of Commendation for outstanding accomplishments on behalf of abused and neglected children Child Abuse Prevention Council of Solano County Annual Award for outstanding efforts in combating child abuse

2002: California Coalition on Sex Offending Fay Honey Knopp Award for outstanding contributions to the field of sex offender assessment and treatment

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on behalf of themselves and others similarly
situated

**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

TEH

C 12 5713

JOHN DOE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, et al.,

Defendants.

Civil Case No. _____

**DECLARATION OF R. KARL HANSON**

I, R. Karl Hanson, declare as follows:

1. I am a Senior Research Scientist at Public Safety Canada. Throughout my career, I have studied recidivism, with a focus on sex offenders. I discuss in this declaration key findings and conclusions of research scientists, including myself, regarding recidivism rates of the general offender population and sex offenders in particular. The information in this declaration is based upon my personal knowledge and on sources of the type which researchers in my field would rely upon in their work. If called upon to testify, I could and would competently testify thereto.

**Summary of Declaration**

2. My research on recidivism shows the following:

   a. Recidivism rates are not uniform across all sex offenders. Risk of re-offending varies based on well-known factors and can be reliably predicted by widely used risk assessment tools such as the Static-99 and Static-99R, which are used to classify offenders into various risk levels. *See* ¶¶ 14-19.

   b. Once convicted, most sexual offenders are never re-convicted of another sexual offence. *See* ¶ 19.

   c. First-time sexual offenders are significantly less likely to sexually re-offend than are those with previous sexual convictions. *See* ¶ 19.

   d. Contrary to the popular notion that sexual offenders remain at risk of re-offending through their lifespan, the longer offenders remain offence-free in the community, the less likely they are to re-offend sexually. Eventually, they are less likely to re-offend than a non-sexual offender is to commit an "out of the blue" sexual offence. *See* ¶¶ 19-41.

      i. Offenders whose are classified as low-risk by Static-99R pose no more risk of recidivism than do individuals who have never been arrested for a sex-related offense but have been arrested for some other crime . *See* ¶¶ 26-30, 36.

ii. After 10-14 years in the community without committing a sex offense, medium-risk offenders pose no more risk of recidivism than individuals who have never been arrested for a sex-related offense but have been arrested for some other crime. *See* ¶¶ 30, 34.

iii. After 17 years without a new arrest for a sex-related offense, high risk offenders pose no more risk of committing a new sex offense than do individuals who have never been arrested for a sex-related offense but have been arrested for some other crime. *See* ¶¶ 30, 35.

3. Based on my research, my colleagues and I recommend that rather than considering all sexual offenders as continuous, lifelong threats, society will be better served when legislation and policies consider the cost/benefit break point after which resources spent tracking and supervising low-risk sexual offenders are better re-directed toward the management of high-risk sexual offenders, crime prevention, and victim services. *See* ¶¶ 39-42.

**Background and Qualifications**

4. I am a Senior Research Scientist at Public Safety Canada. Public Safety Canada is a federal department that was created in 2003 to ensure coordination across all federal departments and agencies responsible for national security and the safety of Canadians. The Department's responsibilities include emergency management, policy development and advice to the Minister of Public Safety on matters of national security, implementing Canada's National Crime Prevention Strategy, developing national policies for new and evolving crime and border issues, and developing legislation and policies governing corrections.

5. As a Senior Research Scientist, I conduct and supervise research on corrections, with a particular focus on sexual offenders and family violence. I have held this position since 2009. From 1991-2009, I served as Senior Research Officer for the Solicitor General of Canada and Public Safety Canada. From 1986 to 1991 I was a psychologist in private practice, specializing in the assessment and short-term treatment of offenders on probation and parole. During that time I was also Course Director for psychology courses

as York University (Personality, Abnormal Psychology, Research) and Trent University (Abnormal Psychology). I earned my Ph.D. in Clinical Psychology from the University of Waterloo in 1986, and my B.A. with honors in Psychology from Simon Fraser University in 1981. I am currently the Chair of the Research Committee of the Association for the Treatment of Sexual Abusers, an appointment that began in 2009 and ends in December, 2012; since 1996 I have been the Secretary/Treasurer for the Criminal Justice Section of the Canadian Psychological Association; since 2000 I have served on the Scientific Advisor Committee International Association for the Treatment of Sexual Offenders. I am a member of the International Association for Correctional and Forensic Psychology, and Ontario College of Psychology. I serve on a variety of editorial boards, scientific committees and working groups, including serving as the advisor to the DSM-V Sexual Disorders Workgroup of the American Psychiatric Association (2009-present). From 1997-2011 I provided training and consulting for the California Department of Mental Health about civil- commitment evaluation and Static-99 scoring and interpretation.

6. Throughout my career I have studied recidivism, particularly recidivism among sex offenders, and have written numerous articles on this topic. A true and correct copy of my CV is attached to this declaration as Exhibit 1.

**Recidivism in the General Offender Population Declines the Longer an Ex-Offender Remains Arrest or Conviction Free**

7. Research has long shown that the longer an ex-offender remains free of arrests or convictions the lower the chance he will reoffend. In fact, most detected recidivism occurs within three years of a previous arrest and almost always within five years.

8. In an effort to try to determine whether it is possible to determine empirically when it is no longer necessary for an employer to be concerned about a criminal offense in a prospective employee's past, the United States Department of Justice's National Institute of Justice funded a study to actuarially estimate a point in time when an individual with a criminal record is at no greater risk of committing another crime than other individuals of the same age.

9. The study's goal was to determine empirically at what point in time the risk of recidivism was no greater than the risk for two comparison populations. Their analysis was based on a statistical concept called the "hazard rate." In this context, the hazard rate is the probability, over time, that someone who has stayed arrest-free will be arrested. For a person who has been arrested in the past, the hazard rate declines the longer he stays free of arrests.

10. The researchers, noted criminologist Alfred Blumstein and his then-doctoral student Kiminori Nakamura, obtained the criminal history records of 88,000 individuals who were arrested for the first time in New York State in 1980, and then determined whether they had been arrested for any other crime(s) during the ensuing 25 years or if they had stayed arrest-free.

11. The study showed that the hazard rates for people who committed crimes such as burglary, robbery, and aggravated assault eventually dropped below the hazard rate for other individuals of the same age in the general population. For example, for 18-year-olds who were arrested for a first offense robbery, the hazard rate declined to the same arrest rate for the general population of same-aged individuals at age 25.7, or 7.7 years after the robbery arrest. After that point, the probability that individuals would commit another crime was less than the probability of other 26-year-olds in the general population. The hazard rates of people who committed burglary at age 18 declined to the same as the general population somewhat earlier: 3.8 years post-arrest at age 21.8. For aggravated assault, the hazard rates of the study group dropped below that of the general population of same-aged individuals 4.3 years post-arrest or at age 22.3.

12. Blumstein and Nakamura also looked at the hazard rates for people whose first arrest had occurred at other ages and found that the younger an offender was when he committed robbery, the longer he had to stay arrest-free to reach the same arrest rate as people his same age in the general population.

13. The results of their study are published in Blumstein, A., and K. Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," Criminology 47 (2) (May

2009), and summarized in an article of the same name in the National Institute of Justice Journal, No. 263 10-17, available at https://www.ncjrs.gov/pdffiles1/nij/226872.pdf .

**Risk Assessment Tools Exist to Predict the Risk of Reoffending by Sex Offenders**

14. Although it has long been suspected that recidivism rates are not uniform across all sex offenders, it is only in the last few decades that researchers have developed tools to assess the risk that different categories of sex offenders will recidivate. In 1999, I, along with my colleague David Thornton, created a 10-item actuarial scale that assesses the recidivism risk of adult male sex offenders, known as the Static-99. We created the Static-99 as a more-accurate replacement for earlier assessment tools. The 10 items cover the nature of sex-related offense or offenses that led to the most recent arrest (the "index offense"), and also the offender's demographics (age at release, relationship history), sexual criminal history (prior sexual offences, any male victims, any unrelated victims, any stranger victims, any non-contact sexual offences), and general criminal history (prior sentencing dates, non-sexual violence committed along with the index offense, prior non-sexual violence). The Static-99 is intended to be used with adult male offenders who have committed either a contact or non-contact sexual offense and have reached the age of 18 prior to release to the community.

15. The Static-99 results in a score that can range from 0 up to 12. Depending on their score, offenders are classified as having low (score of 0-1), moderate-low (score of 2-3), moderate-high (score of 4-5), or high risk (score of 6+) of reoffending. The coding form for the Static-99 can be found at http://www.static99.org/pdfdocs/static-99-coding-rules_e71.pdf, a true and correct copy of which is attached to this declaration as Exhibit 2.

16. The Static-99 is based on static (unchanging) risk factors that estimate the likelihood of sexual re-offending. More recently, researchers and others have begun using the Static-99R. The items and scoring rules are identical to Static-99 with one exception: Static-99R takes into account the well-established principle that rates of almost all crimes decrease as people age. Most studies have found that older sexual offenders are lower risk to reoffend than younger sexual offenders (Barbaree & Blanchard, 2008; Hanson,

2002, 2006) (a list of complete citations for the sources cited is attached). Research has found that the original Static-99 did not fully account for age at release and that the new age weighting had greater predictive accuracy than the original version (Helmus, Thornton, et al., 2012).

17. , Consequently, the Static-99R adjusts the offender's score as follows, based on his age when he was released from custody for the index offense: It increases the score by 1 point if the offender was less than 35 years old at release; it makes no adjustment if the offender was between 35 and 40 at release; it lowers it by 1 point if he was aged 40 to 60; and it lowers it by 3 points if he was age 60 or older. This means that Static-99R scores can range from -3 up to 12. The scores that place offenders into the various risk classification categories are the same as in the Static-99, except that a low score is now defined to include -3 through 1. The coding form for the Static-99R can be found at http://www.static99.org/pdfdocs/static-99rcodingform.pdf, a true and correct copy of which is attached to this declaration as Exhibit 3.

18. The Static-99 and the Static-99R are the most widely used sex offender risk assessment instruments in the world, and are extensively used in the United States, Canada, and other nations. As noted above, from 1997-2011, I provided training and consulting for the California Department of Mental Health about Static-99/99R scoring and interpretation, and it is my understanding that California uses them to assess every eligible sex-offender prior to release on parole, to assess every eligible sex offender pre-sentencing and on a probation caseload, and prior to release of an eligible sex offender from a DMH institution. *See* http://www.saratso.org/risklntsru.htm. I am currently collaborating with the SARATSO (State Authorized Risk Assessment Tool for Sex Offenders) Committee, a committee created by the California legislature to consider the selection of risk assessment tools for California, and the California Department of Corrections and Rehabilitation on a research study examining the validity of Static-99. Additional information about these tools can be found at http://www.static99.org/.

**Recidivism Rates among Sex Offenders**

19. I have conducted studies similar to that conducted by Blumstein and Nakamura of the general offender population in order to determine recidivism rates for sex offenders and to better understand what factors affect those rates. In 2003-2004, I, working with other researchers, analyzed the data from 10 existing follow-up studies of adult male sexual offenders (combined sample of 4,724). The analysis indicated that most sexual offenders do not re-offend sexually, that first-time sexual offenders are significantly less likely to sexually re-offend than those with previous sexual convictions, and that offenders over the age of 50 are less likely to re-offend than are younger offenders. In addition, the longer offenders remained offence-free in the community the less likely they are to re-offend sexually.

20. More specifically, the study found that after 15 years of living in the community, 73% of sexual offenders had not been charged with, or convicted of, another sexual offence. The sample was sufficiently large that very strong contradictory evidence would be necessary to substantially change these recidivism estimates, particularly since other studies have found similar results.

21. Not all sexual offenders were equally likely to reoffend. By using simple, easily observed characteristics, it was possible to differentiate between offenders whose five year recidivism rate was 5% from those whose recidivism rate was 25%. The factors associated with increased risk were the following: a) male victims, b) prior sexual offences, and c) young age.

22. The study also showed that the rate of reoffending decreases the longer offenders have been offence-free. The five year recidivism rate for new releases of 14% decreased to 4% for individuals who have been sex-offence-free for 15 years. The observed rates underestimate the actual rates because not all sexual offences are detected; nevertheless, the findings contradicted the popular notion that all sexual offender remain at risk throughout their lifespan.

23. It is important to understand that most of the offenders in this study had not received effective treatment. Research has found that contemporary cognitive-behavioral treatment

is associated with reductions in sexual recidivism rates from 17% to 10% after approximately 5 years of follow-up (Hanson et al., 2002).

24. The study, including its methodology, is discussed in Andrew J. R. Harris and R. Karl Hanson, Sex Offender Recidivism: A Simple Question (Public Safety and Emergency Preparedness Canada 2004), available at http://www.publicsafety.gc.ca/res/cor/rep/2004-03-se-off-eng.aspx.

25. We concluded that rather than considering all sexual offenders as continuous, lifelong threats, society will be better served when legislation and policies consider the cost/benefit break point after which resources spent tracking and supervising low-risk sexual offenders are better re-directed toward the management of high-risk sexual offenders, crime prevention, and victim services.

26. I, along with three other researchers, recently conducted a similar study to examine the extent to which sexual offenders present an enduring risk for sexual recidivism over a 20 year follow-up period. This updated study is the topic of a paper that we have recently submitted to a peer-reviewed journal for publication; as well, the results of this study were presented by myself and Dr. Andrew Harris at the 2012 Association for the Treatment of Sexual Abusers 32nd Annual Research and Treatment Conference, held in October 2012. The study used the same methodology as the 2003-04 study (life table survival analysis), but differed from the earlier study in two significant ways: the sample size was significantly larger (n=7,740), and the study grouped offenders according to their Static-99R scores into low- (scores below 0) medium- (scores of 0-4) and high- (5 and above) risk categories (we used three rather than the usual four categories in order to maximize sample size for each category and increase the stability of the results). (See Hanson et al., 2012).

27. This study confirmed that sexual offenders' risk of committing sexual crimes decreases the longer they have been sex offence-free in the community. On average, their recidivism risk dropped by 50% each five years that they remained offense-free in the community. This pattern was particularly evident for high risk sexual offenders, whose yearly recidivism rates declined from approximately 7% during the first calendar year, to

less than 1% per year when they have been offence-free for 10 years or more. Thus, like "regular" offenders, sex offenders are less likely to re-offend the longer they remain offence-free in the community.

28. We also determined that, just as Blumstein and Nakamura established with respect to other types of offenders, sex-offenders who remain free of arrests for a sex offense will eventually become less likely to reoffend sexually than a non-sexual offender is to commit an "out of the blue" sexual offence.

29. As a preliminary step, we had to define the level of risk at which sexual offenders should be treated as non-sexual offenders. Unfortunately, there are very limited data as to the rates of sexual offending among the general male population. One study from Great Britain has found that approximately 2% of males are convicted for a sexual offence by age 40 (Marshall, 1997). Another has determined that among non-forensic psychiatric admissions, the proportion with a history of sexual violence is 3% to 5% (Hirdes, 2012). Because these data are not entirely satisfactory, we chose a different reference group: persons who have been arrested but have no recorded history of sexual offending. Among such non-sexual offenders, the observed sexual offense rates are 1% to 3% (Duwe, 2012; Hanson et al., 1995; Langan et al., 2003; Sample & Bray, 2003). For this paper we chose a threshold of < 3% sexual recidivism rates after 5 years as a comparison baseline.

30. Using this threshold, we found that immediately upon release, low-risk offenders pose a smaller risk of recidivism (2.2% five-year risk) than does this baseline group of individuals who have never been arrested for a sex offense. After 10 years in the community without committing a sex offense, medium-risk offenders also pose a risk (2.4% five-year risk) that is below this baseline. Although their recidivism rates declined substantially when they were 10 years offence-free, the five year recidivism rate of the initially high risk offenders (4.2%) was still higher than the 3% expected rate for nonsexual offenders.

31. As part of this research project, presented at the 2012 Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, we also used another

method of estimating the redemption period for sexual offenders. The redemption period is the time at which their expected rates of recidivism are below some pre-determined threshold. The second method involved estimating the probability of sexual recidivism during 6-month periods, from the time of release to more than 20 years in the community. These discrete-time hazard rates were then modeled using logistic regression. Statistical modeling minimizes random noise in the data allowing the patterns to be observed more clearly. By statistically modeling the hazard rates, we were able to make more precise estimates of the recidivism rates than we could using the statistical procedures (life-table survival analyses) reported in our earlier analyses.

32. Statistical modeling of discrete-time hazard rates is a well-established method for estimating changes in hazard rates over time (Singer & Willett, 2003). These statistical methods (logistic regression modeling of discrete-time hazard rates) have been used by other researchers to specifically examine time-to-redemption for general (non-sexual) offenders (Bushway, Nieubeerta & Blokland, 2011). Logistic regression is the standard statistical method for estimating the value of a binary dependent variable (a yes-no question) based on a set of continuous independent variables. In our case, the binary variable was recidivism (charge for a sexual crime) during a six-month period, and the predictor variables were time sex-offence free and Static-99R scores. Logistic regression is discussed in most advanced texts on statistics; a standard reference is Alan Agresti, AN INTRODUCTION TO CATEGORICAL DATA ANALYSIS (John Wiley and Sons 1996).

33. I compared the expected risk of sexual recidivism that individuals in the various risk categories would pose after they have been living in the community without a subsequent arrest for a sex-related crime to a baseline risk posed by any person who has suffered at least one arrest for any type of crime. By averaging the results of five studies that were conducted on this question between 1993 and 2008, we calculated the probability that a person who has suffered any arrest in his lifetime will commit a sex offense during any 6-month period as approximately 0.2% (rounded from 0.19%). This is a somewhat lower baseline than the 3%-over-5-years that we used in our recently submitted paper, discussed above; this means that the results discussed below are more conservative than those discussed above.

34. This analysis, which I presented at the 2012 ATSA conference, showed that after 14 years without a new arrest for a sex-related offense, medium-risk sex offenders pose no more risk of committing a new sex offense than do these baseline individuals who have never been arrested for a sex-related offense.

35. It also showed that after 17 years without a new arrest for a sex-related offense, high-risk sex offenders (top 16% of routine samples) pose no more risk of committing a new sex offense than do these baseline individuals who have never been arrested for a sex-related offense.

36. For the low risk sexual offenders (bottom 16% of routine samples), there was no significant change in their risk levels over time, as their risk was consistently low. Less than 0.2% (0.187%) of the low risk sexual offenders would be expected to be charged with a sexual offence during any discrete 6-month time period. For these individuals, their risk of a new sexual offence was already lower than the .0020 baseline at the time they were released from custody.

37. A true and correct copy of a graph that I presented at the conference, showing the recidivism rates over time for the three categories, along with the baseline, is attached to this declaration as Exhibit 4.

38. I, along with several of my colleagues, am currently preparing a paper for publication in a peer-reviewed journal that will discuss these results. I do not expect that the basic results that I discuss in this declaration will change as a result of that process.

39. I do, however, expect that when our analysis is complete it will allow us to calculate the risks posed by sex offenders who have remained completely free of *any* arrest following their release from custody (the above calculations only examine whether there has been a new arrest for a sex offense). Based on prior research indicating that committing any sort of crime increases the statistical likelihood that one will commit a sex crime, I expect we will find that sex offenders who have remained completely arrest free since their release will be significantly less likely to commit new sex offenses than the above data suggests, and that they will drop below the baseline risk earlier than is indicated above for people

who have remained free of arrests for sex crimes but may have been arrested for other offenses.

40. Finally, it is important to understand that there are post-release factors other than the passage of time without a new arrest that can help predict whether an offender is likely to reoffend. As mentioned above, modern treatment methods can have a significant effect in reducing recidivism; furthermore, one study involving interviews with sexual recidivists found that most of the treatment failures had never seriously intended to stop offending or change the right-risk lifestyle in which their offending was embedded. Sexual offenders with a credible release plan are lower risk than offenders without, and cooperation with supervision is a well-established factor that reduces risk. Consequently, it is quite likely that by monitoring these factors, by measuring indicators of commitment to treatment and other prosocial goals, and by monitoring involvement in non-sexual crime, evaluators could have an increased capacity to discriminate those who will recidivate from those who will not.

41. Thus, as my colleagues and I concluded in our 2004 paper, blanket policies that treat all sexual offenders as "high risk" waste resources by over-supervising lower risk offenders and risk diverting resources from the truly high-risk offenders who could benefit from increased supervision and human service. Research has even suggested that offenders may actually be made worse by the imposition of higher levels of treatment and supervision than is warranted given their risk level (Lovins, Lowenkamp & Latessa, 2009). Rather than considering all sexual offenders as continuous, lifelong threats, society will be better served when legislation and policies consider the cost/benefit break point after which resources spent tracking and supervising low-risk sexual offenders are better re-directed toward the management of high-risk sexual offenders, crime prevention, and victim services.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 3 day of November 2012 in Ottawa, Canada.

R.K. Hanson

R. Karl Hanson

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Sample & Bray, 2003: Sample, L. L., & Bray, T. M. (2003). Are sex offenders dangerous? *Criminology and Public Policy, 3,* 59-82. doi:10.1111/j.1745-9133.2003.tb00024.x

Singer, J. D., & Willett, J. B. (2003). *Applied Longitudinal Data Analysis: Modeling Change and Event Occurrence.* Oxford, UK: Oxford University Press.

# EXHIBIT 1

Curriculum Vitae **R. Karl Hanson**

Work address Corrections and Criminal Justice Research
Public Safety Canada
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Education

1986 - Ph.D. in Clinical Psychology, University of Waterloo
1981 - B.A.(Hons), Psychology, Simon Fraser University

Professional Awards and Distinctions

2010 - Public Safety Canada: Student Recognition Award
2007 – Public Safety Canada: Departmental Achievement Award
2007 – Public Safety Canada: Student Recognition Award
2006 – Public Service Merit Awards for Exceptional Performance
2003 – Canadian Psychological Association: Fellow
2002 – The Association for the Treatment of Sexual Offenders: Significant Achievement Award
1998 – Public Service Merit Award for Exceptional Performance

Academic Awards

As a student (1978 – 1986), I received SSHRC doctoral and M.A. fellowships as well as awards and scholarships from Simon Fraser University, Capilano College and the University of Manitoba (where I completed my internship in clinical psychology).

Current Employment

| Start Dates | Location | Duties |
|---|---|---|
| 2/2009 - | Public Safety Canada | Senior Research Scientist. Conduct and supervise research on corrections, with a particular focus on sexual offenders and family violence |
| 6/2004 | Carleton University | Adjunct Professor |

Professional Work Experience

| Dates | | Location | Duties |
|---|---|---|---|
| 4/1991 - | 2/2009 | Solicitor General Canada/Public Safety Canada | Senior Research Officer. |
| 9/1986 – | 4/1991 | York University | Course Director (Personality, Abnormal, Research). Supervision of student research. (part-time) |
| 9/1987- | 1/1991 | Ontario Ministry of Correctional Services | Assessment, short-term treatment of offenders on probation and parole, staff consultation (part-time) |

Between 1987 and 1990, I was a research consultant for several organizations including the Solicitor General Canada (sexual offenders, impact of sexual victimization) and Thistletown Regional Centre (incest offender assessment). I taught psychopathology at Trent University and the Adlerian Institute. As well, I was engaged in the assessment and treatment of forensic clients, including sexual offenders at the Clarke Institute of Psychiatry (now Centre for Addiction and Mental Health, Toronto, Ontario, Canada).

Clinical Training

I completed a one-year post-doctoral A.P.A./C.P.A. approved internship at the Health Sciences Centre, University of Manitoba in 85/86, and had prior internship experience with adults and children at the University of Waterloo, and Sunnybrook Medical Centre (Toronto). I have been registered as a psychologist in Ontario since 1987. My clinical expertise concerns the assessment and treatment of adult offenders.

Journal Publications (refereed)

Helmus, L., Hanson, R.K., Babchishin, K.M., & Mann, R.E. (in press). Attitudes supportive of sex offending predict recidivism: A meta-analysis. *Trauma, Violence, & Abuse.* doi:10.1177/1524838012462244

Babchishin, K.M., Hanson, R.K., & Helmus, L. (in press). Even highly correlated measures can add incrementally to predicting recidivism among sex offenders. *Assessment.* doi:10.1177/1073191112458312

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Helmus, L., Thornton, D., Hanson, R.K., & Babchishin, K.M. (2012). Improving the predictive accuracy of Static-99 and Static-2002 with older sex offenders: Revised age weights. *Sexual Abuse: A Journal of Research and Treatment, 24*(1), 64-101. doi:10.1177/1079063211409951

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Hanson, R. K. (2009). The psychological assessment of risk for crime and violence. *Canadian Psychology/Psychologie canadienne, 20*(3), 172-182.

Hanson, R.K., Bourgon, G., Helmus, L., & Hodgson, S. (2009). The principles of effective correctional treatment also apply to sexual offenders : A meta-analysis. *Criminal Justice and Behavior, 36,* 865-891.

Hanson, R.K., & Morton-Bourgon, K.E. (2009). The accuracy of recidivism risk assessments for sexual offenders: A meta-analysis of 118 prediction studies. *Psychological Assessment, 21,* 1-21.

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- Abstracted in *Clinician's Research Digest: Briefings in Behavioral Science, 16*(7), 1998.
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Bonta, J., Law, M., & Hanson, R. K. (1998). The prediction of criminal and violent recidivism among mentally disordered offenders: A meta-analysis. *Psychological Bulletin, 123*(2), 123-142.

Hanson, R. K., Cadsky, O., Harris, A., & Lalonde, C. (1997). Correlates of battering among 997 men: Family history, adjustment and attitudinal differences. *Violence and Victims, 12*(3), 191-208.

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Hanson, R. K., & Scott, H. (1996). Social networks of sexual offenders. *Psychology, Crime, & Law, 2,* 249-258.

Hanson, R. K. (1996). Evaluating the contribution of relapse prevention theory to the treatment of sexual offenders. *Sexual Abuse: A Journal of Research and Treatment, 8*(3), 201-208.

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Hanson, R. K., Scott, H., & Steffy, R. A. (1995). A Comparison of Child Molesters and Non-Sexual Criminals: Risk Predictors and Long-term Recidivism. *Journal of Research in Crime and Delinquency, 32*(3), 325-337.

Hanson, R. K., & Whitman, R. (1995). A rural, community action model for treating abusive men. *Canadian Journal of Community Mental Health, 14,* 49-59.

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- Reprinted in A. E. Kazdin, (Ed.). (1992). *Methodological issues and strategies in clinical research.* Washington, DC: American Psychological Association.

Journal Publications (invited)

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Hanson, R.K. (2011). What should we do with sexual offenders? Review of C.P. Ewing's "Justice Perverted: Sex Offense Law, Psychology, and Public Policy". *PsycCRITIQUES-Contemporary Psychology: APA Review of Books, 56*(39).

Seto, M.C., & Hanson, R.K. (2011). Introduction to special issue on internet-facilitated sexual offending. *Sexual Abuse: A Journal of Research and Treatment, 23*(1), 3-6.

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Thornton, D., Hanson, R.K., & Helmus, L. (2010). Moving beyond the Standard Model for Actuarial Assessment for Sexual Offenders. *California Coalition on Sexual Offending, CCOSO Quarterly Newsletter, Perspectives,* Issue: Spring 2010. Available at http://ccoso.org/newsletter.php.

Hanson, R. K. (2010). Dimensional assessment of sexual deviance. *Archives of Sexual Behavior, 39* (2), 401-404. DOI 10.1007/s10508-009-9575-6

Babchishin, K. M., & Hanson, R. K. (2009). Improving our talk: Moving beyond the "low", "moderate", and "high" typology of risk communication. *Crime Scene, 16*(1), 11-14. Available at http://www.cpa.ca/cpasite/userfiles/Documents/Criminal%20Justice/Crime%20Scene%202009-05(1).pdf

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Hanson, R.K. (2008). What statistics should we use to report predictive accuracy? *Crime Scene, 14*(1), 15-17. Available at http://www.cpa.ca/sections/criminaljustice/publications/

Harris, A. J. R., & Hanson, R. K. (2007, November 8). Stable-2007/Acute-2007. *The Forum* (ATSA Newsletter), *19*(4). Available at http://newsmanager.commpartners.com/atsa/issues/2007-11-08/2.html.

Långström, N. & Hanson, R.K. (2006). Population correlates are relevant to understanding hypersexuality: A response to Giles. *Archives of Sexual Behavior, 35,* 643-644.

Cortoni, F., & Hanson, R.K. (2006). Adult female sexual offenders: prevalence and recidivism. *NOTA News, 52,* 6-8.

Hanson, R. K. (2006). Long-term follow-up studies are difficult: Comment on Langevin et al. (2004). *Canadian Journal of Criminology and Criminal Justice, 48* (1), 103-105.

Hanson, R. K. (2005). Twenty years of progress in violence risk assessment. *Journal of Interpersonal Violence, 20*(2), 212-217.

Hanson, R. K. (2005). Age and sexual recidivism : Early identification of persistent offenders and burn-out. *CrimeScene, 12*(1), 8-9. Available at http://www.cpa.ca/sections/criminaljustice/publications/

Harris, A. J. R., & Hanson, R. K. (2003). The Dynamic Supervision Project : Improving the community supervision of sex offenders. *Corrections Today, 65,* pp 60-62,64.

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Hanson, R. K. (2000). Will they do it again? Predicting sex offence recidivism. *Current Directions in Psychological Science, 9*(3), 106-109.

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Edited Books

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Contributions to Edited Books

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Videotapes

Hanson, R.K. (2000). *Predicting sex offender recidivism.* [Videotape training and manual]. Thousand Oaks, CA: Sage.

Government Documents

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Helmus, L., Thornton, D., Hanson, R.K., & Babchishin, K.M. (2011). *Assessing the risk of older sex offenders: Developing the Static-99R and Static-2002R.* Corrections User Report 2011-01. Ottawa: Public Safety Canada.

Hanson, R. K., Bourgon, G., Helmus, L., & Hodgson, S. (2009). *A meta-analysis of the effectiveness of treatment for sexual offenders : Risk, need and responsivity.* Corrections User Report 2009-01. Ottawa: Public Safety Canada.

Phenix, A., Doren, D., Helmus, L., Hanson, R.K., & Thornton, D. (2009) *Coding rules for Static-2002.* Ottawa: Public Safety Canada.

Bourgon, G., Hanson, R.K., Pozzulo, J.D. Morton Bourgon, K.E. & Tanasichuk, C.L. (2008) *The Proceedings of the 2007 North American Correctional & Criminal Justice Psychology Conference (User Report 2008-02).* Ottawa: Public Safety Canada.

Bourgon, G., Hanson, R. K., & Bonta, J. (2008). Risk, need, and responsivity : A heuristic for evaluating the «quality » of offender interventions. In G. Bourgon, R. K. Hanson, J. D. Pozzulo, K. E. Morton Bourgon, & C. L. Tanasichuk, (Eds.) *The Proceedings of the 2007 North American Correctional & Criminal Justice Psychology Conference* (pp. 45-49). Corrections User Report 2008-02. Ottawa: Public Safety Canada.

Hanson, R. K., & Bourgon, G. (2008). A psychologically informed meta-analysis of sex offender treatment outcome studies. In G. Bourgon, R. K. Hanson, J. D. Pozzulo, K. E. Morton Bourgon, & C. L. Tanasichuk, (Eds.) *The Proceedings of the 2007 North American Correctional & Criminal Justice Psychology Conference* (pp. 55-57). Corrections User Report 2008-02. Ottawa: Public Safety Canada.

Hanson, R. K., Helmus, L., & Bourgon, G. (2007). *The validity of risk assessments for intimate partner violence: A meta-analysis.* Corrections User Report No. 2007-07. Ottawa: Public Safety Canada.

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Hanson, R. K., Harris, A.J.R., Scott, T., & Helmus, L. (2007). Assessing the risk of sexual offenders on community supervision: The Dynamic Supervision Project. Corrections User Report No 2007-05. Ottawa: Public Safety Canada.

Hanson, R.K., & Morton-Bourgon, K.E. (2007). *The accuracy of recidivism risk assessments for sexual offenders : A meta-analysis.* Corrections User Report No 2007-01. Ottawa: Public Safety and Emergency Preparedness Canada.
Abstracted in Tardif, M. (Éd.). *L'agression sexuelle: Cooperer au-delà des frontières. Cifas, 2005.* Montréal : Cifas- Institut Philippe-Pinel de Montréal. http://www.cifas.ca.

Cortoni, F., & Hanson, R. K. (2005). *A review of the recidivism rates of adult female sexual offenders.* Report No R-169. Ottawa: Correctional Service of Canada.

Hanson, R. K (2005). *The validity of Static-99 with older sexual offenders.* Corrections User Report No 2005-01: Public Safety and Emergency Preparedness Canada.

Harris, A.J.R., & Hanson, R.K. (2004). Sex offender recidivism : A simple question. Corrections Users Report No. 2004-03: Public Safety and Emergency Preparedness Canada.

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- reprinted (in Polish): Hanson, R. K., & Morton-Bourgon, K. (2004). Predykytory recydywy przestępstw seksualnych: uaktualniona metaanaliza. *Dziecko krzywdzone: Teoria, badania praktyka, 7,* 68-107.

Harris, A., Phenix, A., Hanson, R. K., & Thornton, D. (2003). Static-99 coding rules : Revised 2003. Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K., & Thornton, D. (2003). Notes on the development of Static-2002. User Report 2003-01. Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K. (2001). Age and sexual recidivism: A comparison of rapists and child molesters. User Report 2001-01. Ottawa: Department of the Solicitor General of Canada.

Phenix, A., Hanson, R. K., & Thornton, D. (2000). Coding rules for the Static-99. Corrections Research: Manuals and Forms. Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K., & Wallace-Capretta, S. (2000). Predicting recidivism among male batterers. User Report 2000-06. Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K., & Wallace-Capretta, S. (2000). A multi-site study of treatment for abusive men. User Report 2000-05. Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K., & Harris, A. J. R. (2000). The Sex Offender Need Assessment Rating (SONAR): A method for measuring change in risk levels. User Report 2000-01. Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K., & Thornton, D. (1999). Static-99: Improving actuarial risk assessments for sex offenders. User Report 99-02. Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K., & Harris, A. J. R. (1998). Dynamic predictors of sexual recidivism. (User Report 1998-01). Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K. (1997). The development of a brief actuarial risk scale for sexual offense recidivism. (User Report 97-04). Ottawa: Department of the Solicitor General of Canada.

Hanson, R. K. (1996). Measuring empathy in sexual offenders. In *The treatment of imprisoned sex offenders* (pp. 21-24). London, UK: HM Prison Service.

Hanson, R. K., & Bussière, M. T. (1996). Predictors of sexual offender recidivism: A meta-analysis. (User Report 96-04). Ottawa: Department of the Solicitor General of Canada.

Bonta, J., & Hanson, R. K. (1994). Gauging the risk for violence: Measurement, impact and strategies for change. Ottawa: Ministry Secretariat, Solicitor General Canada.

Hanson, R. K., & Hart, L. (Eds.). (1993). *The evaluation of treatment programs for male batterers: Conference proceedings.* Ottawa: Ministry Secretariat, Solicitor General Canada.

Hanson, R. K., Steffy, R. A., & Gauthier, R. (1992). Long-term follow-up of child molesters: Risk prediction and treatment outcome. (User Report No. 1992-02.) Ottawa: Corrections Branch, Ministry of the Solicitor General of Canada.

Hanson, R. K., Cox, B., & Woszczyna, C. (1991). Sexuality, personality and attitude questionnaires for sexual offenders: A Review. (User Report No. 1991-13.) Ottawa: Corrections Branch, Ministry of the Solicitor General of Canada.

Hanson, R. K. (1990). The psychological impact of crime: A review. (User Report No. 1990-01.) Ottawa: Corrections Branch, Ministry of the Solicitor General of Canada.

Canada. (1990). The management and treatment of sex offenders. Ottawa: Solicitor General Canada. (Members of the working group were R. Cormier, C. Gainer, K. Hanson, F. Porporino, and S. Wormith.)

Special Reports

Phenix, A., Helmus, L., & Hanson, R. K. (2012). *Static-99R & Static-2002R evaluators' workbook.* Available at www.static99.org

Hanson, R. K. (2000). *Risk assessment.* Beaverton, OR: Association for the Treatment of Sexual Abusers.

Doctoral Dissertation

Hanson, R. K. (1986). The assessment of cognitive structures: Emotions and the meaning of daily events (Doctoral dissertation, U. of Waterloo, 1986) *Dissertation Abstracts International, 47*, 2214B-2215B.

Manuscripts submitted for publication/presentation

Hanson, R. K. (2012, October). Étude de la validité de construit des échelles actuarielles statiques: les facteurs de risque statiques sont des indicateurs de dimensions psychologiques associées à la récidive. Submitted for publication.

Hanson, R. K., Harris, A. J. R., Helmus, L., & Thornton, D. (2012, September). High risk offenders may not be high risk forever. Manuscript submitted for publication (30 pages).

Price, S.A., Hanson, R.K., & Tagliani, L. (2012, July). Screening procedures in the United Kingdom for positions of trust with children. Manuscript submitted for publication. (32 pages).

Hanson, R.K., Babchishin, K.M., Helmus, L., & Thornton, D. (2012, July). Quantifying the relative risk of sex offenders: Risk ratios for Static-99R. Manuscript submitted for publication. (50 pages).

Hanson, R.K., & Harris, A.J.R. (2012, March). The reliability and validity of STABLE-2007: A review of the research. Submitted for presentation.

Helmus, L., & Hanson, R.K. (2012, March). Dynamic risk assessment using STABLE-2007: Updated follow-up and new findings from the Dynamic Supervision Project. Submitted for presentation.

Harris, A.J.R., & Hanson, R.K. (2012, February). When is a sex offender no longer a sex offender? Submitted for presentation.

Hanson, R.K., & Thornton, D. (2012, February). Pre-selection effects can explain group differences in sexual recidivism base rates in Static-99R and Static-2002R validation studies. Submitted for presentation.

Selected Conference Presentations (since 2000)

Hanson, R. K., & Harris, A. J. R. (2012, October). The reliability and validity of STABLE-2007 : A review of the research. Presentation at the 31st Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Denver, CO.

Helmus, L. & Hanson, R. K. (2012, October). Dynamic risk assessment using STABLE-2007 : Updated follow-up and new findings from the Dynamic Supervision Project. Presentation at the 31st Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Denver, CO.

Harris, A. J. R., & Hanson, R. K. (2012, October). When is a sex offender no longer a sex offender? Presentation at the 31st Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Denver, CO.

Hanson, R. K., & Thornton, D. (2012, October). Preselection effects can explain variability in sexual recidivism base rates in Static-99R and Static-2002R validation studies. Presentation at the 31st Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Denver, CO.

Hanson, R. K. (2012, June). The assessment and treatment of sexual offenders. Presentation at Expertisecentrum Forensische Psychiatrie Conference on the Future of Forensic Care: Solutions Worth Sharing, Utrecht, Holland.

Hanson, R. K. (2011, November). Percentile ranks for Static-99/R and Static-2002/R. Presentation at the 30th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Toronto, Ontario.

Hanson, R.K. (2011, June). Calculating and presenting percentile ranks for the risk of crime and violence. Second North American Correctional and Criminal Justice Psychology Conference, Toronto.

Seto, M. C., Hanson, R. K., & Babchishin, K. M. (2011, March). Child pornography offenders: Contact offending history and risk of recidivism. Paper presented at the 4th International Congress of Psychology and the Law, Miami, FL.

Babchishin, K.M., & Hanson, R.K. (2010, October). Even Highly Correlated Measures Can Add Incrementally to Risk Prediction: Comparing Static-99R and Static-2002R. Presentation at the 29th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Phoenix, Arizona.

Harris, A.J.R., & Hanson, R.K. (2010, October). Adjusting Recidivism Estimates on the Basis of Time Free. Presentation at the 29th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Phoenix, Arizona.

Hanson, R. K. (2010, June). How should we report the accuracy of risk assessments for crime and violence? Presentation at the Annual Convention of Canadian Psychological Association, Winnipeg.

Cortoni, F., Hanson, R. K., & Coache, M. (2009, November). Recidivism rates of female sexual offenders : A meta-analytic review. Presentation at the American Society of Criminology, Philadephia, PA.

Helmus, L., Thornton, D., & Hanson, R. K. (2009, October). Should Static-99 recidivism estimates be adjusted based on age at release? A multi-sample exploration. Presentation at the 28th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Dallas.

Thornton, D., Helmus, L., & Hanson, R. K. (2009, October). Does Static-2002 fully allow for the effects of age on release? Presentation at the 28th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Dallas.

Hanson, R.K., & Helmus, L. (2009, October). Methods for combining historical and psychological risk factors: An example using Static-2002 and STABLE-2007. Presentation at the 28th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Dallas.

Hanson, R. K. (2009, June). The Growing Pains of Actuarial Risk Assessment for Sexual Offenders. Presentation at the Annual Convention of Canadian Psychological Association, Montreal.

Cortoni, F., & Hanson, R. K. (2009, May). Les principes d'évaluation du risque de récidive. Atelier au 5me Congrès internationale francophone sur l'agression sexuelle, Montréal, Quebec.

Cortoni, F., Hanson, R. K., & Coache, M. (2009, May). Les délinquantes sexuelles : prévalence et récidive. Communication scientifique au 5me Congrès internationale francophone sur l'agression sexuelle, Montréal, Quebec.

Hanson, R.K., & Barsetti, I. (2009, May). L'utilité et la valeur de l'évaluation des facteurs dynamiques dans l'évaluation du risque de récidive sexuelle. Atelier au 5me Congrès internationale francophone sur l'agression sexuelle, Montréal, Quebec.

Helmus, L., Hanson, R.K., & Thornton, D. (2008, October). The stability of recidivism for Static-2002 risk categories. Presentation at the 27th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Atlanta, Georgia.

Harris, A.J.R., Helmus, L., Hanson, R.K., & Thornton, D. (2008, October). Are new norms needed for Static-99? Presentation at the 27th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Atlanta, Georgia.

Mann, R.E., Hanson, R.K., & Thornton, D. (2008, October). What should be assessed in sexual offender risk assessments? Presentation at the 27th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Atlanta, Georgia.

Bourgon, G., & Hanson, R. K. (2008, September). Meta-analysis of sex offender treatment efficacy : The importance of methodological quality and treatment quality. Presentation at the European Society of Criminology, Edinburgh, UK.

Nunes, K. L., Hanson, R. K., Firestone, P., Moulden, H., Greenberg, D. M., & Bradford, J. M. (2007, November). Denial predicts recidivism for some sexual offenders. In K. L. Nunes (Chair), A closer look at the relationship between denial and recidivism. Symposium at the 26th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, San Diego, California.

Harris, A.J.R., & Hanson, R.K. (2007, November). Dynamic Supervision Project Outcomes: Risk Assessment Partnerships with Multiple Provinces and States Presentation at the 26th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, San Diego, California.

Helmus, L., & Hanson, R. K. (2007, November). A Multi-Site Comparison of the Validity and Utility of Static-99 and Static-2002 for Risk Assessment. Presentation at the 26th Annual

Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, San Diego, California.

Hanson, R.K., & Bourgon, G. (June, 2007). Meta-analysis of sexual offender treatment outcome studies: Distinguishing quality studies from quality treatment. Presentation at the North American Correctional and Criminal Justice Psychology Conference, Ottawa.

Bourgon, G., Hanson, R.K., & Bonta, J. (June, 2007). Risk, Need, and Responsivity: A heuristic for evaluating the "quality" of offender interventions. Presentation at the North American Correctional and Criminal Justice Psychology Conference, Ottawa.

Helmus, L., & Hanson, R. K. (June, 2007). The Accuracy of Risk Assessment for Intimate Partner Violence Offenders: A Meta-Analysis. Presentation at the International Association of Forensic Mental Health Services, Montreal, Canada.

Harris, A.J.R., & Hanson, R.K (2006, September). The dynamic supervision of sexual offenders: Updated data 2006. Presentation at the Annual Treatment and Research Conference of the Association for the Treatment of Sexual Abusers, Chicago, IL.

Harris, A.J.R., & Hanson, R.K (2005, November). Dynamic assessment beyond static: Value added? Presentation at the Annual Treatment and Research Conference of the Association for the Treatment of Sexual Abusers, Salt Lake City, Utah.

Price, S., Hanson, R.K., & Andrews, D.A. (2005, November). Automatic processing of sexual information: A Stroop replication study. Presentation at the Annual Treatment and Research Conference of the Association for the Treatment of Sexual Abusers, Salt Lake City, Utah.

Hanson, R. K. (October, 2005). L'évaluation de risque de récidive chez les délinquants sexuels dans la communauté : Facteurs statiques, stables et aigus. Presentation at the Troisième congrès international francophone sur l'agression sexuelle, Hull-Gatineau, Canada.

Price, S., Hanson, R.K., & Andrews, D.A. (June, 2005). Measuring the deviant schema of sexual offenders: A Stroop replication study. Presentation at the Annual Convention of Canadian Psychological Association, Montreal.

Hanson, R.K. (June, 2005). The assessment of criminogenic needs of sexual offenders by community supervision officers : Reliability and validity. Presentation at the Annual Convention of Canadian Psychological Association, Montreal.

Cortoni, F., & Hanson, R. K. (October, 2004). A review of the sexual recidivism rates of female offenders. Presentation at the 23rd Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Albuquerque.

Hanson, R. K. (October, 2004). The future of sexual offender treatment outcome research: Introduction. Presentation at the 23rd Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, Albuquerque, New Mexico.

Långström, N., & Hanson, R.K. (June, 2004). Hypersexual behavior in the general population: Risk factors and correlates. International Association of Sex Research, Helsinki, Finland.

Thomas, T., Harris, A. J. R., Forth, A. E., & Hanson, R. K. (June, 2004). Static and dynamic factors: Predicting recidivism in adult sexual offenders. Presentation at the Annual Convention of Canadian Psychological Association, St. John's.

Price, S., & Hanson, R. K. (June, 2004). Sexual abuse screening procedures for positions of trust with children. Presentation at the Annual Convention of Canadian Psychological Association, St. John's.

Hanson, R. K., Thornton, D., & Price, S. (2003, October). How much do the observed recidivism rates underestimate the actual rates ? Presentation at the 22th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, St. Louis.

Thornton, D., & Hanson, R. K. (2003, October). Models of real re-offence rates: Clinical implications. Presentation at the 22th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, St. Louis.

Hanson, R. K., & Morton, K. E. (2003, June). Recidivism risk factors for sexual offenders : An updated meta-analysis. Presentation at the Canadian Psychological Association Annual Convention, Hamilton, Ontario.

Harris, A.J.R., & Hanson, R.K. (2003, June). Improving the standard of probation and parole supervision of community-based sexual offenders: The Dynamic Supervision Project. Presentation at the Canadian Psychological Association Annual Convention, Hamilton, Ontario.

Hanson, R. K. (2002, May). Static-99, RRASOR and SONAR. Presentation at the Canadian Psychological Association Annual Convention, Vancouver, B.C.

Hanson, R. K. (2002, May). Constructing empirically based risk scales: Balancing breadth and efficiency. Presentation at the Canadian Psychological Association Annual Convention, Vancouver, B.C.

Hanson, R. K. (2001, November). Do sexual offenders burn out? Data from 10 recidivism studies. Presentation at the 20th Annual Research and Treatment Conference of the Association for the Treatment of Sexual Abusers, San Antonio, Texas.

Broom, I., Hanson, R. K., & Stephenson, M. (2001, June). An evaluation of community sex offender treatment programs in the Pacific Region. Presentation at the Canadian Psychological Association's Annual Convention, Saint Foy, Quebec.

Hanson, R. K., & Harris, A. J. R. (2001, January). La prévision de risque chez les délinquants sexuels: Un programme de recherche. Présentation au Premier congrès international francophone sur l'agression sexuelle, Québec (Québec).

Hanson, R. K., & Wallace-Capretta, S. (2000, June). A multi-site study of treatment for abusive men. Presentation at the Canadian Psychological Association, Ottawa.

Hanson, R. K. (2000, May). Measuring change in sex offenders. Presentation at the 6th International Conference on the Treatment of Sexual Offenders, Toronto, Ontario.

Conference Presentations (1984 to 1999)

During this period, I gave 50 presentations at professional conferences, on topics including personality theory, social psychology, the reliability and validity of psychological tests, and the assessment and treatment of sexual offenders, mentally disordered offenders, and abusive men.

A selection of invited addresses, conference plenaries, and other noteworthy presentations.

Trauma and Transformation: The Catholic Church and the Sexual Abuse Crisis, Montreal. (October, 2011). Sexual offenders inside and outside the Church.

Second North American Correctional and Criminal Justice Psychology Conference, Toronto. (June, 2011). The assessment and treatment of sexual offenders.

Centre international de criminology comparée, Université de Montréal. (March, 2009). Improving psychological risk assessments for crime and violence.

International Summer Conference: Research in Forensic Psychiatry, Regensburg, Germany (June, 2008). Chronic propensities and current manifestations: Measuring change in the recidivism risk of sexual offenders.

Canadian Psychological Association – Criminal Justice Section (June, 2006). A framework for violence risk assessment : Static, stable and acute factors.

Congrès international francophone sur l'agression sexuelle, Hull-Gatineau, Canada. (October, 2005). L'évaluation de risque et évolution des pratiques.

Association for the Treatment of Sexual Abusers. (September, 2006) What works: The principles of effective interventions with offenders. (October, 2003) Confronting clergy abuse: Consulting at the Vatican (with William Marshall & Martin Kafka). (November, 2000) The effectiveness of treatment for sexual offenders: Report of the ATSA Collaborative Data Research Committee.

Scottish Prison Service, Edinburgh (September, 1995 and 2003) Sexual offender recidivism.

NOTA Annual Convention (UK): Keynote addresses in 1995 [Cambridge], 1998[ Glasgow] and 2003 [Edinburgh]). NOTA Scotland (Stirling, 2009).

Karolinska Institut, Stockholm (August, 2003). Assessing the recidivism risk of sexual offenders.

Conference on the Abuse of Children and Young People by Catholic Priests and Members of Religious Orders, Vatican (2003, April). Sexual abuse screening procedures for positions of trust with children; risk assessment for identified offenders.

International Conference for Judicial and Clinical Treatment of Sexual Offenders, Taipai, Taiwan (2002, November). Risk markers for recidivism of sex offenders.

International Association for the Treatment of Sexual Offenders: (2002, September, Vienna). Empirical evidence of sex offender treatment efficacy. (2006, September, Hamburg) Dynamic risk assessment for sexual offenders on community supervision. (2010,

September, Oslo) A meta-analysis of sexual offender treatment outcome studies. (2012, Berlin). The characteristics of online sex offenders.

Understanding and Managing Sexually Coercive Behavior, A New York Academy of Sciences Conference, Washington, DC. (2002, June). Sex offender recidivism risk: What we know and what we need to know.

Conférence de consensus Psychopathologie et traitements actuels des auteurs d'agression sexuelle, Paris, France. (2001, November). Facteurs de risque de récidive sexuelle : caractéristiques des délinquants et réponse au traitement.

Università Pontificia Salesiana, Rome, Italy. (2001, November). Evaluation and treatment of sexual offenders.

National Joint Committee of Senior Criminal Justice Officials, Sault Ste. Marie. (May, 2001). Sex offenders: Risk factors and treatment outcome.

American Academy of Psychiatry and Law, Vancouver, B.C. (October, 2000). Using research to improve risk assessments for sex offenders.

Annual Residentual Meeting UK College of Forsenic Psychiatry, Amsterdam (February, 99). Characteristics of Abusive Men.

Regroupement des intervenants en matière d'agression sexuels (RIMAS), Québec (September, 1998). Indicateurs de la récidive chez les agresseurs sexuels dans la communauté.

Home Office Sex Offender Treatment Conference, Coventry, U.K. (September, 1994). Assessing empathy in sexual offenders.

Therapeutic Intervention with Sex Offenders, Gander, Newfoundland. (1991, June). Keynote address: Recent research on the assessment and treatment of sexual offenders.

Sex Offenders and Their Victims Conference, Toronto. (1989, November). Characteristics of sex offenders who were sexually abused as children.

Graduate Student Supervision

Price. S. (2006). A modified Stroop task with sexual offenders: A replication of a study. (M.A. thesis). Psychology Department, Carleton University.

Kerry, G. (2001). Understanding and predicting intimate femicide: An analysis of men who kill their intimate female partners. (Ph.D. thesis). Psychology Department, Carleton University.

Dickie, I. (1998). An information processing approach to understanding sympathy deficits in sexual offenders. (M.A. thesis). Psychology Department, Carleton University.

Rooney, J. (1998). Predicting attrition from treatment programs for male batterers. (M.A. thesis.) Psychology Department, Carleton University.

External Examiner

Carpentier, J. (2009). Adolescents auteurs d'abus sexuels: carrière criminelle et facteurs associés. (Ph.D.). École de criminologie, Université de Montréal.

Eccleston, L. (2001). Violent offenders' failure on parole – personality and dynamic risk factors. (D. Psych.) University of Melbourne.

Cooper, H. (2000). Long-term follow-up of a community-based treatment program for adolescent sex offenders. (M.A.) Psychology Department, Lakehead University.

Jordon, S. A. (1999). An exploration of risk factors for aggression in relationships. (Ph.D.) Psychology Department, University of Ottawa.

Palmer, W. (1996). Enhancing parole prediction using current, potentially dynamic predictors, a continuous longitudinal criterion, and event history analysis. (Ph.D.) Psychology Department, Queen's University.

Qualified as an expert witness

Washington State, 2007. Evaluation of sexual offenders
Commonwealth of Massachusetts, 2002, 2004. Sex offender risk assessment
State of Arizona, 1999. Sex offender risk assessment
State of California, 1998. Sex offender risk assessment

Dissemination through popular media

I have been regularly consulted by reporters and my research findings has been presented in a wide range of popular media outlets, including the *Economist, Scientific American, Scientific American: Mind, New York Times, Atlantic Monthly, Wall Street Journal, CBC Radio (national and regional), CBC Television, CTV, Fox News* (live interview), *Globe and Mail, Chatelaine,* and *the National Post.*

Associate Editor

*Sexual Abuse: A Journal of Research and Treatment,* 1999 – 2010

Editorial Board

*Criminal Justice and Behavior, 2006 -*
*Journal of Sexual Offender Civil Commitment: Science and the Law, 2005 - 2008*
*Sexual Abuse: A Journal of Research and Treatment, 2010 -*

Reviewer

I have been an an ad hoc reviewer for the following journals:

*Canadian Journal of Behavioural Science, Canadian Journal of Criminology and Criminal Justice, Cognitive Therapy and Research, Criminal Justice and Behavior, Criminologie, Journal of Abnormal Psychology, Journal of Consulting and Clinical Psychology, Journal of Interpersonal Violence, Journal of the American Academy of Psychiatry and the Law, Journal of Strategic and Systemic Therapy, Justice Quarterly, Law and Human Behavior, Legal and Criminological*

*Psychology, Psychological Assessment, Psychological Bulletin, Professional Psychology, and Psychology, Crime, & Law.*

Granting agencies:

Federal Ministry of Education and Research (Germany), Ontario Mental Health Foundation, Fonds pour la Formation de Chercheurs et l'Aide à la Recherche (Québec), Fonds de la recherche en santé (Québec), and the Social Sciences and Humanities Research Council of Canada.

And book publishers :

American Psychological Association; Oxford University Press; Wiley.

Membership in Professional Associations

American Psychological Association
Association for the Treatment of Sexual Abusers
- Board of Directors, Chair of Research Committee (2009 – 2012)
Canadian Psychological Association
- Secretary/Treasurer for the Criminal Justice Section (1996 – present)
International Association for the Treatment of Sexual Offenders
- Scientific Advisor Committee (2000 - present)
International Association for Correctional and Forensic Psychology
Ontario College of Psychology

National/International Working Groups, Scientific Committees and Advisory Boards

Current:

American Psychiatric Association. Advisor to the DSM-V Sexual Disorders Workgroup (2009-present).
Centre International de Criminologie Comparée (Montréal) – Collaborator-member (2010 to present).
Dutch Ministry of Justice, Expertise Center for Forensic Psychiatry. Scientific Council (2010 to present).
Hong Kong Correctional Services – Honorary Advisor of the Construction of Risks and Needs Assessments Tools for Sex Offenders (2010 to present).
Safer Society Program & Press (Vermont, USA). Advisory Board (1995 – 1997; 1999 – 2000; 2007 to present).
Social Sciences and Humanities Research Council of Canada – Committee Member (2011 to present)
Sociatà Internazionale di Psicologia Guiridica (Rome; International Society of Psychology and Law). Scientific Committee (2008 to present).

Previous:

Correctional Service of Canada. Accreditation Panel (1998 – 2006).
Her Majesty's Prison Service (United Kingdom). Advisory Board/Accreditation Panel (1993 – 1999; 2000 – 2001).
Solicitor General Canada. Sexual Offender Working Group Member (1988).

Swedish Council on Technology Assessments in Health Care (SBU). External advisor (2010 – 2011)

Selected National/International consultation and training

TBS Review Board, Utrecht, Holland – 2009, 2012
New York State Office of Mental Health – 2009
Vatican, Holy See - 2003
Commonwealth of Massachusetts, Public defenders - 2002
Commonwealth of Massachusetts, Sex Offender Registry Board – 2000
Sex Offender Commitment Defenders Association – 2000
Wisconsin Sex Offender Treatment Network, 1998/2000 (video training tapes)
State of California, Department of Mental Health - 1997 - 2011
National Parole Board of Canada – 1996 - present

As well, I have provided periodic training workshops for various US federal and state organisations (e.g., State of Colorado, U.S. Department of Justice, Safer Society).

Canadian government language competency in French E/C/B

# EXHIBIT 2

# STATIC-99 – TALLY SHEET

**Subject Name:** _____

**Place of Scoring:** _____

**Date of Scoring:** _____ **Name of Assessor:** _____

| Question Number | Risk Factor | Codes | Score |
|---|---|---|---|
| 1 | Young | Aged 25 or older<br>Aged 18 – 24.99 | 0<br>1 |
| 2 | Ever Lived With | Ever lived with lover for at least two years?<br>Yes<br>No | <br>0<br>1 |
| 3 | Index non-sexual violence - Any Convictions? | No<br>Yes | 0<br>1 |
| 4 | Prior non-sexual violence - Any Convictions? | No<br>Yes | 0<br>1 |
| 5 | Prior Sex Offences | Charges / Convictions<br>None / None<br>1-2 / 1<br>3-5 / 2-3<br>6 + / 4+ | <br>0<br>1<br>2<br>3 |
| 6 | Prior sentencing dates (excluding index) | 3 or less<br>4 or more | 0<br>1 |
| 7 | Any convictions for non-contact sex offences | No<br>Yes | 0<br>1 |
| 8 | Any Unrelated Victims | No<br>Yes | 0<br>1 |
| 9 | Any Stranger Victims | No<br>Yes | 0<br>1 |
| 10 | Any Male Victims | No<br>Yes | 0<br>1 |
| | **Total Score** | **Add up scores from individual risk factors** | |

| | POINTS | Risk Category |
|---|---|---|
| **Suggested Nominal Risk Categories** | **0,1** | **Low** |
| | **2,3** | **Moderate-Low** |
| | **4,5** | **Moderate-High** |
| | **6+** | **High** |

# EXHIBIT 3

## Static-99R Coding Form

| Question Number | Risk Factor | Codes | | Score |
|---|---|---|---|---|
| 1 | Age at release | Aged 18 to 34.9<br>Aged 35 to 39.9<br>Aged 40 to 59.9<br>Aged 60 or older | | 1<br>0<br>-1<br>-3 |
| 2 | Ever Lived With | Ever lived with lover for at least two years?<br>Yes<br>No | | <br>0<br>1 |
| 3 | Index non-sexual violence - Any Convictions | No<br>Yes | | 0<br>1 |
| 4 | Prior non-sexual violence - Any Convictions | No<br>Yes | | 0<br>1 |
| 5 | Prior Sex Offences | Charges<br>0<br>1,2<br>3-5<br>6+ | Convictions<br>0<br>1<br>2,3<br>4+ | <br>0<br>1<br>2<br>3 |
| 6 | Prior sentencing dates (excluding index) | 3 or less<br>4 or more | | 0<br>1 |
| 7 | Any convictions for non-contact sex offences | No<br>Yes | | 0<br>1 |
| 8 | Any Unrelated Victims | No<br>Yes | | 0<br>1 |
| 9 | Any Stranger Victims | No<br>Yes | | 0<br>1 |
| 10 | Any Male Victims | No<br>Yes | | 0<br>1 |
| | **Total Score** | **Add up scores from individual risk factors** | | |

**Translating Static-99R scores into risk categories**

| Score | | Label for Risk Category |
|---|---|---|
| -3 through 1 | = | Low |
| 2, 3 | = | Low-Moderate |
| 4, 5 | = | Moderate-High |
| 6 plus | = | High |

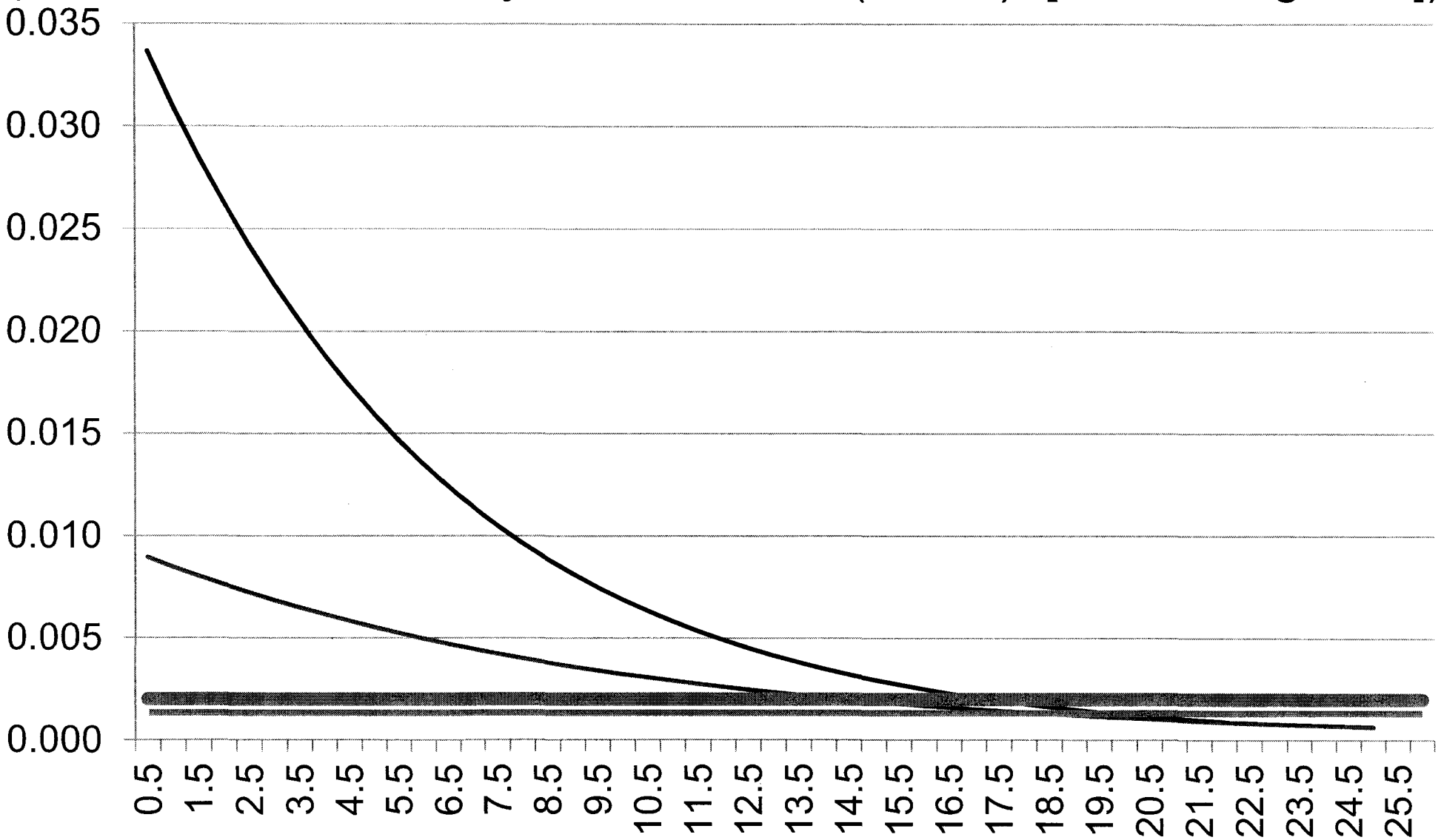
# EXHIBIT 4

# STATIC-99R Groups (High, Moderate)

## Logistic Regression with "Redemption Bar"

## STATIC-99 Low Risk Group – Base Rate Line

## (Percent Recidivism by Time Interval (Years) [6 Month "gates"])



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Attorneys for Plaintiffs
JOHN DOE, et al.
on behalf of themselves and others similarly
situated

2012 NOV -7 A 8:18

**TEH**

**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

C 12 5713

JOHN DOE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, et al.,

Defendants.

Civil Case No. _____

**DECLARATION OF DAVID FINKELHOR**

I, David Finkelhor, declare:

1. I am the Director of the Crimes against Children Research Center, Co-Director of the Family Research Laboratory, and Professor of Sociology at the University of New Hampshire. My research focuses on crimes against children, with an emphasis in recent years on technology-facilitated child sexual exploitation crimes. I discuss in this declaration key findings and conclusions of research scientists, including myself, regarding technology-facilitated crimes against minors. The information in this declaration is based upon my personal knowledge and sources of the type which research scientists in my field would rely. If called upon to testify, I could and would competently testify thereto.

**Summary of Declaration**

2. Current research and data show that the overwhelming majority of sex offenses against children are committed by family members and acquaintances, not strangers; that technology-facilitated sex crimes are a very small percentage of sex crimes against children; and that most online predators are not registered sex offenders.

- In spite of the significant media attention on internet sex-crimes, the overwhelming majority of sex crimes against children are committed by family members and acquaintances known to the victim, not strangers who use the internet to meet their victims. *See* ¶13.
- Arrests for *all* technology-facilitated sex-crimes against minors constitute only about 1% of all arrests for sex crimes committed against children. Although there was a small increase for such arrests between 2006 and 2009, most of the increase involved offenders who used technology to facilitate sex crimes against victims they already knew. *See id.*
- Studies showed a *decline* between 2000 and 2010 in unwanted sexual solicitations of youth on the internet and unwanted exposure by youth to pornography. *See* ¶¶ 14, 16. While there was a small but statistically significant increase in reports

by youth of online non-sexual harassment (bullying), much of this harassment came from individuals in the youth's chosen social network, not strangers. *See* ¶ 15. The decline in online sex offenses against minors is consistent with a broad drop in the incidence of all types of sex crimes against children. *See* ¶ 17.

- Policies targeted at registered sex offenders are aimed at a very small part of the problem. One recent study found that only 4% of persons arrested for technology-facilitated crimes against youth victims were registered sex offenders, and only 2% of those arrested for soliciting undercover investigators were registered sex offenders. *See* ¶¶ 18.
- In 2009, 46% of arrests for technology-facilitated child sexual exploitation were for child-pornography possession, with no additional sex crimes indicated, and thus did not involve an offender using the internet to contact and victimize a child. *See* ¶¶ 20.

**Background and Qualifications**

3. I have studied the problems of child victimization, child maltreatment and family violence since 1977. I have written or edited 11 books and over 150 journal articles and book chapters, including publications such as *Sourcebook on Child Sexual Abuse* (Sage, 1986) and *Nursery Crimes* (Sage, 1988). I have received grants from the National Institute of Mental Health, the National Center on Child Abuse and Neglect, and the US Department of Justice, and a variety of other sources. In 1994, I was awarded the Distinguished Child Abuse Professional Award by the American Professional Society on the Abuse of Children and in 2004 I received the Significant Achievement Award from the Association for the Treatment of Sexual Abusers.

4. I received my B.A. from Harvard College in 1968, my Ed.M. from the Harvard Graduate School of Education, 1971, and my Ph.D. from the University of New Hampshire, 1978. A true and correct copy of my CV is attached as Exhibit A to this declaration.

5. The Crimes against Children Research Center (CCRC), of which I am the Director, is concerned with children and adolescents, from birth through age 17, and all their crime victimizations, both within and outside the family, both known and unknown to law enforcement. CCRC has four primary goals to comprise a comprehensive and feasible policy for child victims within the criminal justice system:

- Greater recognition of the extent of victimization among the children who come within the purview of the justice system;
- Enhanced protection of child crime victims from continued victimization and from unnecessary trauma and discomfort associated with the workings of the justice system;
- Universal rehabilitation of child crime victims through services and programs to aid in recovery and minimize long term effects on development;
- Greater public accountability by evaluating the impact of the justice system's policies and programs on children.

6. To further these goals, the Center works to compile national and local statistics on crimes against children, to monitor and interpret trends in these areas, to create tools for practitioners and researchers, and to develop strategies to promote the reporting of crimes against children and the provision of services to child victims and their families. CCRC projects are funded by grants from government and private agencies and organizations, including the National Center for Missing and Exploited Children, the National Science Foundation, and several programs of the United States Department of Justice, including the Office of Justice Programs and the Office of Juvenile Justice and Delinquency Prevention.

7. In recent years I have studied and written about trends in technology-facilitated child sexual exploitation crimes, a category that includes crimes in which sex offenders use the Internet to meet victims or to facilitate the abuse of children who were family members or face-to-face acquaintances, who solicit sex from undercover investigators posing online as

minors or who use the Internet to download child pornography. Most of the information that I present in this declaration is also discussed in three articles that I have published on the topic with my colleagues Janis Wolak and Kimberly Mitchell: "Trends in law enforcement responses to online child sexual exploitation crimes: The Third National Juvenile Online Victimization Study (NJOV-3)" (2012), "Trends in arrests of 'online predators'"(2009), and "Trends in Youth Internet Victimization: Findings From Three Youth Internet Safety Surveys 2000–2010 (2012)." A true and correct copy of each of these articles is attached to this declaration as Exhibits B, C, and D, respectively.

**Data about Sex Crimes against Children**

8. Unless otherwise noted, the data that I present below come from two studies: the National Juvenile Online Victimization (NJOV) Study and the Youth Internet Safety Surveys (YISS). Both of these studies were sponsored by the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention and were conducted using appropriate survey methodology.

9. The NJOV Study, which was conducted by CCRC, collected information from a national sample of law enforcement agencies about the prevalence of arrests for and characteristics of technology-facilitated sex crimes against minors during three 12 month periods: July 1, 2000 through June 30, 2001 (NJOV1), and calendar years 2006 (NJOV2) and 2009 (NJOV3).

10. The data, weighted to account for sampling procedures and non-response, includes 612 cases from NJOV1, 1,051 cases from NJOV2 and 1,299 cases from NJOV3. Having weighted data that is based on a representative sampling of law enforcement agencies and arrest cases allows us to estimate the incidence of arrests for specific types of crimes during the timeframes of the three NJOV Studies. The studies' methodology is discussed further in the attached articles, *see* Exhibits B & C, with more details available at http://www.unh.edu/ccrc/pdf/NJOV3%20Arrest%20Study%20Methods%20Report%20Final%20

Nov%202011.pdf (all websites last accessed Oct. 31-Nov. 6, 2012). Although the online environment is a rapidly changing one, and careful monitoring of trends will continue to be necessary to identify emerging risks to young people and to provide feedback about polices to combat them, these are the best and most recent available data on the nature of technology-facilitated sexual victimization of minors.

11. The YISS, conducted by a national survey research firm, also comprises three separate surveys, conducted in 1999-2000, 2005, and 2010-2011. An experienced survey research company conducted detailed interviews with youth to determine their demographic information, Internet use characteristics, and rates for sexual solicitation, unwanted exposure to sexual material, and harassment. Again, the methodology is described in greater detail in the paper itself. *See* Exhibit D.

12. In spite of the large amount of media attention on internet sex-crimes, in the larger context of sex crimes against children, offenders who victimize children and youth within their families or networks of acquaintances ("family and acquaintance offenders") are much more common than those who use the Internet to meet victims. Arrests for all technology-facilitated sex-crimes against minors in 2006 constituted only about 1% of all arrests for sex crimes committed against children and youth in that year. This includes cases in which the offender and victim already knew each other. And between 2006 and 2009, arrests for such crimes did not significantly increase; most of the small increase that was observed involved offenders who used technology to facilitate sex crimes against victims they already knew face-to-face, for example, cases where offenders used computers and cell phones to plan meetings with victims or to take and store photos.

13. Thus, conventional child molestation – abusive fathers, neighbors, teachers and family friends -- still constitutes a much larger part of the problem than does online predation. The increase in such crimes that involve the Internet reflects this broader reality, and most of the increase in Internet-related crimes involved offenders who used technology to facilitated sex

crimes against victims they already knew face-to-face. In fact, some of the reported increase may be a result of a growing tendency of law-enforcement to search computers and cell phones of persons suspected or arrested for sexual abuse cases that have nothing to do with the Internet. Thus, the increase in arrests of family and acquaintance offenders with a technology component does not mean that online technologies are making youth more vulnerable, but only that the existing vulnerability is increasingly enacted and evident online, even in the context of overall declines in sexual abuse from the mid-1990s to the present.

14. In fact, the YISS studies show a 50% decline in unwanted sexual solicitations on the Internet from 2000 to 2010. The reason for the steady decline in rates of sexual solicitations could be due to several factors. It may be that online behavior has changed in ways that reduce such solicitations. For example, youth have migrated from chat rooms to social networking sites over past several years. In social networking environments, youth may confine more of their interactions to people they know, thus reducing online unwanted sexual comments or requests. It is also possible that young people have become more cautious regarding whom they interact with because of Internet safety education. A tremendous effort has been made during the past decade to warn young people about the dangers of online sexual interactions. Also, publicity about criminal prosecutions may have deterred some of the aggressive sexual messaging that occurred previously. There have been many prosecutions of adults during the past decade for directing sexual messages to youth, and although research has found that most unwanted sexual messages online come from other youth and not adults, the potential to get into legal trouble from sending such messages may have been impressed on all Internet participants.

15. I should note that during this same period there was a small but statistically significant increase in reports of online harassment, which was defined as threats or other offensive behavior (excluding sexual solicitations) that were sent online to the youth or posted online about the youth for others to see. Much of this harassment may come from within the youth's chosen social network, for example, classmates who have been accepted as friends on

social networking sites. It is also possible that general harassment and bullying behavior is migrating online in the same way that general adolescent communication has migrated.

16. There was also a decline in youth reports of unwanted exposure to pornography from 2000-2010, which may be related to increasing use of sophisticated anti-spamware and other filters, new law-enforcement tools such as the electronic tagging of known child pornography images, and better education among young people about the dangers of opening unidentified emails or clicking on unidentified links.

17. The decline in online sex offenses against minors is consistent with a broad drop in the incidence of all types of sex crimes against children. As my colleague Lisa Jones and I discuss in a recent research bulletin, there is fairly consistent and convergent evidence from a variety of sources pointing to large declines in child sexual abuse from 1992 to 2010. This conclusion is supported by 3 independent sources of agency data and 4 separate large victim surveys. Our judgment is that the decline in sexual abuse is about as well established as crime trends can be in contemporary social science. It should be noted that the trend for non-sexual physical abuse is less clear. A copy of this research bulletin, "Have Sexual Abuse and Physical Abuse Declined Since the 1990s?" (2012), is attached to this declaration as Exhibit E.

18. It is important for the public and officials to know that policies targeted at registered sex offenders are aimed at a very small part of the problem. The 2006 study found that only 4% of persons arrested for technology-facilitated crimes against youth victims were registered sex offenders, as were 2% of those arrested for soliciting undercover investigators. Thus, Internet safety needs to be designed with the understanding that most online predators are not registered offenders and have no prior record.

19. Finally, it is important to understand the nature of the crimes against minors committed using technology. First, a rising number of persons arrested for online crimes against minors are themselves under 25 years old (23% in 2000, 40% in 2006). Second, contrary to many stereotypes, crimes by arrested online predators generally involve adolescent

victims (i.e., minors over the age of 13) who knew they were communicating online with older adults who wanted sex. Most victims who met offenders face-to-face went to such meetings expecting to engage in sexual activity. Most offenders were charged with crimes such as statutory rape that involved non-forcible sexual activity with victims who were too young to legally consent to sexual intercourse with adults. Violence, stalking and abduction were rare.

20. When offenders solicited undercover investigators, the case dynamics were consistent with this pattern as well. While these crimes represented serious threats to the well-being of young people at the hands of unscrupulous adults, they differed from the image of online predation that many people have of a sex offender using the Internet to initiate communicate with children for the purpose of victimizing them. Finally, in 2009, 46% of the arrests for technology-facilitated child sexual exploitation were for child-pornography possession, with no additional sex crimes indicated. Again, while such crimes can be very serious, they are very different from the image of online predation in which an offender uses the Internet to contact and victimize a child.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6 day of November 2012 in Durham, New Hampshire.

David Finkelhor

# EXHIBIT A

# DAVID FINKELHOR

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## EDUCATION

Phillips Exeter Academy, 1964.

Harvard College, 1968. B.A. (Social Relations)

Harvard Graduate School of Education, 1971. Ed. M. (Sociology)

Institut d'Études Politiques, University of Paris, 1967.

University of New Hampshire, 1978. Ph.D. (Sociology)

*Special Fields: Family, mental health, social psychology, sexual behavior, family violence, victimology, criminology, child maltreatment trends, Internet-related child victimization.*

## PUBLICATIONS

## BOOKS

Childhood Victimization: Violence, Crime, and Abuse in the Lives of Young People. New York: Oxford University Press, 2008.
***(Won Daniel Schneider Child Welfare Book of the Year Award – 2009)***

Program Evaluation and Family Violence Research. New York: The Haworth Maltreatment and Trauma Press, 2000 (Edited with Sally K. Ward).

Missing, Abducted, Runaway, and Thrownaway Children in America. Washington, D.C.: Government Printing Office, 1990 (with Gerald Hotaling and Andrea Sedlak).

Nursery Crimes: Sexual Abuse in Day Care. Newbury Park, CA: Sage, 1989 (with Linda Williams and Nanci Burns).

Coping with Family Violence: Research on Policy Perspectives. Newbury Park, CA: Sage, 1989 (Edited with Gerald Hotaling, John Kirkpatrick and Murray Straus).

Family Abuse and its Consequences: New Directions in Research. Newbury Park, CA: Sage, 1988 (Edited with Gerald Hotaling, John Kirkpatrick and Murray Straus).

Stopping Family Violence: Research Priorities for the Coming Decade. Newbury Park, CA: Sage, 1988 (with Gerald Hotaling and Kersti Yllo).

Sourcebook on Child Sexual Abuse. Beverly Hills, CA: Sage, 1986.

License to Rape: Sexual Violence Against Wives. New York: Holt Rinehart, 1985 (with Kersti Yllo).

Child Sexual Abuse: New Theory and Research. New York: Free Press, 1984.

The Dark Side of Families: Current Family Violence Research. Beverly Hills, CA: Sage, 1983 (Edited with Richard Gelles, Gerald Hotaling and Murray Straus).

Sexually Victimized Children. New York: Free Press, 1979 (Spanish translation, 1981).

Up Against the American Myth. New York, NY: Holt Rinehart, 1971 (with Tom Christoffel and Dan Gilbarg.) (Japanese translation, 1973).

## ARTICLES

### In Press

"Family structure, victimization, and mental health in a nationally representative sample of children and youth" (with Heather Turner, Sherry Hamby, & Anne Shattuck). *Journal of Marriage and Family*. (CV235)

"Victimization and delinquency in a national sample of youth" (with Anne Shattuck, Carlos Cuevas, Heather Turner, & Sherry Hamby). *OJJDP Juvenile Justice Bulletin*. (CV227).

"Let's prevent peer victimization, Not just bullying" (with Heather Turner & Sherry Hamby). *Child Abuse & Neglect*. (CV239)

### 2012

"Child and youth victimization known to police, school, and other medical authorities" (with Richard Ormrod, Heather Turner, & Sherry Hamby). *OJJDP Juvenile Justice Bulletin – NCJ235394* (pgs. 1-8). Washington, DC: US Government Printing Office. (CV214B)

"Family context, victimization, and child trauma symptoms: Variations in safe stable and nurturing relationships during early and middle childhood" (with Heather Turner, Richard Ormrod, Sherry Hamby, Rebecca Leeb, J. Mercy, & Melissa Holt). *American Journal of Orthopsychiatry, 82*(2): 209-219. (CV209)

"Teen dating violence: Co-occurrence with other victimizations in the national survey of children's exposure to violence (NatSCEV)" (with Sherry Hamby & Heather Turner). *Psychology of Violence, 2*(2): 111-124. (CV261).

"Trends in law enforcement responses to online child sexual exploitation crimes: The Third National Juvenile Online Victimization Study (NJOV-3)" (with Janis Wolak & Kimberly Mitchell). Crimes against Children Research Center, University of New Hampshire, Durham, NH. (CV268).

"Trends in arrests for child pornography possession: The Third National Juvenile Online Victimization Study (NJOV-3)" (with Janis Wolak & Kimberly Mitchell). Crimes against Children Research Center, University of New Hampshire, Durham, NH. (CV269)

"Trends in arrests for production of child pornography: The Third National Juvenile Online Victimization Study (NJOV-3)" (with Janis Wolak & Kimberly Mitchell). Crimes against Children Research Center, University of New Hampshire, Durham, NH. (CV270).

"How often are teens arrested for sexting? Data from a national sample of police cases" (with Janis Wolak & Kimberly Mitchell). *Pediatrics, 129*(1). (CV241)

"Trends in youth Internet victimizations: Findings from three youth Internet safety surveys, 2000 – 2010" (with Lisa Jones & Kimberly Mitchell). *Journal of Adolescent Health, 50*: 179-186. (CV240)

"Prevalence & characteristics of youth sexting: A national study of youth" (with Kimberly Mitchell, Lisa Jones, & Janis Wolak). *Pediatrics, 129*(1): 1-8. (CV237)

### 2011

"Poly-victimization in developmental context" (with Anne Shattuck, Heather Turner, & Richard Ormrod). *Journal of Child & Adolescent Trauma, 4*(Special Series - Assessing trauma in children and adolescents: Associated variables): 291-300. (CV221)

"Updated trends in child maltreatment, 2010" (with Lisa Jones). Durham, NH: Crimes against Children Research Center.

"Disability and victimization in a national sample of children and youth" (with Heather Turner, Jennifer Vanderminden, Sherry Hamby, & Anne Shattuck). *Child Maltreatment,16*(4):275-86. (CV217)

"Arrests for child pornography production: Data at two time points from a national sample of US law enforcement agencies" (with Janis Wolak, Lisa Jones, & Kimberly Mitchell). *Child Maltreatment 16*(3): 184-195. (CV210).

"Types of undercover investigations on the internet and characteristics of offenders" (with Kimberly Mitchell, Janis Wolak, & Lisa Jones). *Police Practice and Research, 1-15, iFirst Article,* DOI: 10.1080/15614263.2011.627746. (CV212)

"Poly-victimization: Children's exposure of multiple types of violence, crime, and abuse" (with Heather Turner, Sherry Hamby, & Richard Ormrod). *OJJDP Juvenile Justice Bulletin - NCJ235504* (pgs. 1-12). Washington, DC: US Government Printing Office . (CV229)

"Increasing youth safety and responsible behavior online: Putting in place programs that work" (with Lisa Jones). Washington, DC: Family Online Safety Institute. (CV254)

"Questions and answers about the National Survey of Children's Exposure to Violence" (with Heather Turner & Sherry Hamby). *OJJDP Juvenile Justice Bulletin - NCJ235163 (pgs. 1-4). Washington, DC: US Government Printing Office.* (CV224)

"Exposure to intimate partner violence and other forms of family violence: Nationally representative rates among US youth" (Sherry Hamby, Heather Turner, & Richard Ormrod). *OJJDP Juvenile Justice Bulletin - NCJ 232272* (pgs. 1-12. Washington, DC: US Government Printing Office. (CV197)

"Specifying type and location of peer victimization in a national sample of children and youth" (with Heather Turner, Anne Shattuck, Sherry Hamby, & Richard Ormrod). *Journal of Youth & Adolescence, 40*(8): 1052-1067. (CV225)

"Prevalence of child victimization, abuse, crime, and violence exposure". In, White, J.W., Koss, M.P., & Kazdin, A. (Eds). *Violence against women and children: Mapping the terrain* (pgs. 9-29). Washington, DC: American Psychological Association. (CV189)

"Abuse and victimization known to school, police & medical officials in a national sample of children & youth" (with Heather Turner, Richard Ormrod, & Sherry Hamby). *Archives of Pediatrics & Adolescent Medicine, 165*(1): 9-15. (CV214)

"Youth Internet victimization in a broader victimization context" (with Kimberly Mitchell, Janis Wolak, Michele Ybarra, & Heather Turner). *Journal of Adolescent Health, 48*: 128-134. (CV207)

"The true prevalence of "sexting" (with Kaitlin Lounsbury & Kimberly Mitchell). Durham, NH: Crimes against Children Research Center. (CV236FS)

"Sexting: A typology" (with Janis Wolak). Durham, NH: Crimes against Children Research Center. (CV231B)

"Updated trends in child maltreatment, 2009" (with Lisa Jones & Anne Shattuck). Durham, NH: Crimes against Children Research Center. (CV203FS)

"Growth and change in undercover online child exploitation investigations in the U.S., 2000 to 2006" (with Kimberly Mitchell, Lisa Jones, & Janis Wolak). *Policing and Society, 20*(4): 416-431. (CV205)

"Child pornography possessors: Trends in offender and case characteristics" (with Janis Wolak & Kimberly Mitchell). *Sexual Abuse: A Journal of Research and Treatment, 23*(1): 22-42. (CV204)

"Internet-facilitated commercial sexual exploitation of children: Findings from a nationally representative sample of law enforcement agencies in the U.S." (with Kimberly Mitchell, Lisa Jones, & Janis Wolak). *Sexual Abuse: A Journal of Research and Treatment, 23*(1): 43-71. (CV201)

"Preface". In, John E.B. Myers (Ed.), *The APSAC handbook on child maltreatment* (3rd ed. – pgs. vii – ix). Thousand Oaks, CA: Sage. (CV211).

**2010**

"The overlap of witnessing partner violence with child maltreatment and other victimizations in a nationally representative survey of youth" (with Sherry Hamby, Heather Turner & Richard Ormrod). *Child Abuse & Neglect, 34*: 734-741. (CV200)

"Infant victimization in a nationally representative sample" (with Heather Turner, Richard Ormrod, & Sherry Hamby). *Pediatrics, 126:*44–52. (CV199)

"Disasters, victimization and children's mental health" (with Kathy Becker-Blease & Heather Turner). *Child Development, 81*(4): 1040-1052. (CV190)

"Protecting victims' identities in press coverage of child victimization" (with Lisa Jones & Jessica Beckwith). *Journalism: Theory, Practice and Criticism, 11*(3): 347-367. (CV182)

"Use of social networking sites in online sex crimes against minors: An examination of national incidence and means of utilization" (with Kimberly Mitchell, Lisa Jones, & Janis Wolak). *Journal of Adolescent Health, 47*(2): 183-190. (CV174)

"The effects of child victimization on self-concept and depression" (with Heather Turner & Richard Ormrod). *Child Maltreatment, 15*(1): 76-90. (CV179)

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"Victimization prevention programs: An american survey of children's exposure and reactions" (with Jennifer Dziuba-Leatherman). In B. Marquardt-Mau (Ed.), *Prevention of child sexual abuse* (p 87-112). Germany: Juventa Verlag. (CV2-GER)

"What works for children in resisting assaults" (with Nancy Asdigian). *Journal of Interpersonal Violence, 10*(4):402-418. (CV6)

"Prior victimization: A risk factor for child sexual abuse and for PTSD-Related symptomatology among sexually abused youth" (with Sue Boney-McCoy). *Child Abuse & Neglect, 19(*12):1401-1421. (CV7)

"The impact of child sexual abuse on children: A review and synthesis of recent empirical findings" (with Kathy Kendall-Tackett and Linda Williams). In M.E. Hertzig & E.A. Farber (Eds.), *Annual progress in child psychiatry and child development* (pp. 321-356). New York: Brunner/Mazel.

**1994**

"Abus sexuel et santé sexuelle chez l'enfant: Nouveaux dilemmes pour le pediatre". *Le Journal Suisse de Medicine, 124*(51/52):2320-2330.

"Children as victims of violence: A national survey" (with Jennifer Dziuba-Leatherman). *Pediatrics, 94*(4): 413-420. (CV4)

"Current information on the scope and nature of child sexual abuse". *The Future of Children, 4(*2): 31-53.

"How does receiving information about abuse influence boys perception of their risk?" (with Jennifer Dziuba-Leatherman). *Child Abuse and Neglect, 18*(7): 557-568.

"Victimization of children" (with Jennifer Dziuba-Leatherman). *American Psychologist, 49*(3): 173-183. (CV1)

"The international epidemiology of child sexual abuse", *Child Abuse and Neglect, 18*(5): 409-417.

"The 'backlash' and the future of child abuse advocacy: Insights from the study of social issues." In J.E.B. Myers, (Ed.), *The backlash: Child protection under fire*, Thousand Oaks, CA: Sage, p. 1-16.

"Parental relations, socioeconomic status, & father-child contact following divorce" (with Denise Donnelly, Cheryl Brown and Donald Gregory), *Family Perspectives, 28*(3):183-194.

**1993**

"Epidemiological factors in the clinical identification of child sexual abuse". *Child Abuse and Neglect, 17:* 67-70.

"The impact of sexual abuse on children: A review and synthesis of recent empirical studies" (with Kathleen Kendall-Tackett & Linda Williams). *Psychological Bulletin, 113*(1), 164-180.

"The main problem is still underreporting not overreporting". In R.J. Gelles, & D.R. Loseke (Eds.), *Current controversies on family violence*. Newbury Park, CA: Sage, 273-287.

**1992**

"Child sexual abuse". In J.M. Last & R.B. Wallace (Eds.), *Public health & preventative medicine - 13th edition.* Connecticut: Appleton & Lange.

"Sexual abuse prevention education: A review of evaluation studies" (with Nancy Strapko). In D.J. Willis, E.W. Holder & M. Rosenberg (Eds.), *Prevention of child maltreatment.* New York: Wiley. Also published in O. Schubbe (Ed.), *Therapeutische hilfen gegen sexuellen mißbrauch an kindern.* Göttingen, Zurich: Vandenhoeck & Ruprecht.

"New myths about the child welfare system". *The Child, Youth and Family Services, 15*(1): 3-5.

"The abduction of children by strangers and nonfamily members: Estimating the incidence using multiple methods" (with G. Hotaling & A. Sedlak). *Journal of Interpersonal Violence, 7(2)*: 226-243. (MC4)

**1991**

"The scope of the problem". In K. Murray & D. Gough (Eds.), *Intervening in health approach.* New York: Oxford University Press.

"Abus sexuel d'enfants: Nouvelles recherches et développements criminologiques en amérique du nord. (Sexual abuse of children: New criminological developments in North America.)". In J. Schuh & M. Killias (Eds.), *Délinquance sexuelle (sexual delinquency)*. Chur/Zurich: Verlag Ruegger.

"Child sexual abuse". In Mark Rosenberg (Ed.), *Violence in America: A public health approach.* New York: Oxford University Press.

"Flexible reporting options for skilled child abuse professionals" (with Gail Zellman). *Child Abuse and Neglect, 15*(4): 335-342.

"Children abducted by family members: A national household survey of incidence and episode characteristics". *Journal of Marriage and the Family, 53*: 805-817. (MC3)

"The lazy revolutionary's guide to the prospects for reforming child welfare". *Child Abuse and Neglect, 15*(S1): 17-23.

**1990**

"Is child abuse overreported: The data rebut arguments for less intervention". *Public Welfare, 48(1)*: 22-29, 46-47.

"New ideas for child sex abuse prevention". In R. Kim Oates (Ed.), *Understanding and managing child sexual abuse.* Philadelphia, PA: W.B. Saunders.

"Early and long term effects of child sexual abuse: An update". *Professional Psychology: Research & Practice, 21*(5): 325-330.

"Estimating the number of stranger abduction homicides of children: A review of available evidence" (with Gerald Hotaling). *Journal of Criminal Justice, 18*(5): 385-399. (MC2)

"The characteristics of incestuous fathers: A review of recent studies" (with Linda Williams). In W.L. Marshall, D.R. Laws & H.E. Barbaree (Eds.), *The handbook of sexual assault issues, Theories and treatment of the offender.* New York: Plenum.

"Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors" (with Gerald Hotaling, I.A. Lewis and Christine Smith). *Child Abuse and Neglect, 14*: 19-28.

**1989**

"Sexual abuse and its relationship to later sexual satisfaction, marital status, religion & attitudes" (with Gerald Hotaling, I.A. Lewis & Christine Smith). *Journal of interpersonal violence, 4*(4): 379-399.

"Assessing the long-term impact of child sexual abuse: A review and conceptualization" (with Angela Browne). In L. Walker, (Ed.), *A handbook on child sexual abuse: Assessment and treatment issues*. New York: Springer.

"Causes of elder abuse: Caregiver stress versus problem relatives" (with Karl Pillimer). *American Journal of Orthopsychiatry, 59*: 179-187.

**1988**

"The prevalence of elder abuse: A random sample survey" (with Karl Pillimer). *The Gerontologist, 28*: 51-57.

"Sexual abuse in day care: A national study" (with Linda Williams and Nanci Burns). Executive Summary, March 1988.

"An epidemiologic approach to the study of child molestation" (with I.A. Lewis). In R. Prentky & V. Quinsey (Eds.), *Human sexual aggression: Current perspectives.* New York: The Annals of the New York Academy of Sciences, June 1988.

"Child abuse as an international issue" (with Jill Korbin). *Child Abuse and Neglect, 12*: 3-23.

"The trauma of child sexual abuse: Two models". In G. Wyatt (Ed.), *The lasting effects of child sexual abuse.* Newbury Park, CA: Sage.

**1987**

"The sexual abuse of children: Current research reviewed", *Psychiatric Annals: The Journal of Continuing Psychiatric Education, 17*(4): 233-241.

"The trauma of child sexual abuse: Two models". *Journal of Interpersonal Violence, 2*(4): 348-366.

**1986**

"The adolescent sexual perpetrator: A new challenge in the field of sexual abuse". *Treating the juvenile sexual abuse perpetrator: Proceedings of a National training conference.* Minnesota Program in Human Sexuality, University of Minnesota.

"Sexual abuse: Beyond the family systems approach", *Journal of Psychotherapy and the Family, 2(2)*: 53-66; also in T.S. Trepper & M.M. Barrett (Eds.), *Treating incest: A multimodel systems perspective*, New York: Hayworth Press.

"Preventing approaches to child sexual abuse". In M. Lystad (Ed.), *Violence in the home: Interdisciplinary perspectives.* New York: Brunner/Mazel.

"The impact of child sexual abuse: A review of the research" (with Angela Browne). *Psychological Bulletin, 99*(1): 66-77.

"Explanations of pedophilia: A four factor model" (with Sharon Araji). Journal of Sex Research, 22(2): 145-161.

"Risk factors for childhood sexual abuse: A review of the evidence" (with Larry Baron). *Journal of Interpersonal Violence, 1*(1): 26-42.

**1985**

"The traumatic impact of child sexual abuse: A conceptualization" (with Angela Browne). *Journal of Orthopsychiatry, 55*(4): 530-541. Reprinted in S. Cless and A. Thomas, (Eds.), *Annual progress in child psychiatry and child development.* New York: Brunner/Mazel.

"Sexual abuse and physical abuse: Some critical differences". In E.H. Newberger & R. Bourne (Eds.), *Unhappy families*, chapter 3. Littleton, MA: PSG Publishing Company, Inc.

"Explanations of pedophilia: Empirical research" (with Sharon Araji). *Bulletin of the Academy of Psychiatry and the Law, 13*: 17-38.

"The sexual exploitation of missing children: A research review" (with Gerald Hotaling). Office of Juvenile Justice and Delinquency Prevention, Washington, DC: U.S. Department of Justice.

**1984**

"The prevention of child sexual abuse: A review of current approaches", *SIECUS Reports*, Vol XIII (September).

"How widespread is child sexual abuse", *Children Today, 13*(4): 18-20. Also in, National Center on Child Abuse and Neglect, *Perspectives on Child Maltreatment in the Mid 80's.* Washington, DC: USDHHS.
"Child abuse in stepfamilies" (with Jean Giles-Sims). *Family Relations, 33*: 407-413.

"Sexual abuse in the National Incidence Study of Child Abuse and Neglect: An appraisal" (with Gerald Hotaling). *Child Abuse and Neglect, 8:* 22-33.

"Sexual abuse of boys: The available data". In A. Burgess (Ed.), *Handbook of research on rape and sexual assault.* New York: Garland.

"Explanations of pedophilia: Review of empirical evidence" (with Sharon Araji). *Bulletin of the American Academy of Psychiatry and the Law, 13*:17-38.

## 1983

"Common features of family abuse". In D. Finkelhor, R. Gelles, G. Hotaling, & M. Straus (Eds.), *The dark side of families: Current family violence research.* Beverly Hills, CA: Sage.

"Marital rape: A sociological perspective". In D. Finkelhor, R. Gelles, G. Hotaling & M. Straus (Eds.), *The dark side of families: Current family violence research.* Beverly Hills, CA: Sage.

"Removing the child - Prosecuting the offender in cases of sexual abuse: Evidence". *Child Abuse & Neglect, 7:*195-205.

## 1982

"Forced sex in marriage" (with Kersti Yllo). *Crime and Delinquency, 28(*3): 459-478.

"Sexual abuse: A sociological perspective", *Child Abuse and Neglect, 6*: 95-102.

## 1981

"The scope of family violence in America" (with Barbara Carson). In C. Germaine Warner and G. R. Braen (Eds.), *Management of the physically and emotionally abused.* New York: MacMillan.

"Sexual Abuse of Boys". *Victimology, 6*: 71-84.

## 1980

"Risk factors in the sexual victimization of children". *Child Abuse and Neglect, 4*(4): 265-273.

"Sexual socialization in America: High risk for sexual abuse". In J. Samson (Ed.), *Childhood and sexuality.* Montreal, Canada: Editions Etudes Vivanres.

"Sex among siblings: A survey report on its prevalence, variety and effects", *Archives of Sexual Behavior, 9*: 171-194.

## 1979 and earlier

"What's wrong with sex between adults and children: Ethics and the problem of sexual abuse". *American Journal of Orthopsychiatry, 49:* 692-697, 1979.

"Psychological, cultural and structural factors in incest and family sexual abuse". *Journal of Marriage and Family Counseling, 4:* 45-50.

"Review essay: Kantor and Lehr, inside the family". *Journal of Marriage and the Family, 39*: 423-427, 1977.

"Reflections on my teaching", *Journal of Thought, 11*: 23-33, 1976.

"Urban communal living arrangements", *Theological Education,* (Winter) 1972.

## AWARDS

### Research Grants

"Incest and Family Sexual Abuse" (Co-investigator): National Institute of Mental Health grant, 1978-1980.

"Parents Attitudes and Reactions to Sexual Abuse" (Principal Investigator): National Institute of Mental Health grant, 1980-1982.

"Secondary Analysis of Data Collected by the National Incidence Study -- Sexual Abuse of Children" (Principal Investigator): National Center for Child Abuse and Neglect grant, 1981-1982.

"Family Violence Research Training Grant" (Co-Investigator): National Institute of Mental Health, 1982-1992.

"Forced Sex in Marriage" (Principal Investigator): Eden Hall Farm Foundation, 1983-1987.

"Promoting the Development and Dissemination of Knowledge about Child Sexual Abuse" (Principal Investigator): National Center for Child Abuse and Neglect grant, 1983-1985.

"Conflict and Abuse in the Family Care of the Elderly" (Principal Investigator): National Institute on Aging grant, 1984-1986.

"Family Violence: A Research Agenda for the 1980's and 1990's" (Principal Investigator): Conrad N. Hilton Foundation, 1985-1986.

"Sexual Abuse in Day Care" (Principal Investigator): National Center on Child Abuse and Neglect, 1986-1988.

"Characteristics of Incest Offenders" (Principal Investigator): Northstar Foundation, 1987-1988.

"National Studies of Incidence of Missing Children" (Co-Investigator): U.S. Department of Justice - Office of Juvenile Justice and Delinquency Prevention, 1987-1989.

"Recovery from Sexual Abuse and the Validity of Children's Disclosures: A Longitudinal Study, 1973-1990" (Co-Investigator): National Center on Child Abuse and Neglect, 1990-1992.

"Paternal Characteristics and Risk of Sexual Abuse in Navy Families" (Co-Investigator): National Center on Child Abuse and Neglect, 1988-1991.

"A National Study of Youth Victimization Prevention" (Principal Investigator): Boy Scouts of America, (1991-1994).

"Family, Non-Family Abduction and Other Missing Children: Additional Analysis and Dissemination of NISMART Data", (1992-1994).

"Stranger Abduction of Children: Analysis of a National Survey of Children's Experiences", (1993-1994).

"National Youth Victimization Prevention Follow-Up Study" (1993-1995).

"Second National Incidence Study of Missing, Abducted, Runaway and Thrownaway Children" (1996-1999).

"Evaluation of US Air Force Family Violence Prevention Programs (Co-Principal Investigator): US Air Force / US Department of Agriculture (1997).

"Task Force on Children Exposed to Violence" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention / Consortium on Children, Families and the Law (University of South Carolina) (1997-1998).

"Family Violence Research Conference Funding" (Principal Investigator): Packard Foundation (5/98-7/98).

"Family Violence Research Conference Funding" (Principal Investigator): Centers for Disease Control and Prevention (1999-2000).

"Family Violence Research Conference Funding" (Principal Investigator): Centers for Disease Control and Prevention (2000-2001).

"Family Violence Research Conference Funding" (Principal Investigator): Centers for Disease Control and Prevention (2001-2002).

"Youth Internet Safety Survey (YISS-1)" (Principal Investigator): National Center for Missing and Exploited Children. (1998-2001).

"Crimes against Children Research Center: Phase 1" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (1998-2001).

"Crimes against Children Research Center: Phase 2" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (1999-2005).

"Crimes against Children Research Center: Phase 3" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2000-2003).

"Crimes against Children Research Center: Phase 4" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2000-2004).

"Crimes against Children Research Center: Phase 5" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2002-2005).

"Juvenile Online Victimization Study (NJOV-1)" (Principal Investigator): National Center for Missing and Exploited Children. (2001-2003).

"National Incidence Study of Missing, Abducted, Runaway and Thrownaway Children-2" (Co-Principal Investigator): Temple University. (2001-2003).

"Family Violence Research Conference Funding" (Principal Investigator): Sam Houston (2001-2002).

"Crimes against Children Research Center: Phase 6" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2003-2007).

"Crimes against Children Research Center: Phase 7" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2004-2007).

"The Second Youth Internet Safety Survey (YISS-2)" (Principal Investigator): National Center for Missing and Exploited Children. (2005-2006).

"Crimes against Children Research Center: Phase 8" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2005-2008).

"National Statewide Child Protection Training Initiative: Phase 1" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2005-2008)

"National Statewide Child Protection Training Initiative: Phase 2" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2006-2008).

"Crimes against Children Research Center: Phase 9" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2006-2009).

"The National Study of Internet-Facilitated Commercial Sexual Exploitation of Children in the Criminal Justice System" (Co-Principal Investigator): National Institute of Justice. (2007-2009).

"National Study of Children Exposed to Violence (NatSCEV)" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2006-2011).

"National Study of Children Exposed to Violence: Safe, Stable, & Nurturing Relationships Supplement" (Co-Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2009-2011).

"National Study of Children Exposed to Violence: Trend Survey 2" (Co-Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2009-2011).

"National Study of Internet and Technology-Facilitated Risks to Youth (YISS-3)" (Co-Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2009-2012).

"National Study Juvenile Online Victimization Study (NJOV-3)" (Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2009-2012).

"Evaluation of Internet Child Safety Materials Used by ICAC Task Forces in School & Community Settings" (Co-Principal Investigator): National Institutes of Justice. (2009-2012).

"National Study of Children Exposed to Violence: Follow-up Wave 2" (Co-Principal Investigator): Office of Juvenile Justice and Delinquency Prevention. (2010-2011).

"National Incidence Study of Missing, Abducted, Runaway and Thrownaway Children (NISMART-2)" (Principal Investigator): Westat. (2010-2013).

"Ethics in Epidemiology" (Principal Investigator): UBS. (2011-2012).

"National Study of Children Exposed to Violence: Assessing Exposure to Family Violence" (Principal Investigator): National Institutes of Justice. (2011-2013).

## PROFESSIONAL AWARDS

University Professorship (2010).

Daniel Douglas Scheider Child Welfare Book Award (2009).
*Childhood victimization: Violence, crime, and abuse in the lives of young people. New York: Oxford University Press.*

APSAC Article of the Year. (2008).
*"Poly-victimization: A neglected component in child victimization trauma" (with Richard Ormrod & Heather Turner). Child Abuse & Neglect, 31: 7-26. (CV91)*

Elected as a Fellow of the American Society of Criminology. (2007).

Child Maltreatment Article of the Year. (2005).
*"The victimization of children and youth: A comprehensive, national survey" (with Richard Ormrod, Heather Turner, and Sherry Hamby). Child Maltreatment,10 (1): 5-25. (CV73)*

Significant Achievement Award, from the Association for the Treatment of Sexual Abusers. (2004).

Santiago Grisolia Chair, University of Valencia, Spain. For Research on Violence against Children. (1998).

Outstanding Professional Award from the American Professional Society on the Abuse of Children. (1995).

## STUDY GRANTS

National Institute of Mental Health Pre-doctoral Fellowship (1977-78): Study of family violence.

Elementary & Secondary Education Act, Title IV Fellowship (1968-1971): Graduate study in education.

National Science Foundation Grant (1966): To study local government in France.

## PROFESSIONAL ACTIVITIES

### Recent Presentations

**International**

Zurich, Switzerland: UBS - Developing the Global Evidence-base for Child Protection to Improve Outcomes (October, 2011)

Lugano, Switzerland: ASPI Foundation International Conference, "Child Abuse: Complementary Points of View". (October, 2011).

Cape Town, South Africa: World Health Organization's 5th Violence Prevention Milestones Meeting. (September, 2011).

London, UK: EU Kids Online Conference (September, 2011).

Montreal, Canada: Society for Research of Child Development Conference (March, 2011).

Paddington, London, UK: Vulnerable Children – Recognition and Protection: Safeguarding is Everyone's Responsibility (March, 2011).

Gateshead, United Kingdom: Child Sexual Abuse: Learning Lessons, Changing Practice (March, 2011).

University Park, Nottingham, UK: Children As Victims: Prevalence and Prevention - An International One Day Conference (March, 2011).

London, Ontario, Canada: Child Abuse Think Tank (November, 10).

Toronto, Ontario, Canada: Current Issues in Sexual Assault, Domestic Violence and Child Maltreatment Conference (November, 10).

Tokyo, Japan: The Forum on the Prevention of Child Abuse 2010 (October, 10).

London, United Kingdom: Kids Online International Advisory Panel (July, 10).

Barcelona, Spain: University of Barcelona Personality Seminar Series (May, 10).

Montreal, Quebec, Canada: Le Centre Jeunesse de Montréal (February, 10).

Stockholm, Sweden: Swedish Crime Victim Compensation and Support Authority's 6th Annual Conference on Victimology (November, 09).

Hong Kong, China: International Society for the Prevention of Child Abuse & Neglect (ISPCAN) Annual Congress (September, 08).

Zurich, Switzerland: UBS Optimus Foundation Research Advisory Board Meeting (July, 08).

Edinburgh, Scotland: Division of Forensic Psychology Conference, Heriot-Watt University (June, 08).

Calgary, Ontario, Canada: Canadian Society for the Investigation of Child Abuse, "Joining Together – Changes & Challenges in Child Maltreatment Conference" (May, 08).

Bergen, Norway: (May, 08).

Zurich, Switzerland: UBS Optimus Foundation Research Advisory Board Meeting (January, 08).

Montreal, Quebec, Canada: 3e Colloque Québécois sur la Maltraitance envers les Enfants et les Adolescents La maltraitance: une réalité qui bouleverse (October, 07).

Huddersfield, UK: University of Huddersfield Conference: Safeguarding Children? Current Debates – Future Prospects (September, 07).

Toronto, Ontario, Canada: University of Toronto Sexual Exploitation Training (September, 07).

Leuven, Belgium: 2nd International Conference on Child Abuse & Neglect. (May, 07).

York, United Kingdom: XVIth ISPCAN International Congress on Child Abuse & Neglect. (September, 06).

Templepatrick, Ireland: National Organization for the Treatment of Abusers, Northern Ireland Annual Conference. (June, 06).

Montreal, Canada: 74th Congress of ACFAS, "Variations in Child Maltreatment Rates: Epidemiological Reality or Changing Standards?" (May, 06).

Stockholm, Sweden: "Expert Meeting on Children and Young Persons with Abusive and Violent Experiences Connected to Cyberspace – Challenges for Research, Rehabilitation, Prevention and Protection". (May, 06)

## Domestic

Baltimore, MD: Johns Hopkins School of Medicine 1st Annual Child Sexual Abuse Symposium: A Public Health Perspective. (April, 2012).

Washington, DC: Children's Bureau, 18th National Conference on Child Abuse & Neglect. (April, 2012).

Rockland, IL: Child Abuse Council's Children Exposed to Violence Conference. (March, 2012).

Washington, DC: OJP Science Advisory Board Meeting. (January, 2012).

San Diego, CA: Chadwick Center's Annual Conference on Responding to Child Maltreatment. (January, 2012).

Washington, DC: FOSI's Fourth Annual Conference, "Internet Freedom, Safety and Citizenship: A Global Call to Action". (November, 2011).

New York, NY: Social Justice for Children: To End Child Abuse and Violence against Children. (November, 2011).

Portsmouth, NH: University of New Hampshire School of Law Ending Domestic & Sexual Violence: Innovations in Practice & Research Conference (November, 2011).

Washington, DC: Office of Juvenile Justice and Delinquency Prevention's (OJJDP) 2011 National Conference on Children's Justice and Safety: Unite-Build-Lead. (October, 2011).

Washington, DC: Meeting of the Bullying Definitions Expert Panel (September, 2011).

Columbus, OH: At Risk Youth Conference (September, 2011).

Philadelphia, PA: One Child, Many Hands Conference (June, 2011).

Snowbird, Utah: 32nd Annual Conference of Agencies and Organizations Serving Troubled Youth – "Creating Success in Uncertain Times: And How Are the Children?" (May, 2011).

Brooklyn Park, MN: MnATSA 15th Annual Conference (April, 2011).

Washington, DC: Family Online Safety Institute's Forth Annual Conference - Internet Freedom, Safety & Citizenship: A Global Call to Action (November, 10).

Honolulu, Hawaii: XVII ISPCAN International Congress (September, 10).

Quantico, VA: FBI National Center for the Analysis of Violent Crime (NCAVC) Research Advisory Board Meeting (September, 10).

Washington, DC: National Institute of Justice Conference (June, 10).

Dover, Delaware: Protecting Delaware's Children (June, 10).

Baltimore, MD: Pediatric Academic Societies Annual Meeting (May, 09).

Seattle, WA: 17th Annual Children's Justice Conference (April, 09).

West Lebanon, NH: 24th Annual MacNamee Memorial Conference (March, 09).

Miami, FL: University of Miami, School of Education Community Well-Being Forum & Institute for Educational Sciences Speaker Series (February, 09).

Los Angeles, CA: Crime, Violence, and Justice Speaker Series - University of Southern California, Hamovitch Center for Science in the Human Services, School of Social Work (January, 09).

San Diego, CA: 23rd Annual San Diego Conference on Child and Family Maltreatment (January, 09).

Albany, NY: Child Sexual Abuse: Understanding Recent Developments and New Findings Social Work Education Consortium (December, 08).

Charlottesville, VA: Advanced Research and Clinical Topics in Forensic Practice, University of Virginia – Harrison Institute (December, 08).

Durham, NH: Kings County Sexual Assault Resource Center Videoconference (October, 08).

Boston, MA: Academy of Pediatrics Conference (October, 08).

Portsmouth, NH: International Family Violence Research Conference (July, 08).

Bronx, NY: Montefiore Medical Center Grand Rounds (May, 08).

Durham, NH: Midwest Children's Resource Center: "National Children's Alliance Videoconference" (April, 08).

Seattle, WA: National Safe Environment Leadership Conference: "Moving Beyond Compliance, Towards, Conversion" (April, 08).

Chicago, IL: Loyola University – Child Law Center, "ISPCAN Global Summit" (video-presentation) (April, 08).

Bethesda, MD: 2008 APA Summit on Violence and Abuse in Relationships: Connecting Agendas and Forging New Directions (February, 08).

San Diego, CA: 22nd Annual San Diego Conference on Child and Family Maltreatment, (January, 08).

Atlanta, GA: Annual American Society of Criminology Conference (November, 07).

Erie, PA: Mercyhurst College, James V. Kinnane Criminal Justice Conference: cyber.crimes.in.cyber.times (October, 07).

Cambridge, MA: Harvard University Developmental Psychopathology Workshop (September, 07).

St. Louis, MO: 4th Annual Protect our Children Conference (September, 07).

Boston, MA: 15th Annual APSAC Colloquium (July, 07).

Washington, DC: Testimony before the Senate Committee on Commerce, Science, and Transportation – Hearing on Protecting Children on the Internet (July, 07).

Tampa, FL: The Florida Association for the Treatment of Sexual Abusers Conference, "Preventing Sexual Abuse through Collaboration: A Multi-Agency Approach" (May, 07).

New York, NY: The Vincent J. Fontana Center for Child Protection's 1st Annual William Randolph Hearst National Conference, "Preparing Leaders, Protecting Children, Supporting Families" (April, 07).

Cleveland, OH: Bellflower Center for Prevention of Child Abuse Conference (April, 07).

Durham, NH: Prevent Child Abuse America Tele-Symposium. (April, 07).

Washington, DC: Department of Justice, National Press Club Breakfast: "The Effects & Treatment of Child Abuse" (March, 07).

Boston, MA: Society for Research in Child Development 2007 Biennial Meeting. (March, 07).

San Diego, CA: 21st Annual San Diego Conference on Child and Family Maltreatment, (January, 07).

Durham, NH: Laval University (Canada) Videoconference. (January, 07).

## PROFESSIONAL ASSOCIATIONS

American Sociological Association

American Society of Criminology

American Psychological Association

American Professional Society on the Abuse of Children

International Society for the Prevention of Child Abuse and Neglect

HELP Network

Homicide Research Working Group

## EDITORIAL ACTIVITY

Associate Editor, Child Abuse and Neglect.

Associate Editor, The Advisor.

Editorial Board, Child Maltreatment.

Editorial Board, Sexual Abuse: A Journal of Research and Treatment.

# EXHIBIT B

CRIMES AGAINST CHILDREN RESEARCH CENTER

# Trends in Law Enforcement Responses to Technology-facilitated Child Sexual Exploitation Crimes: The Third National Juvenile Online Victimization Study (NJOV-3)

April 2012

Janis Wolak, David Finkelhor & Kimberly J. Mitchell

*Abstract*

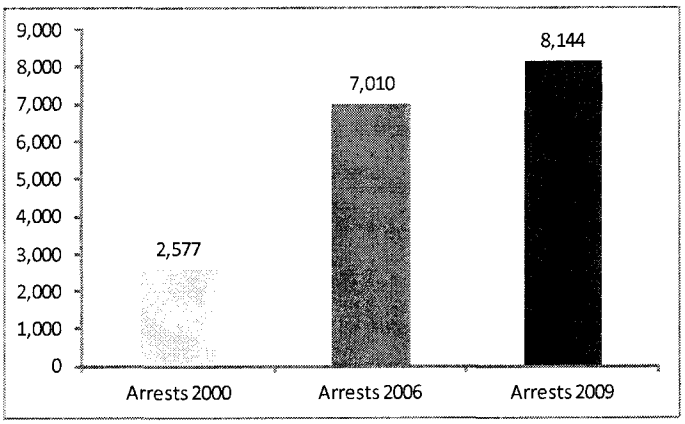
*Overall arrests for technology-facilitated child sexual exploitation crimes did not continue to increase from 2006 to 2009 as they had earlier in the decade. However, arrests for child pornography possession increased by about 50% from 2006 to 2009. In addition, arrests for technology-facilitated sex crimes with identified victims doubled, but the increase was in cases where offenders knew their victims in person, not cases in which they met online. Arrests of offenders who solicited undercover police posing as minors declined between 2006 and 2009, after rising earlier in the decade. The decline may be because of shifts in law enforcement strategies that included more focus on child pornography offenses.*

This bulletin reports on trends in arrests of individuals who committed technology-facilitated child sexual exploitation crimes in the US. These include sex offenders who used the Internet to meet victims or to facilitate the abuse of children who were family members or face-to-face acquaintances, who solicited sex from undercover investigators posing online as minors or who used the Internet to download child pornography. The data come from 3 waves of the National Juvenile Online Victimization (NJOV) Study that examined arrests in 2000, 2006 and 2009. See the end of this report for a description of the methodology of the NJOV Study.

## Arrests for technology-facilitated child sexual exploitation crimes increased substantially between 2000 and 2009.

In 2009, US law enforcement agencies made an estimated 8,144 arrests for technology-facilitated child sexual exploitation crimes, more than 3 times as many as in 2000 (Figure 1). However, the largest increase in numbers of arrests happened between 2000 and 2006 when the number of arrests almost tripled.

**Figure 1. Estimated number of arrests for technology-facilitated child sexual exploitation crimes, by year**




While the estimate for arrests in 2009 appears higher, we cannot be sure there was actually an increase in arrests in 2009 compared to 2006. Our survey of law enforcement agencies has a margin of error, also known as a "95% confidence interval." This confidence interval shows the range of possible numbers within which the true number of arrests is likely to fall in 95 out of 100 attempts to estimate it with a sample of the size we used. Our estimate of arrests in 2006 is 7,010 with possible estimates ranging between 6,188 and 7,832 (see Table 1). The estimate for 2009 is 8,144 with a range of between 7,440 and 8,849. These ranges overlap, which indicates that the estimated number of arrests in 2009 could be similar to the number in 2006. In other words, 2009 arrests did not increase significantly in comparison to those in 2006.

**Table 1. Estimated total arrests for technology-facilitated child sexual exploitation crimes by year**

| | Arrests 2000 | Arrests 2006 | Arrests 2009 |
|---|---|---|---|
| Estimated number | 2,577 | 7,010 | 8,144 |
| 95% Confidence Interval | 2,277—2,877 | 6,188—7,832 | 7,440—8,849 |

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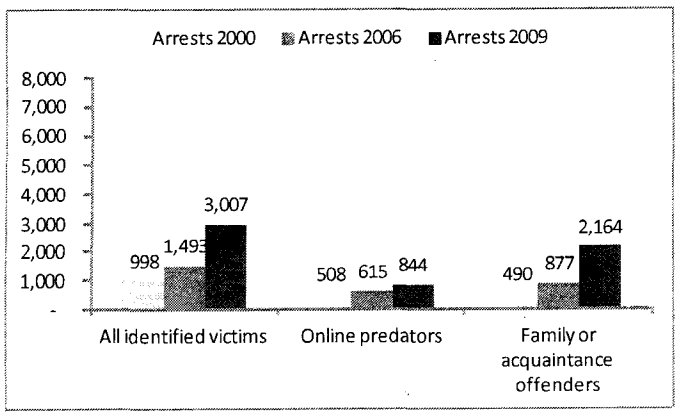
## Arrests increased for crimes with identified victims, declined for solicitations to undercover investigators and increased for downloading child pornography.

*Sex crimes with identified victims*

Arrests for crimes with identified victims increased substantially. ("Identified victims" are directly victimized by offenders and identified by police during the investigation.) These arrests grew by one-third between 2000 and 2006 and then doubled between 2006 and 2009 (Figure 2).

However, arrests of sex offenders who used the Internet to meet victims – so-called "online predators" – accounted for little of this increase. Rather, most of the increase was of offenders who used technology to facilitate sex crimes against victims *they already knew face-to-face* – we call these "family and acquaintance" offenders. Most sex crimes against minors are committed by such persons. More family and acquaintance offenders may be using technology in the course of their crimes. For example, computers and cell phones may be used to plan meetings with victims and to take and store pictures. Also, police may be more aware of the ways technology can be used in sex crimes and thus more likely to examine computers, cell phones and other devices during investigations of sexual abuse cases.

**Figure 2. Estimated arrests for crimes with identified victims, by year**

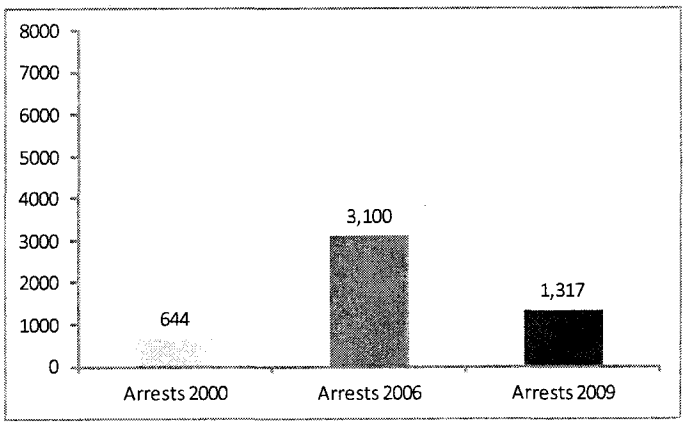



Note: Some numbers do not add exactly due to rounding.

*Solicitations of undercover investigators posing online as minors*

Arrests of offenders who solicited law enforcement investigators posing online as minors spiked in 2006 but then declined in 2009 (Figure 3). This rise and fall may reflect a shift in focus among law enforcement agencies, who in the early 2000s trained many officers to pose online as adolescents, but then may have cut back on these time- intensive investigations in favor of investigations of child pornography, which became easier to conduct due to developing police technology.

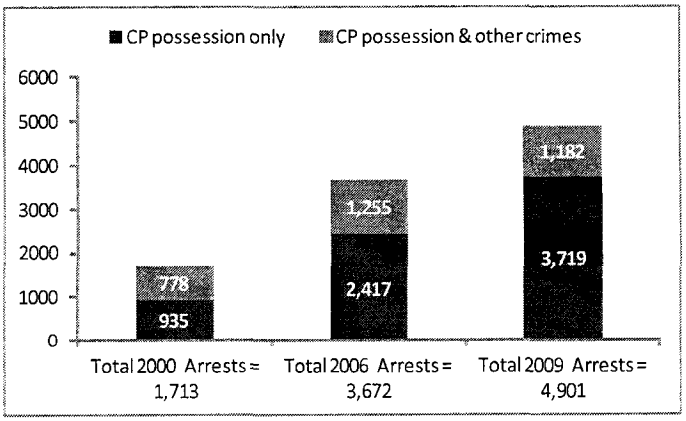
**Figure 3. Estimated arrests for solicitations to undercover investigators posing online as minors, by year**




*Child pornography (CP) possession and distribution*

Arrests for CP possession increased steadily between 2000 and 2009 (Figure 4). Close to half of 2009 arrests for technology-facilitated child sexual exploitation (46%) were for *CP possession only* (no additional sex crimes). We have measured significant increases in arrests for CP possession in each of the three NJOV studies.

**Figure 4. Estimated arrests for CP possession, by year**




## Proactive investigations of online CP trading generated more arrests in 2009.

Law enforcement agencies are aggressively tackling online CP trading by proactively targeting offenders through a variety of tactics – for example, posing online as traders, tracing suspects who transact business on commercial trading sites, and monitoring file sharing networks. Arrests attributable to such proactive investigations more than doubled between 2006 and 2009.

Arrests generated by proactive investigation of online CP trading

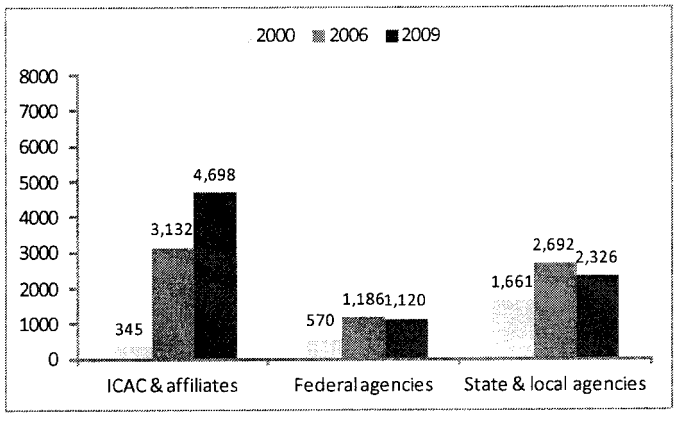
- In 2009, 2,353 arrests
- In 2006, 880 arrests
- In 2000, 274 arrests

## ICAC Task Forces and affiliated agencies made more arrests for technology-facilitated crimes.

Arrests by Internet Crimes against Children (ICAC) Task Forces* increased sharply (Figure 5). One factor in this increase may be arrests by the growing number of ICAC Task Force affiliates – state and local agencies formally associated with ICAC Task Forces through written agreements.

The number of arrests made by federal agencies remained about the same between 2006 and 2009, as did the number of arrests made by state, county and local agencies that were not affiliated with ICAC Task Forces.

**Figure 5. Estimated arrests by ICAC Task Forces and affiliates, federal agencies and state and local agencies, by year**




## Federal charges were filed in more cases.

Federally charged cases increased by about 25% between 2006 and 2009 even though arrests by federal agencies remained constant. Most federally charged cases that did not result from arrests by federal agencies came from ICAC Task Forces, which often have working relationships with US Attorneys that facilitate referrals for federal prosecution.

Estimated cases resulting in federal charges

- In 2009, 1,887 cases
- In 2006, 1,444 cases
- In 2000, 551 cases

Estimated cases resulting in state charges

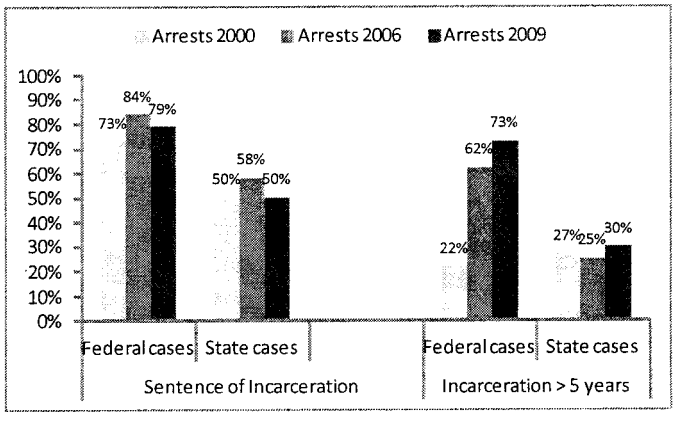
- In 2009, 6,304 cases
- In 2006, 5,714 cases
- In 2000, 2,194 cases

Some cases involved both federal and state charges. For example, an offender might be charged with federal crimes for child pornography offenses and with state crimes for child molestation.

## In federal cases, more offenders received sentences of 5 years or longer.

In each year of the study (2000, 2006 and 2009), about 90% of cases with known outcomes ended in guilty pleas or convictions at trial, a high conviction rate for sex crimes. Most offenders in federal cases with known outcomes were sentenced to incarceration, and most incarcerations were for 5 years or longer (Figure 6). Fewer offenders who were charged under state laws were sentenced to incarceration and, when they were, sentences were shorter.

**Figure 6. Percentage of federal and state cases with sentences of incarceration (cases with known outcomes) and with incarcerations of > 5 years, by year**




## Discussion

Law enforcement in the U.S. appears to be energetically engaged in investigating and prosecuting individuals who use the Internet to commit sex crimes involving children. The most recent trends suggest considerable flexibility and adaptability in their strategies. Overall, arrests in 2009 did not increase as markedly from 2006 as they did earlier in the decade, but arrests for certain types of crimes increased, suggesting a change in focus. There were dramatic increases in arrests for the possession of child pornography and trading in this contraband from 2006 to 2009. This may reflect new tools that law enforcement acquired, including the electronic tagging of known child pornography images and the ability to monitor traffic in these images through peer-to-peer file sharing networks.

At the same time, cases involving police posing online as adolescents declined from 2006-2009, possibly because these cases are time and resource intensive, as investigators need to conduct sometimes lengthy interactions with targets before gathering enough evidence to make an arrest. When suspects are in possession of child pornography, by contrast, arrests often can be made more immediately.

* The ICAC Task Force program is funded by the US Department of Justice. Its aim is to provide training and technical assistance to state and local law enforcement agencies to enhance their ability respond to technology-facilitated child sexual exploitation crimes.

Law enforcement officials continue to debate what mix of strategies allows them catch and incapacitate the most dangerous offenders in the most efficient way. While the data analyzed here do not answer these questions in any specific way, they do suggest that the changes in arrest patterns have not resulted in any lower rate of conviction or any decline in the severity of sanctioning, which could possibly indicate less serious offenders.

Law enforcement and parents have also been concerned about the degree to which growth in Internet technology and social network activity may be putting youth at risk for victimization by online sexual predators. Interestingly, while an increasing number of children were abused by someone using technology as part of the offense, the increase was largely of offenders who abused family members and face-to-face acquaintances. The increase in arrests between 2006 and 2009 of sex offenders who used the Internet to meet victims was relatively small. Meanwhile overall sexual abuse and sexual offenses against children declined during this same time period [1, 2].

Our interpretation of the available data is not that the Internet or social networking communication is putting young people at greater risk of victimization. Rather, as electronic communication becomes a dominant medium for interpersonal interaction, every kind of social activity, criminal and non-criminal, has a growing technology footprint. This footprint may also enhance the ability of parents and law enforcement to identify and prosecute it. Thus the big increase in arrests of family and acquaintance offenders with a technology component does not mean that online technologies are making youth more vulnerable, but only that the existing vulnerability is increasingly enacted and evident online, even in the context of overall declines in sexual abuse from the mid-1990s to the present.

Nonetheless, this and other research continues to signal that the online environment is a rapidly changing one. Careful monitoring of trends is important to identify emerging risks to young people and provide feedback about policies to combat them.

## How the National Juvenile Online Victimization (NJOV) Study was conducted

The National Juvenile Online Victimization (NJOV) Study collected information from a national sample of law enforcement agencies about the prevalence of arrests for and characteristics of technology-facilitated sex crimes against minors during three 12 month periods: July 1, 2000 through June 30, 2001 (NJOV1), and calendar years 2006 (NJOV2) and 2009 (NJOV3).

We used a two-phase process of mail surveys followed by telephone interviews to collect data from a national sample of the same local, county, state, and federal law enforcement agencies.

First, we sent the mail surveys to a national sample of more than 2,500 agencies. These surveys asked if agencies had made arrests for technology-facilitated sex crimes against minors during the respective 12 month timeframes. Then we conducted detailed telephone interviews with law enforcement investigators about a random sample of arrest cases reported in the mail surveys. In NJOV2 and NJOV3 "technology-facilitated" was defined to include Internet use and electronic technologies such as cell phones used for texting and taking and sending photographs.

The data, weighted to account for sampling procedures and non-response, includes 612 cases from NJOV1, 1,051 cases from NJOV2 and 1,299 cases from NJOV3. Having weighted data that is based on a representative sampling of law enforcement agencies and arrest cases allows us to estimate the incidence of arrests for specific types of crimes during the timeframes of the three NJOV Studies.

Table 2 provides details about the dispositions of the mail survey and telephone interview samples for the 3 waves of the NJOV Study. Study procedures were approved by the University of New Hampshire Human Subjects Review Board and complied with all Department of Justice research mandates.

**Table 2. Final dispositions and response rates for the National Juvenile Online Victimization (NJOV) Study**

| | NJOV1 | NJOV2 | NJOV3 |
|---|---|---|---|
| # agencies in sample | 2,574 | 2,598 | 2,653 |
| No jurisdiction | 65 | 282 | 190 |
| Eligible agencies | 2,509 | 2,316 | 2,463 |
| Responded to mail survey | 2,205 (88%) | 2,028 (87%) | 2,128 (86%) |
| Reported cases | 383 (15%) | 458 (20%) | 590 (24%) |
| # cases reported | 1,723 | 3,322 | 4,010 |
| Not selected for sample | 646 (37%) | 1,389 (42%) | 1,522 (38%) |
| Ineligible | 281 (16%) | 276 (8%) | 459 (11%) |
| Total # cases in sample | 796 | 1,657 | 2,029 |
| Non-responders | 101 (13%) | 446 (27%) | 471 (23%) |
| Refusals | 25 (3%) | 118 (7%) | 159 (8%) |
| Invalid or duplicate cases | 40 (5%) | 30 (2%) | 100 (5%) |
| Completed Interviews | 612 (79%) | 1,051 (64%) | 1,299 (64%) |

Note: NJOV1 arrests occurred between July 1, 2000 and June 30, 2001; NJOV2 arrests in 2006; NJOV3 arrests in 2009

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1. *Finkelhor, D., & Jones, L. (2006). Why have Child Maltreatment and Child Victimization Declined. Journal of Social Issues 62(4): 685-716.*
2. *Jones, L., & Finkelhor, D. (2009). Updated Trends in Child Maltreatment, 2007. Durham, NH. Crimes against Children Research Center.*

## ACKNOWLEDGEMENTS

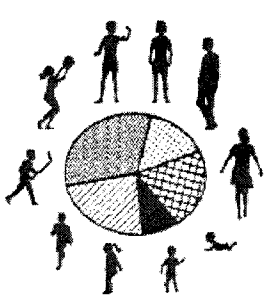
*This research depended on the assistance of hundreds of law enforcement personnel. We thank each of you for helping us and for the important work you do to protect children.*

NJOV3 was funded by Grant No. 2009-SNB-90001 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. The total amount of federal funding was $825,704. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. We are grateful to the many law enforcement investigators who participated in this research and to the talents, perseverance and skills of research assistants Kristina Breton, Elisabeth Cloyd, Matthew Cutler, Laura Healey, Kaitlin Lounsbury, Marisa MacDonnell, Dianne Ramey, Lynn Russ and Samantha Senechal.

**We welcome inquiries about our research. Please contact Janis.Wolak@unh.edu.**

**NJOV Study papers, methodology and other reports are available at the website of the Crimes against Children Research Center: http://www.unh.edu/ccrc/internet-crimes/papers.html.**

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# EXHIBIT C

CRIMES AGAINST CHILDREN RESEARCH CENTER

# TRENDS IN ARRESTS OF "ONLINE PREDATORS"

**Janis Wolak**
**David Finkelhor**
**Kimberly Mitchell**

### How the National Juvenile Online Victimization (N-JOV) Study was conducted

The N-JOV Study collected information from a national sample of law enforcement agencies about the prevalence of arrests for and characteristics of online sex crimes against minors during two 12 month periods: July 1, 2000 through June 30, 2001 (Wave 1) and calendar year 2006 (Wave 2).

For both Waves, we used a two-phase process of mail surveys followed by telephone interviews to collect data from a national sample of the same local, county, state, and federal law enforcement agencies. First, we sent the mail surveys to a national sample of more than 2,500 agencies. These surveys asked if agencies had made arrests for online sex crimes against minors during the respective one-year timeframes. Then we conducted detailed telephone interviews with law enforcement investigators about a random sample of arrest cases reported in the mail surveys.

For the telephone interviews, we designed a sampling procedure that took into account the number of arrests reported by an agency, so that we would not unduly burden respondents in agencies with many cases. If an agency reported between one and three arrests for online sex crimes, we conducted follow-up interviews for every case. For agencies that reported more than three arrests, we conducted interviews for all cases that involved youth victims (victims who were located and contacted during the investigation), and sampled other arrest cases (i.e., crimes that solely involved undercover operations in which investigators posed online as minors, or child pornography possession and distribution). In some agencies, we could not find out which cases had youth victims, so we sampled from all arrest cases.

The final data set, weighted to account for sampling procedures and non-response, includes data from 1,663 completed case-level interviews, 612 from Wave 1 of the N-JOV Study and 1,051 from Wave 2. Having weighted data which is based on a representative sampling of law enforcement agencies and arrest cases allows us to estimate the incidence of arrests for specific types of crimes during the timeframes of Wave 1 and Wave 2 of the N-JOV Study.

The estimates described in this report are based on a subgroup of arrests that includes 726 unweighted case level interviews (Wave 1, n=129 for youth victim cases and n=124 for solicitations to undercover investigators; Wave 2, n=120 for youth victim cases and n=353 for solicitations to undercover investigators.

A full report on the methodology of the N-JOV Study is posted online at: http://unh.edu/ccrc/pdf/N-JOV2_methodology_report.pdf

Publicity about "online predators"* – sex offenders who use the Internet to meet juvenile victims – has raised considerable alarm about the extent to which Internet use may be putting children and adolescents at risk for sexual abuse and exploitation. Media stories and Internet safety messages have raised fears by describing violent offenders who use the Internet to prey on naïve children by tricking them into face-to-face meetings or tracking them down through information posted online. Law enforcement has mobilized on a number of fronts, setting up task forces to identify and prosecute online predators, developing undercover operations, and urging social networking sites to protect young users.

Unfortunately, however, reliable information on the scope and nature of the online predator problem remains scarce. Established criminal justice data collection systems do not gather detailed data on such crimes that could help inform public policy and education. To remedy this information vacuum, the Crimes against Children Research Center at the University of New Hampshire conducted two waves of a

*** Sex offenders who use the Internet to seek underage victims have been widely characterized as "online predators." We are using the expression "online predator" in this report because it has gained so much currency. At the same time, readers must recognize that the term "predator" can mischaracterize some offenders in this study by giving the impression that these are uniformly highly motivated, repetitive, and aggressive sex offenders. In reality, sex offenders who target juveniles are a diverse group that cannot be accurately characterized with one-dimensional labels.**

longitudinal study, the National Juvenile Online Victimization (N-JOV) Study. This research collected data from a national sample of law enforcement agencies about crimes by online predators during two 12 month periods–July 1, 2000 through June 30, 2001 (Wave 1) and calendar year 2006 (Wave 2). This study is the only systematic research that examines the number of arrests of these offenders, the characteristics of their crimes, and the scope of related law enforcement activity.

## KEY FINDINGS

In this first report incorporating data from Wave 2 of the N-JOV study, we examine the number of arrests of and nature of crimes committed by online predators including those who victimized youth and those who solicited undercover investigators posing online as youth.

Some key findings of the report are:

- Between 2000 and 2006, there was a 21% increase in arrests of offenders who solicited youth online for sex. During the same time, there was a 381% increase in arrests of offenders who solicited undercover investigators posing as youth.
- In 2006, of those arrested for soliciting online, 87% solicited undercover investigators and 13% solicited youth.
- During the same period that online predator arrests were increasing, overall sex offenses against children and adolescents were declining, as were overall arrests for such crimes.
- Arrests of online predators in 2006 constituted about 1% of all arrests for sex crimes committed against children and youth.
- During the interval between the two studies (2000 - 2006), the percentage of U.S. youth Internet users ages 12-17 increased from 73% to 93%.[1,2]
- Although arrests of online predators are increasing, especially arrests for soliciting undercover law enforcement, the facts do not suggest that the Internet is facilitating an epidemic of sex crimes against youth. Rather, increasing arrests for online predation probably reflect increasing rates of youth Internet use, a migration of crime from offline to online venues, and the growth of law enforcement activity against online crimes.
- The nature of crimes in which online predators used the Internet to meet and victimize youth changed little between 2000 and 2006, despite the advent of social networking sites. Victims were adolescents, not younger children. Most offenders were open about their sexual motives in their online communications with youth. Few crimes (5%) involved violence.
- There was no evidence that online predators were stalking or abducting unsuspecting victims based on information they posted at social networking sites.
- There was a significant increase in arrests of young adult offenders, ages 18 to 25.
- Few of those arrested for online predation were registered sex offenders (4%).

These findings point to several conclusions: First, law enforcement appears to be having success in investigating, arresting and prosecuting online predators, particularly by using undercover techniques. Second, based on the scope of and trend in arrests for online predation, it is premature to conclude that the Internet is an unusually dangerous environment. Nonetheless, continuing research is needed to assess and monitor the relative risk of Internet use in general and of specific contexts, such as social networking sites. Third, current prevention strategies and messages need to be revised to accurately reflect the nature of crimes committed by online predators.

## FINDINGS

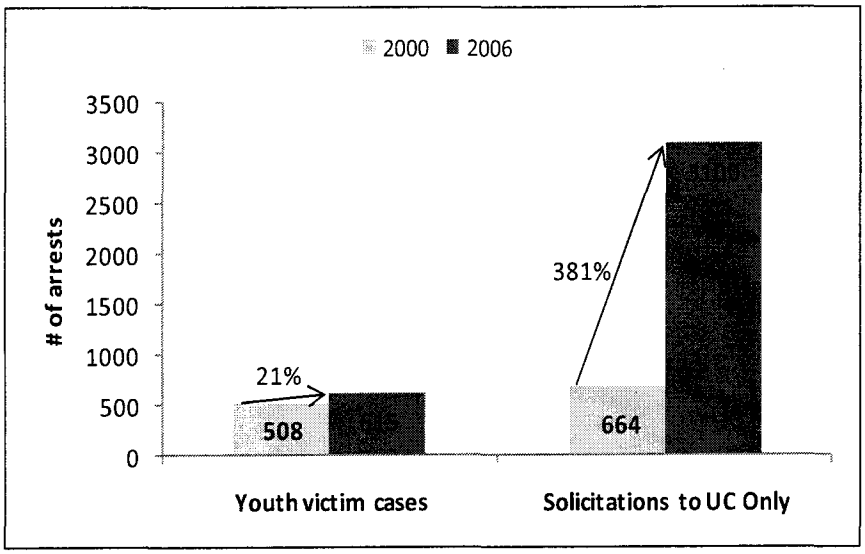
Arrests of online predators increased between 2000 and 2006. Most arrests and the majority of the increase involved offenders who solicited undercover investigators, not actual youth. We classified arrested online predators into two mutually exclusive categories according to whether their arrests were for: 1) "youth victim crimes" that involved youth victims ages 17 or younger or 2) "solicitations to undercover (UC) investigators" who were posing online as minors. Any offender whose crime involved a youth victim was put in the first category whether or not an undercover investigation was also involved.

Arrests for youth victim crimes. In 2006, law enforcement at all levels nationwide made an estimated 615 arrests (95% CI = 468 to 763) for crimes in which youth victims were solicited for sex by someone they met online (see Figure 1). This constituted an increase in arrests of 21% over 2000, when there were an estimated 508 such arrests (95% CI = 405 to 611).

Arrests for solicitations of UC investigators. In 2006, law enforcement made an estimated 3,100 arrests (95% CI = 2,277 to 3,923) for solicitations to UC investigators posing online as minors, compared to an estimated 644 such arrests (95% CI = 327 to 961) in 2000. This was a 381% increase.

These estimates of arrests are not full measures of the number of crimes committed by online predators or even the number of such crimes known to law enforcement. Many sex crimes against minors never come to the attention of law enforcement,[3,4] and many of those known to law enforcement do not culminate in arrest.[5] However, these estimates do provide a means to gauge the growth of these crimes, their number relative to other sex crimes against minors, and the extent of law enforcement activity

**Figure 1. Online predator arrests increased nationwide from 2000 to 2006**

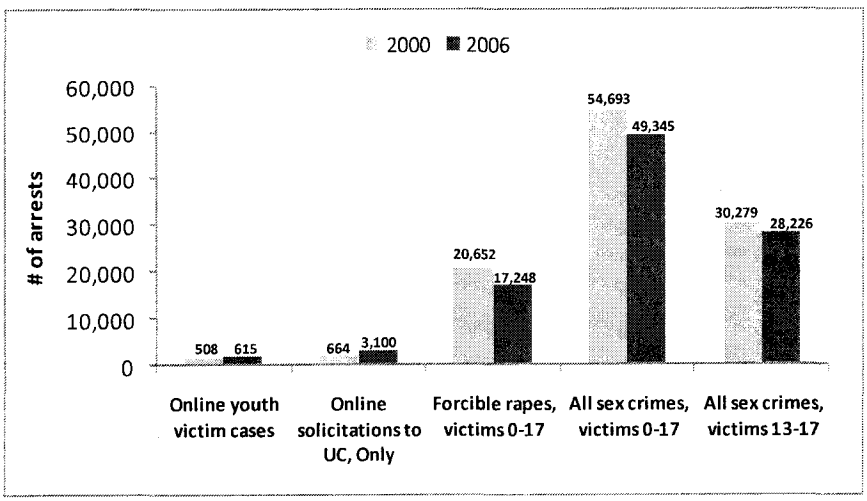



only a few years after the emergence of online predation as a public policy concern.

While there was an increase in arrests of offenders using the Internet to seek sex with minors, there was during the same period a decrease in reports of overall sex offenses against children and adolescents and a decrease in arrests for such crimes.

During the interval between Wave 1 and Wave 2 of the N-JOV Study while arrests for online predation were increasing, sex crimes against children (and sex crimes in general) were on the decline. These trends are apparent from multiple sources (see Figure 2). From 2000 to 2006, forcible rape arrests involving juvenile victims, estimated from the Uniform Crime Report, declined 16%. During the same time period, arrests for all sex offenses against juveniles estimated from the FBI NIBRS data collection system declined by 10%, with a decrease of 7% for the sub-group of victims who were ages 13 to 17.

**Figure 2. Arrests for forcible rapes and other sex crimes with victims younger than 18 declined from 2000 to 2006**




These trends were extensions of declines in sex crimes against minors underway since the early 1990s that have continued through 2006. The magnitude of these declines since the early 1990s has been quite large. For example, the number of sexual abuse cases substantiated by child protective authorities declined 52% between 1992 and 2005.[6] Sexual assault rates as reported by teenagers to the National Crime Victimization Survey declined by 52% between 1993 and 2005.[7] The fact that the evidence for declines in sexual abuse comes from victim self-report surveys as well as official child protective services and criminal justice system data tends to undermine the objection that these trends might be due simply to reduced reporting or changes in investigatory or statistical procedures.[8] Other indicators reflective of real declines in sexual victimization rates have also improved. For example, the rate of pregnancy among teenagers declined 38% between 1990 and 2004,[9] the percentage of teens engaging in sexual intercourse decreased and fewer children were running away from home.[7] So while arrests of online predators increased, the larger overall sex crime problem against children appeared to have been abating.

The nature of crimes in which sex offenders used the Internet to meet and victimize youth changed little between 2000 and 2006, despite the advent of social networking sites.

Findings from Wave 1 of the N-JOV Study indicated that the stereotype of the online predator who used trickery and violence to stalk, abduct or assault young children was largely inaccurate.[10,11] Most crimes by arrested online predators involved adolescent victims who knew they were communicating online with older adults who wanted sex. Most victims who met offenders face-to-face went to such meetings expecting to engage in sexual activity. Most offenders were charged with crimes such as statutory rape that

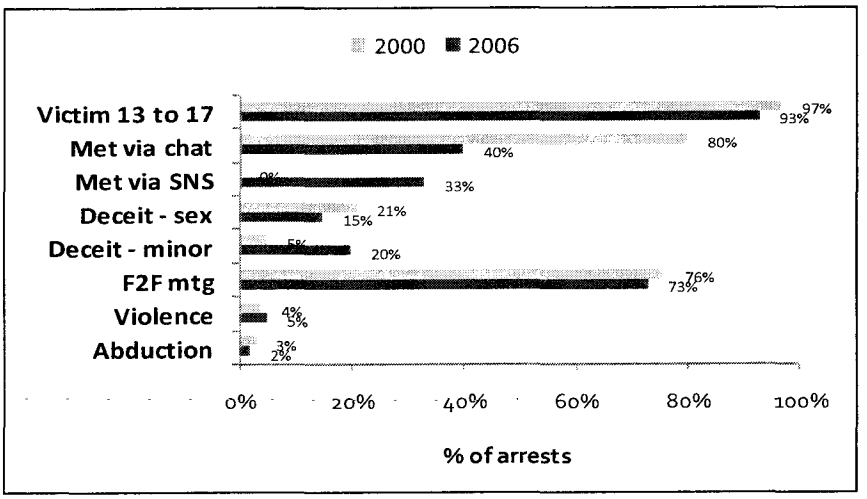
involved non-forcible sexual activity with victims who were too young to consent to sexual intercourse with adults. Violence, stalking and abduction were rare. When offenders solicited undercover investigators, the case dynamics were consistent with this pattern as well.[12] While these crimes represented serious threats to the well-being of young people at the hands of unscrupulous adults, they differed from the image of online predation that many people have.

Despite these findings, the dynamics of crimes by online predators are still often misunderstood. For example, the widespread use of social networking sites by adolescents has led some to propose that sex offenders are commonly using information that youth post online at such sites to track down unsuspecting victims and stalk or abduct them.

Data from Wave 2 of the N-JOV Study suggest, however, that the nature of crimes by arrested online predators against youth victims changed little between 2000 and 2006 (see Figure 3). We found that in 2006 as in 2000, youth victims were young adolescents. Seventy-three percent were ages 13 to 15, similar to 2000 when 76%* of victims were in that age group. None were age 10 or younger. Most victims were girls, but boys were 16% of victims, compared to 25%* in 2000. In 2006, 85% of offenders were open about their sexual motives, compared to 79%* in 2000. Sexual violence against victims was rare, 5% of arrests in 2006 and 4% in 2000*. In 2006, 73% of cases with youth victims progressed from online contact to face-to-face meetings and illegal sexual activity, as did 76%* in 2000. In most cases the sex was illegal because the victims were too young to consent.

There were, however, several differences between online predation cases with youth victims that ended in arrest in 2006 compared to those in 2000.

**Figure 3. The nature of crimes by arrested offenders against youth victims changed little between 2000 and 2008**




- First, in 2000 80% of cases were initiated through contacts in chatrooms, while this was true of only 40% of cases in 2006 ($p<.001$). By contrast, in 2006 33% of cases were initiated with contacts in victims' social networking sites. (Social networking sites were not being used by youth at Wave 1 of the N-JOV Study). However, this

## Crimes by Online Predators: Case Examples

***Case #1.*** Police in a West Coast state found child pornography in the possession of the 22-year-old offender. The offender, who was from a Northeastern state, confessed to befriending a 13-year-old local boy online, travelling to the West Coast, and meeting him for sex. Prior to the meeting, the offender and victim had corresponded online for about six months. The offender had sent the victim nude images via webcam and e-mail and they had called and texted each other hundreds of times. When they met for sex, the offender took graphic pictures of the encounter. The victim believed he was in love with the offender. He lived alone with his father and was struggling to fit in and come to terms with being gay. The offender possessed large quantities of child pornography that he had downloaded from the Internet. He was sentenced to 10 years in prison.

***Case #2.*** A 24-year-old man met a 14-year-old girl at a social networking site. He claimed to be 19. Their online conversation became romantic and sexual and the victim believed she was in love. They met several times for sex over a period of weeks. The offender took nude pictures of the victim and gave her alcohol and drugs. Her mother and stepfather found out and reported the crime to the police. The victim was lonely, had issues with drugs and alcohol, and problems at school and with her parents. She had posted provocative pictures of herself on her social networking site. She had met other men online and had sex with them. The offender was a suspect in another online enticement case. He was found guilty but had not been sentenced at time of the interview.

* This difference was not statistically significant.

difference did not appear to signal changes in case dynamics and probably simply reflected the shift of online social interaction from other Internet venues to social networking sites by 2006.[13]

- A second difference from 2000 was that in 2006 a greater proportion of the offenders claimed to be minors at some point during their online communications with victims, although this ploy was still a factor in only a minority of cases. In 2000, only 5% of cases involved offenders who lied by originally telling victims they were age 17 or younger. In 2006, this happened in 20% of cases ($p<.001$).
- Third, in 2006 fewer cases involved two or more face-to-face meetings between offenders and victims. In 2000, 54% of cases involved repeated meeting, but by 2006 that was true of only 39% ($p<.05$).
- Finally, in 2006 somewhat fewer cases involved offenders or victims who traveled more than 50 miles to a face-to-face meeting, 24% of cases compared to 37% in 2000 ($p<.05$).

There was no evidence that online predators were stalking or abducting unsuspecting victims based on information posted at social networking sites. Some have voiced fears that online predators would use information posted by youth at social networking sites to track down unknowing victims, stalk and abduct them, but we found no cases that reflected this scenario. We specifically asked about offline stalking and abduction in all Wave 2 youth victim cases. There were only three cases where the investigators we interviewed said offline stalking occurred, but all of these incidents happened after offenders and victims had already met face-to-face (see Inset). None involved violence, and it is not clear that any would have met legal definitions of stalking that require patterns of harassment or threatening behavior. Only one case involved abduction, and it also did not match the stereotype of a stranger snatching an unsuspecting victim. In that case, the offender violated criminal abduction statutes when he took the victim somewhere against her will after, not prior, to a sexual assault

There was a significant increase in arrests of young adult offenders, ages 18 to 25.

Between 2000 and 2006, we found few changes in the characteristics of those arrested for online predation when we examined offenders' gender, race, criminal history and related problems such as substance abuse. This consistency was true for offenders against youth victims as well as those who solicited undercover investigators (see Figure 4). In both waves of the N-JOV Study, virtually all offenders (99%) were male. Most were white, non-Hispanic although in 2006 a somewhat higher proportion of online predators came from minority groups (16% in 2006 compared to 10% in 2000, $p<.05$). This may reflect increased Internet access among minority racial and ethnic groups in 2006 compared to 2000.[14,15] There was no change in the percentage of arrested offenders with substance abuse problems (15% in 2000, 14% in 2006*), histories of violence (9% in 2000, 5% in 2006*), or prior arrests for offenses that were not sexual (19% in 2000, 21% in 2006*). Curiously, the proportion of arrested offenders

## Stalking Cases

***Case #1.*** This 24-year-old offender and his 15-year-old victim had at least three face-to-face meetings over two or three years. The investigator said the stalking occurred late in the relationship when the offender "moved to [the city] where [the victim] lived even though she didn't want to continue the relationship."

***Case #2.*** According to the police investigator, this offender, age 36, harassed or stalked the victim, age 14, by making "many unwelcome phone calls." However, the victim was described as being in love with the offender. She was in phone contact with him for months and continued phone contact after her mother tried to stop the relationship. The victim ran away from home to be with the offender, who hid her from police when he found out they were looking for her.

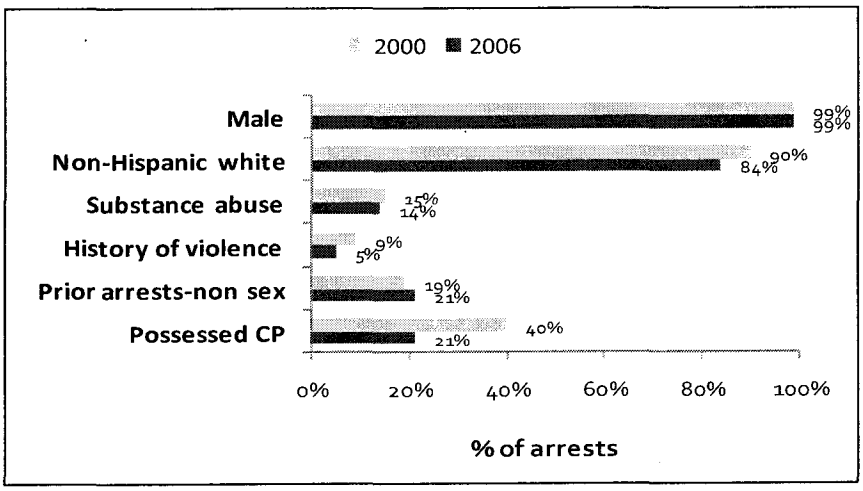
***Case #3.*** The offender, age 41, and victim, age 13, met on a telephone chat line. They communicated via cell phone. They met face-to-face at least once for sex. Both claimed to be in love. The investigator said the offline harassment or stalking occurred when the offender "had a friend call [the victim's] house because he still loved her."

## The Only Abduction Case

The victim, age 17, was raped by the offender when she went to his home to meet him. He was a 22 year old man she met online at a social networking site. After the rape, the victim wanted the offender to drive her back home. He refused and, instead, drove her to a nearby town where he planned to abandon her. The victim called 911 on her cell phone and told police the offender would not let her get out of his car. He was arrested and charged with sexual assault and kidnapping. The investigator said the offender was involved in sexual bondage and sadism.

* This difference was not statistically significant.

**Figure 4. The characteristics of those arrested for online predation changed little between 2000 and 2006**

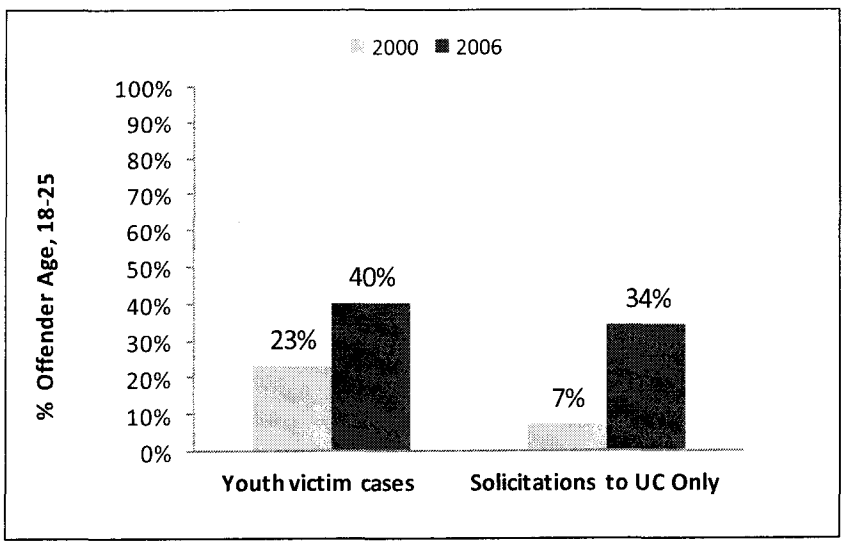



who possessed child pornography, however, decreased by almost half (40% in 2000, 21% in 2006, $p \leq .001$).

One potentially important change was that a larger percentage of those arrested for online predation in 2006 were young adults, ages 18 to 25 (see Figure 5). The percentage of offenders in that age range increased from 23% in 2000 to 40% in 2006 ($p<.05$), for cases with youth victims. In fact, for youth victim crimes, the overall increase in arrests in 2006 appeared to be entirely attributable to more arrests of young adult offenders (ages 18 to 25). There was no increase in the estimated numbers of arrests of online predators in other age groups. The percentage of arrested offenders who solicited UC investigators also increased sharply among young adults, from 7% of arrests in 2000 to 34% in 2006 ($p<.0001$).

This increase in young adult offenders does not correspond to any overall increase in sex criminality within this age group suggested by other sources. It may be a consequence of the coming of age of the first cohort of youth to grow up with the Internet. Adults ages 18 to 25 may be more likely than older adults to use the Internet when engaging in deviant behavior.

**Figure 5. There were significant increases in arrests of young adult offenders, ages 18 to 25, from 2000 to 2006**




Few of those arrested for online predation were registered sex offenders.
Of the online predators who were arrested for crimes against youth victims, 10% in 2006 and 9%* in 2000 had prior arrests for sex offenses against minors (see Figure 6). Only 4% of those arrested for crimes against youth victims in 2006 were registered sex offenders, as were only 2%* of those arrested in 2000. Among offenders arrested for soliciting UC investigators, 3% in 2006 and 4%* in 2000 had prior arrests for sex offenses against minors, and 2% of 2006 arrestees compared to 0%* of arrestees in 2000 were registered sex offenders.

While registration is one of the steps that the criminal justice system has taken to monitor convicted sex offenders and reduce re-offending, aiming strategies to prevent online predation at this population may have limited utility because so few online predators are registered sex offenders.

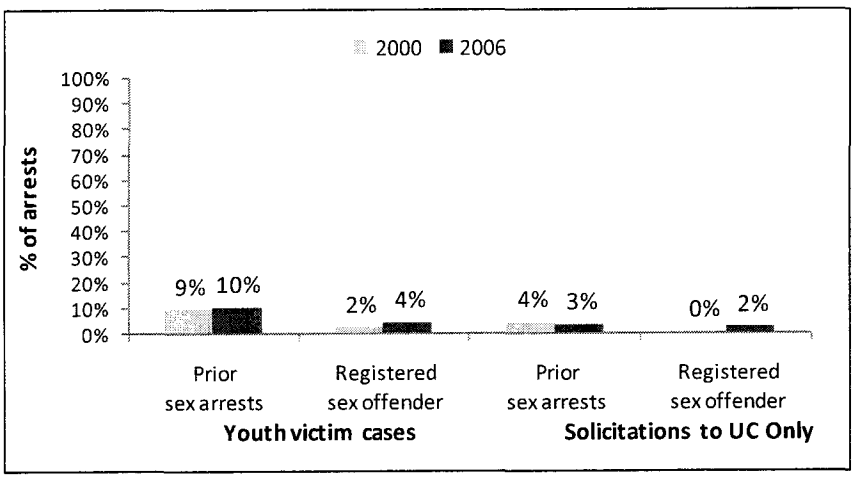
## IMPLICATIONS

Why would arrests of online predators increase while arrests for overall sex crimes against children declined?
This report finds a large increase in arrests for sexual predation online at the same time that overall sex crimes against children have been declining. This may appear to be a paradox, but there are a number of ways to reconcile these contrasting trends.

First, as shown in Figure 2, arrests of online predators make up a relatively small proportion of arrests for sex crimes against children in general. The 615 arrests for youth victim crimes were about 1% of all arrests for nonforcible sex crimes against actual minors and 2%

* This difference was not statistically significant.

**Figure 6. Few of those arrested for online predation were registered sex offenders**




of arrests for nonforcible sex crimes committed against youth ages 13 to 17. Because online predation involves a new and relatively rare crime pattern, arrests could grow by large orders of magnitude and still not affect overall arrest rates by much. In spite of the media attention that online predators have received, it is important to bear in mind that in the larger context of sex crimes against children, offenders who victimize children and youth within their families or networks of acquaintances are much more common than those who use the Internet to meet victims.

Second, Internet use, as it grows to occupy more of social life in general, could simply be encompassing sex crimes that may have heretofore originated in other environments. Sex offenders may be substituting online for offline strategies, so that increases in cases where offenders meet victims online are balanced by decreases in cases in which they meet victims other ways. For example, sex offenders who before the widespread use of the Internet would have gone to places such as shopping malls, parks, and roller rinks to meet potential adolescent victims may now be using online arenas where youth congregate, such as chat rooms or social networking sites. Because of this displacement, online crimes could be increasing even while total crimes fall.

Third, there has been an undeniably large expansion of law enforcement activity online. The number of agencies funded to pursue online child sexual exploitation crimes has increased, as has the number of trained law enforcement investigators. Between 2000 and 2006, the number of Internet Crimes against Children (ICAC) Regional Task Forces funded by the US Department of Justice grew from 30 to 46. By 2006, the ICAC Task Forces had formed partnerships with approximately 1,300 affiliate law enforcement agencies at the local, state, county and federal levels; and had a presence in all 50 states. Training programs for investigating Internet-related child sexual exploitation crimes have been in place and growing since around 1999, so that increasing numbers of law enforcement personnel have been trained in investigating crimes by online predators. New reporting mechanisms have been put in place, such as the CyberTipline, operated by the National Center for Missing & Exploited Children. There was also increased public awareness brought about by television shows such as "To Catch a Predator" and news accounts of such online crimes. Publicity about online predators may have led to citizens being more likely to recognize and report such cases. Such increases in law enforcement activity are generally associated with rising arrests, even when there is no underlying change or even a decline in underlying criminal activity.

Fourth, aggressive law enforcement activity related to online predation could actually be reducing overall sex crimes against minors. Arrests of offenders who solicited UC investigators saw the largest increase and constituted the largest proportion of arrests of online predators – an estimated 3,100 arrests in 2006. Arrests of these offenders, some of whom may be at early stages in their offending careers,[12] may be preventing the victimization of some youth.

Law enforcement authorities report that it is easy to locate sexually predatory behavior toward youth online. Some law enforcement officials have suggested they could easily increase numbers of arrests even further. But the discovery that the Internet provides a ready window on sex criminality does not mean necessarily that Internet use by sex offenders has increased the overall quantity of sexual predation of children. Nonetheless, the possibility that Internet use is fueling sex crimes against children at present or could do so in the future does need to be taken seriously. The ongoing trends and risks to children need to be carefully monitored.

Signs of law enforcement success. After six years of considerable law enforcement mobilization in response to online predators between 2000 and 2006, there has been a marked increase in arrests of those who would try to use the Internet to recruit minors for sexual activity. Most of these arrests have occurred through the use of undercover decoys posing online as young adolescents. Our earlier evaluation of this law enforcement activity suggested that overall this was being carried out

responsibly by specially trained officers in multi-agency operations, and that it had resulted in conviction rates as high as or higher than other sex crime investigations.[12] Given the overall declines in sex crimes against minors and in the absence of evidence that police authority is being abused, we are inclined to see this as a sign of a successful initiative to deploy law enforcement in a domain where criminal sexual activities may be migrating, as well as the successful adaptation of new technology to improve police effectiveness.

These findings do not suggest that the Internet is more dangerous than other environments that children and adolescents frequent.

The findings here should emphatically NOT be interpreted to suggest that the Internet is a dangerous environment for children or youth or that the Internet is ridden with sex crimes or becoming more dangerous. The levels of arrests of online predators revealed in this study are quite small compared to total arrests for sex crimes as evidenced by national crime data. Moreover, the growing number of arrests of online predators is best interpreted as a product of the increasing range of the Internet and the increasing aggressiveness of law enforcement activity online.

To judge how comparatively dangerous Internet use is we need community studies of young people that assess the full range of sexual victimizations they suffer and determine what characteristics and activities are associated with increased risk. However, the studies of child sexual abuse and exploitation that have been conducted to date suggest that it is not being online or even being visible to strangers online that puts young people at risk. When Internet use puts them in danger, it appears to involve specific high risk activities like talking online about sex with unknown people.[16,17] Moreover, the greatest exposure of children and adolescents to sex crimes is at the hands of people who are already a part of their families and social networks.[18,19] More risk assessment studies are needed because there is a great deal that remains to be understood about Internet use and its impact on youth safety. Nonetheless, the fact that overall sex crime rates have been declining during the time that Internet use has expanded to virtually the entire adolescent population is reassuring.

Social networking sites are not necessarily dangerous environments.

We found that, in 2006, 33% of crimes with youth victims involved initial contact between arrested offenders and victims that occurred at victims' social networking sites. This may reinforce recent concerns that social networking sites are risky environments. But findings like those of this study do not mean that social networking sites are necessarily dangerous or promoting sex crimes. When a medium becomes used by a huge portion of the population – in 2006 55% of youth ages 12 to 17 used social networking sites,[13] an estimated 14 million youth based on census numbers (numbers for adult users were not available) – it inevitably becomes a venue for deviant activity by some, but it is not necessarily a risk-promoter. As indicated earlier, studies are needed about specific activities and environments of young people that are associated with risk. But so far studies have not shown that simply using a social networking site is risky in the absence of other behaviors such as responding to sexual overtures made via such sites.[20,21]*

The fact that some online predation involved the use of social networking sites may simply reflect the broad use of such sites as a communication and interaction tool in current society.

Revising prevention strategies.

The findings of the N-JOV study reiterate conclusions from earlier studies that the dynamics of crimes by online predators differ from how such crimes are often conceived by the public and characterized in much Internet safety education.[11] The reality, evidenced from 249 interviews about specific arrest cases with youth victims conducted with police investigators in the two waves of this research, is that the victims of online predators are almost exclusively teenagers who go knowingly to meet men whom they know to be considerably older and interested in sex. Most of these victims are drawn into relationships with offenders after extended online exchanges and because they are looking for romance, sexual adventure or validation. There is little stalking, deception, violence, abduction or forcible rape. Online predators commit serious sex crimes and take advantage of vulnerable youth, but effective prevention strategies need to describe how these crimes actually come about if their occurrence is to be prevented or short-circuited; otherwise, the adolescents involved may not recognize these events as crimes.

For example, we think that more efforts need to be made to educate and discourage teens from engaging in sexual and romantic relationships with older partners. Youth awareness also needs to be raised about age of consent and statutory rape laws, the illegality of cross generational sexual solicitation online, the inadvisability of teens engaging in sexual conversations and exchanging sexual or provocative images with strangers and presenting themselves in sexualized descriptions online. These sorts of messages are more likely to address the real dynamics of the crime than warnings about being stalked by someone who obtains personal information posted online.

Beyond registered sex offenders.

Some recent Internet safety debates have dwelt on restricting online access for registered sex offenders. The current study found that only 4% of online predators arrested for crimes against

* It should also be noted that social networking sites have implemented a number of new safety initiatives since 2006.

youth victims were registered sex offenders, as were 2% of those arrested for soliciting undercover investigators. Thus, it is important for the public and officials to know that policies targeted at registered sex offenders are aimed at a very small part of the problem. Internet safety needs to be designed with the assumption that most online predators are not registered offenders and have no prior record. Thus, other mechanisms for deterring this behavior need to be designed.

Pursuit of conventional child molesters. The broader statistical picture revealed by the N-JOV Study is that, despite increases, crimes by online predators are still a small percentage of total sex crimes committed against children and adolescents. Thus, public policy should be careful not to abandon or underfund the investigation of conventional child molestation. Using the Internet to seek out sex offenders who solicit investigators posing online as minors has a clear value, as well as an appeal to law enforcement, which is utilizing technology and sophisticated undercover techniques regarding a crime of considerable public concern. But conventional child molestation – abusive fathers, neighbors, teachers and family friends -- still constitutes a much larger part of the problem than online predation. There is every reason for law enforcement to continue to mount aggressive efforts to combat sexual abuse of children both on- and offline.

More research is needed. The discussions about online predators reveal an enormous need for additional information. What sites and what activities put young people at risk? What kinds of online protections and education can help protect youth? How do online predators compare to offline sex offenders in their risk to reoffend? There is much that we still do not know, and because the Internet is a new and rapidly changing environment the need for current information is particularly acute. People are keen to act to protect children, but misguided action based on mistaken assumptions may waste time and resources, and it may even undermine the current and future effectiveness of protection efforts. We need a sound, regularly updated research agenda to inform evidence-based education and prevention programs geared toward promoting child and adolescent safety as the Internet and other communication technologies continue to evolve and proliferate.

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## Figure Notes

The estimates in Figures 1, 4, 5 & 6 are based on 726 unweighted case level interviews (Wave 1 YR 2000, n=129 for youth victim cases and n=124 for solicitations to UC only; Wave 2 YR 2006, n=120 for youth victim cases and n=353 for solicitations to UC only).

In Figure 2, arrests for forcible rapes with victims ages 0 to 17 are estimated from the Uniform Crime Report. Arrests for all sex crimes with victims ages 0 to 17 and the subgroup of victims 13 to 17 are estimated from the National Incident-Based Reporting System. Based on these numbers, arrests for forcible rapes of juvenile victims decreased by 16% between 2000 and 2006; arrests for all sex crimes against juveniles decreased by 10%; arrests for all sex crimes against teenage victims decreased by 7%. Arrests for solicitations to UC investigators increased 381%; arrests for online predation against youth victims increased 21%.

Figure 3 estimates are based on 249 unweighted case level interviews (Wave 1 YR 2000, n=129; Wave 2 YR 2006, n=120). "SNS" social networking site; "Deceit – sex" the offender was deceitful about sexual motives; "Deceit – minor" the offender claimed to be a minor; "F2F mtg" the offender and victim met face-to-face.

In Figure 4, "al" alcohol, "CP" child pornography, "Prior arrests-not sex" prior arrests for crimes that were not sex offenses.

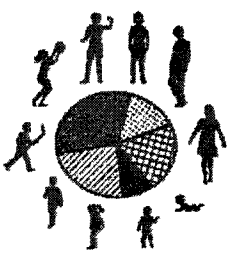
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# EXHIBIT D

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Original article

# Trends in Youth Internet Victimization: Findings From Three Youth Internet Safety Surveys 2000–2010

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*Keywords:* Internet; Victimization; Trends

A B S T R A C T

**Purpose:** The purpose of this research was to explore the trends in youth reports of unwanted online sexual solicitation, harassment, and exposure to pornography over time.
**Methods:** The study was based on three separate cross-sectional national telephone surveys of approximately 1,500 youth Internet users, aged 10 through 17 years. Data were collected in 2000, 2005, and 2010.
**Results and Conclusion:** Nine percent of youth reported an unwanted sexual solicitation in 2010. This continued the decline in unwanted sexual solicitations that occurred between 2000 (19%) and 2005 (13%), resulting in a total 50% decrease between 2000 and 2010. Twenty-three percent of youth reported an unwanted exposure to pornography, a decline from 34% in 2005, following an increase between 2000 and 2005 (25% to 34%). However, marking the only trend to show an increase over the past 5 years, 11% of youth reported an online harassment experience, which was an increase from 9% in 2005, and 6% in 2000. Some differences in these trends were noted for subgroups of youth across age, gender, and race. The trends in unwanted experiences online over the past decade identified by three Youth Internet Safety Surveys may contradict impressions that the general population, professionals, and the media have about what is happening. Trends provide evidence for some optimism that protective adaptations to the online environment have been successful; however, online harassment appears to be increasing for youth, particularly girls, and may require additional mobilization.

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Concerns about the safety of children online have preoccupied parents, educators, public health officials, and the media over the past decade. As electronic technologies and online activities have become an increasing part of youth culture, many have the perception that the risks and dangers have expanded as well. For example, there has a been a great deal of attention to the concern that social networking sites put young people into contact with sexual predators and increase the brazenness of bullies.

However, the electronic environment is characterized by rapid technological changes and equally rapid protective adaptations. Thus, for example, as young people shift from chat rooms to Facebook, Internet platforms provide new controls and security options, and parents and educators respond with educational programs. Some of these responses may be helping. It is not clear whether youth vulnerability has increased. In fact, national surveys comparing 2000 with 2005 showed that although online harassment did increase, unwanted sexual solicitations declined [1,2].

Given the rapidity of the technological and social changes, it is crucial to have ongoing studies that track trends in children's online activity and safety. This article extends the finding from the Youth Internet Safety Surveys (YISS) conducted in 2000 and 2005 with new data from a survey conducted in 2010. The three YISS studies thus provide information across a critical 10-year period (2000–2010) on changes in the rates of three widely cited concerns: online sexual solicitation, unwanted exposure to pornography, and online harassment experiences.

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## Methods

The YISS-1, YISS-2, and YISS-3 studies were conducted to quantify and detail youth experiences with unwanted or problematic Internet experiences, including sexual solicitations, harassment, and unwanted exposure to pornography on the Internet. Respondents in the YISS studies were youth between 10 and 17 years who had used the Internet at least once a month for the past 6 months, and a caregiver. Abt Schulman, Ronca, and Bucuvalas, Inc, a national survey research firm, conducted the sampling, screening, and telephone interviews for the YISS studies. Data collection for YISS-1, YISS-2, and YISS-3 occurred between August 1999 and February 2000; March and June 2005; and August 2010 and January 2011, respectively.

A national sample of households that had been prescreened for another survey was used in YISS-1, whereas YISS-2 and YISS-3 samples were largely recruited through random digit dialing. Response rates across the three YISS studies also reflect increasing rates of cell phone-only households and greater reliance on voice mail and caller identification. Thus, more calls were needed to identify eligible households in YISS-2 and again in YISS-3, and an increasing percentage of households reached were not eligible for the study across the YISS studies (28%, 72%, and 88% for YISS-1, YISS-2, and YISS-3, respectively). After eligible households were reached, the refusal rate was 46% for both YISS-2 and YISS-3. The refusal rate was lower for YISS-1 at 18%.

Owing to the increasing reliance of the U.S. population on cell phones [3,4], a cell phone random digit dialing sample was included in the YISS-3 study. At the end of data collection, 45 interviews had been completed by cell phone in addition to 1,515 landline interviews, resulting in a total sample size of 1,560. Analysis of youth demographic and Internet use characteristics between the cell phone and landline samples indicated the cell phone sample included more respondents of Hispanic ethnicity and from families with a single, never-married parent (see [5] for detailed information on YISS methodology).

### Procedures

For all three YISS studies, a sample size of 1,500 was predetermined based on a maximum expected sampling error of ± 2.5% at the 5% significance level. Human subject participation in each YISS studies was reviewed and approved by the University of New Hampshire Institutional Review Board.

Interviewers first spoke with an adult and determined whether there was an eligible child in the household. In households with eligible children, interviewers asked to speak with the adult who was most familiar with that child's Internet use and after receiving informed consent, asked a series of questions about Internet use. The interviewer then asked for permission to interview the child. Parents were informed by interviewers that the youth interview would be confidential, that it would include questions about "sexual material your child may have seen on the Internet," and that youth would receive $10 for participating. In households with more than one eligible youth, the one who used the Internet most often was chosen as the respondent.

After receiving parental permission, interviewers spoke with the youth and asked for permission to conduct an interview. Interviewers assured youth that they could skip any question they did not want to answer and end the interview at any time. Interviews were scheduled at the convenience of youth and at times when they were able to talk freely and confidentially. The average youth interview lasted 30 minutes, and the average adult interview lasted 10 minutes.

### Sample

Table 1 compares youth and household characteristics across the three samples. There were significant increases from 2000 to 2010 in the amount of youth Internet use. White youth made up a slightly smaller proportion of the YISS-3 sample of youth Internet users compared with YISS-1 and YISS-2. This was likely to do the increase in minority youth access to the Internet in recent years [6]. The YISS-3 sample also included a greater percentage of youth from high-income and well-educated households. This reflects some of the demographic differences found in landline telephone surveys: low-income families are increasingly more likely to live in cell phone-only households [4]. All study analyses controlled for sample differences across the three YISS studies.

Across all the YISS samples, well-educated and high-income families, and white youth are overrepresented compared with the national average (see http://www.census.gov), but the skewed distribution reflects the population of youth Internet users at the time of data collection [7].

### Measures

The incidence rates for sexual solicitation, unwanted exposure to sexual material, and harassment were estimated based on questions about unwanted experiences while using the Internet in the past year ("past year" refers to the year before the interview). The questions used in the current article were identical across all YISS studies.

Unwanted sexual solicitations were defined as requests to engage in sexual activities or sexual talk or to give personal sexual information that was unwanted or made by an individual ≥5 years, whether wanted or not. The incidence rate for sexual solicitation was estimated based on endorsement of at least one of the following three screener questions:

- "In the past year, did anyone on the Internet ever try to get you to talk online about sex when you *did not want to*?"
- "In the past year, did anyone on the Internet ask you for sexual information about yourself when you did not want to answer such questions? I mean very personal questions, like what your body looks like or sexual things you have done?"
- "In the past year, did anyone on the Internet ever ask you to *do* something sexual that you did not want to do?"

Additionally, youth who said they had an online sexual relationship with an adult were included to capture possible statutory sex crimes (n = 0 from YISS-1; n = 8 from YISS = 2; n = 1 from YISS-3). We also defined a subgroup of *aggressive sexual solicitations*, in which solicitors attempted or made offline contact with youth through regular mail, by telephone, or in person.

Harassment was defined as threats or other offensive behavior (not sexual solicitations) that were sent online to the youth or posted online about the youth for others to see. Harassment was measured through endorsement of at least one of the following two screener questions:

- "In the past year, did you ever feel worried or threatened because someone was bothering or harassing you online?"

**Table 1**
Demographic and Internet use characteristics for the 2000, 2005, and 2010 YISS samples

| Characteristics | Year 2000 (n = 1,501) % (n) | Year 2005 (n = 1,500) % (n) | Year 2010 (n = 1,560) % (n) | p |
|---|---|---|---|---|
| Demographic | | | | |
| Gender (male) | 53 (790) | 49 (738) | 50 (775) | .12 |
| Age | | | | |
| 10–12 years | 23 (337) | 23 (345) | 21 (333) | .02 |
| 13–15 years | 48 (725) | 43 (651) | 45 (694) | |
| 16–17 years | 29 (439) | 34 (504) | 34 (533) | |
| Race | | | | |
| White, non-Hispanic | 73 (1,091) | 71 (1,070) | 67 (1,048) | .001 |
| Black, non-Hispanic | 10 (153) | 11 (161) | 13 (208) | |
| Hispanic or Latino, any Race | 7 (108) | 9 (130) | 10 (152) | |
| American Indian/Alaskan native | 2 (30) | 1 (21) | 3 (41) | |
| Asian | 3 (38) | 2 (33) | 3 (48) | |
| Other (includes biracial) | 2 (26) | 3 (40) | 2 (28) | |
| Do not know/not ascertainable | 4 (55) | 3 (45) | 2 (35) | |
| Parental marital status | | | | |
| Married | 79 (1,182) | 76 (1,139) | 78 (1,214) | .01 |
| Living with a partner | 1 (19) | 3 (37) | 2 (36) | |
| Separated | 3 (37) | 1 (22) | 2 (29) | |
| Divorced | 10 (154) | 10 (147) | 10 (148) | |
| Widowed | 2 (35) | 2 (29) | 2 (31) | |
| Single, never married | 5 (73) | 8 (117) | 6 (98) | |
| Youth lives with both biological parents | 63 (949) | 62 (926) | 66 (1,029) | .04 |
| Highest level of education in household | | | | |
| Not a high school graduate | 3 (37) | 2 (30) | 3 (41) | <.001 |
| High school graduate | 21 (320) | 20 (305) | 14 (210) | |
| Some college education | 22 (336) | 23 (344) | 19 (299) | |
| College graduate | 32 (474) | 32 (481) | 37 (577) | |
| Post-college degree | 22 (330) | 22 (333) | 28 (431) | |
| Annual household income | | | | |
| <$20,000 | 8 (119) | 8 (123) | 12 (192) | <.001 |
| $20,000–$50,000 | 38 (575) | 27 (405) | 18 (287) | |
| >$50,000–$75,000 | 23 (350) | 24 (355) | 16 (245) | |
| >$75,000 | 23 (347) | 33 (494) | 45 (700) | |
| Don't know/missing | 7 (110) | 8 (123) | 9 (136) | |
| Internet use | | | | |
| Amount of Internet use (mean, SD)[a] | .24 (.26) | .41 (.31) | .49 (.30) | <.001 |
| Location of Internet use | | | | |
| Home | 74 (1,109) | 91 (1,363) | 97 (1,506) | <.001 |
| Friend's home | 69 (1,028) | 69 (1,029) | 70 (1,088) | .72 |
| School | 73 (1,100) | 90 (1,356) | 89 (1,392) | <.001 |
| Cell phone | – | – | 47 (740) | – |

[a] Amount of Internet use was derived from a factor analysis of the following items: youth experience with the Internet (scale of 1–5), importance of Internet in youth's life (scale of 1–5), and hours and days online in a typical week. Values ranged from .00 to 1.0. This comparison was examined using a t test rather than a $\chi^2$ test.

- "In the past year, did anyone ever use the Internet to threaten or embarrass you by posting or sending messages about you for other people to see?"

Unwanted exposure to pornography was defined as being exposed to pictures of naked people or people having sex without seeking or expecting such pictures, when doing online searches, surfing the web, opening e-mail, or instant messages or links in messages. Unwanted exposure to pornography was estimated based on endorsement of one of the following two questions.

- "In the past year when you were doing an online search or surfing the web, did you ever find yourself in a Web site that showed pictures of naked people or of people having sex when *you did not want to be in that kind of site*?"
- "In the past year, did you ever *open* a message or a link in a message that showed you actual pictures of naked people or of people having sex *that you did not want*?"

Finally, we identified subgroups of youth who reported *distressing* solicitations, harassment, or exposure to pornography. These identified youth rated themselves as very or extremely upset or afraid as a result of a sexual solicitation or harassment incident, or as very or extremely upset because of an unwanted exposure to pornography.

### *Internet use characteristics*

Youth also reported on their Internet use, including the amount and location of use. High Internet use was operationalized using a summation score derived from a factor analysis of the following four responses: high experience with the Internet, high importance of the Internet, ≥4 days per week spent online, and ≥2 hours per day spent online. A summation score was dichotomized at 1 SD above the mean for each YISS study to reflect a high level of Internet use.

### *Demographic information*

Caregivers reported on the youth's gender, age, the highest household education, and the previous year's household income. Youth reported information on race and ethnicity.

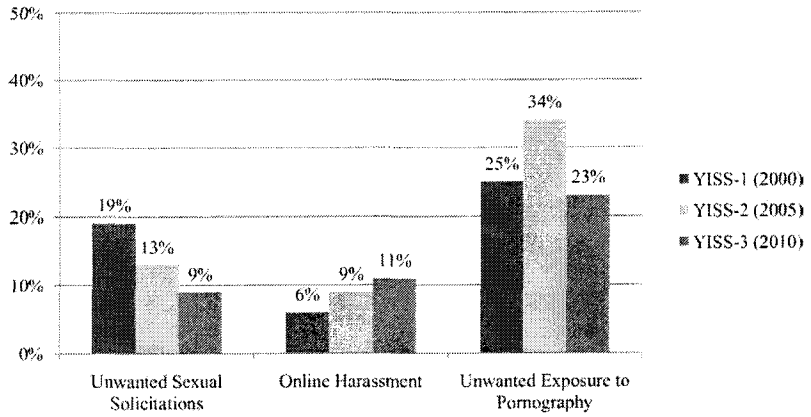



**Figure 1.** Trends in unwanted experiences on the Internet for youth: YISS-1 (2000), YISS-2 (2005), and YISS-3 (2010). For all percentage differences, $p < .001$.

*Analyses*

Differences between YISS-1, YISS-2, and YISS-3 were tested for statistical significance based on the rates of occurrence of specific incidents and experiences within the full samples. Logistic regression analyses were conducted to calculate odds ratios comparing the 2005 and 2010 samples of youth on the prevalence of unwanted Internet experiences by age, gender, and race after adjusting for the other demographic characteristics, amount, and locations of Internet use. SPSS 19.0 [8] was used for all analyses.

## Results

There were significant changes in youth reporting unwanted or problematic experiences using Internet technology across the 2000, 2005, and 2010 YISS studies, but they varied according to the type of problem experienced (Figure 1). Unwanted sexual solicitations declined from 19% in 2000 to 13% in 2005, and finally to 9% in 2010; thus, there was a total 50% decline in reports of this problem between 2000 and 2010. However, aggressive solicitations (in which offline contact was attempted or made) did not change significantly across the three surveys (3%, 4%, and 3% in 2000, 2005, and 2010, respectively; data not shown). There was a small but statistically significant increase in reports of online harassment, from 9% in 2005 to 11% in 2010. This continued an increase seen between 2000 and 2005 (from 6% to 9%). Finally, there was a decline in youth reports of unwanted exposure to pornography between the 2005 and 2010 YISS surveys, from 34% to 23%. This decline followed an increase between 2000 and 2005 (from 25% to 34%).

*Trends by age*

The declines in unwanted sexual solicitations occurred primarily for younger adolescents [9–14] (Table 2). Among 10–12-year olds, there was a 63% decline in reports between 2005 and 2010, whereas for 13–15-year olds, the decline was 52%. No significant decline in overall sexual solicitations was seen for the youth aged 16 and 17 years. However, there was a significant decline among this group of youth in reports of distressing sexual solicitations—from 6% in 2005 to 3% in 2010. Aggressive sexual solicitations also declined by 46% among youth aged 13–15 years, from 5% in 2005 to 3% in 2010. Between 2005 and 2010, no significant differences in reports of online harassment were identified when examining the trends by age group.

Overall, unwanted exposure to pornography, as well as distressing exposure, declined primarily for older adolescents aged 13–15 years and 16 and 17 years. Unwanted exposure to pornography was almost reduced to half for these groups, from 9% in 2005 to 5% in 2010.

*Trends by gender*

There were significant declines in reports of unwanted sexual solicitations for girls and boys (40% and 46%, respectively) (Table 3). A decline in distressing and aggressive sexual solicitations was only seen among girls; boys reported low rates of distressing sexual solicitations.

Reports of general and distressing online harassment increased significantly for girls only. Rates of online harassment increased 50% for girls, from 10% in 2005 to 15% in 2010. Significant declines in reports of unwanted exposure to pornography and distressing exposures occurred equally for both boys and girls.

*Trends by Race and ethnicity*

Finally, some differences were also noted across racial and ethnic groups. There was a significant decline in reports of unwanted sexual solicitations among white and black youth (40% and 50% declines, respectively) (Table 4). A decline in distressing sexual solicitations was also noted among white, non-Hispanic youth (55%). No changes in aggressive sexual solicitation were noted when examined by race and ethnicity.

There were no significant differences in rates of online harassment across the three ethnic and racial groups. Declines in unwanted exposure to pornography were largest for white, non-Hispanic youth (47%) and Hispanic or Latino youth (48%).

## Discussion

The current intensive media attention to the problem of Internet safety can sometimes give the impression that Internet risks are increasing for youth. However, for two out of three online problems measured by YISS-3 in 2010, rates decreased when compared with earlier studies. A decreasing trend was identified for unwanted sexual solicitations of youth online, and also for unwanted exposure to pornography by youth, but a

**Table 2**
Multivariate (adjusted) trends in unwanted Internet experiences by youth age

| Unwanted Internet experiences | Year 2000 % (number) | Year 2005 % (number) | Year 2010 % (number) | Adjusted OR 2005–2010 (95% CI)[a] |
|---|---|---|---|---|
| Any sexual solicitation | | | | |
| 10–12 years | 10 (34) | 5 (19) | 2 (7) | .37 (.15–.92)* |
| 13–15 years | 21 (152) | 15 (95) | 8 (55) | .48 (.34–.70)** |
| 16–17 years | 23 (100) | 17 (86) | 14 (72) | .76 (.53–1.09) |
| Distressing sexual solicitation | | | | |
| 10–12 years | 5 (17) | 3 (10) | 1 (4) | .44 (.14–1.46) |
| 13–15 years | 4 (32) | 5 (29) | 3 (19) | .54 (.29–.99)* |
| 16–17 years | 5 (23) | 6 (28) | 3 (14) | .47 (.25–.92)* |
| Aggressive sexual solicitation | | | | |
| 10–12 years | 1 (3) | 1 (4) | 1 (3) | .42 (.08–2.25) |
| 13–15 years | 3 (23) | 5 (35) | 3 (22) | .54 (.31–.95)*** |
| 16–17 years | 4 (17) | 5 (24) | 4 (22) | .81 (.44–1.49) |
| Any harassment | | | | |
| 10–12 years | 5 (18) | 5 (16) | 6 (20) | 1.43 (.72–2.86) |
| 13–15 years | 7 (47) | 10 (66) | 10 (66) | 1.17 (.83–1.65) |
| 16–17 years | 7 (30) | 10 (48) | 13 (68) | 1.21 (.81–1.81) |
| Distressing harassment | | | | |
| 10–12 years | 2 (8) | 3 (10) | 2 (8) | .93 (.36–2.43) |
| 13–15 years | 3 (19) | 3 (21) | 5 (37) | 1.53 (.88–2.68) |
| 16–17 years | 2 (10) | 4 (19) | 6 (33) | 1.50 (.83–2.70) |
| Any unwanted exposure to pornography | | | | |
| 10–12 years | 9 (29) | 19 (65) | 15 (50) | .70 (.46–1.06) |
| 13–15 years | 28 (201) | 35 (225) | 23 (161) | .57 (.45–.73)** |
| 16–17 years | 33 (146) | 44 (222) | 28 (150) | .49 (.38–.64)** |
| Distressing unwanted exposure to pornography | | | | |
| 10–12 years | 2 (6) | 10 (33) | 6 (20) | .56 (.31–1.01) |
| 13–15 years | 8 (55) | 9 (58) | 5 (35) | .57 (.37–.88)* |
| 16–17 years | 7 (30) | 9 (45) | 5 (24) | .51 (.30–.86)* |

OR = odds ratio.
95% confidence interval (CI) refers to being 95% confident that the interval contains the population percentage.
The rate calculations are based on the total number of youth in each age category and survey year.
10–12-year olds: Year 2000 (n = 337), Year 2005 (n = 345), and Year 2010 (n = 333).
13–15-year olds: Year 2000 (n = 725), Year 2005(n = 651), and Year 2010 (n = 694).
16–17-year olds: Year 2000 (n = 439), Year 2005 (n = 504), and Year 2010 (n = 533).
[a] Adjusted odds ratios are based on multivariate logistic regression tests that control for other demographic characteristics, amount of Internet use, and locations of Internet use.
* $p \leq .05$; ** $p \leq .001$; *** $p \leq .01$.

steady and significant increase in online harassment was identified as occurring since 2000.

*Online sexual solicitations*

In 2010, one in 10 youth reported receiving an unwanted sexual solicitation, a 50% reduction in rates when compared with one in five youth who reported such an experience when the YISS was conducted in 2000. The reason for the steady decline in rates could be due to several factors. It may be that online behavior has changed in ways that reduce such solicitations. For example, youth have migrated from chat rooms to social networking sites over past several years [9]. In social networking environments, youth may be confining more of their interactions to people they know, thus reducing online unwanted sexual comments or requests. It is also possible that young people have become more cautious regarding who they interact with because of Internet safety education. A tremendous effort has been made during the past decade to warn young people about the dangers of online sexual interactions. Also, publicity about criminal prosecutions may have deterred some of the aggressive sexual messaging. There have been many prosecutions of adults during the past decade for directing sexual messages to youth. Although research has found that most unwanted sexual messages online come from other youth and not adults, the potential to get into legal trouble from sending such messages may have been impressed on all Internet participants.

It is important to emphasize that the YISS measure of unwanted sexual solicitation is not a measure of online sexual predation by adults. Our research has shown that to the extent that youth know the age of the solicitors, they believe most of them to be other youth, not adults [2]. Moreover, the vast majority of unwanted sexual solicitations are readily deflected by their recipients [2]. Successful online predator crimes typically involve sexual solicitations that are considered flattering and desired by the recipients [10]. The current findings should not be interpreted to mean that one in 10 youth are solicited by online adult predators or that online predation by adults has declined. Nonetheless, if young people are subject to less unwanted sexual messaging, it does suggest some improvement in the online environment.

*Unwanted exposure to pornography*

The study also found a recent substantial decrease in youth exposure to unwanted pornography. This does not mean that young people who are voluntarily accessing pornography are having a hard time finding it. Rates of intentional viewing of X-rated material among young Internet users range from 13% to 23%, and percentages have remained relatively stable over time

**Table 3**
Multivariate (adjusted) trends in unwanted Internet experiences by youth gender

| Unwanted internet experiences | Year 2000 % (number) | Year 2005 % (number) | Year 2010 % (number) | Adjusted OR 2005–2010 (95% CI)[a] |
|---|---|---|---|---|
| Any sexual solicitation | | | | |
| Girls | 27 (188) | 18 (140) | 13 (101) | .60 (.45–.81)* |
| Boys | 12 (97) | 8 (60) | 4 (33) | .54 (.34–.84)** |
| Distressing sexual solicitation | | | | |
| Girls | 8 (54) | 7 (54) | 4 (31) | .51 (.32–.81)** |
| Boys | 2 (18) | 2 (13) | 1 (6) | .43 (.16–1.14) |
| Aggressive sexual solicitation | | | | |
| Girls | 4 (29) | 7 (50) | 5 (38) | .62 (.40–.98)*** |
| Boys | 2 (14) | 2 (13) | 1 (9) | .72 (.30–1.71) |
| Any harassment | | | | |
| Girls | 7 (46) | 10 (75) | 15 (121) | 1.47 (1.07–2.01)*** |
| Boys | 6 (49) | 8 (55) | 7 (55) | .82 (.55–1.22) |
| Distressing harassment | | | | |
| Girls | 3 (21) | 5 (34) | 8 (62) | 1.65 (1.06–2.56)*** |
| Boys | 2 (16) | 2 (16) | 2 (16) | .96 (.48–1.94) |
| Any unwanted exposure to pornography | | | | |
| Girls | 23 (159) | 31 (236) | 22 (176) | .63 (.50–.79)* |
| Boys | 27 (216) | 37 (275) | 24 (185) | .51 (.41–.65)* |
| Distressing unwanted exposure to pornography | | | | |
| Girls | 6 (41) | 10 (77) | 5 (40) | .45 (.30–.67)* |
| Boys | 6 (50) | 8 (58) | 5 (39) | .62 (.40–.94)*** |

OR = odds ratio.
95% confidence interval (CI) refers to being 95% confident that the interval contains the population percentage.
The rate calculations are based on the total number of boys and girls in each survey year.
Girls: Year 2000 (n = 708), Year 2005 (n = 760), and Year 2010 (n = 775).
Boys: Year 2000 (n = 790), Year 2005 (n = 738), and Year 2010 (n = 785).
[a] Adjusted odds ratios are based on multivariate logistic regression tests that control for other demographic characteristics, amount of Internet use, and locations of Internet use.
* $p \leq .001$; ** $p \leq .01$; *** $p \leq .05$.

[11,12]. The decline identified by the YISS studies involves unwanted exposure, such as those that occur through errors in searches, unwanted pop-ups, and spam e-mail [2]. The decrease in exposure could be due to two factors. First, spamwares and filters have been increasingly present on networks and individual computers, and their detection capacities have become more refined. Second, young people may have become better educated and more savvy about opening unidentified e-mail or clicking on unidentified links.

### *Online harassment*

The 2010 YISS findings show an increase in Internet harassment, from 9% in 2005 to 11% in 2010, continuing an increase from 2000. It is interesting that this trend is opposite the direction of the trend for sexual solicitation. As described earlier, online harassment involves things such as making aggressive or demeaning statements or spreading rumors online. One might have expected that some of the same mechanisms that reduced sexual solicitation, such as increased education, would have reduced harassment as well. However, several features of harassment may make its trend different from sexual solicitation. First, more of the harassment may come from within the youth's chosen social network, for example, classmates who have been accepted as friends on social networking sites. Second, mobilization and education against online harassment are not as longstanding and intensive as that against sexual solicitation. Public concern over "cyberbullying" only took off in recent years. Now that cyberbullying has become a more widespread topic of news and education, it will be interesting to see whether harassment declines as sexual solicitation has done.

Even though online harassment has increased, this cannot be interpreted as a general increase in harassing and bullying behavior by youth (i.e., new types of perpetrators being drawn in to harassing peers). It is possible that general harassment and bullying behavior is migrating online in the same way that general adolescent communication has migrated. There is some evidence for this, given that survey data with youth show decreases in general peer harassment and bullying happening over the same period [13].

Nonetheless, the increase in online harassment suggests it is an important area for additional attention by parents, schools, and health professionals. The increase in harassment for girls is a particularly concerning trend. Research has identified gender differences in the bullying behavior and victimization; one study of school bullying among youth in grades 6–10 found boys were more involved in physical or verbal bullying, whereas girls were more involved in relational bullying [14]. The current findings suggest that whatever is driving the increase in harassment is happening mostly for girls.

One obvious direction is to increase the integration of online harassment prevention into existing evidence-based peer victimization and bullying programs. Evidence also has shown that social and emotional learning programs in early elementary grades can improve behavior and reduce aggression down the road [15]; interventions such as these are likely to continue decreasing trends in offline bullying and reverse the trend in online harassment as well.

### *Limitations*

Findings should be interpreted keeping in mind several limitations. First, as with all self-report measures, some youth respondents may not have disclosed all unwanted Internet experiences. Response rates declined somewhat between the YISS studies, reflective of a general decrease in response rates for

**Table 4**
Multivariate (adjusted) trends in unwanted Internet experiences by youth race/ethnicity

| Unwanted Internet experiences | Year 2000 % (number) | Year 2005 % (number) | Year 2010 % (number) | Adjusted OR 2005–2010 (95% CI)[a] |
|---|---|---|---|---|
| Any sexual solicitation | | | | |
| White, non-Hispanic | 19 (207) | 12 (128) | 8 (83) | .60 (.44–.81)* |
| Black, non-Hispanic | 18 (28) | 20 (32) | 10 (20) | .38 (.20–.71)** |
| Hispanic or Latino | 25 (27) | 19 (24) | 13 (19) | .77 (.38–1.58) |
| Distressing sexual solicitation | | | | |
| White, non-Hispanic | 4 (47) | 4 (44) | 2 (19) | .45 (.26–.78)** |
| Black, non-Hispanic | 7 (10) | 7 (11) | 4 (9) | .52 (.20–1.35) |
| Hispanic or Latino | 7 (8) | 6 (8) | 4 (6) | .85 (.27–2.69) |
| Aggressive sexual solicitation | | | | |
| White, non-Hispanic | 3 (32) | 4 (37) | 2 (23) | .64 (.37–1.09) |
| Black, non-Hispanic | 1 (2) | 8 (13) | 5 (10) | .41 (.17–1.01) |
| Hispanic or Latino | 5 (5) | 8 (10) | 7 (11) | 1.05 (.41–2.66) |
| Any harassment | | | | |
| White, non-Hispanic | 6 (70) | 10 (105) | 11 (116) | 1.05 (.79–1.40) |
| Black, non-Hispanic | 5 (7) | 5 (8) | 12 (25) | 2.18 (.93–5.12) |
| Hispanic or Latino | 11 (12) | 7 (9) | 11 (16) | 1.38 (.57–3.33) |
| Distressing harassment | | | | |
| White, non-Hispanic | 2 (25) | 4 (38) | 5 (48) | 1.23 (.79–1.93) |
| Black, non-Hispanic | 2 (3) | 3 (4) | 6 (13) | 2.13 (.67–6.83) |
| Hispanic or Latino | 5 (5) | 3 (4) | 7 (11) | 2.72 (.82–8.98) |
| Any unwanted exposure to pornography | | | | |
| White, non-Hispanic | 26 (279) | 36 (381) | 23 (243) | .53 (.43–.64)* |
| Black, non-Hispanic | 24 (36) | 27 (44) | 22 (46) | .77 (.48–1.26) |
| Hispanic or Latino | 30 (32) | 42 (54) | 27 (41) | .52 (.31–.86)*** |
| Distressing unwanted exposure to pornography | | | | |
| White, non-Hispanic | 6 (60) | 9 (99) | 5 (49) | .48 (.33–.68)* |
| Black, non-Hispanic | 11 (16) | 8 (12) | 5 (11) | .59 (.24–1.44) |
| Hispanic or Latino | 9 (10) | 15 (19) | 9 (13) | .53 (.25–1.14) |

OR = odds ratio.
95% confidence interval (CI) refers to being 95% confident that the interval contains the population percentage.
The rate calculations are based on the total number of youth in each race/ethnicity category and survey year.
White, non-Hispanic: Year 2000 (n = 1,091), Year 2005 (n = 1,070), and Year 2010 (n = 1,048).
Black, non-Hispanic: Year 2000 (n = 153), Year 2005 (n = 161), and Year 2010 (n = 208).
Hispanic or Latino: Year 2000 (n = 108), Year 2005 (n = 130), and Year 2010 (n = 152).
[a] Adjusted odds ratios are based on multivariate logistic regression tests that control for other demographic characteristics, amount of Internet use, and locations of Internet use.
* $p \leq .001$; ** $p \leq .01$; *** $p \leq .05$.

national telephone surveys [16–18] facing the challenges of caller identification, confusion with telemarketers, and survey saturation among the general population. However, analyses suggest that the decline in participation has not influenced the validity of most surveys conducted by reputable surveying [17]. Keeter et al. [17] noted that compared with government benchmarks, the demographic and social composition of telephone survey samples are quite representative on most measures (p. 777).

## Conclusions

Findings from the YISS studies suggest that trends in youth online unwanted experiences may contradict impressions that the general population, professionals, and the media have about what is happening. It is important that such trend data be collected and disseminated by professionals, integrated into prevention directions and material, and used to inform policy. Problems that have been highlighted and may cause parents to be reluctant to let their youth use the Internet are relatively infrequent and, importantly, have decreased over the past 5 years.

However, because the current study suggests that online harassment may be increasing for youth, particularly girls, this topic may require additional mobilization, using tested and evaluated programs that can incorporate messages relevant to age and demographic subgroups. Parents and youth need information about what do to in cases where Internet harassment occurs. Bystander education, which has proven successful in other prevention campaigns [19–21] should be included so that youth can help intervene effectively when they see problems like harassment occurring. Schools need to have policies in place for when online harassment incidents become serious bullying problems that threaten the healthy functioning of youth in school environments.

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# EXHIBIT E

CRIMES AGAINST CHILDREN RESEARCH CENTER

# Have Sexual Abuse and Physical Abuse Declined Since the 1990s?

David Finkelhor & Lisa Jones

**October 2012**

*This bulletin summarizes statistics on trends for sexual and physical abuse. A decline in sexual abuse since the early 1990s is a conclusion supported by 3 independent sources of agency data and 4 separate large victim surveys. The trend for physical abuse is less clear, since several of the data sources show conflicting patterns.*

Information from several sources has shown declining rates of both sexual and physical abuse from the early 1990s through 2010. But other data and a variety of opinion have disputed whether these trends indicate a true decline in prevalence. This brief is an effort to assess what the current evidence is about these trends.

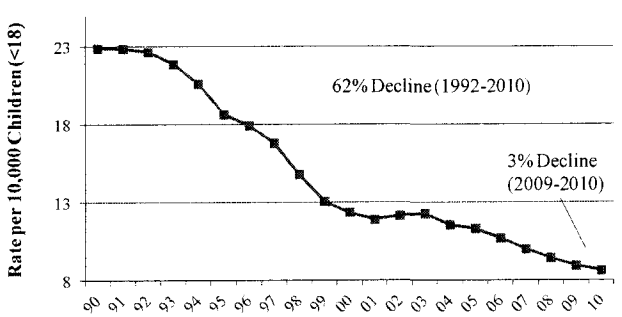
## Sexual Abuse – 7 Independent Sources Show Declines

The case that there has been a true decline in sexual abuse is stronger than the case about physical abuse, and it comes from a variety of sources. Three independent sets of agency data show substantial declines in sexual abuse over this period. At least 4 victim self-report surveys also show declines. A variety of related child welfare "outcome indicators" support the idea of a true decline. Finally, efforts to substantiate "alternative explanations" for the decline, due to changed polices or practices, have not been supported.

### Agency data

*Child protection system substantiations.* The National Child Abuse and Neglect Data System (NCANDS) aggregates data from state child protective agencies. That data show a 62% decline in rates of substantiated sexual abuse starting in 1992 and continuing through 2010, with the largest drop occurring in the late 1990s (Figure 1). The raw numbers declined from over 150,000 to 63,000 cases. These numbers primarily count cases involving abuse by family member and other caregivers.

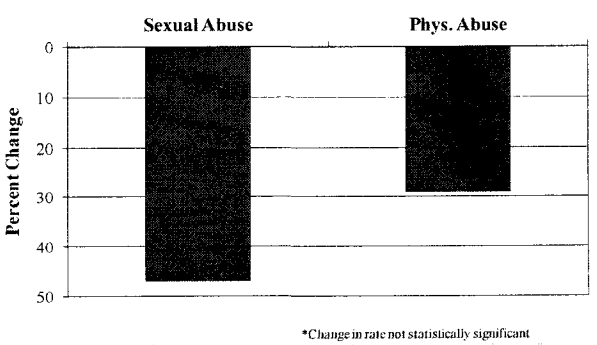
Figure 1. NCANDS National Estimate Substantiated Sexual Abuse (1990-2010)




Source: National Child Abuse and Neglect Data System

*Cases known to professionals – The National Incidence Study.* Because of concern that child protection agency data may not be a fully reliable count of child maltreatment, roughly every decade the federal government has conducted a more rigorous National Incidence Study (NIS) of Child Abuse and Neglect. The NIS gets reports directly from a systematic sample of child-serving professionals (who represent the whole population of professionals in the country). The NIS also uses detailed and consistent criteria to evaluate the validity of the reports they receive. This is to address issues like changes in standards or screening out criteria in child protection practice. Between 1993 and 2005, the study documented a significant 47% decline in sexual abuse measured by what they call their "endangerment standard" (Figure 2). This finding almost completely confirmed what the NCANDS data shows.

Figure 2. National Incidence Study (NIS) Change in Rate of Sexual Abuse and Physical Abuse (1993-2005) (Endangerment Standard)




*Change in rate not statistically significant

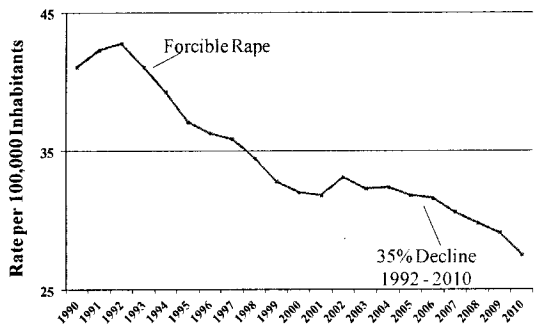
*The NIS finding of a 47% drop strongly suggests that declines in the CPS data are not due primarily to changed screening standards or the implementation of alternative response systems.*

*Cases known to police.* The FBI collects and publishes data from local law enforcement for several major crime types including rape. While the FBI cannot break down the rape statistics by age of victim, over 50% of FBI-reported rape occurs to persons under age 18.[1] Thus the FBI rape statistic is a good proxy of sex crimes against minors.

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*The FBI rape data show a sharp decline that, like the NCANDS data, started in 1992 and continued through 2010. The total drop was 35%, and the trend line is remarkably parallel to the NCANDS trend line (Figure 3).*

Figure 3. FBI Forcible Rape (1990-2010)




Source: FBI, Crime in the United States Reports

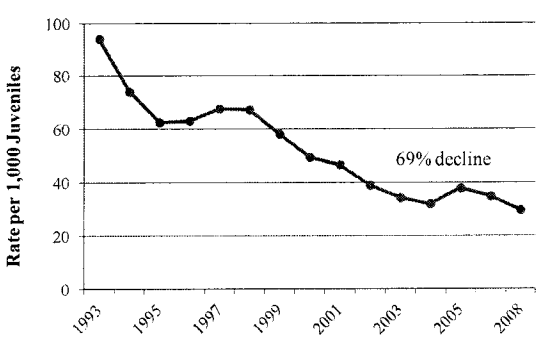
## Victim Self-report Surveys

It is always possible that agency data could show declines because victimizations were not being reported. So survey data from victims themselves are useful to confirm that less victimization is occurring. Four surveys show declines in sex crimes against juveniles during this time period.

*The National Crime Victimization Survey (NCVS).* This study collects crime victimization information annually from a nationally representative sample of tens of thousands of US households every 6 months, and one of the crimes it measures is sexual assault. While there is no information on victims under 12, self-reports of sexual assault are gathered from the 12 to 17 year olds.

*The NCVS shows a decline of 69% in the annual rate of sexual assaults against teens from 1993 through 2008 (Figure 4).*

Figure 4. National Crime Victimization Survey (NCVS) Sexual Assault (1993 – 2008)

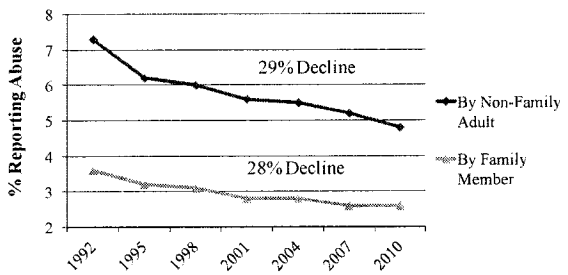



Note: Age 12 – 17 years. 3 year averages except 2008 which is a 2 year average. 2006 data excluded.
Source: National Crime Victimization Survey

*The Minnesota Student Survey.* This study is conducted every 3 years with all 6th, 9th and 12th graders enrolled in public schools in selected school districts. This survey asks specific questions about lifetime sexual abuse by family members and non-family members.

*The Minnesota Student Survey has shown between 1992 and 2010 a 29% decline in sexual abuse by non-family and a 28% decline in abuse by family members (Figure 5).*

Figure 5. Minnesota Study Survey Sexual Abuse (1992 – 2010)

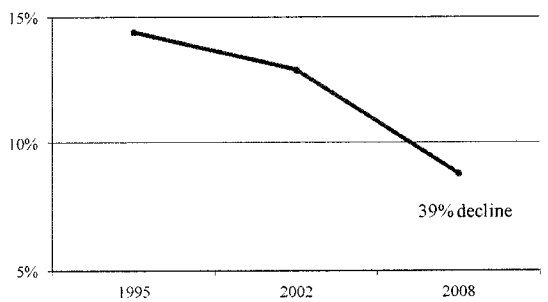



Note: respondents are 6th, 9th, and 12th grade students enrolled in public schools in selected Minnesota school districts.
Source: Minnesota Student Survey, 1992-2010

*The National Survey of Family Growth.* This study gathers information every few years from national samples of women between the ages of 15 and 44 about sexual and reproductive activity. It asks a question about whether their first experience with sexual intercourse was prior to age 15 and occurred with a person who was 3 or more years older. This is a measure of sexual abuse at the hands of adults and

*Between 1995 and 2008, NSFG found a 39% decline in the women age 15-25 who reported that their first experience with intercourse was before age 15 with an older partner (Figure 6).*

Figure 6. Statutory Rape (1995-2008) Percentage of Females, Ages 15-24, Whose First Sexual Intercourse Occurred at Age 15 or Younger with an Individual 3+ Years Older




Source: National Survey of Family Growth, analyzed by Child Trends

*The National Survey of Children Exposed to Violence (NatSCEV).* This study was conducted in 2008 and could be compared to a prior survey using the same methods and questionnaire used in 2003. The comparison found that sexual assault in the past year, including sex offenses at the hands of adults, declined from 3.3% for all children ages 2-17 in 2003 to 2.0% in 2008[2] (Table 1).

Table 1. Sexual Victimization (2003 and 2008)
National Surveys Using Juvenile Victimization Questionnaire

| | % of Children | | |
|---|---|---|---|
| Any sexual victimization | 8.0 | 6.7 | 0.06 |
| Any sexual assault | 3.3 | 2.0 | <0.001[a] |
| By a known adult | 0.3 | 0.2 | 0.45 |
| By a nonspecified adult | 0.3 | 0.3 | 0.99 |
| By a peer | 1.2 | 0.6 | 0.01[a] |
| Rape, completed/attempted | 2.1 | 1.3 | 0.02[a] |
| Sexual exposure/flashed | 3.2 | 3.0 | 0.67 |
| Sexual harassment | 3.8 | 2.9 | 0.06 |
| Sexual misconduct/statutory rape | 2.9 | 1.5 | <0.001[a] |

[a] $P \leq .05$
Source: Finkelhor, D., Turner, H.A., Ormrod, R.K., & Hamby, S.L. (2010) *Archives of Pediatrics & Adolescent Medicine 164*(3): 238-242.

*National Survey of Adolescents.* There is, however, at least one national survey that did not find a significant decline during this interval. The National Survey of Adolescents conducted two national studies 10 years apart[3] and reported a non-significant decline in lifetime sexual assault for girls from 13.2% in 1995 to 11.5% in 2005 and a non-significant rise for boys from 3.5% to 3.8%.

### Associated Outcome Indicators

Sexual abuse is well known to be associated with a number of other child welfare problems, such as running away, teen pregnancy and suicidal behavior. While these indicators could change for many other reasons, if they were trending in the same way as sexual abuse, it could be seen as indirect support for true decline. Data from national vital statistics show that the teen suicide rate has declined 30% from 1990 to 2010, the rate of teenage running away as measured by police arrests has declined 60%, and the rate of teen births declined 55% from 1991 to 2010. Other indicators of risky and early sexual behavior have also declined.[4] In addition, sex offender re-offense rates have come down by 41%.[19]

### Tests of Alternative Explanations

A major concern about the decline in sexual abuse shown by the NCANDS data is the possibility that the drop could be due, not to a real decline, but to changed standards, less funding for investigations or the exclusion of certain categories of offenders or victims.

To a large degree, the NIS findings do address this issue because that study looked at cases using the identical criteria and standards at different points in time. But other studies have also tested the alternative explanations with various data. One study looked at whether worker caseload could account for some of the decline, but found it could not.[5] Another study[6] found evidence that sexual abuse cases involving very young victims and teenage perpetrators had disproportionately declined in some states in ways consistent with more conservative standards, but that these changes were not substantial enough or consistent enough across states to explain most of the decline.

### Sexual Abuse: Summary

There is fairly consistent and convergent evidence from a variety of sources pointing to large declines in sexual abuse from 1992 to 2010. The idea that child protection system data is a misleading indicator on this trend is contradicted by the fact that the decline shows up in other sources that do not rely on CPS. The NIS study is particularly important because it uses consistent criteria across time, and confirms the child protection system trends. The self-report surveys are also very important because they represent victim testimony itself. It seems unlikely that, in the face of more public attention to sexual abuse and decreasing stigma, youth would be more reluctant to disclose in surveys. In fact one study shows greater reporting of sexual abuse to the authorities.[7] Some have raised the question of whether sexual abuse has become more "normal" and thus less disclosed in surveys by youth. But the surveys showing declines do not use terms like sexual abuse or assault, but simply ask about sexual behaviors and categorize them as assault when certain behaviors occur.

*Our judgment is that the decline in sexual abuse is about as well established as crime trends can be in contemporary social science.*

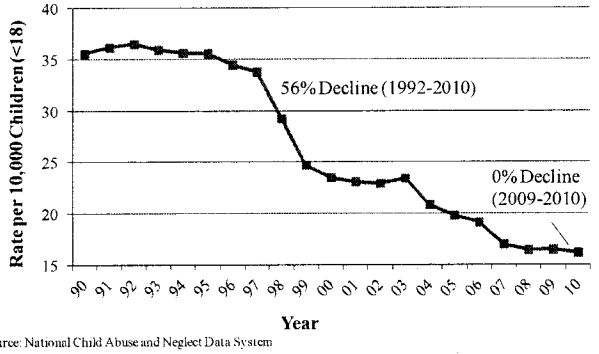
## Physical Abuse – Contrasting Findings from Different Sources

The evidence for a decline in physical abuse is more mixed than for sexual abuse, and varies perhaps by the type of physical abuse being considered. Both NCANDS data representing national CPS cases and NIS data representing national child serving professionals show declines in caregiver perpetrated physical abuse. However, hospital data on young children admitted for inflicted injuries do not show a decline. Child maltreatment fatalities have also not declined, but FBI reported homicides of young children and older children have. Two national victim surveys of youth do not find decreases in caregiver abuse, but one state survey did, and several other surveys show that youth are exposed to considerably less interpersonal violence in general since the early 1990s.

## Agency data

*Child protection substantiations.* NCANDS data from child protection agencies show a 56% decline in the rate of substantiated physical abuse from 1992 to 2010 with two periods of particularly steep drops between 1997 and 2000 and between 2003 and 2008 (Figure 7). The comparative numbers were from 240,000 cases in 1992 to 118,700 cases in 2010.

Figure 7. NCANDS National Estimate Substantiated Physical Abuse (1990-2009)



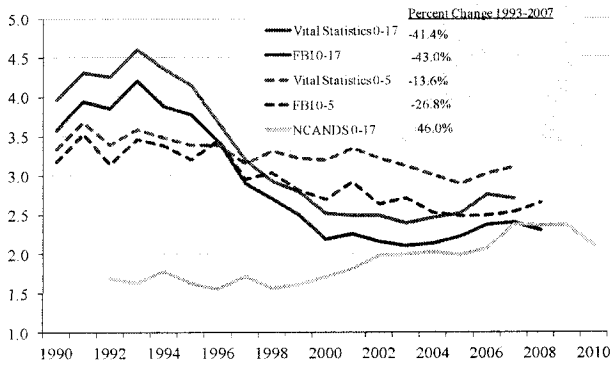

Source: National Child Abuse and Neglect Data System

*Cases known to professionals – The National Incidence Study.* This study which samples community professionals and uses consistent definitions of abuse, found that, using their "endangerment standard," physical abuse had declined 29% from 1993 to 2005 (Figure 2). This somewhat confirms the NCANDS trend data but not quite to the same extent as with sexual abuse.

*The National Incidence Study shows a clear 29% decline in physical abuse, but it is not as large as the decline evident in the CPS substantiation trend.*

*Physical abuse deaths.* Three sources of information exist on child maltreatment deaths: NCANDS data from child protection agencies, the FBI data from police and Vital Statistics death records. The sources are discrepant. The NCANDS data show an increase of 46% in child maltreatment fatalities from 1993 to 2007 (Figure 8). However, a majority of these maltreatment deaths are due to neglect and not physical abuse.
By contrast, homicide data from the FBI show a 43% decline for all children (0-17) over this same time period and a 26% decline for children 0-5, the ages during which most homicides are perpetrated by caregivers. The vital statistics data roughly parallel the FBI data showing a 41% decline for 0-17 and 14% decline for 0-5.

Figure 8. National Child Abuse Deaths and Homicides (1990-2008)




*So two sources, from the FBI and Vital Statistics, show declines in the most severe type of abuse resulting in death, but one other source does not.*

*Hospital data.* Several researchers have also looked at trends in physical abuse with hospital data. Only a small fraction of physically abused children, particularly the youngest and most severely injured, are admitted to hospitals. *These studies have found no large decline and in some cases increases in these children.* A large study of acute care hospitals[8] found a 10.9% increase from 1997 to 2009 in children under 1 admitted for abuse, and a 9.1% decrease for children 1-18 years old. Wood et al. (2012)[9], using a sample of 38 hospitals found between 2000 and 2009, found a .79% increase per year in hospital admissions for physical abuse to children under age 6 and 3% per year increase in admissions for traumatic brain injury to children under age [1]

*The hospital data do not show a decline.*

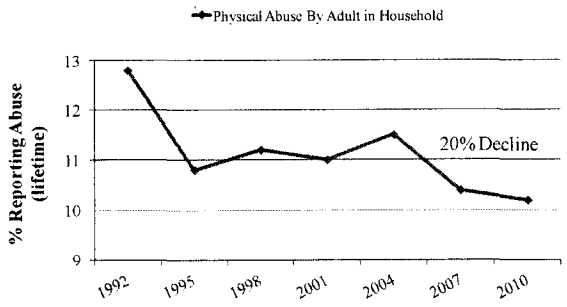
## Survey data

*The survey data also show mixed findings on physical abuse.*

The NatSCEV compared past year physical abuse by caregivers in 2003 and 2008 in 2 national surveys and found no significant change; in fact, the indicator actually increased.[2] The National Survey of Adolescents[10] compared lifetime physical abuse from two national surveys in 1995 and 2005 and found no significant change although the indicator decreased about 6%.

The Minnesota survey asked a question about students being abused by other family members and tracked a 20% decline from 1992 through 2010 (Figure 9).

Figure 9. Juvenile Physical Abuse Trends in Minnesota (1992 - 2010)

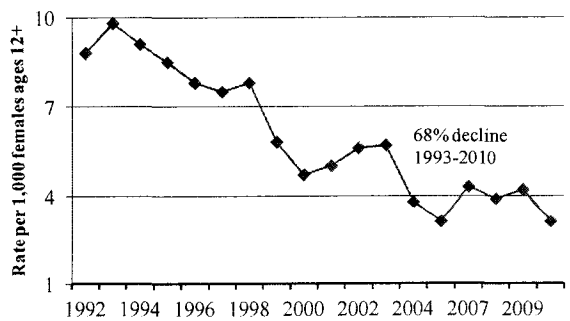



Note: respondents are 6th, 9th, and 12th grade students enrolled in public schools in selected Minnesota school districts.
Source: Minnesota Student Survey, 1992-2010

The NCVS reports a large decline in assaults against youth ages 12-17, with simple assault down 59% and aggravated assault down 69%. Most of these assaults are by peers, not family members.†

The NCVS also reports a large decline in intimate partner violence, down 68% from 1993 through 2008 (Figure 10). Most of this violence is between adults, but some may have been in households where children were present and observers.[11]

Figure 10. NCVS Intimate Partner Violence (1992-2010 )




Source: National Crime Victimization Survey Data

Other surveys report declines in youth exposure to assault, but it is mostly peer abuse. For example, the Youth Risk Behavior Survey (YRBS) reports a 16% decline in teens saying they were in a fight in the past year.[12]

So of three surveys asking specifically about physical abuse by caregivers, only one showed a significant decline (19%) and its data is confined to Minnesota. Other national surveys show declines in youth exposure to violence, but it is not clear how much of this is caregiver violence.

*The survey data on physical abuse do not confirm the agency data in the same way that they do for sexual abuse.*

### Associated Indicators

Violence in general has been declining in the US during the last 20 years. There has been a substantial and widely documented decline in violent crime in the US during the period since about 1992. Police reports of overall violent crime are down 47% from 1992 to 2010.[13] The National Crime Victimization survey finds from victim self-reports that crimes (including assault) for persons living in households with children declined 68% from 1993 to 2010.[14] Homicide rates have declined as well.[15] If people are acting less violently in general, they might be physically assaulting their children less as well, but some people feel that societal violence and child physical abuse are phenomena without common etiology and so inferences about trends cannot be made from crime data.

### Physical Abuse: Summary

The strongest evidence that overall physical abuse has declined is the evidence from the NIS. This study was specifically designed to monitor rates and it is unique in its use of exactly consistent criteria across time points.

However, a variety of other data sources do not show trends consistent with the NIS. The rise in child maltreatment fatalities as measured by NCANDS is particularly important since these are the biggest protection failures. There is, however, evidence that the maltreatment fatalities measured by NCANDS have increased over time at least partly as a result of more careful review and classification of child death cases, particularly those conducted by the child death review boards that have been empaneled in most states.[16-18] The fact that FBI homicide and vital statistics data show a decline when NCANDS does not could be because police and medical examiner judgments, using criteria for what can be charged as a homicide, have been less vulnerable to expansion over time.

The hospitalization data also does not show a decline. This system of data collection is relatively recent and has been developing and expanding during the time period in question. It is possible that as a result of training and system implementation, the coding process to label cases as abuse has gotten more refined and universal, and thus masked a decline. But another explanation for the hospital data trends is that abuse with serious injuries involving hospitalization may be a different phenomenon from overall physical abuse and thus it trends differently.[8] But that leaves a question about why serious abuse resulting in hospitalization has a different trend from homicides, because homicide also is an indicator of the most serious abuse cases.

*In summary, the trends in physical abuse are difficult to conclusively summarize because of contradiction among the various data sources.*

† analysis conducted by authors

## CONCLUSION

The controversy over trends in physical and sexual abuse is sometimes characterized as a debate over the validity of trends found in the CPS data. But the reality is that there are multiple sources of data on trends that can be interpolated to try to assess what is happening.

*At least in the case of sexual abuse, the convergence of multiple independent data sources leads to a conclusion that a decline has likely occurred.*

Physical abuse is more ambiguous. Two of the strongest indicators (the National Incidence Study of Child Abuse and Neglect and the FBI homicide data) point to a decline in physical abuse. But the existence of contradictory information on physical abuse from other sources means that more evidence needs to be gathered to provide an account that explains all the evidence we have.

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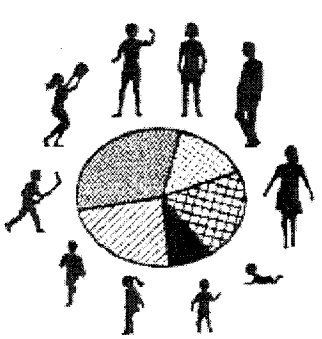
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on behalf of themselves and others similarly
situated

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**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

JOHN DOE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, et al.,

Defendants.

Civil Case No. C 12 5713

**DECLARATION OF BRIAN R. ABBOTT**

I, Brian R. Abbott, declare as follows:

1. I am a licensed clinical and forensic psychologist. I have treated and evaluated sexual offenders over the past thirty-three years, have presented at professional conferences about risk assessment of sexual offenders, and have been retained by the California Department of Mental Health to conduct training on the use of scientifically defensible methods of sexual recidivism risk assessment with sexually violent predators. I am well acquainted with the Internet viewing habits of sexual offenders that I have treated and evaluated.

**Summary of Declaration**

a. Ninety percent of sex crimes against children (age under 12) are committed by persons who know the victim; nearly half of these involve family members. Eighty percent of sexual assaults against older victims involve acquaintances or family members.

b. The vast majority (87%-95%) of sex crimes are committed by people other than registrants, and this is even more pronounced with respect to crimes committed using the internet (96%).

c. Sexual offense recidivism rates are much lower than commonly believed. Two studies by the California Department of Corrections and Rehabilitation have revealed a sexual recidivism rate over three years of 3.25% and 3.6%, respectively. Studies with longer follow up periods have found that lifetime sexual offense recidivism rates are much lower than commonly believed, averaging between 14 and 20%.

d. The risks that these offenders pose to the community vary widely. The majority of sex offenders released on parole in California after 2005 have risk assessment scores of three or under on the Static-99, meaning that the state classifies them as posing a low or moderate-low risk of reoffending.

e. There is an extensive body of evidence and research that document the positive public safety impact of sex offender treatment, particularly when coupled with supervision and management strategies.

f. Sex offenders primarily use the internet for the same purposes as other members of the general public. They access the Internet to obtain a wide variety of information for lawful purposes related to purposes such as seeking employment, obtaining news and other information, recreational pursuits, and socializing.

2. I am a licensed clinical and forensic psychologist in California and Washington and licensed clinical social worker in California. I have treated and evaluated sexual offenders over the past thirty-three years. I have performed forensic psychological evaluations on more than 1,400 sexual offenders and I have provided psychological treatment to more than 550 sexual offenders. In the course of this work I have evaluated dozens of sexual offenders who have been charged with sexual crimes committed via the Internet and, in general, I am well acquainted with the Internet viewing habits of sexual offenders that I have treated and evaluated. I am aware of the literature as it relates to the interface between Internet and sex crimes. I routinely qualify and testify as an expert witness in criminal and civil legal proceedings involving sexual offenders in state courts in California, Washington, and New Hampshire, as well as having qualified as an expert witness in Hawaii (1979-1982). A true and correct copy of my CV is attached to this declaration as Exhibit 1.

3. As part of my education, training, and experience I have received training in statistics. I have consulted with notable statistic experts from around the country as it applies to the development, cross-validation, and use of actuarial risk assessments instruments used to assess sexual offenders. I have presented at state-wide and national professional conferences about risk assessment of sexual

offenders where I teach information about sexual recidivism rates, the proper scoring and interpretation of actuarial risk instruments, and understanding the limitations in the accuracy of prediction of these instruments and considering this when rendering risk predictions.

4. In particular, I was retained by the California Department of Mental Health ("DMH") to conduct training on the use of scientifically defensible methods of sexual recidivism risk assessment with sexually violent predators ("SVP"s). I presented this training on March 9, 2010 to psychologists and psychiatrists who conduct SVP evaluations for DMH. I conducted a sexual recidivism study of incest offenders eight years after leaving treatment. I have authored two peer reviewed papers. The first article is entitled: "The Applicability of the Static-99 in Sexually Violent Predator Risk Assessments," published in the journal of Sexual Offender Treatment (2009) that includes material about the role of sexual recidivism rates in the predictive accuracy of the Static-99. I wrote another peer reviewed paper on the misuse of the clinically adjusted actuarial approach to sexual recidivism assessments that was published in the Journal of the American Academy of Psychiatry and the Law in June 2011. I co-authored a third peer reviewed article with Theodore S. Donaldson entitled "Prediction in the Individual Case: An Explanation and Application to the Static-99R in Sexually Violent Predator Risk Assessment" published in May 2011 in the Journal of the American Academy of Forensic Psychology. Dr. Donaldson and I have another article under peer reviewed that discusses serious errors in the development of the Static-99R High Risk reference group risk estimates and showing the margin of error under-estimates the recidivism rates in all reference groups. I wrote an article for the newsletter, "Perspectives," published by the California Coalition on Sexual Offending entitled, the role of local base rate information in determining the accuracy of sexual recidivism actuarial instruments. I co-authored a paper with Theodore S. Donaldson, Ph.D. that examines the influence of sexual recidivism

rates (base rates) in the accuracy for recidivism prediction for the two sexual recidivism actuarial instruments, the Static-99R and Static-2002R. I have written another unpublished article on the use of the SRA-FV measure in sexually violent predator risk assessments.

5. In the normal scope of my practice with sexual offenders, I routinely assess the potential for sexual reoffense of an alleged offender and testify about this assessment at trial. When rendering these opinions, I take into consideration contemporary sexual recidivism research data, as well as the limitations in the accuracy of prediction inherent in actuarial risk assessment instruments such as the Static-99R. I also testify about sexual recidivism research and limitations of using actuarial risk instruments to predict sexual recidivism in criminal and civil legal proceedings as an expert witness, in particular, but not limited to, the Static-99 and Static-99R.

6. The information in this declaration is based upon my personal knowledge and on sources of the type which researchers in my field would rely upon in their work. If called upon to testify, I could and would competently testify thereto. Much of the information in this declaration is included in a 2010 report by the California Sex Offender Management Board ("CASOMB"), *CASOMB Recommendations Report January 2010* ("CASOMB 2010"), available at http://www.casomb.org/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf (all websites cited were last visited November 1-2, 2012). The California legislature created CASOMB in 2006 to provide state and local agencies with an assessment of current sex offender management practices and recommended areas of improvement. See CASOMB 2010 at 7. The Board included representatives of the California Attorney General, the Department of Corrections and Rehabilitation (CDCR) and other law-enforcement agencies. *See id.* at 3-4, 7. Other information is included in a 2007 report by the California Sex Offender Management Task Force entitled *Making California Communities Safer:*

*Evidence-Based Strategies for Effective Sex Offender Management* ("Task Force 2007 Report") available at http://www.casomb.org/docs/CSOM%20Full%20Report.pdf. This report was funded by the U.S. Department of Justice and supported by CASOMB and the CDCR. *See id.* at vi.

**Registrants in California**

7. California has the largest number of registered sex offenders of any state in the United States. This is due to the large overall population of the state, the length of time California have been registering sex offenders (since 1947, retroactive to 1944), the large number of offenses that require mandatory sex offender registration, and the fact that California is one of the few states that has lifetime registration for all sex offenders, regardless of assessed risk. CASOMB 2010 at 50, 52. Even ex-offenders who have received certificates of rehabilitation often must continue to register. CASOMB 2010 at 52-53. The California Department of Justice Reports that as of November 1, 2012, there are 73,946 California registrants living in the community; this number does not include registrants who are incarcerated or have been deported. This information is found at http://www.meganslaw.ca.gov/statistics.aspx?lang=ENGLISH.

8. Although this one-size-fits-all system of registration allows the public to be aware of the majority of sex offenders that may live in their neighborhoods, it also means that the public and local law enforcement agencies have no way of differentiating between higher and lower risk sex offenders and cannot concentrate scarce resources on close supervision of the more dangerous offenders or on those who are at higher risk of committing another sex crime. *Id.* Policies and practices that are appropriate for high risk sex offenders, for example, are not necessarily applicable to lower risk offenders and are likely to be fiscally wasteful and even counterproductive. Task Force 2007 Report at 17. In fact, CASOMB

recommends that state change registration duration so that it would be based on Static-99 score: scores of 1-3 would register for 10 years, 4-5 for 20 years, and 6 and above for life. CASOMB 2010 at 96-97

9. The majority of sex offenders released on parole in California after 2005 have risk assessment scores of three or under on the Static-99, meaning that the state classifies them as posing a low or moderate-low risk of reoffending. *See* CASOMB 2010 at 54. In December 2009, the California Department of Justice determined that the Static-99 score distribution for the 28,612 registered sex offenders in the DOJ database, whose risk assessments were done prior to release from prison or at pre-sentencing, was as follows (from CASOMB 2010 at 54):

| Static-99 Score | Percentage of offenders with score | Risk Category |
|---|---|---|
| 0 | 12.45% | Low |
| 1 | 18.92% | Low |
| 2 | 19.84% | moderate-low |
| 3 | 17.74% | moderate-low |
| 4 | 13.21% | moderate-high |
| 5 | 7.89% | moderate-high |
| 6+ | 9.96% | High |

10. The California score distribution is consistent with the percentages of sex offenders found in each score category in the risk assessment study which was the basis for the Static-99 risk assessment tool. CASOMB 2010 at 54-55 (citing Hanson, Morton, & Harris, "Sexual Offender Recidivism Risk: What We Know and What We Need to Know," Ann. N.Y. Acc. Sci. 989:154–166 (2003)). As

these figures suggest, the risks that these offenders pose to the community vary widely. CASOMB 2010 at 39.

11. The vast majority of these offenders were convicted of crimes against persons whom they already knew. As the California Department of Justice reports on its website, "90% of child victims know their offender, with almost half of the offenders being a family member. Of sexual assaults against people age 12 and up, approximately 80% of the victims know the offender." State of California Department of Justice, Facts about Sex Offenders (2009), available at http://www.meganslaw.ca.gov/facts.aspx?lang=ENGLISH; see Task Force 2007 Report 2007 at 12-13.

12. My experience has shown that sex offenders primarily use the internet for the same purposes as other members of the general public. They access the Internet to obtain a wide variety of information for lawful purposes related to purposes such as seeking employment, obtaining news and other information, recreational pursuits, and socializing.

**Recidivism and Factors that Affect It**

13. Unfortunately, despite CASOMB's recommendation, California has not conducted an analysis of the long term recidivism rate (arrest or conviction) for sex offenders released from custody after serving a sentence in a CDCR prison. CASOMB 2010 at 13. However, some data are available.

14. First, CDCR analyzed the three-year sexual recidivism rates of 7,011 sexual offenders released from prison in 2006, available at: http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY0506_Outcome_Evaluation_Report.pdf. The three-year sexual recidivism rate (new conviction or return to prison on a parole violation for a sex

crime) was 3.25%. This result was similar to an earlier CDCR examination of the three-year sexual recidivism rate of 4,287 sexual offenders released from prison in California during 2003, available at: http://www. calcasapublicpolicy.org/wp-content/uploads/2008/02/somb-report.pdf. This study revealed a 3.6% sexual recidivism rate over three years.

15. Second, studies with longer follow up periods conducted by the US Department of Justice and the Canadian Government have found that sexual offense recidivism rates are much lower than commonly believed, averaging between 14 and 20%. Task Force 2007 Report at 50. Certain sub-groups, such as pedophiles who molest boys, and rapists of adult women, seem to present the greatest risk; they have been found over long follow-up periods to recidivate at rates of 52% and 39% respectively. Id. Repeat offenders are more likely to reoffend than first-time offenders. Those who comply with probation and treatment have lower re-offense rates that those who violate the conditions of their release. Id. Sex offenders who target strangers are more dangerous than those with victims inside their own family. Id.

16. Third, it is clear that the risk of sexual re-offense as well as any other type of serious offense is greatest in the first year following release from custody. This is true in national recidivism studies as well as those conducted in California. CDCR data for sex offender recidivism showed that more new offenses occurred in the first year following release then in the next two years combined. CASOMB 2010 at 38. First enacted in 1944, the California sexual offender registration law subjects both adults and juveniles and, as a result, with a large proportion of the registrants having committed sexual crimes decades previously but are required to register despite research showing the risk for sexual reoffense after seventeen years of offense free behavior is no greater than a nonsexual criminal later reoffending in a sexual way (Harris, A.J.R. and Hanson, R.K. *When is a sexual offender no longer a sexual offender*. Workshop presented at the Association for

Treatment of Sexual Abusers 31st Annual Research and Treatment Conference, Denver, CO, October 19, 2012)

17. Fourth, there is an extensive body of evidence and research that document the positive public safety impact of sex offender treatment, particularly when coupled with supervision and management strategies. CASOMB 2010 at 11. Sex-offender-specific treatment has been found to reduce re-offenses by up to forty percent. CASOMB 2010 at 35 (citing 1 January 2008 CASOMB 2010 Assessment of Current Management Practices of Adult Sex Offenders in California 137-156); *see* Task Force 2007 Report at 50.

18. Fifth, and relatedly, the period of time immediately after an offender's release from prison or jail is an important indicator of that offender's ultimate success in the community. CASOMB 2010 at 11. Monitoring the individual during this period, and whether an individual is cooperating with supervision and treatment, could be valuable in assessing whether an offender is likely to reoffend.

19. Sixth, to the extent these reporting requirements deter use of net for lawful purposes, they may increase risk of recidivism. Research has long shown that maintaining social stability and support and having a job reduces the risk that offenders will reoffend. See CASOMB, Homelessness among Registered Sex Offenders in California: The Numbers, the Risks and the Response (2008), at 19-20, available at www.casomb.org/docs/Housing%202008%20Rev%201%205%20FINAL.pdf

20. In fact, CASOMB reports that a "lack of stability is a primary contributing factor to an increased risk of re-offending." Id. at 27. To the extent that internet reporting requirements interfere with registrants' social stability and support or employment, they may well increase the risk of recidivism.

21. Finally, it is important to understand that the vast majority of sex crimes are committed by people other than registrants, and that this is even more pronounced

with respect to crimes committed using the internet. A comprehensive survey by the United States Department of Justice found that only 1 in 8 (13%) persons incarcerated for sex crimes had been previously convicted of a violent sex offense. (Greenfield, Bureau of Justice Statistics, "Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault", February 1997 at 22, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF. A recently published study (Sandler, J.C., Freeman, N.J., & Socia, K.M. (2008). Does a watched pot boil? A time series analysis of New York State's sex offender registration and notification law. *Psychology, Public Policy, and Law*, 19(4), 284-302) examined more than 170,000 sex crimes committed by 160,000 unique sexual offenders in New York over a period of 21 years (1986-2006). The results found an astonishing low proportion, 5%, of the sex crimes were committed by registered sexual offenders. In other words, 95% of the sexual crimes committed over the twenty-one year study period were committed by first time offenders. A 2006 study found that only 4% of persons arrested for crimes against youth victims that involved the internet were registered sex offenders. Janis Wolak, David Finkelhor, and Kimberly Mitchell, "Trends in arrests of 'online predators'"at 2 (2009), available at http://www.unh.edu/ccrc/pdf/CV194.pdf.

22. Thus, it is not particularly useful to require all registrants to provide information about their internet use. Only a small percentage of sex-crimes even involve the internet. Most registrants do not reoffend at all. And, as researchers Karl Hanson and Andrew Harris discussed at a presentation I attended the 2012 31st annual Association for the Treatment of Sexual Abusers Annual Research and Treatment Conference, the risk that an offender will recidivate drops the longer he lives in the community without being arrested for any new sex-related crimes. Thus, the percentage of registrants who will use the internet to commit a new sex-related crime is very small, and registrants who have been living in the community for a substantial period of time without any new arrests are particularly unlikely to use

the intent to commit a new crime. For registrants whose crimes did not involve the internet, the risk that they will use the internet to commit a new crime is even lower. And for registrants whose crimes involved adults, the risk that they will use the internet to commit a crime against a child is smaller still.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this second day of November, 2012 in San Jose, California.

Brian R. Abbott, Ph.D.

Brian R. Abbott, Ph.D.
Licensed Clinical Psychologist
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# EXHIBIT 1

# BRIAN R. ABBOTT, PH.D.

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## SUMMARY

More than 30 years of forensic and clinical experience with criminal justice populations, juvenile delinquency and dependency matters, and family court issues in such areas as:

- Forensic Evaluations
- Expert Witness
- Consultation
- Psychotherapy
- Program Development
- Research and Publishing
- Professional Education
- International Spokesperson

## OVERVIEW OF EXPERIENCE

**Forensic Evaluations**

- ✓ Performed more than 1,500 psychological evaluations in 25 years for county agencies, Courts, and attorneys.
- ✓ Court appointed evaluator for delinquency and dependency Courts in Santa Clara, San Benito, and Alameda counties.
- ✓ CONREP Sexually Violent Predator evaluator
- ✓ Specialty in the areas of adult sexual offenders, including delinquent youth, dependency cases, sexually violent predators, adolescent sexual offenders, internet sexual solicitation of minors and possession of child pornography, adult victims of sexual abuse, child and adolescent victim of sexual abuse, mentally disordered offenders, and family court matters (custody evaluations).
- ✓ Experience with various personality, cognitive, and physiological testing.

**Expert Testimony & Consultation**

- ✓ Qualified as expert witness in Criminal, Civil, Family, Delinquency, and Dependency Courts in various Counties in California, Washington, and Honolulu, Hawaii.
- ✓ Called as defense and prosecution witness
- ✓ Expertise includes assessment and treatment of adult, adolescent, and child sexual offenders, victims of sexual and physical abuse, and nonoffending parents; possession of Internet child pornography and Internet stings using police child-decoys, potential for sexual reoffending, administration and interpretation of the Abel Assessment for Sexual Interest™, psychosocial dynamics and characteristics of sexual offenders, nonoffending parents, and child sexual abuse victims, child development, capacity to parent, amenability to treatment, 288.1 PC evaluations, *competency to assist in defense, fitness for juvenile court proceedings, use of* sexual reoffense risk instruments, and assessment of mental disorders
- ✓ Assessment of reliability and validity of SVP commitment psychological evaluations
- ✓ Evaluation of the reliability and competency of investigative interviews of child victims, including use of suggestive questioning, children's memory, forensically defensible interviewing and in Child Sexual Abuse Accommodation Syndrome

**Professional Education**

- ✓ Conducted training for the California District Attorney's Association, California Association of County Counsels, and the California Public Defender's Association in the areas of sexual offender profiling, accommodation syndrome, false memory syndrome, and conducting sexual offender evaluations.
- ✓ Trained mental health and child welfare workers in the assessment and treatment of sexually abused children and their families, as well as in developing programs.
- ✓ Invited Speaker by Ministry of Justice in British Columbia, Canada and Norway to speak on developing child sexual abuse treatment programs.
- ✓ Presented in National conferences hosted by National Children's Hospital and C. Henry Kempe Center to present research studies and model programs.

- ✓ Field Practicum instructor for SJSU School of Social Work and UC Berkeley School of Social Welfare.

**Psychotherapy & Program Management**

- ✓ Clinically assessed and treated more than 550 and supervised treatment of more than 700 adult and adolescent sexual offenders (including rapists).
- ✓ Directly or supervised treatment of more than 750 child sexual and physical abuse victims.
- ✓ Developed one of the initial adolescent sexual offender treatment programs in the United States
- ✓ For seven years, responsible for the operations of Giarretto Institute, the first Child Sexual Abuse Treatment Program established worldwide.
- ✓ Director for the Giarretto Institute Clinical and Professional Training programs for three years, being responsible for more than 40 licensed and intern therapists. Supervised 30 intern therapist as supervising therapist over five years.
- ✓ Co-developed the first Child Sexual Abuse Treatment Program in Honolulu, Hawaii.

**International Spokesperson**

- ✓ National and international spokesperson for Giarretto Institute.
- ✓ Appeared on national television programs including Donahue, Late Night with Jane Whitney, Dr Dean Edell Show, to talk about issues related to child sexual abuse.
- ✓ Interviewed by local, national, and international print, radio, television news.
- ✓ Interviewed for documentaries aired by Swedish and Japanese television and on MTV.

## PROFESSIONAL EXPERIENCE

PRIVATE PRACTICE — 1984-current

GIARRETTO INSTITUTE — 1983-1998
Executive Director (1991-1998); Director of Clinical & Training Services (1988-1991); Supervising Therapist (1983-1988)

ALAMEDA COUNTY MENTAL HEALTH — 1986-1989
Psychiatric Social Worker

CATHOLIC SOCIAL SERVICES — 1980-1982
Program Coordinator and Clinician

KAPIOLANI CHILDREN'S MEDICAL CENTER — 1978-1980
Rape Crisis Worker

## EDUCATION

Ph.D. Clinical Psychology- California Institute of Integral Studies, San Francisco, CA. 1990

Masters in Social Work- University of Hawaii at Manoa, Honolulu, HI. 1980

Bachelors of Art in Criminology, Corrections Concentration- CSU Sacramento, Sacramento, CA. 1978

## PROFESSIONAL LICENSURE

Washington Licensed Clinical Psychologist- PY60248127 (2011)

California Licensed Clinical Psychologist- PSY18655 (2002)

California Licensed Clinical Social Worker- LCS10026 (1983)

## PROFESSIONAL AFFILIATIONS

Association for the Treatment of Sexual Abusers ("ATSA")

California Coalition on Sexual Offending

American Psychological Association

## PUBLICATIONS

Donaldson, T.S., **Abbott, B.R.**, & Michie, C. (2012). Problems with the Static-99R prediction estimates and confidence intervals. *Open Access Journal of Forensic Psychology*, 4, 1-23.

Abbott, B.R. (2011). Throwing the Baby Out with the Bath Water: Is It Time for Clinical Judgment to Supplement Actuarial Risk Assessment? Journal of the American Academy for Law and Psychiatry. 39, 222-230.

Donaldson, T.S. & **Abbott, B. R.** (2011). Prediction in the Individual Case: An Explanation and Application of Its Use With the Static-99R in Sexually Violent Predator Risk Assessments. *American Journal of Forensic Psychology, 29(1), 5-35*

Abbott, B.R. (2010). Is the Static-99R preselected high risk group appropriate to compare the risk performance of individuals undergoing sexually violent predator risk assessments? Unpublished paper.

Abbott, B.R. & Donaldson, T.S. (2009). Base Rates and the Static-99R and 2002R. Unpublished paper.

Abbott, B.R. (2009). Applicability of the new Static-99 experience tables in SVP risk assessments. *Sexual Offender Treatment*. 1, 1-24.

Abbott, B.R. (2008). The role of local base rate information in determining the accuracy of sexual recidivism actuarial instruments. *Perspectives*, (Fall, 2008). Available at www.ccoso.org/newsletter.php.

Abbott, B.R. (1995). Some family considerations in the treatment and case management of child sexual abuse. In T. Ney (Ed.), *Allegation in child sexual abuse cases: Assessment and management*. New York: Brunner/Mazel.

Abbott, B.R. (1995). Group Therapy. In C. Classen (Ed.), *Treating women molested as children*. San Francisco: Jossey Bass.

Abbott, B.R. (1993). Sexual reoffense rates among incest offender eight years after leaving treatment. San Jose, CA.: Giarretto Institute.

Abbott, B.R. (1992) A Psycho-educational Group for Adult Incest Offenders and Adolescent Sexual Offenders. In M. Mckay & K. Paleg (Eds.), *Focal group psychotherapy*. Oakland, CA.: New Harbinger Press.

Abbott, B.R. (1990) Adolescent Sexual Offenders and Delinquent Adolescents: A Comparison of Intergenerational Family Dynamics and Traumas and Offense Characteristics, *Dissertation Abstracts*, (June).

## RECENT TRAINING (CONDUCTED)

Abbott, B.R. (2012). The weakest link in the diagnosed mental disorder: Serious difficulty in controlling behavior. Los Angeles Public Defender's Office, SVP Unit, Chatsworth, CA (June 21, 2012).

Halon, R., Abbott, B.R., Donaldson, T.S., & Jacquin, K.M. (2012). Citizen and expert witness: The role of psychologists in laws they are asked to address. American College of Forensic Psychology 28th Annual Symposium, San Francisco, CA (April 21, 2012).

Abbott, B.R. (2011). Overview of the State-of-the-Science Risk Assessments in SVP Commitments. Sexual Offender Commitment Defense Association Seminar, Chicago, IL (August 13, 2011).

Abbott, B.R. (2011). Do SVP risk assessments predict the likely criterion? California Public Defender's Association Defending SVP Cases Seminar, Berkeley, CA (July 9, 2011)

Abbott, B.R. (2011). 1+1 ≠ 2: Developments in Sexual Recidivism Actuarial Risk Assessment. COOSO Annual Conference, San Mateo, CA. (May 12, 2011)

Abbott, B.R. (2010). Using the Static-99R and Other Recent Developments in Actuarial Risk Assessment. CCOSO Bay Area Chapter, San Leandro, CA (October 25, 2010)

Abbott, B.R. (2010). Challenges of Applying Sexual Recidivism Actuarial Instruments in SVP Risk Assessments. California Department of Mental Health Sexual Offender Commitment Program. Monterey, CA (March 9, 2010).

Abbott, B.R. (2009). Use of 2008 Static-99 Experience Tables in Risk Assessments. CCOSO Annual Conference, Los Angeles, CA. (May 14, 2009).

Abbott, B.R. (2009). Use of the Static-99 risk data in SVP cases. The Defender Association, Seattle, WA. (April 16, 2009).

Abbott, B.R. (2009). Efficacy of the adjusted actuarial approach in assessing risk of sexually violent predators. Raising the Bar Conference, Los Angeles County Public Defender, Los Angeles, CA. (December 11, 2008).

Abbott, B.R. (2008a). Presenting Risk Assessment Findings: Keeping the Message Simple. Sex Offender Commitment Defense Association, Atlanta, GA (October 25, 2008).

Abbott, B.R. (June 2, 2007). The Adjusted Actuarial Risk Assessment Method with SVP's. Workshop conducted for the California Public Defender's Association, Studio City, CA.

Abbott, B.R. (September 25, 2006). Age and Sexual Recidivism. Workshop conducted for CCOSO, Bay Area Chapter.

Abbott, B.R. (October 6, 2005). Forensic Issues in Evaluating Adolescent Sexual Offenders. Grand Rounds Training at Stanford Center for Law and Psychiatry.

Abbott, B.R. (September 19, 2005). Administration and Scoring of the Static-99. Workshop conducted for CCOSO, Central Valley Chapter.

Abbott, B.R. (May 5, 2005). Accuracy of predicting individual recidivism risk using the Static-99. Workshop presented at the California Coalition on Sexual Offending.

### *OTHER PUBLICATIONS*

The following works were published by Giarretto Institute 232 E. Gish Road, First Floor, San Jose, CA. 95112

Abbott, B.R. (1988). Risk Assessment Guidelines.

Abbott, B.R. (1988). Outcome of Treatment Progress for Adolescent Sexual Offenders.

Abbott, B.R. and Popper, P. (1988). Prognosis for Change Scale for Adolescent Sexual Offenders.

Abbott, B.R. (1988). Treatment Workbooks for Adolescent and Adult Incest Offenders.

Abbott, B.R. (1987). Identification of Adolescent Sexual Offenders Appropriate For Outpatient Community Based Treatment.

Abbott, B.R. (1985). Guidelines for Assessment of Adolescent Sexual Offenders.

## SPECIALIZED TRAINING (ATTENDED)

14 hours: D. Thornton (2010). Structured Risk Assessment: Using the Forensic Version of SRA in Sex Offender Risk Assessment. Atascadero, CA, (December 2 & 3, 2010).

3.5 hours: R. Wollert (2010). The Use of Probability Mathematics in Sexually Violent Predator Evaluations. California Department of Mental Health Sexual Offender Commitment Program. Monterey, CA (March 9, 2010).

3.5 hours: H. Barbaree (2010). The Effects of Aging on Sex Offender Recidivism. California Department of Mental Health Sexual Offender Commitment Program. Monterey, CA (March 10, 2010).

3.5 hours: R. Prentky (2010). Rapists: Classification, Diagnosis, Etiology. California Department of Mental Health Sexual Offender Commitment Program. Monterey, CA (March 10, 2010).

8 hours: D. Thornton & L. Helmus (2009). California DMH Training on Using and Interpreting Static-99R. Sacramento, CA. December 7, 2009

3.5 hour: R.K. Hanson & L. Helmus (2009). Actuarial Risk Assessment: The static-2002 training. ATSA 28th Annual Research and Treatment Conference. Dallas, TX. September 30, 2009.

3.5 hours: R.K. Hanson, A. Phenix, & L. Helmus (2009).Static-99 and static-2002: How to interpret and report scores in light of recent research. ATSA 28th Annual Research and Treatment Conference. Dallas, TX. September 30, 2009.

1.5 hours: L. Helmus, R.K. Hanson, D. Thornton, & H.E. Barbaree (2009). How well do current scales account for age and are adjustments necessary. ATSA 28th Annual Research and Treatment Conference. Dallas, TX. October 2, 2009.

7 hours in the use of the Stable 2007 by Andrew Harris, Ph.D. at ATSA Annual International Conference, October 23, 2008, Atlanta, GA

7 hours in the administration and scoring of the Juvenile Sexual Recidivism Risk Assessment Tool-II (JSORRAT-II) conducted by Douglas L. Epperson, Ph.D. May 10, 2006 at CCOSO annual conference. Update on use of (JSORRAT-II), CCOSO annual conference, May 11, 2007 (1-1/2 hours).

7 hours in assessment and treatment of Internet child pornography and attempted child molestation cases conducted by David Delmonico, Ph.D. at ATSA Annual International Conference, September 27, 2006, Chicago, IL.

14 hours in the use and scoring of the Hare PCL-R Second Edition conducted by Bob Hare, Ph.D. and Anna Salter, Ph.D. July 29 & 30, 2003.

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Attorneys for Plaintiffs
JOHN DOE, et al.
on behalf of themselves and others similarly situated

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**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

TEH

JOHN DOE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, et al.,

Defendants.

C 12 5713

Civil Case No. _____

**DECLARATION OF DAVID G. POST**

I, David G. Post, declare as follows:

1. I am a professor of law at Beasley School of Law, Temple University, specializing in copyright, trademark, other intellectual property law, and cyberlaw. In this declaration, I set forth my conclusions about the scope of the CASE Act's "Internet service provider" and "Internet identifier" reporting requirements for registered sex offenders, focusing on the meaning of the law's definitions and the breadth and range of activities they will affect. The information in this declaration is based upon my personal knowledge and experience and sources of the type that researchers in my field would rely upon in their work. If called upon to testify, I could and would competently testify thereto.

2. In relevant part, the CASE Act amends California law to provide:

> Cal. Penal Code § 290.014(b): If any person who is required to register pursuant to the Act adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 24 hours. The law enforcement agency or agencies shall make this information available to the Department of Justice. Each person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.
>
> Cal. Penal Code § 290.015(a): A person who is subject to the Act shall register. . .
> (4) A list of any and all Internet identifiers established or used by the person.
> (5) A list of any and all Internet service providers used by the person.
> (6) A statement in writing signed by the person acknowledging that the person is required to register and update the information in paragraphs (4) and (5), as required by this chapter.
>
> Cal. Penal Code § 290.024(a): "Internet service provider" means any business, organization, or other entity providing directly to consumers a computer and communications facility through which a person may obtain access to the Internet. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.
> Cal. Penal Code § 290.024(b): "Internet identifier" means any electronic mail address, user name, screen name, or similar identifier used for the purpose of

Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications.

**Summary of Declaration**

3. Based on my personal knowledge, experience, and research, I conclude that:

   a. The CASE Act's definitions of the terms "Internet service provider" and "Internet identifier" reporting requirements are ambiguous and would cause uncertainty for officials and registrants.

   b. Under reasonable and plausible readings of the statutory language, the CASE Act's "Internet service provider" and "Internet identifier" definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller and seemingly capriciously-chosen subset of those communications.

   c. Under *any* reading of the statutory text, the CASE Act will substantially curtail registrants' ability to engage in anonymous communication, and will require considerable and burdensome reporting even for ordinary, non-anonymous communication.

**Background and Experience**

4. I am a professor of law at Beasley School of Law, Temple University, in Philadelphia, Pennsylvania, specializing in copyright, trademark, other intellectual property law, and cyberlaw. I received a Ph.D. in biological anthropology (1978), specializing in computer analysis of primate behavioral data, and taught in the Anthropology Department at Columbia University for five years (1976 – 81), including courses on mathematical statistics and computer techniques in the social sciences. After graduating from Georgetown Law Center in 1986, I served as a law clerk to the Honorable Ruth Bader Ginsburg for one year, at the United States Court of Appeals for the District of Columbia Circuit (1986-87 term), and then practiced computer and intellectual property law for six

years (1987 – 93) as an associate at the Washington, D.C. law firm of Wilmer, Cutler & Pickering. After clerking again for then-Justice Ginsburg at the Supreme Court of the United States (1993-94 term), I began writing and teaching in the area of Internet law, first at Georgetown University Law Center (1994 – 97) and then Temple University (1997 – present). During this period I have published several dozen scholarly articles, and participated as presenter and/or commentator at numerous scholarly conferences and Continuing Legal Education seminars, relating to Internet law. I have recently published two books on the subject: In Search of Jefferson's Moose: Notes on the State of Cyberspace (Oxford, 2009), and Cyberlaw: Problems of Policy and Jurisprudence in the Information Age (West, 4th ed. 2010), (co-authored with Paul Berman, Patricia Bellia, and Brett Frischmann), currently the most widely-used casebook in the field.

5. I have previously served as an expert in the case *John Doe and Jane Doe 1 through 36 et al. v. State of Nebraska et al.,* Docket No. 8:09-cv-456 (D. Neb.), involving a challenge to Internet-related reporting requirements for registered sex offenders, for which I prepared an expert report and testified at trial.

**Background: Size and Use of Internet**

6. The Internet is a network of networks that communicate with each other using a common protocol (Internet Protocol, or IP).[1] It does not have a central control point or directory that will be aware of any newly-created web page. In addition, web pages are constantly created and deleted, many by automated processes. Thus, it is impossible to determine the precise "size" of the Internet at any given time.

[1] The most common definition of "the Internet" is probably that found in the federal Telecommunications Act, 47 U.S.C. § 230(f)(1) ("[T]he international computer network of both Federal and non-Federal interoperable packet switched data networks."). Roughly speaking, federal law treats Internet communications services as a type of "information service" and not "telecommunications service." 47 U.S.C. § 153(24) (defining "information service" to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.")

7. Various properties of the Internet can be measured, however. For example:

   a. A domain name (e.g., "google.com") must be publicly registered with an established registrar in order to be available to a generic Internet-connected computer. These registrars report that there are over 200 million active domain names at this time.

   b. A Uniform Resource Locator (URL) can be used to identify a specific web page or other form of online content hosted on a given domain. Although not all URLs are known or recorded, see ¶6, Google reported in 2009 that it had found and indexed over 1 trillion URLs as of July 2008, a number that has undoubtedly increased since then. While some of these URLs are duplicates (they point to the same content) or possibly no longer extant, this gives a rough lower bound as to the number of web pages in existence.

8. The Internet is an increasingly common platform for individuals to communicate about a wide range of subjects. Today most Americans use the Internet, and the typical user spends more than an hour per day online on average.

9. The most popular Internet sites generate a tremendous amount of traffic. For example, there are now over 1 billion registered accounts on Facebook, and Twitter users generate hundreds of millions of "Tweets" per day.

10. Internet users also tend to visit and engage with a large number of different sites. A typical user visits well over 100 distinct websites per month. A prolific user may visit even more sites.

11. Americans use the Internet for a wide range of expressive activities. For example, a recent study by the Pew Center for Internet & Society found that significant numbers of adult Internet users use the Internet for the following activities:

   - Email (91 percent of adult Internet users),

   - Social networking (66 percent),

- Using an online classified ads site (53 percent),
- Uploading photos (46 percent),
- Sending instant messages (46 percent),
- Rating a product or service (37 percent),
- Playing online games (36 percent),
- Commenting on a site or blog (32 percent),
- Uploading user-generated content (30 percent),
- Participating in an online forum concerning health or personal issues (22 percent),
- Creating collaborative web pages or blogs (15 percent), and
- Maintaining a personal web page or blog (14 percent).[2]

12. A growing number of Americans rely on the Internet as a source of news, increasingly preferring it to traditional sources such as newspapers. Roughly half of all Americans regularly obtain at least some news online, and an increasing minority obtains news via social networking sites.

13. Many Americans go online to learn about or even engage in political activities. According to recent research, 39 percent of Americans have engaged in some form of online civic or political activity.[3]

14. Businesses increasingly view the Internet as an important channel for reaching out to consumers. Companies, ranging from startups to Fortune 500 stalwarts, increasingly use

[2] *See* Pew Internet & American Life Project, *Trend Data (Adults)*, http://pewinternet.org/Trend-Data-%28Adults%29/Online-Activites-Total.aspx.
[3] *See* Pew Internet & American Life Project, *Social Media and Political Engagement*, http://www.pewinternet.org/Reports/2012/Political-engagement.aspx.

Facebook, Twitter, blogs, and other methods of reaching out to current and potential customers online.

15. Many people use the Internet to find employment or employees. Employers and jobseekers use both specialized sites such as Monster.com and general-purpose Internet sites and services. The professional social network LinkedIn, which describes itself as the world's largest online professional network, has more than 187 million members in over 200 countries and territories.

16. The Internet is increasingly used for educational purposes, even beyond academic research. Many academic institutions offer formal or informal courses online, and millions of Americans participate in these courses. These offerings frequently include online forums, chat rooms, or similar sites where class participants can meet to interact with the instructors and each other. In addition, user-generated content sites frequently include "how-to" videos and similar educational materials.[4]

17. The Internet is also an outlet for personal creative expression. As noted above, see ¶11, 30 percent of Internet users upload content they have created themselves to share with others, and 14 percent maintain their own website or blog. The video hosting site YouTube, which allows both user-generated and commercial videos, is the third most visited website in the world.

**Statutory Language**

*Internet identifier reporting requirements*

18. The CASE Act requires a registrant to annually report "[a] list of any and all Internet identifiers established or used by the person." Cal. Penal Code § 290.015(a)(4). In addition, a registrant must "send written notice" within 24 hours if she "adds or changes

[4] For example, Harvard, MIT, and Stanford are all exploring ways to open up their classes to the general public via the Internet. *See* Gregory Ferenstein, *Move over Harvard and MIT, Stanford Has the Real "Revolution in Education,"* TECHCRUNCH, May 9, 2012, http://techcrunch.com/2012/05/09/move-over-harvard-and-mit-stanford-has-the-real-revolution-in-education/.

an Internet identifier." Cal. Penal Code § 290.014(b) In addition, "[e]ach person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.. *Id.*

19. The Act defines "Internet identifier" to mean "any electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications." California Penal Code 290.024(b). The Act does not provide additional definitions for any of the terms used.

20. The phrase "any electronic mail address, user name, screen name, or similar identifier" could include almost any information a person uses to refer to himself or herself on the Internet, including:

    a. A person's real name, when used as a user name, screen name, or similar identifier;

    b. The word "Anonymous," when used as a user name, screen name, or similar identifier;

    c. Any temporary or permanent forwarding address, such as one created on behalf of a person posting an article for sale on craigslist. (Any such address could be an "Internet identifier" regardless of whether the registrant were actually aware of its creation or existence.)

21. The phrase "any electronic mail address, user name, screen name, or similar identifier" could also include information about other people. The natural reading of the phrase "used by the person" is "used to identify the person," but there is also a possible unintended reading: "employed for any purpose by the person." Because people "use" other people's Internet identifiers when communicating with or referring to those people, an "identifier used for [the specified purposes]" could be read to include every identifier a registrant uses to communicate or even refer to another Internet user.

22. The phrase "any electronic mail address, user name, screen name, or similar identifier" does *not*, however, by its plain terms, include the identity of the site or service on which the Internet identifier was used, nor does the CASE Act elsewhere require registrants to submit a reporting of the websites, blogs, social networks, etc. associated with these identifiers.

23. Without the names of the associated websites, blogs, or social networking sites, however, the information being reported often may be of no practical value to law enforcement. It is difficult to imagine any practical value in merely knowing that *e.g.*, a registrant used the identifier "Angry_User" as an Internet identifier *somewhere* on the Internet on November 7, 2012, because there may well be thousands, or hundreds of thousands, of postings across the Internet on that day with that "identifier," posted by thousands or hundreds of thousands of different people.

24. The disutility of this information, standing alone, may well lead law enforcement officials to demand that registrants additionally report the particular website/blog/social networking site associated with each reported username.

25. Similarly, it is unclear how the requirement to report "any and all Internet identifiers . . . used by the person" applies to a person who uses the same username (e.g. "davidgpost") for several different newspaper websites, political blogs or other services.

26. On many sites or services, distinct additional identifiers, such as an account number or email forwarding address may be automatically "established" for the person and used internally or externally to enable forms of communication encompassed by the definition of Internet identifier in the Act. It is unclear whether each identifier for a given service must be reported.

27. The ordinary meanings of the terms used in the phrase "used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications" appears to encompass a vast array of Internet communications on a wide range of subjects.

28. I would describe an "Internet forum discussion" as an online site where individuals can participate in a discussion by means of posting messages or comments. As such, any site that permits comments by visitors would appear to be an "Internet forum discussion," or at the very least "similar" to an "Internet forum discussion." This would include:

    a. Many, if not most, news-oriented websites, which often permit comments on at least some of the articles or other content on the site.

    b. Many, if not most, political, legal, and current affairs sites. For example, the "Volokh Conspiracy" blog, where I am a regular contributor, permits site visitors to leave comments and to participate in a discussion about individual blog postings, using a username of the visitor's choosing.

    c. Many sites promoting discussions of sensitive topics such as sexuality, alcoholism, etc. In particular, the website for California Reform Sex Offender Laws (http://californiarsol.org/), a group advocating on behalf of convicted sex offenders, includes a discussion forum.

    d. Many commercial sites, such as Amazon.com or eBay.com, which allow users to post feedback on recent purchases or otherwise participate in group discussions.

    e. Many entertainment sites, such as HBO.com or YouTube.com, which allow users to start, or to participate in, online discussions of the content posted at the site or other matters.

    f. Many blogs, which increasingly use platforms such as WordPress or Tumblr and allow visitors to comment or otherwise contribute.

    g. Most sites offering social networking functionality as described in ¶¶35-36 below.

29. I estimate that the number of sites falling into one or more of these categories is in the millions, if not the hundreds of millions.

30. The term "Internet chat room discussions" is undefined and broad. The term "chat," in cyberspace jargon, generally refers to any form of online "synchronous conferencing"– applications that allow users to exchange messages (usually text, but increasingly, these days, including video content as well) with at least one other known user, in real time.

31. "Instant messaging" is another name for functionality that permits users to exchange messages (text or video) to one or more other known users in real-time. As such, it is largely overlapping with "Internet chat room discussion."

32. The Facebook "chat" function is a typical web-based chat application; when a user logs on to her Facebook account, she is presented with a list of her "friends" – other users who have accepted, or extended, a "friend request" to her in the past – who are currently logged on to their Facebook accounts, and she can choose any one of them with whom to "chat," i.e., to exchange messages one-to-one in real-time.

33. Hundreds of thousands of ordinary commercial websites allow users to "chat" with a service representative if they have questions about the merchandise being offered for sale, a prior order, etc.

34. A number of politicians and political candidates have participated in "online town halls" where constituents can ask questions for the politician or candidate to answer in real time. Although these events may be moderated, they are otherwise functionally equivalent to any other "chat."

35. The term "social networking" is also extremely broad. In the Internet context, "social networking" has become a widely used catchphrase to define a class of online functions, spurred largely by the phenomenal popularity of such sites as Myspace, LinkedIn, Twitter, and Facebook. There is no consensus definition of the term, although it generally describes websites that allow users to create searchable profiles, and that contains mechanisms for communicating with, and linking to, other users.[5]

[5] Existing definitions are often conflicting. For example, the federal Keeping the Internet Devoid of Sexual Predators Act defines a "social networking website" as an Internet website

36. An increasing number of web pages incorporate some form of social networking functionality in this sense. Examples include:

    a. Online commerce sites such as Amazon.com and eBay.com,

    b. Product and business review sites such as Yelp,

    c. Blogging sites and services, especially those using platforms such as WordPress and Tumblr, and

    d. User-generated or user-curated content sites or services such as YouTube or Pinterest.

37. I estimate that the number of websites incorporating such functionality – without even considering sites that are "similar" in some unspecified manner to these sites – is in the millions, if not hundreds of millions.

38. In addition, Internet sites and services are not static; instead, they are constantly adding new functionality. Thus, even a site that does not presently fall within the scope of the Act could change its functionality so that it qualified in the future. A user of the site may or may not be aware of such changes.

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> (i) that allows users, through the creation of web pages or profiles or by other means, to provide information about themselves that is available to the public or to other users; and
> (ii) that offers a mechanism for communication with other users where such users are likely to include a substantial number of minors; and
> (iii) whose primary purpose is to facilitate social interactions . . . .

42 U.S.C. § 16915a(e)(1)(A). In contrast, an oft-cited academic article defines "social network sites" as

> web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.

danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMP.-MEDIATED COMM. 11 (2007). The difference between these two definitions is considerable; a simple blog or forum that might appeal to minors would qualify as a "social networking website" under the federal definition but would likely fail prongs (2) and (3) of the boyd/Ellison definition, whereas a professional network such as LinkedIn would qualify as a "social network site" under the boyd/Ellison definition but might fail both prongs (ii) and (iii) of the federal definition.

39. Finally, while the Internet identifier definition sweeps broadly in many respects, it also contains one significant exception. By restricting itself to "Internet" identifiers and communications, the definition appears to exclude identifiers used for communications over non-Internet networks – most importantly, the proprietary cellphone networks.

40. A substantial proportion of the billions of "instant messages" transmitted each day do not travel over "the Internet" but, instead, over one of many proprietary cellphone networks. Identifiers used for that purpose would appear to be outside the scope of the statutory reporting requirements. On the other hand, many instant messaging services do, in fact, use the Internet to handle all, or some portion, of the relevant communication. Identifiers used for those purposes would appear to be within the scope of the statute. Users of the different systems, however, may have no knowledge – and no practical way of obtaining the knowledge – about which kind of instant messaging system they are using; this information is, generally speaking, invisible to the users involved.

41. In summary, the definition for "Internet identifier" can be construed as requiring reporting of every identifier used for a vast amount of online communications. However, the exact boundaries are extremely difficult to determine, owing in part to the imprecise language used to define the sites and services covered by the definition. Finally, although registrants are not required to report the actual site or service where they use the reported identifiers, law enforcement may nevertheless require that registrants provide such site or service association information.

*Internet service provider reporting requirements*

42. The CASE Act requires a registrant to annually submit "[a] list of any and all Internet service providers used by the person." Cal. Penal Code § 290.015(a)(5). In addition, a registrant must "send written notice . . . within 24 hours" if she "adds or changes [her] account with an Internet service provider." Cal. Penal Code § 290.014(b). Finally, "[e]ach person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision." *Id.*

43. The Act defines "Internet service provider" to mean "any business, organization, or other entity providing directly to consumers a computer and communications facility through which a person may obtain access to the Internet. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution." Cal. Penal Code § 290.024 (a).

44. This definition appears to be derived from the definition of an Internet access provider found in the federal Communications Act:

> The term 'Internet access provider' means a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services.
>
> 47 U.S.C. § 151 (note).

45. There are three significant differences, however, between the two statutes. First, the federal definition includes only persons "engaged in the business of" providing Internet access, while the CASE Act includes "any business . . . *or other entity*." Second, the federal definition applies only to those providing a facility through which a "customer" can access the Internet; the CASE Act applies to those providing a facility through which "a person" may access the Internet. Finally, the FCA definition excludes a "common carrier," but only "to the extent that it provides only telecommunications services"; the CASE Act excludes any entity that "provides only" such services.

46. There are a wide range of methods by which a person (or his or her device) may obtain access to the Internet:

    a. Many people access the Internet via their iPhones or other "smart" mobile devices using their wireless carrier.

    b. Many people access the Internet from "cyber cafés" or "Internet cafés," which typically provide computer terminals and Internet access for a fee.

c. Many people access the Internet from coffee shops, airport 'hot spots,' and hotels that provide wireless or wired Internet access for a fee or at no charge.

d. Many people access the Internet using "open" wireless systems. Residential and business users may leave their wireless networks "open" so that anyone within range of the network, whether guest or stranger, can use their wireless connection to freely access the Internet. Devices that are configured to connect to "open" wireless systems may do so without notifying or requiring any activity on the part of the user.

e. Many people access the Internet from their workplaces, using their employers' systems.

f. Many people access the Internet from libraries and educational institutions; in the latter case, access may be limited to students, faculty and staff, but not necessarily.

47. However, if the statute covers all entities that provide a "computer and communications facility" that allows users to access the Internet, it would reach entities that most people would not ordinarily think of as ISPs, potentially including:

a. A company that sells or rents computers, smartphones, or other devices with networking capabilities. Many businesses, such as Best Buy, Amazon.com and other electronics stores, sell devices that can access the Internet.

b. A business or home Internet user that leaves a wireless network "open" for others to use for Internet access.

c. A company that sells or rents cars with Internet-enabled mapping or other services.

48. In many circumstances, it may be difficult if not impossible for a user to know the identity of the entity or entities "used" when communicating over the Internet.

a. An employee may use the employer's Internet access service, but that service may in turn be provided by another entity.

b. A mobile device user may not realize that her device is "roaming" on a different provider's cellular network or has connected to an open wireless network.

c. A wireless user at a coffee shop or a hotel may be using Internet access service cooperatively provided by (a) the coffee shop or hotel, (b) a traditional ISP such as AT&T, and possibly (c) an intermediary who assists the coffee shop or hotel in setting up its network and/or provides the hardware or software used to connect users to the Internet.

49. In addition, any form of online communication, including simply accessing a website, could be said to "use" the target computer's Internet service provider and the providers of any intermediary networks as well as the initiator's Internet service provider. See ¶21.

50. Furthermore, the Act does not limit Internet service providers to those entities which provide Internet access *to the registrant*. Thus, any registrant who "uses" any business which qualifies as an Internet service provider as to *any* person appears to be required to report this use. For example, a registrant who purchases a DVD at Best Buy plausibly is required to report that "use."

51. The CASE Act's reporting requirement refers to a registrant's "account with an Internet service provider," Cal. Penal Code § 290.014(b). This can reasonably be read to imply that only entities with whom a registrant has an account must be reported, and conversely that entities with which the registrant has no account are *not* ISPs under the CASE Act.

52. If so, then cyber cafés (for which one usually pays an hourly fee), coffee shops, hotels, roommates, and open wireless home or business networks (for which no account is needed) would not be ISPs under the CASE Act, insofar as consumers can readily use these facilities to obtain Internet access without setting up an account.

53. However, by the same reasoning, libraries (for which one does not need an account) would not fall within the basic definition of ISP and thus would not need to be explicitly excluded.

54. In addition, this reading appears to be in tension with Penal Code Section 290.015(a)(5), which requires reporting of "[a] list of any and all Internet service providers used by the person" and does not imply any account requirement.

55. It thus is unclear whether a user must report on the use of "Internet service providers" that do not provide or require an account.

56. The statute excludes "a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution" from the definition of "Internet service provider."

57. Under the plain text of this statute, only businesses that provide *exclusively* "telecommunications services, cable services, or video services" are excluded. If a company provides Internet service at all, even if the registrant does not purchase or use such service, it is encompassed by the definition.

58. The Act's departure from the definition of Internet access provider in federal law seems to reinforce this interpretation. See ¶¶44-45. The federal definition excludes entities that would otherwise qualify "to the extent that they provide only telecommunications services," 47 U.S.C. § 151 (note), while the CASE Act exclusion is instead limited to entities that "*provide only* telecommunications . . . services." Cal. Penal Code § 290.024(b) (emphasis added).

59. But extremely few companies would fall within the definition so construed, as the vast majority of telecommunications and cable television providers also offer some form of Internet access.

60. A more reasonable reading would be that businesses that provide only telecommunications, cable, or video services *to the registrant* are excluded from the definition of Internet service provider—but this reading is in tension with the plain language of the bill.

61. Thus, while a court might determine that a registrant is not required to report on his telecommunications, cable, or video services that do not involve Internet access, a cautious registrant is likely to err on the side of caution and report more than is required.

62. In summary, the "Internet service provider" reporting requirements appear to encompass a wide range of entities outside of the common understanding of that term, potentially including entities which a registrant has no way of identifying.

**Burdens and Restrictions Imposed**

*Recording and reporting Internet identifiers and Internet service providers*

63. The reporting provisions of the CASE Act appear to place a significant and substantial burden on the ordinary Internet user to document and submit his or her Internet usage, both because the requirements are difficult to interpret, and because they potentially encompass many, and possibly most, of the avenues through which most people in this country communicate with one another online, whether to perform their jobs, purchase goods and services, or educate or entertain themselves.

64. To comply with the reporting requirements for Internet identifiers, a registrant plausibly must document and submit each distinct identifier she uses, potentially including:

    a. A transient screen name in a customer support chat,

    b. A newly-chosen screen name used for expressive purposes in the context of a specific political or current events discussion,

    c. A temporary forwarding email alias automatically assigned by a classified ad service, and even

d. Identifiers associated with other persons that he "uses" in order to communicate with or refer to those persons.

65. To comply with the reporting requirements for Internet service providers, she plausibly must document and submit each distinct provider he uses, potentially including:

a. Each wireless network he uses at a café, hotel, or other location, including every entity involved in providing Internet access through that network;

b. Each purchase of any device that can connect to the Internet; and even

c. Each "use" he makes of any entity that provides Internet access to any person.

66. It is also plausible that the actual reporting requirements could be construed much more narrowly. However, because of the significant ambiguities in the law, a registrant wishing to "play it safe" would attempt to report far more than the narrowest possible construction, particularly if there are criminal penalties for noncompliance.

67. While the statute on its face only requires a registrant to document and submit Internet identifiers, but not the sites or services for which she creates or uses identifiers, law enforcement may nevertheless demand that registrants provide such site or service association information. Similarly, it is unclear whether she is required to report the reuse of a previously reported user name on a new service.

68. Taken as a whole, the CASE Act's reporting requirement for "Internet identifiers" and "Internet service providers" may encompass all of the forms of online speech and mechanisms of accessing the Internet discussed above, or some vaguely-defined and apparently arbitrary subset thereof.

69. In addition, the CASE Act may require reporting not only of Internet identifiers and Internet service providers that the registrant currently uses or uses in the future, but also identifiers and providers that the registrant has used in the past. There is no guidance in the statute as to whether or not it extends to past information.

70. Exhaustively documenting all such information may be difficult if not impossible for many persons, and as a result may deter residents from participating in online communications so as to avoid the burden of reporting on such activities or the accompanying risk of criminal penalties if she fails to do so.

*Anonymous speech and association*

71. In addition, the reporting requirements of the CASE Act will prohibit or chill many forms of anonymous online speech and online association.

72. Anonymous political speech has long contributed to important public discourse in this country. This includes both anonymous speech in the strict sense of speech having no indication of authorship at all (*e.g.,* Thomas Jefferson's publication of Notes on the State of Virginia, published anonymously because of the radical views on a number of sensitive political matters that were expressed in the book) and pseudonymous speech (*e.g.*, the John Jay-James Madison-Alexander Hamilton collaboration published "The Federalist" under an assumed name ("Publius")).

73. In the modern era, the U.S. Supreme Court has recognized the importance of anonymity to political speech and association. "Under our constitution, anonymous [speech] … is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995). Courts routinely protect the identities of online speakers against discovery in litigation. *See, e.g.*, In re Anonymous Online Speakers, 611 F.3d 653 (9th Cir. 2010); Highfields Capital Mgmt., LP v. Doe, 385 F.Supp.2d 969 (N.D. Cal. 2005); Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

74. In addition, individuals enjoy the "right to be protected from compelled disclosure by the State" of their associations and affiliations, and thus the freedom of association. *NAACP v. Alabama*, 357 U.S. 449, 458 (1958); *see also Brown v. Socialist Workers*, 459 U.S. 87, 91 (1982); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159-60 (9th Cir. 2010).

75. Many if not most of the online communications covered by the CASE Act allow users to participate under a pseudonym. Examples exist in all categories, from social networks (Twitter, Google+) to forums on news sites (New York Times) to user-generated content services (Flickr) to product and business review sites (Yelp).

76. Some sites and services permit users to create a screen name without even divulging their name or other identifier to the site itself. This appears to be particularly common for sites focused on sensitive topics where contributors are particularly concerned about protecting their identity.

77. Under the CASE Act, however, any registrant wishing to use an online pseudonym for *any* reason will be required to disclose his/her real identity to the government.

78. In addition, while the Act does not appear to require registrants to disclose the actual sites which they use, it is possible that registration agencies will nonetheless request or demand such information. See ¶¶22-24.

79. This is of particular concern for individuals, such as members of California Reform Sex Offender Laws, who rely on online anonymous speech to discuss political issues related to their status as a sex offender, or who exercise their right to speak anonymously in order to criticize public officials – activities for which they have a reasonable fear of retribution were their true identities to be disclosed.

80. In addition, the CASE Act does not restrict law enforcement's broad discretion to further disseminate any information it collects, creating the further possibility of retribution from private parties.[6]

[6] The potential for additional consequences is not limited to anonymous speech or speakers. For example, if social networks such as Facebook were provided with the Internet identifiers of all registered sex offenders and decided to exclude such individuals, registrants would effectively be barred not only from e.g. Facebook itself but also from any news site, blog, or other online discussion that requires a Facebook login in order to participate, a requirement that is becoming increasingly common.

81. As a result, the CASE Act is likely to substantially chill speech by an already-vulnerable population and make it more difficult for registrants to self-organize and advocate for change in their own interest.

**Conclusion**

82. The CASE Act's definitions of the terms "Internet service provider" and "Internet identifier" reporting requirements are ambiguous and would cause uncertainty for officials and registrants.

83. Under reasonable and plausible readings of the statutory language, the CASE Act's "Internet service provider" and "Internet identifier" definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller seemingly capriciously chosen subset of those communications.

84. Under *any* reading of the statutory text, the CASE Act will substantially curtail registrants' ability to engage in anonymous communication, and will require considerable and burdensome reporting even for ordinary, non-anonymous communication.

I declare, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6th day of Nov., 2012 at Philadelphia, Pennsylvania.

David G. Post

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on behalf of themselves and others similarly situated

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**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**TEH**

JOHN DOE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, et al.,

Defendants.

Civil Case No. C 12 5713

**DECLARATION OF JANICE BELLUCCI**

DECLARATION OF JANICE M. BELLUCCI

1. I am the President of the Board of Directors of California Reform Sex Offender Laws and a member of the California Bar.

2. California Reform Sex Offender Laws ("California RSOL") is incorporated in the State of California as a non-profit public benefit organization.

3. California RSOL is a tax-exempt corporation organized under Section 501(c)(4) of the Internal Revenue Code.

4. California RSOL is dedicated to protecting the rights of individuals who are convicted of a sex-related offense, whether by plea or by trial. As the California Department of Justice Reports, there are more than 73,900 California registrants living in the community; this number does not include registrants who are incarcerated or have been deported. See http://www.meganslaw.ca.gov/statistics.aspx?lang=ENGLISH (all websites last visited November 2-5, 2012). California RSOL believes that no sexual abuse is ever acceptable; that sex offense laws and policies should be based upon sound research and common sense, not fear, panic or paranoia; that current laws and policies that paint all sex offenders with one broad brush are counterproductive, wasteful, and cause needless harm; that each offense must be judged on its own merits with a punishment that fits the crime and does not waste taxpayer dollars; that the public sex offender registry and residency restriction laws do no protect children but instead ostracize and dehumanize individuals and their families; and that money spent on purely punitive measures would be better used for prevention, healing and rehabilitation.

5. California RSOL is led by a Board of Directors and has 352 members who are registrants throughout the state of California.

6. California RSOL's work include lobbying, informing the public, and litigation to protect the rights of our members and of others who have been convicted of sex-related offenses. Most recently, I am representing several registrants in a challenge to a new Simi Valley ordinance that required all registrants to post a sign on their doors saying "no candy or treats at this residence." *John Doe #1 et al. v. City of Simi Valley*, No. 2:12-CV-08377-

PA-VBK (C.D. Cal). On October 29 the court issued a TRO prohibiting the city from enforcing this provision. A copy of the court's order is attached as Exhibit A to this declaration.

7. California RSOL maintains a website, www.californiarsol.org. The primary purpose for maintaining this website is to inform its members and the public about legal and policy issues relating to individuals who are required to register under California Penal Code § 290. Additional purposes for maintaining the website are to promote political and social change on these issues.

8. Examples of recent articles and information on the website include the following:

   a. information about consideration of an ordinance that bans sex offenders from parks in the City of Anaheim;

   b. notice of a California RSOL meeting to be held in Los Angeles on November 10, 2012;

   c. information regarding a recent California Court of Appeals decision upholding an injunction that prohibits the California Department of Corrections and Rehabilitation from applying residency restrictions as a blanket requirement upon all parolees in San Diego County;

   d. information about *John Doe #1 et al. v. City of Simi Valley*, discussed above;

   e. an exhortation for people to vote and links to information about how to register to vote and the of a past felony conviction on eligibility to vote in California.

9. California RSOL also used the website to help it meet its goal of obtaining 500 signatures on a petition to the Orange County District Attorney challenging a county ordinance that prohibits all registrants from entering public parks, beaches, harbors and other recreational areas. California RSOL further used the website to inform registrants of city and county ordinances throughout the state of California that prohibit them from entering public places, such as parks, museums and libraries.

10. The California RSOL website allows individuals opportunities to comment on these

items and individuals regularly do so. For example, one article about a park ban proposed in the City of Anaheim included 13 comments, ranging from expressions of thanks for California RSOL's advocacy efforts to statements that such laws are unconstitutional as well as bad public policy.

11. In one of those comments, a sex offender made an anonymous comment in response to encouragement by California RSOL to attend an Anaheim City Council meeting, "I understand why you attend these meetings and why you encourage everyone to attend. I wish I had the courage to do so. But you have to understand people that are forced to register feel they would be putting themselves and their families in danger by doing so. A lot of them, myself included, are like dogs that have been kicked repeatedly and cower in the corner…I've been coming to this site a couple years and just mustered the fortitude to even post here…After the first post I made I waited in anxiety for the police to come knocking at my door. I will probably do the same after this post. I noticed in the new ballot proposition 35 will require that…a person that registers will have to disclose all of their internet activity. It is another kick in the face cowering us further into the corner. I would be afraid to post here anymore and this is the only place I have been able to share a few of my thoughts."

12. An item on the website about the November 10 meeting had generated 8 comments, including questions about who would be allowed to attend and how to do so. As their content often makes clear, many of the individuals who comment are sex offenders who have questions or comments about how these laws affect them and are requesting updates from California RSOL staff on specific efforts required to change California's registration law.

13. A discussion of the internet-identifier provisions Proposition 35 had generated 15 comments on the website, many of them from registrants expressing confusion about what they will be required to do. For example, one commenter ("MM") writes "My question is … Internet Identifier, I'm confused. I know that your AOL, YAHOO or GMAIL account information would have to be provided, but what about your Directv account? your car insurance account? Your Macy's log on? We all have 'internet

identifiers', 'username' and they are not necessarily the same as your email... does it include your work email? I tired [sic] to decipher some of the Prop but got lost in the mumbo-jumbo of internet identifiers and whether it's at a library or work or home."

14. Another commenter on the website asks "What about posting on this website? You can post under a new name all day long, if you so please. Is every time you write something under a user name (just because you do not register per se that does not mean you are not posting under that name) cause to provide that name? What if you stop using it?"

15. A printout of the section of the website that contains these comments, http://californiarsol.org/2012/10/proposition-35/#comments, is attached to this declaration as Exhibit B.

16. The website's comments sections further California RSOL's goals in several ways. First, they allow sex offenders and others to express matters of fact and opinion about an original story. Second, they allow sex offenders and others to ask questions about legal and policy matters, which are often answered by staff or by other commenters. Third, and related to both of these goals, the ability to comment encourages membership by providing a forum for sex offenders and others to speak and to ask questions about issues relating to persons convicted or entered pleas regarding a sex-related offense.

17. Almost all of the comments found on the California RSOL website, aside from those submitted by staff, are submitted using pseudonyms. California RSOL recognizes that its members face social ostracism and the risk of violence, even death, because they are sex offenders, and thus it is important to allow them to participate anonymously. All meetings of California RSOL, held monthly throughout the state, are limited to sex offenders, family members and supporters and are closed to media and government officials. Consistent with its policy regarding attendance at monthly meetings, the organization's ability to protect the identity of sex offenders who provide anonymous comments is of paramount importance to the individuals as well as to the organization.

18. The challenged laws will invade this anonymity because sex offenders who provide comments on the website generate what is clearly with Prop. 35's definition of internet

identifier: in order to leave a comment, a person must enter a screen name (which may be a pseudonym) and email address. The screen name is displayed with the comment, however, the email address is not displayed. This loss of anonymity will make it less likely that registrants will express themselves on the website, both because some of them may not want the government to be able to connect them to specific posts and because providing the police with the screen names that they use to post comments will reveal their association with California RSOL and the fact that they participate in discussions on the website. A prime illustration of this is the comment described above in Paragraph 12, which shows that anonymity is essential to registrants and without it, they would be deterred from participating in the discussions on California RSOL's website.

19. California RSOL is bringing this lawsuit because of the impact on the constitutional rights of its 352 members and other § 290 sex registrants. Defending their rights is squarely within the mission of California RSOL, which is committed to taking legal action in furtherance of this mission, and has done so in the past, as described above in paragraph 7. California RSOL understands that its role as a plaintiff in this action is to represent the rights of its members and other §290 registrants. I am a lawyer, and understand that this means that I, on behalf of California RSOL, will need to stay informed with what's happening in the case and that I need to think about the interests of the class members and act on those interests.

I declare, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 5th, 2012, in Novembee, California.

Janice M. Bellucci

Janice M. Bellucci, President

California Reform Sex Offender Laws

**EXHIBIT A**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

| Present: The Honorable | PERCY ANDERSON, UNITED STATES DISTRICT JUDGE | |
|---|---|---|
| Paul Songco | N/A | N/A |
| Deputy Clerk | Court Reporter | Tape No. |

| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
|---|---|
| None | None |

**Proceedings:** IN CHAMBERS - ORDER

Before the Court is an *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction (the "Application"), filed by ten plaintiffs proceeding under pseudonyms (collectively, "Plaintiffs"). [Docket No. 15.] Defendant City of Simi Valley (the "City") has filed an Opposition.

## I. Background

On September 10, 2012, in light of "[s]tatistical information indicat[ing] that the supervised release of sex offenders has only been marginally effective from keeping them from committing another sex offense" and amid concerns that trick-or-treating on Halloween offers unique opportunities for sex offenders to victimize children, the Simi Valley City Council enacted Ordinance No. 1201 (the "Halloween Ordinance" or "Ordinance"). See Ordinance No. 1201, Simi Valley Municipal Code ("S.M.V.C.") § 5-43.01 – 5-45.04. The Halloween Ordinance aims to "protect children from the dangers posed by registered sex offenders convicted of offenses against minors" by imposing lifetime restrictions on Simi Valley registered sex offenders (October 31st of each year). Id. § 5-43.01.

The Halloween Ordinance regulates the conduct of "Sex Offenders,"[1/] who are defined in the ordinance as "any person for whom registration is required pursuant to Section 290 of the California Penal Code, regardless of whether that person is on parole or probation, and has been convicted of an offense against a child." Id. § 5-43.02(b). The Ordinance defines "child or children" as "any person(s) under the age of eighteen (18) years of age." Id. § 5-43.02(a).

The Halloween Ordinance imposes four separate restrictions on the conduct of sex offenders on Halloween. The Ordinance provides:

1/ Unless otherwise noted, the term "sex offender" as used in this Order shall comport with the definition assigned that term by the Halloween Ordinance.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

Any sex offender, as defined herein, shall be required, between 12:00 a.m. and 11:59 p.m., on October 31 of each year to do the following:

(a) Post a sign, no smaller than twelve (12) inches by twenty-four (24) inches, with a font size no smaller than 72 points, on the front door at his or her residence stating, "No candy or treats at this residence." This requirement shall only apply to sex offenders who: i) are visible on the Megan's Law website, as maintained by the State of California Department of Justice, Office of the Attorney General; and ii) have been criminally prosecuted and convicted of a sex crime(s) upon a child, as defined herein.

(b) Leave all exterior residential, decorative, and ornamental lighting off during the evening hours starting at 5:00 p.m. until midnight, the next day;

(c) Refrain from decorating his or her front yard and exterior of the residence with Halloween decorations;

(d) Refrain from answering the door to children who are trick or treating.

Id. § 5.43-03. A violation of any of these provisions constitutes a misdemeanor. Id. § 5.43-04.

The Halloween Ordinance went into effect on October 11, 2012. On October 18, 2012, the City of Simi Valley Office of the Chief of Police adopted the Registered Sex Offender Halloween Restrictions Enforcement Policy to clarify the provisions of the Halloween Ordinance and guide its enforcement. (See Declaration of Cpt. John McGinty in Support of Opposition to Application for TRO, Ex. A ("Enforcement Policy").) The Enforcement Policy is being distributed to Simi Valley registered sex offenders. The interpretations provided by the Enforcement Policy will, to the extent necessary, be discussed in the Court's analysis.

**B. Factual & Procedural Background**

Plaintiffs are a group of Simi Valley registered sex offenders and their spouses and children who are subject or potentially subject to the Halloween Ordinance. Plaintiffs desire to hand out candy to trick-or-treaters and decorate the exterior of their residences with lights and Halloween decorations. On September 28, 2012, Plaintiffs filed suit in this Court alleging a single cause of action under 42 U.S.C. §

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

Case No. CV 12-8377 PA (VBKx) Date October 29, 2012

Title John Doe # 1, et al. v. City of Simi Valley

1983. Plaintiffs then filed a Verified Amended Complaint on October 12, 2012.[2/] Through this action, Plaintiffs seek a declaration that the Halloween Ordinance is facially unconstitutional in violation of the First Amendment, as applied to the States through the Fourteenth Amendment.

Plaintiffs filed the Application on October 19, 2012.[3/] Having considered the parties' submissions, and for the reasons that follow, the Court grants in part and denies in part Plaintiffs' Application.

## II. Preliminary Considerations

### A. Jurisdiction

The City argues that the Court lacks jurisdiction over this action because Plaintiffs "filed their original Complaint . . . under John Doe and Jane Doe pseudonyms, without first seeking leave to do so." (Opp'n at 2.) The City relies on a Tenth Circuit case, W.N.J. v. Yocom, 257 F.3d 1171 (10th Cir. 2001), to support its argument.

As explained by the Tenth Circuit, Federal Rule of Civil Procedure 17(a)

> mandates that 'every action shall be prosecuted in the name of the real party in interest.' . . . When a party wishes to file a case anonymously or under a pseudonym, it must first petition the district court for permission to do so. If a court grants permission, it is often with the requirement that the real names of the plaintiffs be disclosed to the defense and the court but kept under seal thereafter. Where no permission is granted, the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them.

Id. at 1172.

Notwithstanding the Tenth Circuit's decision in Yocom, "district courts within the Ninth Circuit have concluded that dismissal for lack of jurisdiction is not warranted when the plaintiff files a motion to proceed under a pseudonym, even if that motion is filed after the defendant filed a motion to dismiss." Doe v. Network Solutions, LLC, 2008 U.S. Dist. LEXIS 7397, at *9 (N.D. Cal. Jan. 22, 2008) (emphasis added) (citing Roe v. Providence Health System, Inc., 2007 U.S. Dist. LEXIS 50655 (D. Or. Apr. 24, 2007); Roe v. City of San Diego, 2001 U.S. Dist. LEXIS 26137, at *10-12 (S.D. Cal. Dec. 21, 2001)).

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2/ Plaintiffs' verifications were filed under seal.

3/ Also on October 19, Plaintiffs filed a Motion for Leave to Proceed Under Pseudonym. [Docket No. 21.] That Motion is not presently before the Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

Such a rule makes sense, as "[t]he initial complaint is a matter of public record, and once a plaintiff has opened a file number in federal court using his or her real name, any attempt to proceed under a pseudonym would be pointless." City of San Diego, 2001 U.S. Dist. LEXIS 26137, at *11.

Plaintiffs have filed a Motion for Leave to Proceed Under Pseudonyms. [Docket No. 21.] That Motion was filed the same day as Plaintiffs' Application. In light of that Motion, and considering the obvious reasons Plaintiffs have chosen to file under pseudonyms, the Court declines to deny Plaintiffs' Application for lack of jurisdiction.

**B. *Ex Parte* Application Requirements**

Plaintiffs' request for a temporary restraining order is filed as an *ex parte* application. To justify *ex parte* relief, "the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regularly noticed motion procedures." See Mission Power Eng'g Co. v. Continental Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995). Moreover, the moving party must be "without fault" in creating the need for *ex parte* relief or establish that the "crisis [necessitating the *ex parte* application] occurred as a result of excusable neglect." K. Clark v. Time Warner Cable, 2007 U.S. Dist. LEXIS 100716, at *2 (C.D. Cal. May 3, 2007) (citing Mission Power Eng'g Co., 883 F. Supp. at 492).

With Halloween fast approaching, Plaintiffs will be unable to challenge the constitutionality of the Halloween Ordinance without expedited review of their claims. Thus, *ex parte* relief is appropriate. The City argues, however, that Plaintiffs unjustifiably delayed in filing their Complaint and Application, and that relief should be denied on that basis. The City points out that the "first reading" of the Halloween Ordinance took place in August. Based on this notice of the impending passage of the Ordinance, the City argues, Plaintiffs' filing of the Application in October was unreasonably late and subjected the City to prejudice.

The Complaint was filed just over two weeks after the passage of the Ordinance and before it went into effect. In light of the City Council's recent passage of the Ordinance and the sensitive interests at stake on both sides of this litigation, the Court does not believe that Plaintiffs are at fault in creating the need for emergency relief.

The City also faults Plaintiffs for failing to follow precisely the notice requirements of Local Rule 7-19(b), which provides that "[i]t is the duty of the attorney [] applying [for *ex parte* relief] . . . to advise the Court in writing and under oath of the efforts to contact other counsel and whether any other counsel, after such advice, opposes the application." Plaintiffs' Application did not provide that information. However, Plaintiff provided actual notice to the City of the impending Application (Opp'n at 3), and the City had sufficient time to respond adequately to it. Thus, the Court declines to strike the Application for failure to abide by the letter of Local Rule 7-19(b).

Accordingly, the Court proceeds to the merits of Plaintiffs' Application.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

## III. Legal Standard: Temporary Restraining Order

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale," a preliminary injunction may issue "when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other two Winter factors have also been met. Id. (internal citations omitted). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

Plaintiffs seek a temporary restraining order enjoining the City from enforcing the entirety of the Halloween Ordinance effective October 31, 2012. For the reasons that follow, the Court temporarily enjoins only § 5.43-03(a) of the Ordinance (the sign posting requirement).

## IV. Analysis

### A. Likelihood of Success on the Merits

Plaintiffs argue that "[t]he Ordinance prohibits, regulates and mandates speech and regulates association speech and other expressive activity on private property by imposing four burdens on the speech and association rights of [sex offenders]. By virtue of the Ordinance's broad prohibitions relating to the entire residence of any [sex offender], all who reside with [sex offenders] are burdened by the Ordinance." (Application at 6.)

The Court addresses the provisions of the Halloween Ordinance in reverse order.

#### 1. Simi Valley Municipal Code § 5.43-03(d): Ban on Receiving "Trick-or-Treaters"

Section 5.43-03(d) provides that "any sex offender . . . shall be required, between 12:00 a.m. and 11:59 p.m., on October 31 of each year to . . . [r]efrain from answering the door to children who are trick or treating." Plaintiffs claim that this provision violates their First Amendment right of association.

To the extent that the spouses and children of sex offenders bring this claim, they have failed to demonstrate a likelihood of success on the merits. That is, the plain language of the Halloween

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

Ordinance and the Enforcement Policy's interpretive guidelines make clear that it is only a "sex offender," and not his or her spouse or children, who is prohibited from answering the door to "trick or treaters." The Enforcement Policy, for example, explains that

> Section 5.43-03 section (d) prohibits *a sex offender within the scope of the ordinance* from answering the door when persons who appear to be under the age of 18 approach the sex offender's residence on October 31 for 'trick or treating' activities. Children are deemed to be 'trick or treating' on October 31 if they are dressed in costumes. This provision does not prohibit sex offenders from answering the door to adults, or to members of their own immediate family.

Enforcement Policy § 4(e) (emphasis added).

Three additional considerations bolster the Court's conclusion that the prohibition on opening the door to "trick-or-treaters" applies only to sex offenders as defined by the statute. First, the explicit recognition by the Enforcement Policy of the impact that the Ordinance might have on a sex offender's "own immediate family" by acknowledging that such persons are not barred from opening the door to "trick or treaters." Second, the Enforcement Policy confirms that the term "sex offender" as used in the Halloween Ordinance is a term of art that "*narrows* the definition of 'sex offender'" rather than expands its scope or reach. Enforcement Policy § 2. Finally, the City's Opposition never argues that this provision extends to persons who do not fall within that narrow definition.

Thus, this provision of the Halloween Ordinance plainly does not regulate the conduct of any persons who do not fall within its narrowly defined group of "sex offenders." Accordingly, those plaintiffs who are the spouses and children have failed to demonstrate a likelihood of success or that serious questions are raised on their claim that their constitutional rights are infringed by this provision.

Whether this provision infringes the constitutional rights of sex offenders is another matter. Plaintiffs baldly assert that this provision implicates their rights to freely associate. (Application at 12-13.) However, Plaintiffs neither explain the basis for their assertion that having underage "trick-or-treaters" visit their homes on Halloween is a constitutionally protected associational activity, nor do they cite any authority for this proposition. (Id.) The existence of such a right is far from clear, moreover, as the freedom of association protects the rights (1) "to enter into and maintain certain intimate human relationships" such as marriage and familial cohabitation, and (2) "to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984). Receiving "trick-or-treaters" – that is, opening the door to costumed children to provide them with pieces of candy – does not readily fall within either of these categories. Accordingly, Plaintiffs have failed to meet their burden to demonstrate even a serious question going to the merits (let alone a likelihood of success on the merits) of their claim that the

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

Halloween Ordinance's ban on answering the door to underage "trick-or-treaters" is facially unconstitutional.

**2. Simi Valley Municipal Code §§ 5.43-03(b)-(c): Restrictions on Halloween Decorations & Exterior Lighting**

**a. Exterior Lighting & Halloween Decorations as Expressive Conduct**

Sections 5.43-03(b) and (c) of the Simi Valley Municipal Code impose restrictions on the decoration and presentation of the exterior of a sex offender's residence. A sex offender is required to "[l]eave all exterior residential, decorative, and ornamental lighting off during the evening hours starting at 5:00 p.m. until midnight, the next day," § 5.43-03(b), and to "[r]efrain from decorating his or her front yard and exterior of the residence with Halloween decorations," § 5.43-03(c). As defined by the Enforcement Policy, "the duty . . . to extinguish exterior lighting and to refrain from decorating the exterior of his or her residence applies only to such exterior lighting and exterior areas that are visible from sidewalks or other places open to the public." Enforcement Policy § 4(c). "Halloween decorations," moreover, "include decorations . . . or symbols that a reasonable observer would perceive as relating to Halloween, including, but not limited to, Jack-o-lanterns or carved pumpkins, spider webs, ghosts, witches, skeletons, black cats, bats, monsters and tombstones." Id. § 4(d).

Plaintiffs argue that these provisions are facially unconstitutional as content-based prior restraints and compelled speech activities. As written, these provisions do not prohibit or compel verbal or written speech. As a threshold matter, then, Plaintiffs have failed to demonstrate that these provisions even implicate the First Amendment at all.

The First Amendment reads, in its entirety: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In relation to expression, the First Amendment specifically addresses only speech. The United States Supreme Court has found, however, that conduct, when sufficiently imbued with clear elements of expression, also implicates the First Amendment's protections.

As the Supreme Court has summarized,

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," United States v. O'Brien, [391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)], we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

> Fourteenth Amendments," [Spence v. Washington, 418 U.S. 405, 409, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974)]. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." [Spence, 418 U.S. at 410-11.]

Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). "The nature of [a plaintiff's] activity, combined with the factual context and environment in which it was undertaken" are relevant considerations in determining whether the communicative aspects of conduct amount to speech. O'Brien, 391 U.S. at 376.

Plaintiffs claim that these provisions "impose[] a government-mandated burden upon every [sex offender] to express the viewpoint that they do not wish to participate in Halloween." (Application at 13.) On the present record, however, it is not clear that the use or non-use of "exterior residential, decorative, and ornamental lighting" and the display or non-display of "Halloween decorations" constitutes expressive conduct. In support of their Application, Plaintiffs have submitted the declaration of John Doe #6. He explains: "My family and I regularly leave on exterior lighting at our home during the evening, in large part to declare our presence to would-be vandals or thieves[, and we] celebrate[] Halloween . . . by decorating the front yard and exterior and interior of our home [with Halloween decorations]." (Application, Declaration of John Doe #6, ¶¶ 9-10.) This declaration does not indicate that John Doe #6 intends to convey any particularized message by either the use of exterior lighting or the display of Halloween decorations. Cf. Muscko v. McClandless, 4 Am. Disabilities Cas. (BNA) 625 (E.D. Pa. 1995) (" In order to prove that his conduct was protected, plaintiff will have to establish that his exterior decorating was intended to express an idea . . . . This issue is better addressed in more factual detail at the summary judgment stage.").

Moreover, the same display of exterior lighting (ornamental or otherwise) and Halloween decorations can convey any of a number of "messages" ranging from the most general or abstract – for example, as a signal that someone is present in the residence, or simply a message akin to "Happy Holidays!" or "Happy Halloween!" – to relatively particularized – such as the display of Halloween decorations to signify that "trick-or-treating" at a particular residence is encouraged. The Court notes that Halloween itself encompasses a variety of beliefs and superstitions, both secular and non-secular, and that Halloween decorations are likewise varied; any message a person might intend to convey through such decorations is likely to be accordingly ambiguous and opaque. Thus, given the weakness of Plaintiffs' evidence and the multitude of messages, both generalized and particularized, that might be conveyed by the same lights or decorations, the Court is not convinced that, even within the context of Halloween night, "the likelihood [is] great that the [particularized] message [intended] would be understood by those who viewed it." Spence, 418 U.S. at 410-11.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-8377 PA (VBKx) | Date | October 29, 2012 |
|---|---|---|---|
| Title | John Doe # 1, et al. v. City of Simi Valley | | |

At this stage of the proceedings, Plaintiffs bear a heavy burden of persuasion. Nonetheless, Plaintiffs present only conclusory argument and unpersuasive evidence in support of their claim that the Halloween Ordinance's prohibitions on the display of exterior lighting and Halloween decorations implicate conduct that falls within the ambit of the First Amendment. This is insufficient at this stage of the proceedings. On a more developed record, the Court may indeed agree with Plaintiffs that such activities constitute expressive conduct, but on the record, Plaintiffs have failed to raise even a serious question going to the merits of this claim, let alone a "clear showing" that they are likely to succeed on the merits.

**b. The Halloween Ordinance's Prohibitions on Exterior Lighting & Halloween Decorations Satisfy are Valid**

Assuming *arguendo* that these provisions of the Halloween Ordinance do in fact impose restrictions on expressive conduct, these provisions nonetheless appear to pass constitutional muster.

"The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." Johnson, 491 U.S. at 406. Thus, a message "delivered by conduct that is intended to be communicative . . . may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (citations omitted). Notably, "narrowly drawn" here does not mean the "least restrictive or least intrusive means of" achieving a government's legitimate content-neutral interests. Ward v. Rock Against Racism, 491 U.S. 781, 798, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). Rather, the regulation must "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 294.

As discussed in more detail below, the City's interests here are legitimate – indeed, they are compelling. Moreover, to the extent that the message conveyed by exterior lighting and Halloween decorations is that the residence and its occupants "wish to participate in Halloween" (Application at 13), these provisions leave open ample alternative channels for the communication of this message. As the City points out:

> [N]umerous other opportunities remain for Plaintiffs to celebrate Halloween. They can attend parties, visit at a friend's house or go ["trick-or-treating"] door-to-door themselves. Indeed, the ordinance imposes no restrictions on their ability to stand [in public view] on the sidewalk, at the foot of the driveway, or in other public places and hand out candy.

(Opp'n at 15.) These activities clearly suffice to communicate to the public Plaintiffs' festive Halloween spirit. Thus, the Court finds that even had Plaintiffs shown that these provisions regulate expressive conduct, Plaintiffs still cannot demonstrate even that serious questions going to the merits of this claim are present here.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

Case No. CV 12-8377 PA (VBKx) Date October 29, 2012
Title John Doe # 1, et al. v. City of Simi Valley

**3. Simi Valley Municipal Code § 5.43-03(a): Sign Posting Requirement**

Finally, those sex offenders whose names also are "listed on the portion of the Megan's law website visible to the general public" are further required to "[p]ost a sign, no smaller than twelve (12) inches by twenty-four (24) inches, with a font size no smaller than 72 points, on the front door at his or her residence stating, "No candy or treats at this residence." Enforcement Policy, §3(2); S.M.V.C. § 5.43-03(a).

Plaintiffs contend that this provision of the Halloween Ordinance is unconstitutional as compelled speech that requires them to espouse – in written words directed to the general public – a viewpoint to which they do not adhere. (See Application at 12.)

It is well-established that a regulation compelling noncommercial speech is subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); Riley v. National Federation of Blind, Inc., 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). The First Amendment protects not only "the right to speak freely," but also "the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."). Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," laws that compel speech are normally considered "content-based regulation[s] of speech" and therefore are subject to strict scrutiny. Riley, 487 U.S. at 795.

The City nonetheless argues that because "the sign posting requirement . . . is an accurate, viewpoint neutral statement of fact[, it] should not be subject to strict scrutiny." (Opposition at 13.) Strict scrutiny applies, however, "even in cases where the compelled disclosure is limited to factually accurate or non-ideological statements." Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council, 683 F.3d 539, 552 (4th Cir. 2012); see also Riley, 487 U.S. at 797-98 (invalidating a requirement that professional fundraisers disclose to potential donors the percentage of charitable contributions collected during the previous 12 months that were actually turned over to the charity); Hurley, 515 U.S. at 573 (stating that the "general rule[] that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact").

The Halloween Ordinance does indeed compel sex offenders to speak, mandating that they post a sign that there is "no candy or treats at this residence." Thus, the Court applies strict scrutiny to that provision. Cf. Greater Balt. Ctr., 683 F.3d at 552 (applying strict scrutiny to ordinance requiring pregnancy center "to post a sign that it 'does not provide or make referral for abortion or birth-control services'"). This exacting standard is appropriate notwithstanding the substantial and delicate interests

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

Case No. CV 12-8377 PA (VBKx) Date October 29, 2012
Title John Doe # 1, et al. v. City of Simi Valley

served by laws regulating the conduct of sex offenders. See White v. Baker, 696 F. Supp. 2d 1289, 1311-12 (N.D. Ga. 2010) (applying strict scrutiny in First Amendment challenge to invalidate law authorizing the public release by law enforcement officials of identifying information about registered sex offenders).

Content-based speech regulations such as the Halloween Ordinance's sign requirement "are presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). The City thus bears the burden of rebutting the presumption of invalidity. Playboy Entm't Group, 529 U.S. at 817. Indeed, "[i]t is rare that a regulation restricting [or compelling] speech because of its content will ever be permissible." Id. at 818. The City can, nonetheless, rebut the presumption if it is able to show that the ordinance is "narrowly tailored to promote a compelling Government interest," such that the ordinance is the "least restrictive alternative" to serve the government's purpose. Id. at 813; Ashcroft v. ACLU, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004).

The City has successfully demonstrated that a compelling governmental interest underlies the Halloween Ordinance. The Simi Valley City Council enacted the Halloween Ordinance in order to protect children from the dangers posed by sex offenders while "trick-or-treating," a night-time activity during which children of all ages frequently come into close and unsupervised contact with strangers. In particular, the City's statute aims at substantially decreasing the likelihood that children will be in vulnerable locations near the entry areas of the residences of sex offenders while "trick-or-treating."

It has been recognized that "[s]ex offenders are a serious threat in this Nation." McKune v. Lile, 536 U.S. 24, 32, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). Statistics show that when "convicted sex offenders reenter society they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." Id. at 32-33. "[E]very . . . State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders." Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 4, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

The City provides no documentary evidence that Halloween is a particularly dangerous time for children vis-à-vis sex offenders. It is common sense, however, that young "trick-or-treaters" are indeed vulnerable to child predators on Halloween. Thus, the Court agrees with the City that the interest underpinning the Halloween Ordinance is sufficiently compelling to satisfy the strict scrutiny standard.

Nonetheless, the Halloween Ordinance's sign requirement is not narrowly tailored to achieving that compelling interest. First, the Court notes that the sign is ambiguous and does not clarify the "danger" that the statute serves to mitigate. Moreover, and more importantly, a number of less speech-restrictive alternatives exist that serve substantially to further the aims of the statute. The three remaining substantive provisions of the Halloween Ordinance, for example, are powerful avenues by which "trick-or-treaters" will be dissuaded from venturing onto the properties of sex offenders. Moreover, all the sex offenders who would, under the Ordinance, be required to post a sign are already visible on California's Megan's Law website. Thus, in light of these less restrictive, effective

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

Case No. CV 12-8377 PA (VBKx) Date October 29, 2012
Title John Doe # 1, et al. v. City of Simi Valley

alternatives to the sign posting requirement, the Court finds that Plaintiffs are likely to prevail on the merits of their claim that the sign requirement is unconstitutional.

**B. Likelihood of Irreparable Harm**

It is undisputed that the that loss of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); see also Assoc. General Contractors of Calif. v. Coalition for Econ. Equity, 950 F.2d 1401, 1412-13 (9th Cir. 1991) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm."); New York Magazine v. Metro. Transp. Auth, 136 F.3d 123, 127 (2d Cir. 1998) (same). As discussed above, Plaintiffs have made a clear showing that they are likely to succeed on the merits of their claim that the sign requirement – a form of compelled speech – runs afoul of the free speech guarantee of the First Amendment. Thus, they are likely to suffer irreparable harm absent issuance of a temporary restraining order.

Furthermore, the sign requirement, heavily publicized in the Simi Valley area, poses a danger to sex offenders, their families and their property. Although the sign employs innocuous language, its function and effect is likely to approximate that of Hawthorne's Scarlet Letter – drawing immediate public attention to Plaintiffs and potentially subjecting them to the dangerous mischief common on Halloween night and to community harassment in the weeks and months following – and in that way the Ordinance's sign requirement is different in kind from the disclosure requirements of California's Megan's Law. These considerations further support the issuance of a temporary restraining order.

**C. Balancing of the Equities & Public Interest Considerations**

As noted, Plaintiffs are likely to suffer irreparable harm in the form of lost First Amendment freedoms. Moreover, the sign posting requirement potentially subjects Plaintiffs to harm to their persons, properties, and reputations. These are significant hardships that support the issuance of an injunction.

The City responds that enjoining enforcement of any part of the Halloween Ordinance – the sign posting requirement in particular – contravenes the public interest and imposes a hardship on the City that far outweighs that imposed on Plaintiffs. The Court is sensitive to the City's concerns. State and local governments should – and do – have substantial freedom to fashion laws regulating the post-release conduct of convicted sex offenders, particularly those whose sex crimes targeted children. The compelling governmental interest such laws serve, however, does not render them immune to constitutional scrutiny. In light of the effective alternatives to the sign posting requirement and the identifying information already publicly available on California's Megan's Law website, the Court does not believe that an injunction against the sign posting requirement will impose a substantial hardship on the City or the public. Accordingly, the balance of hardships tips in Plaintiffs' favor.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
**CIVIL MINUTES - GENERAL**

Case No. CV 12-8377 PA (VBKx) Date October 29, 2012
Title John Doe # 1, et al. v. City of Simi Valley

Finally, a limited temporary restraining order is in the public interest. Plaintiffs have made a strong showing that the sign posting requirement is facially unconstitutional and likely to pose a risk to sex offenders and their families and cohabitants. The public interest is not served – indeed, it is undermined – by enforcement of an unconstitutional law singling out a discrete, outcast group to speak in such a way that their persons, property, and loved ones may be endangered. Because the impact on the public of enjoining this section of the Halloween Ordinance is likely to be negligible, the Court finds that a temporary restraining order is in the public interest.

**Conclusion**

Plaintiffs have failed to call into question the constitutionality of sections 5.43-03(b)–(d) of the Halloween Ordinance. Thus, the Court denies Plaintiffs' Application as it pertains to those provisions.

Plaintiffs have, however, made a clear showing that they are likely to succeed on the merits of their facial challenge to the sign posting requirement of the Halloween Ordinance and that they are likely to suffer irreparable harm absent a temporary restraining order. Moreover, the Court also finds that the balance of equities tips in Plaintiffs' favor and that the public interest will be served by a limited injunction. Thus, the Court finds that the issuance of a temporary restraining order is appropriate.

In light of the foregoing, the Court grants in part and denies in part Plaintiffs' *Ex Parte* Application for Temporary Restraining Order. The Court hereby temporarily enjoins the City from enforcing the sign posting requirement of the Halloween Ordinance, section 5.43-03(a) of the Simi Valley Municipal Code.[4/] This Minute Order shall constitute the temporary restraining order; no further Order shall issue at this time.

IT IS SO ORDERED.

**NOT FOR PUBLICATION**

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[4/] Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court orders the temporary restraining order is effective for 14 days. Plaintiffs' request for an order to show cause why a preliminary injunction should not issue is denied without prejudice inasmuch as Halloween falls within that 14 day period. If this matter is not resolved or tried on the merits before the celebration of Halloween in 2013, Plaintiffs are free to renew their motion for a preliminary injunction.

**EXHIBIT B**

# Proposition 35

Posted On 23 Oct, 2012 - 23 Comments

The California ballot includes a proposition that would require all registrants to disclose internet activities and identities within 24 hours of its passage. This requirement is hidden within Proposition 35 which states its focus is upon stopping human trafficking. The proposition would also require anyone convicted as a sex trafficker to register as a sex offender.

Supporters of this proposition include the California Statewide Law Enforcement Association and the Police Officers Research Association. It is not surprising then that fines collected from sex traffickers will be used for law enforcement! The combined investment of these two organizations – reported as about $700,000 – could pay great dividends since individual fines could reach $1.5 million.

California RSOL joins organizations such as the California Association for Criminal Justice, the California Council of Churches, and the Harvey Milk LGBT Democratic Club in opposing Proposition 35. **Please vote NO on Proposition 35 to protect the privacy of more than 100,000 citizens!**

If this proposition should pass, California RSOL will participate in legal action to stop enforcement of this proposition.

Full Text of Proposition 35
Complete California Voter Guide
LA Times: Vote NO on Proposition 35

NOTE: Also see commentary and comments here

**This Post Has 23 Comments**

**Bluewall**
October 23, 2012 at 11:39 am

and somehow email addresses of people would prevent human trafficking.. a person can have thousands of email accounts easily by sitting on a computer for 30 minutes... in comparison of actually mailing addresses, it may take a few weeks... This sooo makes perfect sense..

**Joe**
October 23, 2012 at 1:48 pm

Reading the ballot text:

=> current RSOs will have to submit their e-mail addresses, screen names and providers immediately (whatever that means) after passage of this bill, and then within 24 hours (!) WITH EVERY CHANGE (addition, deletion or modification).

*290.014.(b) If any person who is required to register pursuant to the Act adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 24 hours. ... Each person to whom this subdivision applies at*

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CA RSOL Meeting in Los Angeles – Nov 10

Proposition 35

Oct 23 – Anaheim City Council / Parks Ban

**Recent Comments**

J on Proposition 35

http404 on Proposition 35

Mad Mom on Proposition 35

Pam on Proposition 35

DZ on Proposition 35

Janice Bellucci on Prop 35: Sex traffic law vaguely expands police power

Janice Bellucci on Proposition 35

DZ on Proposition 35

Pam on Proposition 35

RJ on Teen Stunts Landing Kids On Sex Offender List... For Life

**CA RSOL News**

CA RSOL Meeting in Los Angeles – Nov 10

Operation Boo / Daily Corrections Clips

*the time this subdivision becomes effective shall immediately provide the information required by this subdivision.*

*"Internet identifier" means an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging*

Do I smell a logistical nightmare?

**leagleeagle**
October 26, 2012 at 7:46 am

The use of the word "immediately" should be grounds to invalidate this law right off the bat.

While I am not sure how a proposition becomes a law, the nano-second after it goes becomes actual law and goes into effect, 100,000 people across California have just committed a NEW CRIME, (the same offense across the board, but misdemeanor or felony based on something in the past) by not reporting their e-mail etc, IMMEDIATELY. Which is physically and practically impossible.

**MM**
October 23, 2012 at 3:39 pm

I too have shared Prop 35 within my world and told them of the hidden requirement for RSO's and asked them to vote NO, I already have. My question is ... Internet Identifier, I'm confused. I know that your AOL, YAHOO or GMAIL account information would have to be provided, but what about your Directv account? your car insurance account? Your Macy's log on? We all have "internet identifiers", "username" and they are not necessarily the same as your email ... again, another law that is NOT CLEAR.

How far does Prop 35 reach? To only your "email" (internet identifier) you use to communicate with friends and family or further, does it include your work email? I tired to decipher some of the Prop but got lost in the mumbo-jumbo of internet identifiers and whether it's at a library or work or home .... will they ask for passwords next?

**http404**
October 23, 2012 at 4:42 pm

MM, see the pdf link and(proposed)section 290.014 where definitions are provided. If your DirecTV or Macys account offers a comments section or chat capability once you're logged in, then I am reading into it that you would in fact be required to disclose your user ID for those accounts. What doesn't seem clear is whether "chat" capability would include sites that offer a chat feature to interact with their technical support team. This may be splitting hairs but I'd hate to see someone get arrested on a technicality and this legislation is rife with opportunities to entrap someone based on technical aspects.

As Joe said, this would be a logistical nightmare.

**Wonderer**
October 24, 2012 at 7:43 am

What about posting on this website? You can post under a new name all day long, if you so please. Is every time you write something under a user name (just because you do not register per se that does not mean you are not posting under that name) cause to provide that name? What if you stop using it?

What if you sell something on craigslist? They assign a unique email to the each posting. Does that need to be provided? What if you sell the item / delete the posting. Terminating an identifier is a change per the definition.

What is the process for informing the police of a new name / identity? Must you appear in person? Registered letter? E-mail? Is there a form? Or do you just scribble something on a piece of paper? What determines the 24 hour period? USPS stamp? Personal appearance?

Teen Stunts Landing Kids On Sex Offender List... For Life

California judge's ruling a partial victory for registered child sex offenders

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Anaheim City Council approves Parks Ban

SIMI VALLEY ORDINANCE CHALLENGED IN FEDERAL COURT

Sex offender residential requirements unconstitutional, court rules [updated with Court Decision]

**Categories**

Select Category

What if your annual appt comes and they do not have a current list of your digital identifiers? How, oh how, can you sign the form if it is not correct? I would not if I had back-up (and believe you me I would).

This must be the least thought about piece of legislation on the planet! Lets see, if it passes, if they did not bite off more than they can chew!

**Wonderer**
October 24, 2012 at 8:37 am

One should not forget, that failure to comply with PC 290 is an automatic felony or misdemeanor, depending on the underlying conviction. No nag letter, no fine, no lien against some asset. A CRIME – very likely a felony – poor book-keeping skills suffices. For something that is completely unrealistic and entirely ambiguous.

If someone were intent on creating repeat felons, this legislation should do it...

**Janice Bellucci**
October 25, 2012 at 1:50 pm

Thank you everyone for your insightful comments. The situations you have described are why we will be fhallenging the enforcement of the proposition if it passes. Please stay tuned! And, yes, donations to the "cause" would help us to what needs to be done.

**Get your Rights**
October 26, 2012 at 10:59 pm

just be ready.....basicly we cant do nothing about this and most probably it will pass.
so, stay alert and contact your registered police department at he same day as this measure passes. otherwise we will fall into this new trap with a new mosdimonor or felony,

**Get your Rights**
October 27, 2012 at 6:24 pm

if it passed, what we have to do? should we contact our city police department immidiatly?

**CharlieO**
October 30, 2012 at 4:12 pm

These are such great comments – I especially love the one about CraigsList which I use frequently to offload this or find a deal on that.

The insanity continues...
In this day and age anyone younger than my parents has more Internet accounts than they realize. As an IT consultant somoene in my role probably has more than the average end user and to compile a comprehensive list for every forum, blog, support site, email, ISP, telco, bank, shopping, or merchant account that I have established since I entered this career in 1997 without an accidental omission would be impossible. I maintain client accounts for software licensing, domain registrars, etc. Must I disclose those as well? That would be a breach of any NDAs I have in place with them.
Will this list be publicized? I remember a story within the last couple of years where this happened in another state. The list of email addresses was made available to FaceBook who immediately de-activated profiles associated with email addresses on the list.
My gut tells me that the gross ambiguity of this law will cause it to be struck down or suspended the day after it passes. Of course, this will only happen if we have someone to file an injunction. Does anyone know if Janice Belluci or the ACLU is standing by? Where can I contribute to help fight this battle?

**Janice Bellucci**
October 30, 2012 at 8:23 pm

Yes, CharlieO, we are standing by to challenge Prop. 35 if it is passed. California RSOL will be actively involved in the challenge and therefore donations are both needed and appreciated. It's easy to do....use the Donate button on this website or send a check to the mailbox. Thanks for asking!

**CharlieO**
November 2, 2012 at 8:49 am

Done.
Best of luck, Janice, and thank you so much for all of your hard work!

**MM**
October 31, 2012 at 10:01 am

We've got our letter ready, addressed to the Chief of Police with "internet identifiers" listed (fortunately, there are only 7 of them) ... if (when) this law passes – when will it go into effect?? (Is that an ignorant question? I just don't know.)

I'm also sure that once the letter is sent to the Police Department they will most likely react something like ... "Great, now what do we do with this letter and information?"

**DZ**
November 2, 2012 at 4:38 am

I would hope this portion of the law would be struck down, but who knows? Within court could take a long time. No wonder the law says 'immediately' since they must realize there is good reason for this portion to be struck down, but at that point, law enforcement already has all of the email and forum accounts, and who knows what they plan to do with those.

Are they really going to arrest 150,000 people in 24 hours for not knowing the fine print of a brand new law, and not having been asked to provide the information? Or for not providing information in full, because of unclear wording or accidental omission?

I have read in some places that it requires passwords as well, but I did not see anything specifying that in the wording of the proposition. I did however notice it says that registrants must fill out the form, and it seemed to indicate that the form might change: perhaps on the form it will ask for passwords? I know the Patriot Act already allows Homeland Security to scan email and telephone calls, but that is very different than local and state law enforcement having your passwords to accounts. Wouldn't this violate the right to privacy? Under normal circumstances law enforcement would need a warrant to tap phones, computers and read personal mail, so how would this be legal? This also violates the privacy of all my friends, family and business clients.

I also do online banking. I don't want to have someone I don't know and don't trust having access to this through my email.

With a voter approval rating projected at 77% this looks like it will be a reality in a few days.

**Pam**
November 3, 2012 at 12:59 pm

Alas, I think this is going to pass. I am a member of SEIU, and a strong supporter of my union; however, it grieves me and I am ashamed to say that SEIU is supporting Prop 35 and recommending that its members vote yes. Brace yourselves–it's going to be a bumpy ride.

**DZ**
November 3, 2012 at 1:54 pm

So what is the actual requirement for rso's?
The wording of the proposition is not very clear.

It states 'internet identifiers' must be given to law enforcement 'immediately' after the prop is enacted, which would mean the day after the election. But what information must be given exactly? For sure, the name of the company that provides the internet access (but not the actual IP address it would seem) and email addresses. But other online identifiers? For what? Forums,

social media & chatroom only? Or for blogs & sites like this one as well? Would I give them simply 'DZ' because I have posted a comment here or would I give them DZ along with this website, or none because it isn't a forum or chatroom? The law is not clear at all. If I use the same forum name for many forums do I give them my handle only, or list every forum I tend to post on, and then, if I use the same forum name on a new forum- is that no change because it's the same name, or is it a change because it's a new forum and they will require written notice of this within 24 hours? The law says nothing about listing the website addresses of forums you post on, but is it implied? It isn't clear.

Also, what prevents someone from using the same forum name you use on one forum on a completely different forum? How will the police know this is not you? Nothing prevents a person from purposefully or accidentally creating the same name someone uses on one forum but on an unrelated forum. Will people be arrested because a stranger made a name that was the same as one of theirs?

What will they do with these email addresses and forum handles? If they list it on the meagan's law website that opens up registrants to internet harassment and loss of business.

Most rso won't even know about the provision of this new law, and so are they open to be arrested for violation of registry? I am burdened with this legal stigma, what info exactly am I required to give the police on Wed. morning? despite this obviously being a bad law and surely unconstitutional, I will give them what I must but nothing more than I have to, because I'm sure not giving them an excuse to throw me in prison. I was foolish once, never again. The requirements are vague and undefined. It seems to be a trap or 'gotcha' law.

What info must be given? There isn't much time left to figure this out.

**Janice Bellucci**
November 4, 2012 at 7:57 am

Although I am a lawyer, I am not giving any one person legal advice. If I were a registrant, I would prepare a list of online identifiers and have it ready IF it is necessary to provide such a list to law enforcement. However, if I were a registrant, I would not provide the list to anyone until 23 hours, 59 minutes after the proposition is passed. Why? There will be a legal challenge to block its enforcement and if one has already given such a list to law enforcement, one cannot take it back. More to be posted at a later date.

**DZ**
November 4, 2012 at 11:56 am

Thank you Janice!

I am glad to hear that this is being challenged and that it's already being prepared.
I understand this isn't personal legal advice, just asking an informed person their personal opinion and for general governmental definitions that should be (but seemingly are not) made general public knowledge.

When does the clock start ticking?

Looking online all I could find is that a proposition is enacted 'the day after it is voted on and passed'. Does that mean 12:01 a.m. or 24 hours after the poll closes, or is there a moment of official recognition of a proposition becoming a law which is announced? And then, after whatever time this is, do we have 24hrs from that point?

24 hours is not a lot of time to overturn a law, which I'm sure is the reason they wrote it that way, so will the first step be trying to get a temporary hold put on it? Or will there be a shot at striking it down immediately? and if so, is this the best location to find out such information? I'm new to this site, but so far very impressed with the information and motivation. You have my gratitude.

**Pam**
November 4, 2012 at 1:06 pm

"Online identifiers" is a broad term. What, exactly, are they? Where do we start? Also, my husband hasn't been near a computer in over 5 years. We haven't had one in our home due to his parole restrictions. I doubt that he even remembers any email addresses he might have had back then, as he rarely used a computer before his arrest anyway. How far back do we have to go?

**Mad Mom**
November 4, 2012 at 2:06 pm

I'm a bit confused as to who all would be required to disclose internet activity....ALL registrants currently on the registry, or just those convicted of human trafficking, which is what Prop. 35 is primarily about?

**http404**
November 5, 2012 at 1:38 pm

Attn Pam and Mad Mom:

Definitions are provided within the proposition's language that answer your questions. Internet service provider and internet identifier are spelled out. Also, this amends the information required to be provided to law enforcement when registering for those required to register, which means EVERYONE subject to PC 290 registration requirements would be expected to comply.

**J**
November 6, 2012 at 8:21 am

Is there any more word on the constitutional challenge/injunction being prepared by the CA RSOL? It seems very likely that prop 35 will pass.

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**We Believe:**

- No sexual abuse is ever acceptable.
- Sex offense laws and policies should be based on sound research and common sense, not fear, panic or paranoia.
- Current laws and policies that paint all sex offenders with one broad brush are counter-productive, wasteful, and cause needless harm.
- Each offense must be judged on its own merits with a punishment that fits the crime and does not waste taxpayer dollars.
- The public sex offender registry and residency restriction laws do not protect children but instead ostracize and dehumanize individuals and their families.
- Money spent on purely punitive measures would be better used for prevention, healing, and rehabilitation
- We do not now nor have we ever had a relationship with the North American Man Boy Love Association (NAMBLA)

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**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

JOHN DOE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, et al.,

Defendants.

Civil Case No. C 12 5713

**SUPPLEMENTAL DECLARATION OF "JACK ROE"**

I, JACK ROE, declare and state:

1. I am in a Plaintiff in this action. The information in this declaration is based upon my personal knowledge and if called upon to testify, I could and would competently testify thereto.

2. I previously provided the Court with a declaration, signed in California on November 2, 2012, providing my true name and the reasons I am asking to proceed as "Jack Roe" in this litigation.

3. I was born in California, and other than two years when my family lived in Nevada, I have otherwise spent the entirety of my life living in California.

4. As I indicated in my original declaration, I was so afraid of being arrested for failing to comply with Proposition 35, and so afraid it would have an adverse effect on my business, I contemplated moving out of the state so I would not have to turn over my online identification information.

5. I have now followed through with this plan. I am currently living outside of California; before I left I informed the agency with which I registered that I would be leaving their jurisdiction, as required under California law.

6. If I am not required to provide this online identifier information, or if Proposition 35 is found to be unconstitutional, I would happily move back to California, and resume my life in in the county where I previously resided.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this __5th_____ day of _November_____, 2012.

Jack Roe

JACK ROE

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**UNDER PARTIAL SEAL**

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C 12 5713

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Defendants.

Civil Case No. _____

**DECLARATION OF [redacted], REFERRED TO IN THIS LITIGATION AS "JACK ROE"**

I, [redacted], declare and state:

1. I am in a Plaintiff in this action. The information in this declaration is based upon my personal knowledge and if called upon to testify, I could and would competently testify thereto.

2. I reside near [redacted]. I am [redacted] years old.

3. I have twice been convicted of violating [redacted], once in [redacted] when I was [redacted] years old, and again in 1992, when I was [redacted] years old. Neither crime involved the use of a computer or the Internet. Both convictions involved victims I already knew, not strangers. As a result of these convictions, I am required to register as a sex offender pursuant to Penal Code § 290.

4. Since I was released from prison in 1999, I have had no trouble with the law and have never been arrested or convicted for any crime since then. I discharged parole in 2001 and have kept my registration current with law enforcement. I have been receiving counseling since I was released from custody, which has helped me to understand the connection between my offenses and the fact that I myself was the victim of sexual abuse when I was a child.

5. I have worked hard to build a successful life for myself and repay my debt to society since I was released from prison. I pay my taxes, bought my own house, purchased several pieces of real estate investment property, and have run a successful small business that relies heavily on the Internet.

6. Since 2002, I have owned [redacted], a company that [redacted].

7. [redacted] is primarily an Internet based business. Our website is located at [redacted] I am the webmaster of the website, meaning I am responsible for administering and maintaining all data contained on the site. [redacted] has Facebook and LinkedIn pages, as well as other business directory websites and so I have a username to login and access all of these sites. The

same is true of [redacted] a website that I use and that allows me to find and hire independent contractors and other part time or limited term employees.

8. In connection with my business, there are numerous emails I administer. For example, [redacted] website lists [redacted] as an email address people can use to obtain information about [redacted] services. Additionally, there are separate emails for accounting and support, which I administer and have control over. I send approximately 100 emails day in connection with my business.

9. [redacted] has twenty subcontractors, some of whom have an [redacted] email address. Because I administer the website, I have control over these emails as well. After I create an email account for an employee, I provide them with a temporary password that they can change after logging in for the first time. Although I do not keep a record of these passwords after an employee changes the initial password I establish for them, I have the ability to reset their password and restore my access to their email account at any time.

10. In addition, in order to keep a competitive advantage, I have reserved domain names related to the industry in case I need them for future use. For each of these domain names, I have a unique username.

11. In addition to using the Internet for my business, I use it in my personal life too. I have my own Facebook and Linked In pages, as well as an email address I use for personal purposes.

12. I regularly engage in anonymous online speech. I run a blog on the popular [redacted] blogging website, focused on [redacted]. I run the blog anonymously and there is no information on the site that connects me to the blog. The blog allows users to comment on my posts, allowing them to do so anonymously if they like.

13. Anonymity is an important part of the blog. It protects me from [redacted] If I could not run the blog anonymously, I would not run it at all for fear of having my

business negatively affected.

14. Additionally, I regularly comment on articles I read online. In order to express my true opinions about oftentimes controversial topics, I always comment anonymously. Again, this is to protect the reputation of my business.

15. There is tremendous social stigma associated with my status and I fear adverse consequences if I have to reveal my status as a convicted sex offender beyond the registration requirements already in place.

16. These adverse consequences include my fear that my online identities will eventually become public record just like my address has. I fear that service providers and websites like Facebook or Linked In will effectively "blacklist" me on account of my registration status, allowing law enforcement and Internet service providers alike to keep tabs on my online activity.

17. Moreover, I fear severe adverse consequences to my business should the email addresses I use for work purposes become a matter of public record. As a small business owner, I live in constant fear that potential clients will take their business elsewhere if they learn of my status as a registered sex offender. Disclosing this information will ruin my business and destroy everything I've worked hard to achieve since being released from prison thirteen years ago.

18. These consequences will not just affect me. [redacted] But since the account is under my name, if our Internet service provider is scrutinizing my Internet activity, then they necessarily will be scrutinizing his Internet activity and use too.

19. From personal experience, I have a strong basis for believing that these adverse consequences will come to pass. In the past, I have experienced retaliation against me on the basis of my status as a registered sex offender. When California made sex offender registration information available to the public in 2004, I had neighbors knock on my door and confront me about being on the registry.

20. In 2010, I started a successful [redacted] business and worked hard to get business throughout [redacted]. When a business competitor found out about my status as registrant, he broadcasted that information to the local business community. As a result, I was shunned from the local chambers of commerce, had previously scheduled speaking engagements cancelled, and ultimately went out of business, losing all of the money I invested as a result.

21. In September of this year, when I went to the [redacted] Sheriff's Department to complete my annual registration paperwork, I was told I had to provide my email address and Facebook account information even though Proposition 35 had not been passed yet.

22. Because of my fear of these adverse consequences, if I were forced to reveal my identity in connection with my online speech, I would stop speaking online, notwithstanding my desire to continue, and belief in the importance of contributing to the public debate on public issues. This includes shutting down my blog and not commenting anonymously on articles I read online anymore.

23. Moreover, I am afraid that I will simply be unable to comply with the law. Compiling a list of each and every forum for which I speak, or every username or online account for which I have control or am responsible for, would be burdensome and act as a further deterrent to my participation in online speech. Since I've been released from prison and been active online, I have created numerous usernames for websites, and am unable to recall all of them.

24. I am so afraid of being arrested for failing to comply with Proposition 35 and the adverse effect it could have on my business that I am planning on moving to [redacted], where I will not be required to turn over this information. If I do not have to turn over this information or if the law is struck down as unconstitutional, I will happily return to California and resume my life in [redacted].

25. Because of my fear of the adverse consequences described above, particularly my concerns that my business would suffer, I would also be reluctant to pursue this litigation if I had to reveal my name on public court documents. I therefore ask that I be referred to as "Jack Roe" in this lawsuit.

26. I am bringing this lawsuit because I am concerned about Proposition 35's violation of my constitutional rights and the constitutional rights of other people who must register under Penal Code § 290. I want to stand up for my rights, and the rights of other people who are in the same position. I know that as a plaintiff in this lawsuit, I am here to represent other § 290 registrants. I understand that this means I will need to stay informed with what's happening in the case and that I need to think about the interests of the other class members and act on those interests.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 2 day of Nov., 2012 at [redacted] California.

[redacted]

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KAMALA D. HARRIS, et al.,

Defendants.

Civil Case No. _____

**DECLARATION OF [redacted] REFERRED TO IN THIS LITIGATION AS "JOHN DOE"**

I, [redacted] declare and state:

1. I am a Plaintiff in this action. The information in this declaration is based upon my personal knowledge and if called upon to testify, I could and would competently testify thereto.

2. I reside in Alameda, California. I am 75 years old.

3. In 1986, I was convicted of two counts of violating [redacted]. Neither conviction involved the use of a computer or the Internet. As a result of these convictions, I am required to register as a sex offender pursuant to Penal Code § 290.

4. Since I was released from prison in 1991, I have had no trouble with the law and have never been arrested or convicted for any crime since then. I discharged parole in 1994 and my registration is current with law enforcement.

5. I have worked hard to repay my debt to society since I was released from prison 21 years ago and consider myself an activist on sex offender issues.

6. In an effort to help the public understand sex offenders and how they can be reformed, I have spoken extensively to victims groups and treatment professionals. I have appeared on television programs like the [redacted], been profiled in [redacted] magazine and [redacted] and wrote the book [redacted]. And I have regularly commented on other blogs and websites concerning sex offenders, Megan's Law and the road to recovery.

7. In addition, I have made an effort to reach out to sex offenders to not only help them understand their reporting requirements but provide a forum for them to speak their mind about reporting requirements or their recovery.

8. From 2000 until earlier this year, I operated two different sex offender recovery websites, [redacted] and [redacted] The sites provided information about registration requirements as well as recovery resources for sex offenders. The websites provided an online forum for sex offenders to discuss their recovery with other sex offenders.

9. Many sex offenders fear retaliation from the community for speaking out, and so I

permitted people to comment anonymously. That way, people would feel free to discuss their thoughts openly without fear of retaliation or further community embarrassment.

10. I operated these websites until earlier this year, when my health took a turn for the worse. For many years, I have suffered from chronic obstructive pulmonary disease (COPD). But earlier this year, I was told I only had six months to live. I was transferred to a [redacted] and as a result, stopped operating and running my websites.

11. Thankfully, in the [redacted] my health began improving. The doctors changed their prognosis and believe that my COPD is no more likely to kill me than anything else. I have since been transferred to [redacted].

12. Now that my health is better, I want to again become engaged in the issues surrounding the sex offender community. That includes not only reviving my websites, but also continuing to comment in online newspapers, articles and other forums about sex offender issues.

13. Proposition 35, however, presents severe obstacles to me being able to do so. There is tremendous social stigma associated with being a registered sex offender and I fear sex offenders who wish to speak out about their recovery or ask questions – or even complain – about their registration requirements will only do so if they can speak anonymously.

14. Ultimately, because of Proposition 35, I believe people will not comment on my website if they were forced to reveal their identity. This would deprive me of the opportunity to provide a service – essentially a forum to speak – to sex offenders because their fear of retaliation will be too great.

15. Moreover, I have contributed to a various online forums and websites on a variety of issues, including those surrounding the sex offender community. Compiling a list of each and every one of them would be burdensome and act as a further deterrent to my participation in online anonymous speech.

16. Because of my fear of the adverse consequences described above, I am also reluctant to pursue this litigation if I have to reveal my name on public court documents. Specifically, because I live in an [redacted], I fear that publicizing my

involvement in this lawsuit – in addition to publicizing my status as a registered sex offender – could lead to retaliation from [redacted], as well as cause them embarrassment and discomfort. I therefore ask that I be referred to as "John Doe" in this lawsuit.

17. I am bringing this lawsuit because I am concerned about Proposition 35's violation of my constitutional rights and the constitutional rights of other people who must register under Penal Code § 290. I want to stand up for my rights, and the rights of other people who are in the same position. I know that as a plaintiff in this lawsuit, I am here to represent other § 290 registrants. I understand that this means I will need to stay informed with what's happening in the case and that I need to think about the interests of the other class members and act on those interests.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 2nd day of November, 2012 at [redacted] California.

[redacted]

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Defendants.

Civil Case No. _____

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

## TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. BACKGROUND ..... 2

A. The California Sex Offender Registry ..... 2

B. Recidivism Rates Vary Among Sex Offenders in Predictable Ways ..... 3

C. Sex Crimes are Overwhelmingly Committed by Family Members and Acquaintances, Not Strangers who Use the Internet to Meet Their Victims ..... 4

D. The Internet Is a Forum for Expression and Association ..... 5

E. Newly Enacted Requirements of CASE Act ..... 6

F. Plaintiffs Engage in Protected Online Speech ..... 7

III. LEGAL STANDARD ..... 9

IV. ARGUMENT ..... 10

A. Plaintiffs are Likely to Succeed on the Merits ..... 10

1. The CASE Act is unconstitutionally overbroad because it makes it a crime to engage in constitutionally protected anonymous speech and is not narrowly tailored ..... 10

a. The CASE Act criminalizes constitutionally protected anonymous online speech ..... 11

b. The CASE Act is not narrowly tailored ..... 12

2. The CASE Act is unconstitutional because its burdensome registration requirements are not narrowly tailored ..... 17

a. The CASE Act's registration requirements trigger First Amendment scrutiny ..... 17

b. The CASE Act must satisfy strict scrutiny because it discriminates among speakers ..... 18

c. The CASE Act is not sufficiently tailored to satisfy either intermediate or strict scrutiny ..... 19

3. The CASE Act is unconstitutionally vague ..... 20

4. The CASE Act violates Plaintiffs' freedom of association by requiring the compelled disclosure of the membership of their online communities ..... 23

B. Plaintiffs Face Imminent and Irreparable Harm ..... 24

C. An Injunction Against Enforcement Serves the Public Interest and the Balance of Equities Tips in Plaintiffs' Favor ..... 24

D. Scope of Relief ..... 25

V. CONCLUSION ..... 25

## TABLE OF AUTHORITIES

### Federal Cases

*ACLU v. Johnson*,
194 F.3d 1149 (10th Cir. 1999) ..... 25

*Alliance for the Wild Rockies v. Cottrell*,
632 F.3d 1127 (9th Cir. 2011) ..... 10

*American Civil Liberties Union v. Reno*,
31 F.Supp.2d 473 (E.D. Pa. 1997), *aff'd* 542 U.S. 656 (2004) ..... 17

*American Legion Post 7 of Durham, N.C. v. City of Durham*,
239 F.3d 601 (4th Cir. 2001) ..... 17

*Art of Living Found. v. Does 1-10*,
2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) ..... 12, 24

*Ashcroft v. Free Speech Coal.*,
535 U.S. 234 (2002) ..... 10, 19

*Baggett v. Bullitt*,
377 U.S. 360 (1964) ..... 23

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433 U.S. 350 (1977) ..... 17

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569 F.3d 1029 (9th Cir. 2009) ..... 14

*Broadrick v. Oklahoma*,
413 U.S. 601 (1973) ..... 17

*Brown v. Socialist Workers*,
459 U.S. 87 (1982) ..... 23

*Buckley v. Am. Constitutional Law Found.*,
525 U.S. 182 (1999) ..... 10

*Citizens United v. Federal Election Com'n*,
130 S.Ct. 876 (2010) ..... 18

*Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*,
657 F.3d 936 (9th Cir. 2011) ..... 11, 14, 16, 19

*Denney v. Drug Enforcement Admin.*,
508 F.Supp.2d 815 (E.D. Cal. 2007) ..... 19

*Doe v. Nebraska*,
--- F.Supp.2d ----, 2012 WL 4923131 (D. Neb. Oct. 17, 2012) ..... *passim*

*Doe v. Shurtleff*, 2008 WL 4427594 (D. Utah Sept. 25, 2008) ("*Shurtleff I*"),
*vacated after law amended by*, 2009 WL 2601458 (D. Utah Aug 20, 2009)
("*Shurtleff II*"), *aff'd*, 628 F.3d 1217 (10th Cir. 2010) ..... 10, 16

*Farris v. Seabrook*,
677 F.3d 858 (9th Cir. 2012) ..... 10, 24

*Golan v. Gonzales*,
501 F.3d 1179 (10th Cir. 2007) ..... 19

*Grayned v. City of Rockford*,
408 U.S. 104 (1972) ..... 10, 12, 20

*Hunt v. City of Los Angeles*,
638 F.3d 703 (9th Cir. 2011) ..... 20, 23

*Hynes v. Mayor and Council*,
425 U.S. 610 (1976) ..... 20

*In re Anonymous Online Speakers*,
661 F.3d 1168 (9th Cir. 2011) ..... 11, 15

*Klein v. City of San Clemente*,
584 F.3d 1196 (9th Cir. 2009) ..... 10, 24

*Laird v. Tatum*,
408 U.S. 1 (1972) ..... 17

*Lorillard Tobacco Co. v. Reilly*,
533 U.S. 525 (2001) ..... 16

*Mass. Bd. of Retirement v. Murgia*,
427 U.S. 307 (1976) ..... 19

*McIntyre v. Ohio Elections Comm.*,
514 U.S. 334 (1995) ..... 11

*Melendres v. Arpaio*,
695 F.3d 990 (9th Cir. 2012) ..... 24

*Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*,
460 U.S. 575 (1983) ..... 18

*NAACP v. Alabama*,
357 U.S. 449 (1958) ..... 23, 24

*Nunez v. Holder*,
594 F.3d 1124 (9th Cir. 2010) ..... 3

*Ohio Citizen Action v. City of Mentor-On-The-Lake*,
272 F. Supp. 2d 671 (N.D. Ohio 2003) ..... 15

*Perry v. Schwarzenegger*,
591 F.3d 1147 (9th Cir. 2010) ..... 24

*Reno v. ACLU*,
521 U.S. 844 (1997) ..... 16, 19

*Sable Communications v. FCC*,
492 U.S. 115 (1989) ..... 18

*Sammortano v. First Jud. Dist. Court*,
303 F.3d 959 (9th Cir. 2002) ..... 24

*Scott v. Roberts*,
612 F.3d 1279 (11th Cir. 2010) ..... 24

*Shelton v. Tucker*,
364 U.S. 479 (1960) ..... 24

*Simon and Schuster, Inc. v New York State Crime Victims Bd.*,
502 U.S. 105 (1991) ..... 17, 19

*Smith v. Goguen*,
415 U.S. 566 (1974) ..... 20

*Sorrell v. IMS Health Inc.*,
131 S.Ct. 2653 (2011) ..... 18

*Talley v. California*,
362 U.S. 60 (1960) ..... 11

*United States v. T.M.*,
330 F.3d 1235 (9th Cir. 2003) ..... 13

*United States v. Weber*,
451 F.3d 552 (9th Cir. 2006) ..... 14

*United States v. Wolf Child*,
--F.3d--, 2012 WL 5200347 (9th Cir. 2012) ..... 14

*Walker v. County of Santa Clara*,
2011 WL 4344212 (N.D. Cal. 2011) ..... 9

*Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*,
536 U.S. 150 (2002) ..... 11

*White v. Baker*,
696 F. Supp. 2d 1289 (N.D. Ga. 2010) ..... *passim*

*Winter v. Natural Res. Def. Council*,
555 U.S. 7 (2008) ..... 9

**State Cases**

*Dendrite Int'l, Inc. v. Doe No. 3*,
775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) ..... 12

*Doe No. 1 v. Cahill*,
884 A.2d 451 (Del. 2005) ..... 12

*Indep. Newspapers, Inc. v. Brodie*,
966 A.2d 432 (Md. 2009) ..... 12

*Krinsky v. Doe 6*,
72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008) ..... 12

*Mobilisa, Inc. v. Doe 1*,
170 P.3d 712 (Ariz. Ct. App. 2007) ..... 12

*Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*,
999 A.2d 184 (N.H. 2010) ..... 12

*People v. Archer*,
98 Cal. App. 4th 402 (Cal. Ct. App. 2002) ..... 3

*People v. Kennedy*,
194 Cal. App. 4th 1484 (2011) ..... 2

*People v. McKee*,
47 Cal. 4th 1172 (Cal. 2010) ..... 10

*People v. Meeks*,
123 Cal. App. 4th 695 (Cal. Ct. App. 2004) ..... 7

*People v. Newton*,
9 Cal. App. 3d Supp. 24 (Cal. App. Dep't Super. Ct. 1970) ..... 3

*People v. Rylaarsdam*,
130 Cal. App. 3d Supp. 1 (Cal. App. Dep't Super Ct.1982) ..... 3

**State Statutes**

Californians Against Sexual Exploitation Act ("CASE Act" or "Act") ..... *passim*

Ca. Gov't Code § 12511 ..... 25

Ca. Gov't Code § 12512 ..... 25

Ca. Gov't Code § 12524 ..... 25

Ca. Gov't Code § 12550 ..... 25

Ca. Gov't Code § 12560 ..... 25

Cal. Pen. Code § 290 ..... *passim*

Cal. Pen. Code § 314 ..... 3

Cal. Pen. Code § 1203 ..... 3

Cal. Pen. Code § 3008 ..... 3

**Federal Rules**

Fed. Rule Civ. Pro. 65 ..... 25

**Federal Constitutional Provisions**

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV ..... 10

**State Constitutional Provisions**

Ca. Const. art. V ..... 25

Cal. Const. art. II ..... 7

**Legislative Materials**

2005 Cal. Legis. Serv. Ch. 722 (A.B. 1323) ..... 15

## I. INTRODUCTION

Plaintiffs seek a TRO and preliminary injunction to prohibit the state from enforcing a new California statute that criminalizes online anonymous speech and imposes burdensome reporting requirements on the online speech, whether anonymous or not, of all persons convicted after 1944 of any sex-related offense that requires registration, including misdemeanors such as indecent exposure ("registrants"). The law, the Californians Against Sexual Exploitation Act ("CASE Act" or "Act"), was enacted by voter initiative yesterday and is effective today. It expressly requires all of the 73,900 current California registrants currently living in the community to "*immediately*" provide the police with information about their access to and use of the Internet for expressive purposes; they must also document and disclose any additions or changes to such information within 24 hours. A failure to comply with any of these new requirements is a crime, often a felony.

Immediate relief is necessary to prevent irreparable harm to the rights to freedom of expression and freedom of association granted by the First Amendment. Plaintiffs have a substantial likelihood of succeeding on the merits for the following four reasons.

**First**, the Act is overbroad because it criminalizes constitutionally protected anonymous speech but is not narrowly tailored because it restricts far too much anonymous speech by too many speakers, and allows the information to be used for too many purposes. The statute prohibits *all* anonymous speech, even if it pertains to news, politics, and professional activity, and could not possibly be used to commit a crime (such as commenting on a newspaper website). The statute also applies to *all* registrants, regardless of the severity, type, or age of the underlying offense and whether it had any connection whatsoever to the Internet or to children. Only 1% of sex-crimes against children involve any sort of technology, and even fewer involve the use of the Internet. Registered sex offenders make up only two to four percent of persons arrested for technology-facilitated sex crimes against youth. And after a number of years in the community without a new arrest, sex offenders are *less likely* to re-offend than a non-sexual offender is likely to commit an "out of the blue" sexual offense. Thus, the Act criminalizes many types of anonymous speech, and the speech of many people, that do not pose the dangers with which the statute is concerned. Further, the Act contains no real restrictions on the purposes for which the information may be

used by law enforcement.

**Second**, the Act is unconstitutional because it imposes burdensome registration requirements on a great deal of non-anonymous online speech by registrants, but is not narrowly tailored to its stated goals, for the reasons set forth above.

**Third**, the Act violates due process because it is impossibly vague. It requires registrants immediately to report all "Internet service providers" and "Internet identifiers," but the definitions of these terms leave it entirely unclear whether they trigger reporting obligations for connecting to a wireless network at a coffee shop or hotel, renting a car equipped with an Internet-connected navigation system, creating an account on a new service with the same user name as that used on a different service, or buying something from an online retailer that allows customer reviews, such as Amazon.com. The statute is also unclear whether a registrant must report all "Internet service providers" and "Internet identifiers" she has ever used or only those currently in active use. The vague definitions do not give registrants sufficient notice of what they need to report to comply with the law, a vagueness that is particularly intolerable given the free speech rights implicated and the severe criminal penalties for failure to comply.

Fourth, the Act is unconstitutional because it violates registrants' associational rights by potentially compelling disclosure of their participation in online forums organized by political and other groups and by compelling disclosure of the identity of other registrants with whom they discuss political issues.

## II. BACKGROUND

### A. The California Sex Offender Registry

California law requires every person convicted of a variety of offenses after July 1, 1944 to register as a sex offender for the rest of his or her life. *See* Cal. Pen. Code § 290(b) (all statutory references are to this Code unless otherwise noted). Registrants must provide law enforcement with their address, employer, and license plate numbers within five working days of changing their residence address, and annually. *See* §§ 290.012, 290.013, 290.015(a). Registration is automatic, retroactive, mandatory, lifelong, and not subject to plea bargaining. *See People v. Kennedy*, 194 Cal. App. 4th 1484, 1491 (2011); *see also* §§ 290.007, 290.5.

Registration is required for anybody convicted of any of the some three dozen offenses listed in the statute. § 290(c). In addition, registration is required upon conviction of any offense that the court determines was "committed ... for purposes of sexual gratification." § 290.006. One of the offenses that specifically requires registration is misdemeanor indecent exposure, Penal Code § 314, which can include nude erotic dancing on a stage at a bar (*see People v. Newton*, 9 Cal. App. 3d Supp. 24 (Cal. App. Dep't Super. Ct. 1970)), exposing oneself during an incident of road rage (*see People v. Archer*, 98 Cal. App. 4th 402 (Cal. Ct. App. 2002)), or exposing oneself to an undercover officer who the defendant thought was interested in engaging in sexual activity (*see People v. Rylaarsdam*, 130 Cal. App. 3d Supp. 1 (Cal. App. Dep't Super Ct.1982)). *See generally Nunez v. Holder*, 594 F.3d 1124, 1133-38 (9th Cir. 2010) (discussing broad range of conduct prohibited by statute).

The law's broad scope means that California has the largest number of registered sex offenders of any state: approximately 73,900 registrants, not including persons who are in custody or have been deported. *See* Dec. of Brian Abbott ¶ 7.

**B. Recidivism Rates Vary Among Sex Offenders in Predictable Ways**

Extensive research demonstrates that recidivism rates are not uniform across all sex offenders. Rather, the risk of re-offending varies based on well-known factors and can be reliably predicted by widely used risk assessment tools such as the Static-99, which classify offenders into varying risk levels. *See* Dec. of R. Karl Hanson ¶¶ 2, 14-19. Indeed, outside of the context of its sex offender registry, California uses these tools to distinguish between sex offenders who pose a high risk to the public and those who do not. For example, California law mandates the use of the Static-99 to determine which offenders require a high level of supervision and which do not. *See* § 290.04(b)(1); *see also* §§ 290.04-290.07, 1203e, 1203f, 3008; Hanson Dec. ¶ 18. The majority of felony sex offenders sentenced to prison and released on parole in California after 2005 are classified as posing a low or moderate-low risk of reoffending under Static-99 (scores 0-3). Abbot Dec. ¶¶ 9-10. Less than 10% are classified as high risk. *Id.*[1]

Research also contradicts the popular notion that sexual offenders remain at risk of re-

[1] Similarly, the state's website contains varying amounts of information about registrants offenders based on their offense; lower-level offenders are not even on the site. *See* § 290.46.

offending through their lifespan. Most sex offenders do not re-offend. Hanson Dec. ¶¶ 19-25; Abbott Dec. ¶¶ 13-15. The longer offenders remain offense-free in the community, the less likely they are to re-offend sexually. Hanson Dec. ¶¶ 7-13, 22, 26-38; Abbott Dec. ¶ 16. On average, the likelihood of re-offending drops by 50% every five years that an offender remains in the community without a new arrest for a sex offense. Hanson Dec. ¶ 27. Eventually, persons convicted of sex offenses are *less likely* to re-offend than a non-sexual offender is to commit an "out of the blue" sexual offence. *See id.* ¶¶ 28, 31-33. For example, offenders who are classified as "low risk" pose no more risk of recidivism than do individuals who have never been arrested for a sex-related offense but have been arrested for some other crimes. *See id.* ¶ 30. After 10 to 14 years in the community without committing a sex offense, medium-risk offenders pose no more risk of recidivism than individuals who have never been arrested for a sex-related offense but have been arrested for some other crimes. *See id.* ¶¶ 30, 34. The same is true for high-risk offenders after 17 years without a new arrest for a sex-related offense. *See id.* ¶ 35. Ex-offenders who remain free of any arrests following their release should present an even lower risk. *See id.* ¶ 39. Importantly, post-release factors such as cooperation with supervision, treatment, can dramatically reduce recidivism, and monitoring these factors can be highly predictive. *See id.* ¶¶ 23, 39-40; Abbott Dec. ¶¶ 17-18.

Based on this research, criminal justice and recidivism experts recommend that "rather than considering all sexual offenders as continuous, lifelong threats, society will be better served when legislation and policies consider the cost/benefit break point after which resources spent tracking and supervising low-risk sexual offenders are better re-directed toward the management of high-risk sexual offenders, crime prevention, and victim services." *See* Hanson Dec. ¶ 41.

### C. Sex Crimes are Overwhelmingly Committed by Family Members and Acquaintances, Not Strangers who Use the Internet to Meet Their Victims

In only very rare cases are sex crimes against children committed by strangers whom they have met on the Internet. Ninety percent of sex offenses against children are committed by family members and acquaintances, not strangers, as are eighty percent of sex crimes against older victims. Abbott Dec. ¶ 11. And arrests for *all* technology-facilitated sex crimes against minors (including those committed by acquaintances or family members) constitute only about 1% of all

arrests for sex crimes against children. *See* Dec. of David Finkelhor ¶¶ 12-13. Of that 1%, nearly half (46%) were for possession of child pornography. *See id.* ¶ 20.

Registrants constitute only a small percentage of those who commit technology-facilitated crimes against children: only 4% of persons arrested for technology-facilitated crimes against youth victims were registered sex offenders, and only 2% of those arrested for soliciting undercover investigators were registered sex offenders. *See id.* ¶ 18; Abbott Dec. ¶ 21.

Online targeting of children is decreasing, as are sex crimes against children in general. *See* Finkelhor Dec. ¶¶ 14-17. Studies show a 50% decline between 2000 and 2010 in sexual solicitation of youth on the Internet. *See id.* ¶ 14.

**D. The Internet Is a Forum for Expression and Association**

At the same time, the role of the Internet as a forum for expression, communication, and association has continued to expand. There are millions, if not hundreds of millions, of web sites incorporating some form of "social networking" functionality, *e.g.*, the ability to create a profile and post some form of content. Dec. of David G. Post ¶¶ 35-36. While the total number of different web sites continues to increase, so does the user base and usage of the most popular sites and services. For example, Facebook alone now has more than one billion users worldwide, and Twitter users generate hundreds of millions of "tweets" per day. *Id.* ¶ 9.

Use of the Internet for a wide range of activities is also increasing. Most Americans use the Internet, and the average American spends approximately an hour per day online. *Id.* ¶ 8. Roughly half of Americans regularly obtain at least some news online, including a growing number who obtain news from social networks. *Id.* ¶ 12. Approximately 40 percent of all Americans have engaged in some form of online civic or political activity beyond simply reading about political issues. *See id.* ¶ 13. And millions of Americans use the Internet to carry out their current employment, seek new employment, or further their education. *See id.* ¶¶ 14-16.

As a result, Americans visit a large number of different Internet sites, many of which require or permit the creation of user names, screen names, or similar identifiers, and engage in various expressive activities on these sites. In a typical month the average Internet user visits well over 100 distinct web sites, and prolific Internet users may visit far more. *See id.* ¶10. Using these

sites and accounts, Internet users can and do post feedback on both recently-purchased items and their sellers, collaboratively create and maintain online encyclopedia and documents, discuss local, national, and international events, and advertise for and otherwise conduct their businesses. *See id.* ¶¶ 11-12, 14, 35.

Many Internet users also use a large number of services to access the Internet. In particular, any person who travels is likely to use one or more new providers, such as a local cellular network or a wireless network at a hotel or café, at each destination. *See id.* ¶¶ 45, 47.

Plaintiffs and other registered sex offenders use the Internet as do other Americans: to conduct business, communicate with friends and associates, engage in self-expression, comment on news articles, and participate in groups with political, religious, or recreational purposes. *See* Abbott Dec. ¶ 12; Doe Dec. ¶¶ 7-14; Roe Dec. ¶¶ 7-11, 14. They have and create multiple user names and similar identifiers for these activities. Doe Dec. ¶¶ 8-11, 21.

**E. Newly Enacted Requirements of CASE Act**

The CASE Act adds to the types of information an offender is required to register. In particular, registrants are now required to provide to law enforcement "[a] list of any and all Internet identifiers established or used by the person" and "[a] list of any and all Internet service providers used by the person." *See* CASE Act, § 12 (codified as amended at § 290.015(a)(4), (5)). The law defines these terms as follows:

> "Internet service provider" means a business, organization, or other entity providing a computer and communications facility directly to consumers through which a person may obtain access to the Internet. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.
>
> "Internet identifier" means an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication.

*Id.* at § 13 (codified as amended at § 290.024(a), (b)).

Every registrant must provide this newly required information "immediately" after the law becomes effective and thereafter within 24 hours after he or she "adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier." *Id.* at § 11

(codified as amended at § 290.014(b)). The law went into effect the day after the election. *See* Cal. Const. art. II, § 10(a).

As with other registration requirements, a violation of these requirements is a crime. If the individual was required to register because of a prior misdemeanor conviction and has no prior convictions for violating registration requirements, then the failure to provide this information within 24 hours is punishable as a misdemeanor; otherwise, it is a felony punishable by up to three years in state prison, a sentence that may be dramatically increased if the registrant has any prior felony convictions. *See* § 290.018(a)-(c); *see also People v. Meeks*, 123 Cal. App. 4th 695, 706 (Cal. Ct. App. 2004) (upholding life sentence for failure to re-register after moving).

**F. Plaintiffs Engage in Protected Online Speech**

Plaintiff John Doe, a resident of Alameda, is a 75-year old registrant who was convicted 26 years ago, in 1986, of two crimes that did not involve a computer or the Internet. He has had no subsequent arrests or convictions. *See* Doe Dec. ¶¶ 2-4. In the 21 years since he was released from prison, he has worked hard to repay his debt to society. He is an activist on sex offender issues, working with victims groups, treatment professionals, and sex offenders. *See id.* ¶¶ 5-7. From 2000 until earlier this year, when he was given a terminal health diagnosis, he operated two websites that provided sex offenders with information about registration requirements and recovery resources. *See id.* ¶ 8. His websites also provided an anonymous online forum for sex offenders to discuss their recovery with other sex offenders. Anonymity was key to the online discussions so that offenders would feel free to express themselves openly without fear of retaliation or community embarrassment. *See id.* ¶¶ 8-9.

His health recently improved and Doe now wishes to resume operating his websites and return to his activism on issues affecting the offender community. *See id.* ¶ 11-12. But the Act will interfere with his ability to provide offenders with an essential forum to communicate with each other about sensitive subjects such as their recovery or registration requirements, because their frank discussions are made possible only by their anonymity. *See id.* ¶ 13-14. In addition, he has contributed to a wide variety of online forums over the years and compiling a

comprehensive list of all those sites, as the Act requires, would be highly burdensome, if not impossible, which will deter his own online speech. *See id.* ¶¶ 13-15.

Plaintiff Jack Roe was convicted of two registerable offenses before 1993. Neither crime involved use of the Internet or a computer, and since he was released from prison in the late 1990s, he has had no arrests or convictions. *See* Roe Dec. ¶¶ 3-4. He has since purchased a home and built an Internet-based business for which he must routinely use websites that require usernames. *See id.* ¶¶ 7-10. He anonymously maintains blog that discusses matters of public concern; users can also comment anonymously on the blog. *See id.* ¶ 12. Anonymity is essential to that blog because it protects him from retaliation from those who would be upset about the information revealed on the blog. *See id.* ¶ 13. Plaintiff Roe also comments regularly on online news articles; he does so anonymously to express his true opinions about oftentimes controversial topics to avoid any consequences to his business. *See id.* ¶ 14. He is concerned about the burdens of complying with the CASE Act, in particular, the difficulty of accurately recalling and compiling a list of each and every username or online account he has used since he was released from prison 13 years ago. *See id.* ¶ 21.

Roe has previously experienced retaliation against him on the basis of his status as a registered sex offender. When California first made registrant information available to the public, neighbors confronted him about his status and business competitors broadcast his status, ruining his business. *See id.* ¶ 19. As a result of the social stigma associated with his status and the past retaliation he has suffered, Plaintiff Roe would stop engaging in online speech. *See id.* ¶ 20. In fact, he has left the state because of the new law but wants to return if it is held unenforceable. *See* Supp. Roe Dec. ¶¶ 4-6. Roe's experience of retaliation is not unique. Many registrants have lost their jobs or homes when information about their offender status was publicized by law enforcement. *See* Steen Dec. ¶¶ 2-4.

Plaintiff California Reform Sex Offender Laws ("California Reform") is a tax-exempt, non-profit organization dedicated to protecting the rights of individuals convicted of sex-related offenses. It is committed to the principles that no sexual abuse is ever acceptable; sex offense laws and policies should be based on sound research, not fear and panic; current laws and policies

that paint all sex offenders with one broad brush are counterproductive; and that sex-offender registration and residency laws do not protect children but instead ostracize and dehumanize individuals and their families. *See* Bellucci Dec. ¶ 4. It has 352 members who are registrants in the state of California. *See id.* ¶¶ 2-6. California Reform maintains a website on which it informs its members and the public about legal and policy issues affecting registrants for the purpose of encouraging political and social change on these issues. *See id.* ¶ 8. The site also provides a discussion forum that allows anonymous commentary on issues affecting registrants. In response to encouragement by California Reform that registrants attend a particular Anaheim City Council meeting, one registrant recently commented: "I wish I had the courage to do so. … After the first post I made [on this website] I waited in anxiety for the police to come knocking at my door. … I would be afraid to post here anymore and this is the only place I have been able to share [a] few of my thoughts." *See id.* ¶ 12. As shown by this comment, registrants would be chilled from commenting on Plaintiff California Reform's discussion forum website if they were required to reveal their identities; the CASE Act would thus interfere with Plaintiff California Reform's ability to provide a forum for registrants to express their views. *See id.* ¶16. The website also has several articles about Proposition 35; the comments on one of them show that registrants are worried that they do not understand what information they will have to provide if the law passes. *See id.* ¶¶ 13-15 & Ex. B.

## III. LEGAL STANDARD

"The standard for issuing a TRO is the same as that for issuing a preliminary injunction." *Walker v. County of Santa Clara*, 2011 WL 4344212 at *2 (N.D. Cal. 2011). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). If plaintiffs show a "likelihood of irreparable injury and that the injunction is in the public interest," a "preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir.

2011); *accord Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). The law "clearly favors granting preliminary injunctions to a plaintiff... who is likely to succeed on the merits of his First Amendment claim." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

## IV. ARGUMENT

### A. Plaintiffs are Likely to Succeed on the Merits

#### 1. The CASE Act is unconstitutionally overbroad because it makes it a crime to engage in constitutionally protected anonymous speech and is not narrowly tailored

Three federal courts have invalidated or enjoined the enforcement of laws[2] that require sex offenders to provide the government with identifying information about their online speech. *See Doe v. Nebraska*, --- F.Supp.2d ----, 2012 WL 4923131 (D. Neb. Oct. 17, 2012); *White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010); *Doe v. Shurtleff*, 2008 WL 4427594 (D. Utah Sept. 25, 2008) ("*Shurtleff I*"), *vacated, after law amended, by* 2009 WL 2601458 (D. Utah Aug 20, 2009) ("*Shurtleff II*"), *aff'd*, 628 F.3d 1217 (10th Cir. 2010). Like those laws, the CASE Act is facially unconstitutional because it criminalizes speech that the First Amendment protects and is not narrowly tailored to the government's interests of preventing sex offenses and human trafficking.

A statute is unconstitutionally "'overbroad' in violation of the First Amendment if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). "The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Id.* at 114-15; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). Statutes that prohibit protected speech must be "narrowly tailored to further [the government's] compelling interest." *Grayned*, 408 U.S. at 119.[3] An

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[2] That this statute was enacted by initiative does not affect the constitutional analysis. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 194 (1999) ("The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation."); *see also People v. McKee*, 47 Cal. 4th 1172, 1206 (Cal. 2010) ("assertions, written into the findings of [ballot initiative] by those who drafted the initiative, are not the same as facts" and cannot satisfy state's burden when a constitutional right is at stake).

[3] These requirements apply to laws such as this one that seek to protect children from criminal acts. *See Free Speech Coal., 535 U.S.* at 252-53, 255 (2002) (where "the Government wants to keep speech from children not to protect them from its content but to protect them from those who

individual has standing to challenge a law as overbroad even if a more narrowly tailored law could properly be applied to him. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011).

**a. The CASE Act criminalizes constitutionally protected anonymous online speech**

The CASE Act sweeps within its prohibitions speech that is constitutionally protected anonymous online speech. "Under our constitution, anonymous [speech] … is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995) (law prohibiting anonymous leafletting unconstitutional); *see also Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002); *Talley v. California*, 362 U.S. 60, 64-65 (1960). "As with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without fear of economic or official retaliation or concern about social ostracism." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (internal quotes omitted).

The Act prohibits registrants from using a pseudonymous screen name to participate in online speech without disclosing their real identity. Registrants who engage in anonymous online speech but fail, within 24 hours, to disclose to the police any new "Internet identifiers" face criminal prosecution, including up to three years in state prison, possibly longer. *See* CASE Act, § 11 (codified as amended at § 290.014(b)); § 290.018(a)-(c). The Act thus criminalizes anonymous online speech by registrants.

While the Act requires after-the-fact identification, and not identification as a prerequisite to the speech, the effect is functionally and legally equivalent: a prohibition on pseudonymous speech online. Numerous courts, including this one, have recognized that requiring anonymous speakers to identify themselves even long after the fact infringes on anonymity in the same way as contemporaneous identification requirements, and have thus imposed demanding standards before civil plaintiffs allegedly harmed by speech can unmask an anonymous online speaker. *See Art of*

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would commit other crimes," it cannot employ a "restriction [that] goes well beyond that interest by restricting the speech available to law-abiding adults.").

*Living Found. v. Does 1-10*, 2011 WL 5444622, at *7 (N.D. Cal. Nov. 9, 2011).[4] The loss of anonymity deters speech regardless of when the coerced identification of the speaker occurs. *See id.* at *8-*9;[5] *see also* Bellucci Dec. ¶ 12 (registrant who made an anonymous comment on California Reform's website about a proposal to ban registrants from parks wrote that "[a]fter the first post I made [on the site] I waited in anxiety for the police to come knocking at my door. I will probably do the same after this post," and that if Prop. 35 passes and he is forced to disclose information about his Internet activity, "I would be afraid to post here anymore and this is the only place I have been able to share a few of my thoughts.").

**b. The CASE Act is not narrowly tailored**

Because the Act criminalizes protected speech, it must be "narrowly tailored to further" the government's goals. *Grayned*, 408 U.S. at 119. But in several ways, the Act goes far beyond what is necessary to further the government's interest in "track[ing] and prevent[ing] online sex offenses and human trafficking," CASE Act § 3(3).

First, the Act prohibits far more anonymous speech than is necessary. Where, as here, the state seeks to prevent sex offenses, the regulation must be targeted at "the means by which sex offenders may communicate with [their victims] and by which [their victims] may respond to offenders' sexual advances," "usually, but not exclusively, interactive, and often real time" "Internet communication." *White*, 696 F.Supp.2d at 1311. But rather than requiring disclosure of Internet identifiers only when used in this tailored context, the Act requires registrants to disclose to the police *all* Internet identifiers, including identifiers used to comment anonymously on articles published on newspaper websites like that of the New York Times, to participate in discussion groups pertaining to the civil rights of § 290 registrants, like that of Plaintiff California Reform, or to run Plaintiff Roe's anonymous blog. *See* Post Dec. ¶ 28; Bellucci Dec. ¶¶ 11, 17-18; Roe Dec.

[4] *See also, e.g., Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, 999 A.2d 184 (N.H. 2010); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Doe No. 1 v. Cahill*, 884 A.2d 451, 460-61 (Del. 2005); *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[5] In *Art of Living*, more than a year elapsed between the time of the speech and the court's finding that disclosure of the defendants' identity would cause "irreparable harm." *See id.* at *1, *9 (complaint filed November 5, 2010, motion to quash granted November 9, 2011).

¶¶ 12-13. But such websites "are by their nature open to the public and pose no threat to children. That sex offenders – perhaps the most reviled group of people in our community – may 'blog' threatens no child, but the government reporting requirement – that puts a stake through the heart of the First Amendment's protection of anonymity – surely deters faint-hearted offenders from expressing themselves on matters of public concern." *Nebraska,* 2012 WL 4923131 *28; *see also White,* 696 F.Supp.2d at 1310 (predatory Internet communications "generally do not occur in communications that are posted publicly on sites dedicated to discussion of public, political, and social issues; identification requirement that applied to speech on such public sites not narrowly tailored).

Second, the Act's application to all registrants, but only to registrants, is both over- and under-inclusive. The Act is woefully overinclusive because it applies to *all* registrants, regardless of the age of the conviction, whether they are at high or low risk of re-offending, and whether the registration-triggering conviction had anything to do with the Internet. Most sexual offenders do not re-offend; the longer offenders remain offense-free in the community, the less likely they are to re-offend sexually. Hanson Dec. ¶¶ 2, 7-13, 19. Eventually, they are *less likely* to be arrested for a sex-related offense than individuals who have never been arrested for a sex-related offense. *See id.* ¶¶ 19-37 & Ex. 4; *see also United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003) ("The fact that T.M. has lived the last twenty years without committing a sex offense suggests that he no longer needs to be deterred or shielded from the public."). A large proportion of registrants committed their offenses decades ago. *See* Abbott Dec. ¶ 16. And most registrants are classified as low or moderate-low risk upon release. *See id.* ¶ 9. Finally, the vast majority of registrants were convicted of crimes that did not involve the Internet (more than 99%) but did involve victims who already knew the offender (80%-90%). *See* Finkelhor Dec. ¶¶ 12-13; Abbott Dec. ¶ 11. Thus, the Act targets vastly more individuals than it needs to. *See id.* ¶ 22. It "is not narrowly tailored to target those offenders who pose a factually based risk to children through the use or threatened use of the [specified] sites or services." *Nebraska*, 2012 WL 4923131 at *19. The state cannot justify infringing an individual's constitutional rights with "a generalized assessment based on the class of sex offenders generally, rather than on the particular sex offenses a defendant has committed or

related offenses he is likely to commit." *United States v. Weber*, 451 F.3d 552, 569 (9th Cir. 2006) (invalidating supervised release condition); *see United States v. Wolf Child*, --F.3d--, 2012 WL 5200347, at *7 (9th Cir. 2012).

Notably, the CASE Act could achieve its goals if it applied only to those who have been convicted of offenses involving the Internet or who are at high risk of re-offending, or even by allowing persons with very old or minor convictions or those who could otherwise demonstrate that they do not pose a risk to apply to be excluded from the new requirements. *See Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) ("[T]he existence of obvious, less burdensome alternatives is 'a relevant consideration in determining whether the "fit" between ends and means is reasonable.'"). Instead, it prohibits anonymous speech by registrants with no more chance of committing a future sex crime than a typical member of the population. *See* Hanson Dec. ¶¶ 19-34. California cannot possibly argue that it is not feasible to assess the risk of offenders because it currently *mandates* that all § 290 registrants be assessed for risk and uses those assessments to decide which of them need increased supervision. *See* Penal Code §290.04(a)(1), *et seq*. Risk assessment tools, developed based on decades of data and extensive research, are also widely used in the criminal justice field in California and elsewhere. *See* Hanson Dec. ¶ 18. California already recognizes in other contexts that sex offenders are not all alike, and thus publicly discloses varying amounts of information about registrants depending on the offense of conviction, *see* § 290.46(b)-(d),[6] and provides a process for registrants to apply for exclusion from the public registry if they meet certain conditions. *See* § 290.46(e). The existence of "feasible, readily identifiable, and less-restrictive means of addressing" the state's concerns confirm that the statute "is not narrowly tailored." *See Comite*, 657 F.3d at 950.

At the same time, by applying only to registrants, the Act is underinclusive. *See Berger*, 569 F.3d at 1043 (city's rules failed narrow tailoring in light of "significant underinclusiveness"). The overwhelming majority of technology-facilitated sex crimes are not committed by registered sex offenders. Only 4% of persons arrested for technology-facilitated sex crimes against youth

[6] Registrants who have been convicted of minor offenses are not included at all on the site, persons convicted of more serious offenses have their names, offenses, and zip codes posted, and those convicted of the most serious offenses have additional information posted, including addresses and photographs. *See id.*

were registered sex offenders, and only 2% of those arrested for soliciting undercover investigators were registered sex offenders. *See* Finkelhor Dec. ¶ 18. "[T]he fact that [the statute] is both overinclusive and underinclusive would lead to the conclusion that it is not narrowly tailored to serve the governmental interest at stake." *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F.Supp.2d 671, 684 n.2 (N.D. Ohio 2003).[7]

Third, the Act nowhere restricts public disclosure or potential uses by law enforcement of the identifying information. Instead, release of registry information is governed by the existing law, § 290.45, which grants the government broad discretion to release the information to the public.[8] In fact, a 2009 study found that 39% of California law-enforcement agencies had "proactively" supplied information under this statute to the community by handing out flyers and other similar means, apparently without any reason to think that a crime had occurred, sometimes with serious consequences. *See* Steen Dec. ¶¶ 2-4. "The prospect that Internet Identifiers ... may be released to the community has an obvious chilling effect." *White*, 696 F. Supp. 2d at 1311; *In re Anonymous Online Speakers*, 661 F.3d at 1173. This is starkly illustrated by the experience of Plaintiff Roe, who is engaged in an Internet business and has previously suffered the loss of a prior Internet business after public revelations of his offender status. *See* Roe Dec. ¶ 19; *see also Nebraska*, 2012 WL 4923131 *28 ("the requirement that offenders report to the police regarding the material they post to Internet sites they operate will surely deter offenders in business from maintaining such sites."). Releasing registrants' Internet identifiers to social networking sites in the interest of "public safety" could result in registrants being cut off not only from these services but from the increasingly wide range of activities that require a Facebook or similar account, including participation in online discussions of news articles, political and social issues, and more. *See* Post Dec. n.6. This could even increase recidivism. *See* Abbott Dec. ¶¶ 19-20.

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[7] The Act is also underinclusive because it applies only to *Internet* speech, and thus excludes all analogous communications that take place over cellular networks or other communications channels with the same characteristics. *See* Post Dec. ¶¶ 39-40. Further, the Act also explicitly excludes "libraries and educational institutions" from its definition of "Internet service providers," despite the fact that such facilities not only provide identical Internet access but may offer greater physical proximity to children. *See* CASE Act, ch. 8, § 13 (codified as amended at § 290.024(a)).

[8] The statute was specifically amended in 2005 to delete the requirement that the police have reasonable suspicion. *See* 2005 Cal. Legis. Serv. Ch. 722 (A.B. 1323).

Nor is there limitation on use of the information by law enforcement. *See White,* 696 F.Supp.2d at 1310 (allowing use of Internet identifiers for "law enforcement purposes" was "too broad" and had "obvious" "free speech implication" because agency might "create list of registrant user names for use in monitoring" protected anonymous speech on "targeted Internet sites," creating a chilling effect). The lack of sufficient limits on public disclosure or the governmental use of the information distinguishes the CASE Act from the Utah law that was upheld in *Shurtleff II,* after it was amended to permit use of the information only to investigate a specific sex crime. *See Shurtleff I,* 628 F.3d 1217, 1224; *Shurtleff II,* 2009 WL 2601458 *5.

Further, the vagueness of the Act's definitions of what registrants must provide, as coupled with the serious punishment for failure to provide the correct information, renders it "problematic for purposes of the First Amendment" narrow tailoring test, regardless of whether it is so vague as to violate Due Process. *Reno v. ACLU,* 521 U.S. 844, 870-72 (1997). As a practical matter, vague criminal laws regulating speech are nearly always overinclusive because the "severity of criminal sanctions may well cause speakers to remain silent rather than" risk prosecution for "arguably unlawful" activity. *Id.* at 872. As discussed below, the Act's definitions of "Internet identifier" and "Internet service provider" are incomprehensible. *See infra* Part IV.A.3; *see also* Post Dec. ¶¶ 22-25, 30, 35-37, 40-41, 47, 50-60. A registrant who would like to engage in anonymous Internet speech in a way that only "arguably" falls within the Act's purview would be reckless indeed to risk arrest and imprisonment by doing so. Even construing them as narrowly as possible, the Act's requirements are not narrowly tailored; that they are potentially much broader in scope due its vague definitions only magnifies this constitutional infirmity.

Finally, intermediate scrutiny requires that the government show that "the speech restriction directly and materially advance the asserted governmental interest." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555, 566 (2001).[9] But the facts about recidivism and sex crimes discussed above mean that "it is not particularly useful to require *all* registrants to provide information about their Internet use." Abbott Dec. ¶ 22 (emphasis added). And it is not even clear that the

[9] Although this case involved commercial speech, the test it used is "substantially similar" to the intermediate scrutiny that applies to content-neutral regulations of non-commercial speech. *Lorillard Tobacco,* 533 U.S. at 554; *see Comite,* 657 F.3d at 950.

government has developed any way to actually make use of registrants' Internet identifiers or ISPs to prevent or solve sex crimes, much less that it is prepared to process the information received from 73,900 registrants. If the government has no way to use this information to directly advance its goal, it cannot burden speakers by forcing them to provide it.

In short, the statute is facially unconstitutional because it prohibits protected anonymous speech by all registrants but is not tailored to address the state's stated interests in preventing sex offenses and human trafficking. Even if its vague terms are construed as narrowly as possible, it is not limited to the speech or speakers that give rise to the purported dangers the statute seeks to address, and fails to prohibit law enforcement from using the information for purposes unrelated to the prevention or investigation of sex offenses and human trafficking.

**2. The CASE Act is unconstitutional because its burdensome registration requirements are not narrowly tailored**

In addition to criminalizing anonymous speech, the Act also mandates registration for all sorts of online speech, whether anonymous or not. The Act is unconstitutional for the independent reason that these burdensome registration requirements are not narrowly tailored.

**a. The CASE Act's registration requirements trigger First Amendment scrutiny**

The First Amendment takes heed not only of flat prohibitions on speech, but also "statutes attempting to restrict or burden the exercise of First Amendment rights." *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973); *see, e.g., Simon and Schuster, Inc. v New York State Crime Victims Bd.*, 502 U.S. 105, 118 &122 n.* (1991) (invalidating law that "establishe[d] financial disincentive" to certain speech by former offenders); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."); *American Civil Liberties Union v. Reno*, 31 F.Supp.2d 473, 493-95 (E.D. Pa. 1997), *aff'd* 542 U.S. 656 (2004). Because First Amendment rights are fragile, "the amount of burden on speech needed to trigger First Amendment scrutiny as a threshold matter is minimal." *American Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 607 (4th Cir. 2001); *see Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

The CASE Act's reporting requirements far exceed this minimal threshold for triggering First Amendment scrutiny. The Internet identifier reporting requirement appears to require each registrant to document and report not only her email address and Facebook account but also any "screen name" or similar identifier associated with her comments on news websites and civil rights discussion fora, her participation in professional networks such as LinkedIn and other online sites related to her business or profession, any identifier associated with feedback submitted to an online retailer like Amazon.com or review site like Yelp, and even her own personal blog or web page.[10] *See* Post Dec. ¶¶ 27-37. In addition, the Internet service provider reporting requirements appears to require her to document and report not only her cable Internet, DSL, or cellular Internet provider but also each wireless network she uses at a café or hotel and each device she purchases, rents, or uses that is capable of connecting to the Internet for any reason. *See* Post Dec. ¶¶ 45-47. A registrant facing the possibility of arrest and serious criminal penalties if she fails to document and report each of these online activities—or even if her letter to the police is lost in the mail—may reconsider exercising First Amendment rights at all. *See Nebraska*, 2012 WL 4923131 at *29; Roe Dec. ¶ 21; Doe Dec. ¶ 15. This is more than enough to trigger First Amendment scrutiny.

**b. The CASE Act must satisfy strict scrutiny because it discriminates among speakers**

The First Amendment generally prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 888 (2010); *see also Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2663 (2011) (applying strict scrutiny to law that "disfavors specific speakers"). Such laws are akin to those that discriminate by content, and are therefore subject to strict scrutiny, under which a law regulating speech is unconstitutional unless the government can "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S.Ct. at 898 (citation omitted). In addition, the law must "choose[] the least restrictive means to further the articulated interest." *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *see also, e.g. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586, 591 (1983).

[10] In a recent case concerning the constitutionality of a similar law, the parties agreed that the term "interactive online forums," similar to the term "Internet forum discussions" in the CASE Act, included blogs. *White*, 696 F.Supp.2d at 1310.

The CASE Act singles out the speech of § 290 registrants for differential treatment, and must therefore satisfy this heightened standard.[11]

**c. The CASE Act is not sufficiently tailored to satisfy either intermediate or strict scrutiny**

Even content-neutral restrictions on speech must meet intermediate scrutiny, meaning that they "must be 'narrowly tailored' to advance the interest asserted by the State." *Simon and Schuster*, 502 U.S. at 122 n.*; *see Comite*, 657 F.3d at 950-51. "To satisfy the narrow tailoring requirement, the Government bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests." *Comite*, 657 F.3d at 948.[12]

While the Act must satisfy strict scrutiny, it cannot even satisfy intermediate scrutiny. It fails the narrow tailoring requirement for the reasons discussed above. *See supra* Part IV.A.1.b. The registration requirements, which apply even to participation in a political forum or speech on a professional networking site, are dramatically overinclusive because they cover a great deal of speech that could not possibly be used to facilitate a crime. The Act also places these burdens on all registrants rather than just those individuals (whether registrants or not) who are likely to commit future sex crimes involving the Internet. And the Act fails to limit law enforcement's disclosure and use of the information obtained to furthering the statute's stated goals of preventing and investigating human trafficking and sex offenses. Its vague definitions and requirements, even if not rising to the level of a constitutional defect, increase the overbreadth of its impact. In short, the Act's registration requirements "suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 255. They therefore cannot survive intermediate scrutiny, much less strict scrutiny, under the First Amendment.

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[11] Strict scrutiny is also required under equal protection. "Since the First Amendment right to free speech is a fundamental right, the court applies strict scrutiny to laws impacting First Amendment rights and discriminating based on any classification." *Denney v. Drug Enforcement Admin.*, 508 F.Supp.2d 815, 835 (E.D. Cal. 2007); *see Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 & n.3 (1976).

[12] Although this narrow-tailoring requirement is most often applied to speech that occurs in a public forum, as *Simon and Schuster* illustrates, it also applies to laws that generally restrict speech, including online speech. *See Golan v. Gonzales*, 501 F.3d 1179, 1196 (10th Cir. 2007); *see also Reno*, 521 U.S. at 868-870.

**3. The CASE Act is unconstitutionally vague**

The definitions of "Internet service provider" and "Internet identifier" are unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned,* 408 U.S. at 108. "An ordinance may be void for vagueness because either it ... fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited [or] abuts upon sensitive areas of basic First Amendment freedoms, operating to inhibit the exercise of these freedoms." *Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011) (citations omitted). Vague laws violate the principle of fair notice and encourage "arbitrary and discriminatory enforcement." *Grayned,* 408 U.S. at 108. "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). This is necessary to avoid chilling lawful, constitutionally protected speech. *Grayned*, 408 U.S. at 109. The Supreme Court has invalidated as vague a law that required speakers to identify themselves to the police. *See Hynes v. Mayor and Council*, 425 U.S. 610, 620-623 (1976).

The Act defines an "Internet service provider" as "any business, organization, or other entity providing directly to consumers a computer and communications facility through which a person may obtain access to the Internet." CASE Act, ch. 8, § 13 (codified as amended at § 290.024(a)). This definition seems to include not only "traditional" ISPs such as DSL or cable Internet services but also other entities such as cafés, hotels, and even individuals who provide access to an Internet-connected wireless network, and possibly any company that provides an Internet-connected device, ranging from a cellular phone to an automobile or home security system that connects to the Internet for certain functions. *See* Post Dec. ¶¶ 46-48. The definition also could encompass the use of products or services other than Internet access provided by a company that acts as an "Internet service provider" to other persons. *See id.* ¶ 50. In addition, it is unclear whether the definition encompasses only ongoing contractual relationships or whether it also covers one-time use of a wireless network, whether or not the registrant is even aware of such

use.[13] *See id.* ¶¶ 47-49, 51-55.

In addition, it is unclear exactly what must be reported pertaining to the use of an ISP. One set of provisions of the Act require a registrant to provide "[a] *list* of any and all Internet service providers used by the person" as well as "[a] statement in writing signed by the person acknowledging that the person is required to register and update [such list] as required by this chapter," CASE Act, ch. 8, § 12 (codified as amended at § 290.015(a)(5)-(6)) (emphasis added), while a separate provision of the Act requires a registrant to notify the agencies with which she is registered whenever she "adds or changes [his] *account* with an Internet service provider." CASE Act, ch. 8, § 11 (codified as amended at § 290.014(b)) (emphasis added). These two provisions create confusion as to whether, for example, a registrant must report the use of a wireless network if no account is required for its use, or if a roommate or employer rather than the registrant herself is the account holder.

Finally, the Act fails to specify whether a registrant is required to report only information about ISPs that she currently uses or whether she is instead required to provide information about every Internet service provider she has ever used. The latter requirement would place a huge burden on registrants, who would be forced to document their entire history of network and Internet access or suffer criminal sanctions.

The definition of "Internet identifiers" renders compliance equally difficult. In the case of Internet identifiers, registrants must inform the appropriate agency or agencies of "any electronic mail address, user name, screen name, or *similar identifier* used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or *similar Internet communications*." CASE Act, ch. 8, § 13 (codified as amended at § 290.024 (b)) (emphasis added). However, the Act provides no further definition of the specific terms used in this definition, and there is no consensus as to the meaning of these terms.

For example, in examining a law prohibiting the use of "instant messaging" services by sex offenders registered under Nebraska's statute, one judge noted the difficulty in determining

[13] For example, a laptop computer or mobile device can be configured to automatically connect to any "open" wireless network that it detects, requiring no action on the part of the user but arguably triggering the reporting requirements of the Act. *See* Post Dec. ¶¶ 46, 48(c).

whether "text messages" and "instant messages" were differentiable and, if so, whether a registrant would be permitted to use a service that offered both "text messaging" and "instant messaging" services if the registrant utilized only the "text messaging" functionality. *Nebraska*, 2012 WL 4923131 at *21; *see also* Post Dec. ¶ 40. Furthermore, in Internet jargon "chat" typically means near-real-time communications with one or more persons, and as such is essentially indistinguishable from "instant messaging." *See* Post Dec. ¶¶ 31-32.

Similarly, there is no consensus definition of "social networking," and competing definitions are in tension.[14] *See id.* ¶ 35 & n.5. An increasing number of sites incorporate some functions that are traditionally associated with social networks, such as the creation of a profile and the use of mechanisms for communicating and linking with other users. *See id.* ¶ 36. The total number of sites incorporating social networking functionality, and thus potentially qualifying as "social networking" sites under the Act, is estimated to be in the millions if not hundreds of millions. *Id.* ¶¶ 36-37.

The inclusion of "similar" identifiers and services in the definition of "Internet identifiers" creates further uncertainty. It is all but impossible for a registrant to know whether the use of an email mailing list is "similar" to participating in an Internet forum discussion or a social network; whether Wikipedia, which permits users to establish a profile and communicate directly and indirectly with each other, is "similar" to a social network or Internet forum discussion; whether making a VoIP call or sending audio or text communications to other players in an online game is "similar" to an "Internet chat room discussion," or whether writing a blog post or reviewing a recently-purchased item is "similar" to some covered form of Internet communication such that any associated identifier must be reported.

In addition, the Act is unclear as to what a registrant is actually required to report. While the language of the Act only requires registrants to report the "Internet identifier" (*e.g.*, "JohnDoe") and not the site on which that identifier was used, obtaining an identifier without the associated site is frequently of no practical value. *See id.* ¶¶ 22-24. As a result, law enforcement agencies may

[14] For example, a simple blog could qualify as a "social networking website" under a definition used in federal law but would not meet the definition provided by a frequently-cited academic article, whereas a professional network such as LinkedIn would qualify as a "social network site" under the article's definition but not under the federal definition. *See* Post Dec. ¶ 35 & n.5.

demand that registrants provide the Internet identifier associated with a specific site or the site associated with each Internet identifier. *See id.* ¶ 24. Similarly, under one plausible reading of the Act, a registrant would be required to report only once that he has created the new screen name "JohnDoe" and may then use that identifier on as many sites as he chooses; under another, he must report each use of *his own full name* as a user name or screen name. *See* Post Dec. ¶ 25.

The Act requires reporting of certain identifiers "used for the purpose of" certain forms of communication. Again, the precise meaning is unclear: is an identifier "used for the purpose of" a certain form of communication if its creation *permits* that form of communication, or only if the creator actually *engages* in that form of communication? For example, an account on Amazon.com allows a user both to purchase items and to post feedback on purchased items. Assuming that posting feedback constitutes participating in an "Internet forum discussion," it is unclear whether a registrant is required to report the creation of an account on Amazon.com even if she never intends to post feedback.

Regulations that impact "sensitive areas of basic First Amendment freedoms" must be particularly clear to avoid chilling legitimate speech. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *see Hunt*, 638 F.3d at 712-13. The CASE Act is rife with imprecise definitions and uncertain requirements. Registrants have already expressed confusion over what they must report. *See* Bellucci Dec. ¶ 13 & Ex. B. The Act is unconstitutionally vague because it fails to provide guidance to a person of ordinary intelligence as to what information she is required to report about her online speech, and the penalty for getting it wrong is prison.

**4. The CASE Act violates Plaintiffs' freedom of association by requiring the compelled disclosure of the membership of their online communities**

Requiring registrants to disclose the online communities or groups of which they are a member implicates their "right to be protected from compelled disclosure by the State" of their associations and affiliations, and thus the freedom of association. *NAACP v. Alabama*, 357 U.S. 449, 458 (1958). The CASE Act would require the disclosure of all such groups, including groups advocating dissident beliefs where "privacy in group association may ... be indispensable to preservation of freedom of association." *Id.* at 462 (citation omitted); *see also Brown v. Socialist Workers*, 459 U.S. 87, 91 (1982); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159-60 (9th Cir.

2010). Even a legitimate purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *see NAACP*, 357 U.S. at 463, 464-65.

The CASE Act could effectively require every registered sex offender to disclose her relationship with online organizations regardless of type, purpose, or membership, including her membership with the NAACP or California Reform if she interacts with those organizations online. *See* Bellucci Dec. ¶¶ 17-18; Post Dec. ¶¶ 23, 78-79. Because "[m]any such relationships could have no possible bearing" on the state's interest in deterring and investigating Internet sex crimes and the Act's "comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate" interest, this requirement violates the First Amendment. *Shelton*, 364 U.S. at 487-88, 490.

**B. Plaintiffs Face Imminent and Irreparable Harm**

As a matter of law, "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012)* (9th Cir. 2012) (citation omitted); *see Farris*, 677 F.3d at 868; *Sammortano v. First Jud. Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002). As discussed above, the law prohibits online anonymous speech and chills much more speech than that. *See* Roe Dec. ¶ 20; Doe Dec. ¶ 14; Bellucci Dec. ¶¶ 12, 17-18. The revelation of their identities can never be undone. *See Art of Living*, 2011 WL 5444622 at *9. Moreover, registrants face the ongoing burden of recording and reporting each Internet service provider and each Internet identifier that they use, which will deter them from participating in online communications in the first instance. *See* Doe Dec. ¶ 15; Roe Dec. ¶ 21.

**C. An Injunction Against Enforcement Serves the Public Interest and the Balance of Equities Tips in Plaintiffs' Favor**

When a preliminary injunction is sought against the government, these last two prongs "are largely the same" and can be considered together. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010); *see Farris*, 677 F.3d at 864 (considering both prongs together); *Klein*, 584 F.3d at 1208 (same). As the Ninth Circuit has recently confirmed, "it is *always* in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (citation omitted, emphasis added); *see Klein*, 584 F.3d at 1208.

An injunction here will maintain the status quo while the court considers a law that was passed by the voters only yesterday and purports to require more than 73,000 individuals to "immediately" report to the police and provide what for many may be a large amount of information about their Internet use or face criminal prosecution. It is not even clear that the government will be able to do anything with this enormous influx of information in the near future, or even that the states' registrants even know of this new requirement, with its serious criminal penalties for failure to comply immediately.

**D. Scope of Relief**

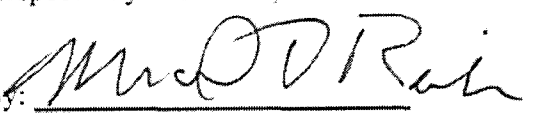
Defendant Harris is the chief law-enforcement of the state, with supervisory authority over local prosecutors and law enforcement. *See* Ca. Const. art. V § 13; Ca. Gov't Code §§ 12511, 12512, 12524, 12550, 12560. Her Department is responsible for implementing many of California's registration requirements. *See* §§ 290.012(d), § 290.014(b) 290.022, 290.09(b)(2). Thus, all such persons are acting as her agents and will be bound by an injunction against her under Rule 65(d)(2). *See ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999).

## V. CONCLUSION

For the foregoing reasons, the Court should immediately issue interim injunctive relief prohibiting enforcement or implementation of the provisions of the CASE Act here at issue, Penal Code §§ 290.014(b) and 290.015(4)-(6), as enacted by Proposition 35, or from otherwise requiring registrants to provide identifying information about their online speech to the government.

DATED: November 7, 2012

Respectfully submitted,

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TEH

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 12 5713

JOHN DOE, JACK ROE, and CALIFORNIA REFORM SEX OFFENDER LAWS, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

KAMALA D. HARRIS, Attorney General of California; and CITY OF ALAMEDA,

Defendants.

Civil Case No. _____

**CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, for their Complaint in this action, allege and aver as follows:

## INTRODUCTION

1. This is a challenge to a just-enacted California statute that requires more than 73,000 Californians who are required to register under California Penal Code § 290 as a result of being convicted of a sex-related offense to immediately provide the police with their Internet identifiers and service providers. These requirements, enacted as part of Proposition 35, cover individuals who were convicted of a wide range of crimes, including misdemeanor indecent exposure, at any point since July 1, 1944, and they require registrants to provide information about online activities that have no possible relationship to criminality, such as the screen names they use to post comments about articles on a newspaper's website or names that they use to access political discussion groups. In addition, when registrants use a new screen name, they must now provide information about that name to the police within 24 hours. These new requirements burden the online speech of all such persons, infringe on their right to engage in lawful, anonymous speech on the Internet, and require them to reveal their membership in online groups, including groups devoted to political reform. Because they sweep much too broadly in terms of who must comply with them and the types of information they must provide, they are overbroad, in violation of the First Amendment. In addition, the statutory definitions of "Internet identifier" and "Internet service provider," which do not comport with the common understanding of these terms, are unconstitutionally vague. As a result of these and other constitutional infirmities, the statutes are facially invalid and cannot be enforced.

## JURISDICTION AND VENUE

2. This action arises under 42 U.S.C. § 1983 and the United States Constitution. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

3. The Defendants are all public officials of the State of California or its political subdivisions. Each of the Defendants resides within this District and/or performs official duties within the State of California. This Court, accordingly, has personal jurisdiction over each of the Defendants.

4. Venue properly lies within this District under 28 U.S.C. § 1391(b). One or more of the named Defendants perform their official duties in this District, and a substantial part of the events or omissions giving rise to Plaintiffs' claims have occurred or will occur in this District.

## INTRADISTRICT ASSIGNMENT

5. Pursuant to Local Rule 3-2, this action may properly be assigned to the San Francisco or Oakland divisions of this Court because a substantial part of the events or omissions which give rise to the claims in this action will occur in Alameda County, where Plaintiff Doe resides, engages in anonymous Internet speech, and will be subject to the requirements of Proposition 35.

## THE PARTIES

### Plaintiffs

6. Plaintiff Doe is an individual residing in the City of Alameda, in Alameda County, California, who is required to register with Defendant City of Alameda under Penal Code § 290 because he was convicted of two registerable offenses in 1986. Neither of them involved the Internet or a stranger. Doe has not been arrested or convicted of any crime since he was released from custody for those offenses in 1991. He is currently 75 years old.

7. Doe engages in a wide variety of online speech, including participation in online discussions about political topics. Some of Doe's online speech is rendered anonymous through the use of screen names or other pseudonyms. Doe fears retaliation and social stigma if he and other registrants are unable to participate anonymously in online dialogue. In addition, Doe would be deterred from online speech by the burden of documenting and reporting the Internet service providers and Internet identifiers that he uses. As a result, if Doe were required to disclose to law enforcement all Internet service providers and Internet identifiers that he uses, he would refrain from at least some online speech due to the fear of retaliation and the burdens of reporting. If Doe were required to disclose his identity in publicly filed pleadings in this action, Plaintiff would also be reluctant to participate in this litigation due to fear of retaliation.

8. Plaintiff Roe is an individual who is required to register under Penal Code § 290 when he resided in California because of convictions that occurred before 1993. Neither of them involved the Internet or a stranger. Since his release from custody in the late 1990s he has never been arrested or convicted of any crime.

9. Roe engages in a wide variety of online speech, including through participation in online discussion forums about political topics and the posting of comments in response to articles on the websites of newspapers. Much of this speech is anonymous. Roe posts online comments from the perspective of a registered sex offender but does so anonymously because of the fear of retaliation and social stigma associated with such status. Roe has experienced retaliation in the past on the basis of his status as a registered sex offender. As a result, if Roe were required to disclose to law enforcement all screen names he uses to engage in online speech, he would cease engaging in such speech because of the fear of the consequences of losing anonymity and the burdens of registration. If Roe were required to disclose his identity in publicly filed pleadings in this action, he would also be reluctant to participate in this litigation due to fear of retaliation.

10. Roe had lived in California nearly his entire life and would like to do so again. However, his concerns about having to provide the government with information about his lawful online speech, and the practical burdens of doing so, have led him to leave the state, and he now resides elsewhere. These laws are all that are keeping him from returning; he intends to return to California if the law that he and the other Plaintiffs are here challenging are held unconstitutional.

11. Plaintiff California Reform Sex Offender Laws ("California Reform") is a California tax-exempt corporation organized under 501(c)(4) of the Internal Revenue Code. California Reform's mission is to protect the rights of those accused or convicted of sex crimes. California Reform believes that no sexual abuse is ever acceptable; that sex offense laws and policies should be based on sound research and common sense, not fear, panic, or paranoia; that current laws and policies that paint all sex offenders with one broad brush are counterproductive, wasteful, and cause needless harm; that each offense must be judged on its own merits, with a

punishment that fits the crime and does not waste taxpayer dollars; that the public sex offender registry and residency restriction laws do not protect children, but instead ostracize and dehumanize individuals and their families; and that money spent on purely punitive measures would be better used for prevention, healing, and rehabilitation. California Reform has members who are registrants throughout the state.

12. California Reform maintains a website, http://californiarsol.org/. One of its purposes in maintaining this website is to inform the public and its members about legal and policy issues relating to persons who are required to register under § 290 and to promote political and social change on these issues. For example, these are a few of the many articles and information that appeared on the website in October and November of 2012: information about a pending proposal in Anaheim to enact an ordinance banning registrants from its parks, a notice of a California Reform meeting to be held on November 10 in Los Angeles, information about a recent California Court of Appeals decision upholding an injunction prohibiting the enforcement in San Diego of a state law restricting where registrants can live. The website also included an exhortation for people to vote in the 2012 election and links to information about how to register to vote in California and who is eligible to do so. California Reform also used the website to help it meet its goal of obtaining 500 signatures on a petition to the Orange County District Attorney challenging a county ordinance that prohibits all registrants from entering parks, beaches, harbors, and other recreational areas.

13. The California Reform website allows people to comment on these items, and people regularly do so anonymously. For example, as of November 2, one item about the Anaheim Parks ban included 13 comments, ranging from expressions of thanks for California Reform's advocacy efforts to statements that such laws are unconstitutional and bad policy. An item about the November 10 meeting had generated 8 comments, including questions about who would be allowed to attend and how to do so. As their content often makes clear, many of the persons who comment are registrants with questions or comments about how these laws affect them and with updates on efforts to change California's registration law.

14. A discussion of the provisions of Proposition 35 here at issue had generated 15 comments on the website, many of them by registrants expressing confusion about what they will be required to do. For example, one commenter ("MM") writes "My question is . . . Internet Identifier, I'm confused. I know that your AOL, YAHOO or GMAIL account information would have to be provided, but what about your Directv account? your car insurance account? Your Macy's log on? We all have "internet identifiers", "username" and they are not necessarily the same as your email . . . does it include your work email? I tired [sic] to decipher some of the Prop but got lost in the mumbo-jumbo of internet identifiers and whether it's at a library or work or home."

15. Another commenter on the California Reform website asks, "What about posting on this website? You can post under a new name all day long, if you so please. Is every time you write something under a user name (just because you do not register per se that does not mean you are not posting under that name) cause to provide that name? What if you stop using it?"

16. The comments sections of its website site further California Reform's interests in several ways. First, they allow registrants and others to express matters of fact and opinion about an original article. Second, they allow registrants and others to ask questions about the organization and about legal and policy matters, which are often answered by staff or by other commenters. Third, and related to both of these other interests, allowing comments encourages membership by providing a safe and welcoming forum for registrants and others to speak and ask questions about issues relating to persons convicted or accused of sex offenses.

17. Almost all of these comments, aside from those submitted by staff, are submitted using pseudonyms. Reform California recognizes that its members face social ostracism, the risk of violence, and other adverse consequences because they are registrants, and thus exists the importance of allowing them to participate anonymously. Therefore, its meetings are open to registrants, family members, and supporters but closed to media and government officials. And the website allows commenters to remain anonymous by using pseudonyms.

18. The challenged laws will invade this anonymity because registrants who leave comments on the website generate what is clearly within Proposition 35's definition of

Internet identifier: to leave a comment, a person must enter a screen name (which may be a pseudonym) and email address. The screen name is displayed with the comment. This loss of anonymity will make it less likely that registrants will express themselves on the website, both because some of them may not want the government to be able to connect them to specific posts and because providing the police with the screen names that they use to post comments will reveal their association with California Reform and that they participate in discussions on the website. The loss of anonymity will also impair California Reform's mission by interfering with its ability to provide a safe and welcoming forum in which registrants and others can participate in discussions about issues affecting sex offenders, without fear of adverse consequence.

19. Members of California Reform would have standing to pursue this lawsuit in their own right because they are registrants subject to the requirements of the challenged laws. This lawsuit is germane to the purpose of California Reform because the challenged laws violate the rights of its members, and its mission is to protect those rights. Participation of California Reform's individual members in this litigation is unnecessary because Plaintiffs do not seek damages.

**Defendants**

20. All Defendants are sued in their official capacities only.

21. Defendant Kamala D. Harris is the Attorney General of the State of California. Under Article 5, Section 13 of the California Constitution, she is the "chief law officer of the State," with a duty "to see that the laws of the state are uniformly and adequately enforced." This provision grants her "direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law." *Id.*; *see* Ca. Gov't Code §§ 12524, 12550, 12560. She "has charge, as attorney, of all legal matters in which the State is interested." § 12511.

22. As Attorney General, Defendant Harris also supervises the operations of the California Department of Justice. *See* Cal. Gov't. Code § 12510. The California Department of Justice is responsible for implementing many of California's registration requirements, including the creation and maintenance of the database itself (§§ 290.012(d), 290.022, 290.09(b)(2), 290.47),

creation and maintenance of the publicly accessible website that contains information about certain registrants (§ 290.46), creation of registration forms that specify what information registrants must provide (§ 290.012(a)), and coordination of registration information for registrants who move from one jurisdiction to another (§ 290.013). The new law specifically requires that local law enforcement make the information they collect about registrants' Internet use available to the Department. § 290.014(b).

23. Therefore, all California law enforcement personnel who collect information relating to registrants' Internet use under §§ 290.014 and 290.015 do so as agents of and in active participation with Defendant Harris.

24. Defendant City of Alameda is a municipal corporation organized as a charter city under the laws of the State of California. The Alameda Police Department is a department of the City of Alameda. *See* Alameda Municipal Code § 2-30.1. Because he resides in the City of Alameda, Plaintiff Doe is required to provide a list of his Internet identifiers and Internet service providers to the Alameda Police Department immediately after Proposition 35 goes into effect, within 24 hours of adding or changing an Internet identifier or changing his account with an Internet service provider, and every year within 5 days of his birthday, under Penal Code §§ 290.014 and 290.015.

## CLASS ACTION ALLEGATIONS

### Plaintiff Class

25. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(b)(2) or, alternatively, Fed. R. Civ. P. 23(b)(1), on their own behalf and on behalf of all other persons who are required to register under California Penal Code § 290, including those whose duty to register arises after the class has been certified (the "Plaintiff Class"). All such persons are subject to the law here at issue.

26. The class is so numerous that joinder is impracticable: according to the website of the California Department of Justice, the Plaintiff Class includes more than 73,000 people who are currently living in the community, a figure that does not include those persons who are incarcerated or have been deported.

27. The claims of Plaintiff Class members share common issues of law, including but not limited to whether the challenged statutes violate the First Amendment because they are overbroad; whether the challenged statutes violate the First Amendment and Due Process Clause because they are vague; and whether they violate the Equal Protection Clause of the Fourteenth Amendment.

28. The claims of Plaintiff Class members share common issues of fact, including but not limited to whether these new statutes will be effective at addressing the problem that they are meant to address; what the Department of Justice intends to do with the information it is collecting; and how the state plans to implement the new laws.

29. The claims or defenses of the named Plaintiffs are typical of the claims of members of the Plaintiff Class, particularly because this is a facial challenge to the statutes.

30. The named Plaintiffs will fairly and adequately protect the interests of the Plaintiff Class. The named Plaintiffs have no interest that is now or may be potentially antagonistic to the interests of the class. The attorneys representing the Plaintiffs include experienced civil rights attorneys and are considered able practitioners in federal constitutional litigation. These attorneys should be appointed as class counsel.

31. Defendants have threatened to act and will act on grounds generally applicable to the Plaintiff Class, thereby making final injunctive and declaratory relief appropriate to the class as a whole. The Plaintiff Class may therefore be properly certified pursuant to Fed. R. Civ. P. 23(b)(2).

32. Prosecution of separate actions by individual members of the Plaintiff Class would create the risk of inconsistent or varying adjudications and would establish incompatible standards of conduct for individual members of the Plaintiff Class. The Plaintiff Class may therefore be properly certified, alternatively, under Fed. R. Civ. P. 23(b)(1).

## THE MATTERS IN CONTROVERSY

33. In California, every person who has been convicted of a variety of offenses since July 1, 1944, must register as a sex offender for the rest of his or her life. § 290(b). The requirement applies to persons convicted of a number of listed crimes as well as to persons who

committed non-registerable offenses "as a result of sexual compulsion or for the purposes of sexual gratification." §§ 290(c), 290.006. Registerable offenses include misdemeanor indecent exposure, and California appellate courts have upheld convictions and the registration requirement for such offenses based on nude erotic dancing on a stage at a bar, exposing oneself during an incident of road rage, and exposing oneself to an undercover officer who the defendant thought was interested in engaging in sexual activity.

34. Because California's registration statute is so broad, was enacted so long ago, and because it, unlike most states, imposes a lifetime requirement for all offenders, there are currently more than 73,000 people required to register in California, not including persons who are in custody or who have been deported. This is so even though California does, in other contexts, distinguish between sex offenders who pose a high risk to the public and those who do not, using tools such as the Static-99 instrument that have been developed for just this purpose. *See* §§ 290.04-290.07, 1203e, 1203f, 3008.

35. Prior to the adoption of the challenged laws, California's registration law specifically required that registrants provide local law enforcement with their address, employer, and license plate numbers. § 290.015(a). Registrants must provide this information within 5 working days of changing their residence address and annually within 5 days of their birthday. §§ 290.012, 290.013.

36. The specific statutes here at issue were adopted as part of a voter initiative, Proposition 35, on November 6, 2012, and went into effect the following day pursuant to Article II § 10(a) of the California Constitution. Although the bulk of this initiative focuses on issues relating to what it describes as human trafficking, the challenged sections apply to all registrants.

37. Proposition 35 amends § 290.015(a) so that registrants must provide the following additional information whenever they register or re-register: "A list of any and all Internet identifiers established or used by the person" and "[a] list of any and all Internet service providers used by the person." § 290.015(a)(4), (5).

38. The initiative defines these terms as follows:

"Internet service provider" means a business, organization, or other entity providing

> a computer and communications facility directly to consumers through which a person may obtain access to the Internet. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.
>
> "Internet identifier" means an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication. § 290.024(a), (b).

39. The initiative requires that registrants provide this newly required information "immediately" after the law becomes effective and also that they advise the police within 24 hours of changes:

> If any person who is required to register pursuant to the Act adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 24 hours. The law enforcement agency or agencies shall make this information available to the Department of Justice. Each person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision. § 290.014(b).

40. As with the other registration requirements, a violation of any of these requirements is a crime. If the person is required to register as a result of a prior misdemeanor conviction and has no prior convictions for registration violations, a violation is a misdemeanor, punishable by no less than 90 days and no more than 1 year in jail; otherwise, it is a felony, punishable by no less than 90 days in jail and up to 3 years in prison, a sentence that may be dramatically increased if the registrant has prior felony convictions. § 290.018(a)-(c).

41. These new reporting requirements burden speech in several ways. First, the requirement that registrants provide new Internet identifiers or Internet service provider accounts to the government within 24 hours burdens their ability to engage in all manner of online speech, as does the requirement that they provide a yearly list of all Internet identifiers or Internet service providers that they use.

42. In addition, requiring registrants to provide this information infringes upon their right to engage in anonymous online speech. Not only does it require them to identify themselves to the government, but, because there are inadequate limits on what the government can disclose, it may mean that information about their lawful but anonymous online speech

activities will be released to the public. A 2009 survey of California law enforcement agencies found that 39% had "proactively" provided information about registrants to the public, apparently without any evidence that the registrant had been involved in any sort of criminal activity; nothing in the new law prevents them from doing the same with the information about registrants' online speech that registrants must now provide.

43. Scholarly research suggests that requiring all registrants to provide their Internet identifiers and Internet service providers is not an effective way to accomplish the government's stated goal of protecting children.

44. First, as the California Department of Justice reports, the vast majority of sex crimes against children are committed by family members or acquaintances: 90% of child victims know their offender, with almost half of the offenders being a family member. Of sexual assaults against people aged 12 years and up, approximately 80% of the victims know the offender.

45. Second, the best available data show that, as measured by arrests, online offenses constitute only about 1% of sex crimes committed against children and youth. And only 4% of those arrested for online sex crimes against youth victims in 2006 were registered sex offenders. Few of these crimes involve violence, abduction, or stalking, and few involved young children. A rapidly growing proportion of those arrested for such crimes are themselves aged 25 years or under.

46. Third, because the government can, as it does in other contexts, distinguish between registrants who pose a high risk of reoffending from those who pose a much lower risk, requiring all registrants to comply with this new law is needlessly overbroad. Most sex offenders do not reoffend, and the government can use tools such as the Static-99 test to determine which registrants pose a high risk of reoffending and which do not. A 2009 study by the state showed that the majority of felony sex offenders sentenced to prison and released on parole in California after 2005 were classified as posing a low or moderate-low risk of reoffending under Static-99. In addition, the longer ex-offenders remain offense-free in the community, the less likely they are to reoffend sexually. On average, the likelihood of reoffending drops by 50% every 5 years that an

offender remains in the community without a new arrest for a sex offense. Eventually, persons convicted of sex offenses are *less likely* to reoffend than a non–sexual offender is to commit an "out of the blue" sexual offence. For example, offenders who are classified as "low risk" pose no more risk of recidivism than do individuals who have never been arrested for a sex-related offense but have been arrested for some other crimes. After 10 to 14 years in the community without committing a sex offense, medium-risk offenders pose no more risk of recidivism than do individuals who have never been arrested for sex-related offenses but have been arrested for other crimes. The same is true for high-risk offenders after 17 years without a new arrest for a sex-related offense.

47. Thus, rather than imposing these requirements on all registrants, the government could have a more narrowly tailored requirement that excludes registrants whose Static-99 scores, offense of conviction, and post-release conduct show that they do not pose a high risk of using the Internet to commit a new crime.

**Need for Injunctive and Declaratory Relief**

48. Plaintiffs re-allege and incorporate here the allegations in the above paragraphs, as though fully set forth herein.

49. There exists an actual, present, and justiciable controversy between Plaintiffs and Defendants concerning their rights and duties with respect to Defendants' conduct described herein. Plaintiffs contend that Defendants violate Plaintiffs' rights under the Constitution and laws of the United States, because the challenged provisions are unconstitutional on their face and as applied to the individual Plaintiffs, the members of the organizational Plaintiff, and to others in the Plaintiff Class. On information and belief, Defendants deny that their conduct violates Plaintiffs' rights under the Constitution and laws of the United States. Plaintiffs fear that they are now and will again be subjected to such unlawful and unconstitutional actions and seek a judicial declaration that Defendants' conduct deprives Plaintiffs of their rights under the Constitution and laws of the United States.

50. This controversy is ripe for judicial decision, and declaratory relief is necessary and appropriate pursuant to 28 U.S.C. §§ 2201 and 2202, so that the parties may know the legal obligations that govern their present and future conduct.

51. In the absence of court-ordered relief, Plaintiffs will suffer imminent, immediate, and ongoing irreparable harm in the form of loss of anonymity, and a chilling of their free speech and associational rights. No future award of damages can remedy the loss of these constitutional rights. Both the public interest and equity favor granting an injunction to allow Plaintiffs to exercise their constitutional free speech and associational rights. Injunctive relief is therefore necessary and appropriate.

**COUNT I: VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

52. Plaintiffs hereby re-allege and incorporate by reference the allegations contained in the above paragraphs as though fully set forth herein.

53. The provisions of §§ 290.015(a)(4), (5) and § 290.014(b) that require registrants to provide their Internet identifiers and Internet service providers to the government violate the First Amendment rights to free speech and association because the provisions are vague, overbroad, burden speech without being appropriately tailored to the government's stated goals, and require the compelled disclosure of individuals with whom registrants associate.

54. The provisions of §§ 290.015(a)(4), (5) and § 290.014(b) that require registrants to provide their Internet identifiers and Internet service providers to the government violate the First Amendment because they apply to some persons but not others without sufficient justification.

55. Defendants, acting under color of state law, have threatened to and will enforce and implement the challenged laws against the individual Plaintiffs, members of the organizational Plaintiff, and members of the Plaintiff Class, in violation of their First Amendment rights.

56. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have and will suffer irreparable harm, which will continue absent injunctive relief.

**COUNT II: VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

57. Plaintiffs hereby re-allege and incorporate by reference the allegations contained in the above paragraphs as though fully set forth herein.

58. The definitions of "Internet identifier" and "Internet service providers" in §§ 290.024(a), (b) are impermissibly vague in that persons of common intelligence must guess at their meaning; this problem is magnified because a registrant who reads the provisions too narrowly is subject to criminal prosecution and punishment, and one who reads them too broadly suffers a greater infringement of his First Amendment rights than the statutes require. These statutes therefore violate due process.

59. Defendants, acting under color of state law, have threatened to and will enforce and implement the challenged laws against the individual Plaintiffs, members of the organizational Plaintiff, and members of the Plaintiff Class, in violation of their due process rights. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have and will suffer irreparable harm, which will continue absent injunctive relief.

**COUNT III: VIOLATION OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)**

60. Plaintiffs hereby re-allege and incorporate by reference the allegations contained in the above paragraphs as though fully set forth herein.

61. The provisions of §§ 290.015(a)(4), (5) and § 290.014(b) that require registrants to provide their Internet identifiers and Internet service providers to the government violate equal protection because they apply to some persons but not others without sufficient justification.

62. Defendants, acting under color of state law, have threatened to and will enforce and implement the challenged laws against the individual Plaintiffs, members of the

organizational Plaintiff, and members of the Plaintiff Class, in violation of their equal protection rights.

63. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have and will suffer irreparable harm, which will continue absent injunctive relief.

**COUNT IV: EX POST FACTO LAW**

**UNDER ARTICLE II § 10 cl. 1 OF THE UNITED STATES**

**CONSTITUTION (42 U.S.C. § 1983)**

64. Plaintiffs hereby re-allege and incorporate by reference the allegations contained in the above paragraphs as though fully set forth herein.

65. The provisions of §§ 290.015(a)(4), (5) and § 290.014(b) that require registrants to provide their Internet identifiers and Internet service providers to the government violate the Ex Post Facto Clause because they impose additional punishment for crimes committed before they were enacted.

66. Defendants, acting under color of state law, have threatened to and will enforce and implement the challenged laws against the individual Plaintiffs, members of the organizational Plaintiff, and members of the Plaintiff Class, in violation of their rights under the Ex Post Facto Clause.

67. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have and will suffer irreparable harm, which will continue absent injunctive relief.

**RELIEF SOUGHT**

WHEREFORE, Plaintiffs, on behalf of themselves and the Plaintiff Class, seek the following relief:

1. A declaration that California Penal Code §§ 290.015(a)(4), (5), § 290.014(b), and §§ 290.024(a), (b) are unconstitutional, facially and as applied.

2. A temporary restraining order, preliminary injunction, and permanent injunction enjoining Defendants, including all of Defendant Harris's officers, agents, servants, employees, attorneys, and other persons in active concert or participation with Defendant Harris, including but not limited to every California District Attorney, City Attorney, or peace officer,

from enforcing §§ 290.015(a)(4), (5), § 290.014(b) and §§ 290.024(a), (b) or from otherwise requiring registrants to provide their Internet identifiers or Internet service providers to the government.

3. Costs and attorney's fees incurred in this action pursuant to 42 U.S.C. § 1988 and other applicable authority.

4. Such other and further relief as may be just and proper.

DATED: November 7, 2012

Respectfully submitted,

By: 

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JS 44 CAND (Rev. 12/11)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

**I. (a) PLAINTIFFS**
JOHN DOE, et al.

(b) County of Residence of First Listed Plaintiff ALAMEDA
*(EXCEPT IN U.S. PLAINTIFF CASES)*

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
ELECTRONIC FRONTIER FOUNDATION

**DEFENDANTS**
KAMALA D. HARRIS, et al.,

12-5713 TEH

County of Residence of First Listed Defendant SAN FRANCISCO
*(IN U.S. PLAINTIFF CASES ONLY)*
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
DEPARTMENT OF JUSTICE
455 Golden Gate, Suite 11000
San Francisco, CA 94102-7004

**II. BASIS OF JURISDICTION** *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

**III. CITIZENSHIP OF PRINCIPAL PARTIES** *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
*(For Diversity Cases Only)*

| | PTF | DEF | | PTF | DEF |
|---|---|---|---|---|---|
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

**IV. NATURE OF SUIT** *(Place an "X" in One Box Only)*

**CONTRACT**
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

**REAL PROPERTY**
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

**TORTS**

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

**CIVIL RIGHTS**
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

**PRISONER PETITIONS**
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

**FORFEITURE/PENALTY**
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

**LABOR**
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

**IMMIGRATION**
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

**BANKRUPTCY**
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

**PROPERTY RIGHTS**
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

**SOCIAL SECURITY**
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

**FEDERAL TAX SUITS**
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

**OTHER STATUTES**
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

**V. ORIGIN** *(Place an "X" in One Box Only)*
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
42 U.S.C. Section 1983
Brief description of cause:
First Amendment and Due Process challenge to Proposition 35

**VII. REQUESTED IN COMPLAINT:**
☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY** *(See instructions)*:
JUDGE DOCKET NUMBER

**IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)**
(Place an "X" in One Box Only) ☒ SAN FRANCISCO/OAKLA ND ☐ SAN JOSE ☐ EUREKA

DATE 11/07/2012 SIGNATURE OF ATTORNEY OF RECORD

Court Name: U.S. District Court, NDCA
Division: 3
Receipt Number: 34611000039
Cashier ID: spinka
Transaction Date: 11/07/2012
Payer Name: american civil liberties uni
on

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CIVIL FILING FEE
For: john doe
Case/Party: D-CAN-3-12-CV-005713-001
Amount: $350.00

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PAPER CHECK CONVERSION
Check/Money Order Num: 32978
Amt Tendered: $350.00

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Total Due: $350.00
Total Tendered: $350.00
Change Amt: $0.00

teh

Checks and drafts are accepted
subject to collections and full
credit will only be given when the
check or draft has been accepted by
the financial institution on which
it was drawn.

05713-TEH Document1-1 Filed11/07/12

ADRMOP,APPEAL,E-Filing,STAYED

# U.S. District Court
# California Northern District (San Francisco)
# CIVIL DOCKET FOR CASE #: 3:12-cv-05713-TEH

Doe et al v. Harris et al
Assigned to: Hon. Thelton E. Henderson
Case in other court: 13-15263
13-15267
Cause: 42:1983 Civil Rights Act

Date Filed: 11/07/2012
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

**Plaintiff**

**Jack Roe**

represented by **Hanni Meena Fakhoury**
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333
Fax: (415) 436-9993
Email: hanni@eff.org
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Michael Temple Risher**
ACLU Foundation of Northern California, Inc.
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Email: llye@aclunc.org
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**John Doe**

represented by **Hanni Meena Fakhoury**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Michael Temple Risher**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Lee Tien**
(See above for address)
*ATTORNEY TO BE NOTICED*

**Linda Lye**
(See above for address)
*ATTORNEY TO BE NOTICED*

**Plaintiff**

**California Reform Sex Offender Laws**
*on behalf of themselves and others similarly situated*

represented by **Hanni Meena Fakhoury**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Michael Temple Risher**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Lee Tien**
(See above for address)

*ATTORNEY TO BE NOTICED*

**Linda Lye**
(See above for address)
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**Kamala D. Harris**
*Attorney General of California*

represented by **Robert David Wilson**
California State Attorney General's Office
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 327-7870
Fax: (916) 324-8835
Email: Robert.Wilson@doj.ca.gov

*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Defendant**

**City of Alameda**
*TERMINATED: 01/25/2013*

**Intervenor**

**Daphne Phung**

represented by **Margaret R. Prinzing**
Remcho, Johansen & Purcell LLP

201 Dolores Avenue
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Fax: (510) 346-6201
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*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

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**Karen Ann Getman**
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Fax: 510-346-6201
Email: kgetman@rjp.com
*ATTORNEY TO BE NOTICED*

**Intervenor**

**Chris Kelly** represented by **Margaret R. Prinzing**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**James C. Harrison**
(See above for address)
*ATTORNEY TO BE NOTICED*

**Karen Ann Getman**
(See above for address)
*ATTORNEY TO BE NOTICED*

| Date Filed | # | Docket Text |
|---|---|---|
| 02/28/2013 | 101 | United States Court of Appeals for the Ninth Circuit CASE NUMBER 13-15267 for re 95 Amended Notice of Preliminary Injunction Appeal filed by Kamala D. Harris. (tn, COURT STAFF) (Filed on 2/28/2013) (Entered: 02/28/2013) |
| 02/25/2013 | 100 | STIPULATION AND ORDER Staying Proceedings Pending Appeal and Vacating Presently Calendared Court Dates. Signed by Judge Thelton E. Henderson on 02/25/2013. (tmi, COURT STAFF) (Filed on 2/25/2013) (Entered: 02/25/2013) |
| 02/22/2013 | 99 | STIPULATION OF COUNSEL AND [PROPOSED] ORDER Granting Stay of District Court Proceedings Pending Appeal and Vacating Presently Calendared Court Dates filed by Kamala D. |

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| | | Harris. (Attachments: #(1) Stipulation of Counsel and [Proposed] Order)(Wilson, Robert) (Filed on 2/22/2013) (Entered: 02/22/2013) |
| 02/20/2013 | 98 | United States Court of Appeals for the Ninth Circuit CASE NUMBER 13-15263 for re 93 Notice of Preliminary Injunction Appeal filed by Daphne Phung, Chris Kelly. (tn, COURT STAFF) (Filed on 2/20/2013) (Entered: 02/20/2013) |
| 02/14/2013 | 97 | Transcript Designation and Ordering Form (Wilson, Robert) (Filed on 2/14/2013) (Entered: 02/14/2013) |
| 02/12/2013 | 96 | Transmission of Notice of Appeals & Docket Sheet to the United States Court of Appeals for the Ninth Circuit as to re 95 Notice of Preliminary InjunctionAppeal filed by Defendant Kamala D. Harris & re 93 Notice of Preliminary Injunction Appeal filed by Intervenors Daphne Phung & Chris Kelly. (tn, COURT STAFF) (Filed on 2/12/2013) (tn, COURT STAFF). (Additional attachment(s) added on 2/12/2013: # 1 Notice of Appeal Notification Form) (tn, COURT STAFF). (Additional attachment (s) added on 2/12/2013: # 2 Notice of Preliminary Injunction Appeal by Intervenors) (tn, COURT STAFF). (Additional attachment(s) added on 2/12/2013: # 3 Notice of Preliminary Injunction Appeal by Defendant Harris) (tn, COURT STAFF). (Additional attachment(s) added on 2/12/2013: # 4 Civil Docket Sheet) (tn, COURT STAFF). (Entered: 02/12/2013) |
| 02/11/2013 | 95 | NOTICE OF PRELIMINARY INJUNCTION APPEAL filed by Defendant Kamala D. Harris as to re 78 Order Granting Plaintiffs' Motion for a Preliminary Injunction -*Preliminary Injunction Appeal, [Appeal Fee of $455.00 Paid, receipt number 0971-7473511] (Amended to change docket text from Notice of Appeal to the Federal Circuit to Notice of Appeal to the United States court of Appeals for the Ninth Circuit)*. (Attachments: #(1) Exhibit Exhibit A, #(2) Exhibit Exhibit B, #(3) Certificate/Proof of Service Certificate of Service)(Wilson, Robert) (Filed on 2/11/2013) (Entered: 02/11/2013) |
| 02/11/2013 | 94 | [DOCKETED IN ERROR...PLS. DISREGARD...REFER TO DOCUMENT NUMBER re 95 ]...NOTICE OF APPEAL to the Federal Circuit as to 78 Order by Kamala D. Harris. Filing fee $ 455, receipt number 0971-7473511. *Preliminary Injunction Appeal* Appeal Record due by 2/11/2013. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Certificate/Proof of Service Certificate of Service)(Wilson, Robert) (Filed on |

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|---|---|---|
| | | 2/11/2013)...Modified on 2/11/2013 (tn, COURT STAFF). (Entered: 02/11/2013) |
| 02/11/2013 | 93 | NOTICE OF PRELIMINARY INJUNCTION APPEAL to the United States Court of Appeals for the Ninth Circuit filed by Intervenors Chris Kelly, Daphne Phung. [Appeal Fee of $455.00 Paid, receipt number 0971-7473257] (Prinzing, Margaret) (Filed on 2/11/2013) (Entered: 02/11/2013) |
| 02/06/2013 | | ADR Remark: ADR Phone Conference held by GDB on 2/6/13. (sgd, COURT STAFF) (Filed on 2/6/2013) (Entered: 02/06/2013) |
| 02/04/2013 | 92 | STIPULATION AND ORDER Continuing Case Management Conference. Case Management Conference set for 3/4/2013 01:30 PM in Courtroom 12, 19th Floor, San Francisco. Signed by Judge Thelton E. Henderson on 02/04/2013. (tmi, COURT STAFF) (Filed on 2/4/2013) (Entered: 02/04/2013) |
| 01/31/2013 | 91 | *Stipulation and [Proposed] Order Continuing Intitial Case Management Conference* filed by John Doe, Kamala D. Harris. (Risher, Michael) (Filed on 1/31/2013) (Entered: 01/31/2013) |
| 01/29/2013 | 90 | ADR Clerk Notice Setting ADR Phone Conference on 2/6/13 at 10:00 a.m. Pacific. Please note that you must be logged into an ECF account of counsel of record in order to view this document. (sgd, COURT STAFF) (Filed on 1/29/2013) (Entered: 01/29/2013) |
| 01/28/2013 | 89 | *Declaration of Linda Schweig re Notice of Preliminary Injunction to California Law Enforcement Agencies re 78* filed by Kamala D. Harris. (Attachments: #(1) Certificate/Proof of Service) (Wilson, Robert) (Filed on 1/28/2013) (Entered: 01/28/2013) |
| 01/25/2013 | 88 | *PLAINTIFFS' NOTICE OF DISMISSAL OF DEFENDANT CITY OF ALAMEDA* filed by John Doe (Risher, Michael) (Filed on 1/25/2013) (Entered: 01/25/2013) |
| 01/22/2013 | 87 | ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Wilson, Robert) (Filed on 1/22/2013) (Entered: 01/22/2013) |
| 01/22/2013 | 86 | ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Prinzing, Margaret) (Filed on 1/22/2013) (Entered: 01/22/2013) |
| 01/22/2013 | 85 | NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Lye, Linda) (Filed on 1/22/2013) (Entered: 01/22/2013) |

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| 01/22/2013 | 84 | ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options *by Pltfs Doe, Roe and Calif Reform* (Lye, Linda) (Filed on 1/22/2013) (Entered: 01/22/2013) |
| 01/17/2013 | 83 | CERTIFICATE OF SERVICE by Chris Kelly, Daphne Phung re 82 Certificate of Interested Entities (Prinzing, Margaret) (Filed on 1/17/2013) (Entered: 01/17/2013) |
| 01/17/2013 | 82 | Certification of Interested Entities or Persons filed by Chris Kelly, Daphne Phung (Prinzing, Margaret) (Filed on 1/17/2013) (Entered: 01/17/2013) |
| 01/17/2013 | 81 | CERTIFICATE OF SERVICE by Chris Kelly, Daphne Phung re 80 Answer to Complaint (Prinzing, Margaret) (Filed on 1/17/2013) (Entered: 01/17/2013) |
| 01/17/2013 | 80 | *Interveners'* ANSWER to Complaint filed by Chris Kelly, Daphne Phung. (Prinzing, Margaret) (Filed on 1/17/2013) (Entered: 01/17/2013) |
| 01/16/2013 | 79 | STIPULATION AND ORDER extending time for City of Alameda to respond to Complaint and re: City's desire not to participate in litigation over plaintiffs' motions for preliminary injunction, to proceed anonymously, for partial sealing, and for provisional class certification. Signed by Judge Thelton E. Henderson on 01/16/2013. (tmi, COURT STAFF) (Filed on 1/16/2013) (Entered: 01/16/2013) |
| 01/11/2013 | 78 | ORDER granting re 6 Plaintiffs' motion for a preliminary injunction. Signed by Judge Thelton E. Henderson on 01/11/13. (tehlc3, COURT STAFF) (Filed on 1/11/2013) (Entered: 01/11/2013) |
| 01/10/2013 | 77 | CORRECTION OF DOCKET # 76 . ORDER by Judge Thelton E. Henderson granting 40 Motion to Intervene. (tmi, COURT STAFF) (Filed on 1/10/2013) (Entered: 01/10/2013) |
| 01/10/2013 | 76 | *** **FILED IN ERROR. PLEASE SEE DOCKET # 77** *** ORDER by Judge Thelton E. Henderson granting 40 Motion to Intervene. (tehlc2, COURT STAFF) (Filed on 1/10/2013) Modified on 1/10/2013 (tmi, COURT STAFF). (Entered: 01/10/2013) |
| 01/02/2013 | 75 | Order to Pro Tem Reporter to Produce Transcript. Signed by Judge Thelton E. Henderson on 12/21/12. (tehlc1, COURT STAFF) (Filed on 1/2/2013) (Entered: 01/02/2013) |
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| 12/29/2012 | 74 | Transcript of Proceedings held on December 17, 2012, before Judge Thelton E. Henderson. Court Reporter/Transcriber Christine A. Triska, Telephone number (650)743-8425; christinetriska@sbcglobal.net. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 3/29/2013. (cat, COURT STAFF) (Filed on 12/29/2012) (Entered: 12/29/2012) |
| 12/19/2012 | 73 | ORDER Signed by The Honorable Thelton E. Henderson granting re 68 Administrative Motion to submit notice of grant of certiorari and clarifying evidence. (tmi, COURT STAFF) (Filed on 12/19/2012) (Entered: 12/19/2012) |
| 12/17/2012 | 72 | Minute Entry: Motion Hearing held on 12/17/2012 before Judge Thelton E. Henderson. Motions are taken under submission. (Court Reporter: Christine Triska) (tmi, COURT STAFF) (Date Filed: 12/17/2012) (Entered: 12/17/2012) |
| 12/13/2012 | 71 | ORDER with questions for counsel for December 17 Hearing. Signed by Judge Thelton E. Henderson on 12/13/2012. (tehlc2, COURT STAFF) (Filed on 12/13/2012) (Entered: 12/13/2012) |
| 12/12/2012 | 70 | [Proposed] Order Granting re 68 Administrative MOTION to Submit *Notice of Grant of Certiorari and Clarifying Evidence -- [Proposed] Order* filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Risher, Michael) (Filed on 12/12/2012) (Entered: 12/12/2012) |
| 12/11/2012 | 69 | Declaration of Michael T. Risher in Support of re 68 Administrative MOTION to Submit *Notice of Grant of Certiorari and Clarifying Evidence* filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Attachments: #(1) Exhibit A, #(2) Exhibit B)(Related document(s) 68 ) (Risher, Michael) (Filed on 12/11/2012) (Entered: 12/11/2012) |
| 12/11/2012 | 68 | Administrative MOTION to Submit *Notice of Grant of Certiorari and Clarifying Evidence* filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Risher, Michael) (Filed on 12/11/2012) (Entered: 12/11/2012) |
| 12/03/2012 | 67 | Declaration of Hanni Fakhoury in Support of re 65 Plaintiffs' |

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|---|---|---|
| | | Reply in Support of Motion for Preliminary Injunction and re 66 Plaintiffs' Objections to Evidence filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Attachments: #(1) Exhibit 1, #(2) Exhibit 2, #(3) Exhibit 3, #(4) Exhibit 4, #(5) Exhibit 5, # (6) Exhibit 6) (Related document(s) 66 , 65 ) (Fakhoury, Hanni) (Filed on 12/3/2012) (Entered: 12/03/2012) |
| 12/03/2012 | 66 | OBJECTIONS to Evidence & Response to Defendants' & Proponents' Objections to Evidence, re 54 Opposition/Response to Motion, *to the Declaration of David G. Post* filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Fakhoury, Hanni) (Filed on 12/3/2012) (Entered: 12/03/2012) |
| 12/03/2012 | 65 | *Plaintiffs' Reply In Support Of re 6 Motion for Preliminary Injunction* filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Related document(s) 6 ) (Risher, Michael) (Filed on 12/3/2012) (Entered: 12/03/2012) |
| 12/03/2012 | 64 | Declaration of James C. Harrison in Support of re 40 MOTION to Intervene; *Memorandum of Points and Authorities in Support Thereof* filed by Chris Kelly, Daphne Phung. (Attachments: #(1) Exhibit 1)(Related document(s) 40 ) (Prinzing, Margaret) (Filed on 12/3/2012) (Entered: 12/03/2012) |
| 12/03/2012 | 63 | REPLY in Support of (re 40 MOTION to Intervene; *Memorandum of Points and Authorities in Support Thereof*) filed by Chris Kelly, Daphne Phung. (Prinzing, Margaret) (Filed on 12/3/2012) (Entered: 12/03/2012) |
| 12/03/2012 | 62 | STIPULATION AND ORDER Regarding Page Limitation for Plaintiffs' Reply re 61 . Signed by Judge Thelton E. Henderson on 12/03/2012. (tmi, COURT STAFF) (Filed on 12/3/2012) (Entered: 12/03/2012) |
| 11/30/2012 | 61 | STIPULATED ADMINISTRATIVE MOTION *Regarding Page Limitation for Plaintiffs' Reply* filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Attachments: #(1) Stipulation and [Proposed] Order) (Risher, Michael) (Filed on 11/30/2012) (Entered: 11/30/2012) |
| 11/28/2012 | 60 | ANSWER to Complaint*for Declaratory and Injunctive Relief* filed by Kamala D. Harris. (Attachments: #(1) Certificate/Proof of Service)(Wilson, Robert) (Filed on 11/28/2012) (Entered: 11/28/2012) |
| 11/26/2012 | 59 | CERTIFICATE OF SERVICE filed by Chris Kelly & Daphne |

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| | | Phung of *[Opposition to Preliminary Injunction Motion and Related Documents]* (Harrison, James) (Filed on 11/26/2012) (Entered: 11/26/2012) |
| 11/26/2012 | 58 | *Interveners' Joinder in Defendant Harris' Objections to the Declaration of David G. Post* filed filed by Chris Kelly & Daphne Phung. (Harrison, James) (Filed on 11/26/2012) (Entered: 11/26/2012) |
| 11/26/2012 | 57 | Request for Judicial Notice in Support of re 55 Opposition/Response to Motion for for Preliminary Injunction; Declaration of Brian Metzker filed by Chris Kelly, Daphne Phung. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Related document(s) 55 ) (Harrison, James) (Filed on 11/26/2012) (Entered: 11/26/2012) |
| 11/26/2012 | 56 | Declaration of Sharmin Bock in Support of re 55 Opposition/Response to Motion for Preliminary Injunction filed by Chris Kelly & Daphne Phung. (Related document(s) 55 ) (Harrison, James) (Filed on 11/26/2012) (Entered: 11/26/2012) |
| 11/26/2012 | 55 | RESPONSE to (re 6 Ex-parte Application for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue; *Memorandum of Points and Authorities in Support Thereof*) *-Proposed Interveners' Opposition to Motion for Preliminary Injunction-* filed by Chris Kelly & Daphne Phung. (Harrison, James) (Filed on 11/26/2012) (Entered: 11/26/2012) |
| 11/26/2012 | 54 | RESPONSE to (re 6 Ex-parte Application for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue; *Memorandum of Points and Authorities in Support Thereof*) *-Opposition to Preliminary Injunction Motion-* filed by Kamala D. Harris. (Attachments: #(1) Declaration, #(2) Declaration, #(3) Supplement, #(4) Certificate/Proof of Service)(Wilson, Robert) (Filed on 11/26/2012) (Entered: 11/26/2012) |
| 11/26/2012 | 53 | RESPONSE to (re 40 MOTION to Intervene; *Memorandum of Points and Authorities in Support Thereof*) filed by John Doe, Jack Roe. (Attachments: #(1) Declaration of Hanni M. Fakhoury) (Fakhoury, Hanni) (Filed on 11/26/2012) (Entered: 11/26/2012) |
| 11/16/2012 | 52 | DOCUMENT E-FILED UNDER SEAL re 50 Order Granting Motion to File Under Seal *Decl of Jack Roe ISO TRO & PI* by Jack Roe. (Lye, Linda) (Filed on 11/16/2012) (Entered: |

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| 11/16/2012 | 51 | DOCUMENT E-FILED UNDER SEAL re 50 Order Granting Motion to File Under Seal *Decl of John Doe ISO TRO & PI* by John Doe. (Lye, Linda) (Filed on 11/16/2012) (Entered: 11/16/2012) |
| 11/15/2012 | 50 | ORDER Allowing Filing Under Seal re: order 49 . Signed by Judge Thelton E. Henderson on 11/15/12. This is a text-only docket entry; there is no document attached.(tehlc1, COURT STAFF) (Filed on 11/15/2012) (Entered: 11/15/2012) |
| 11/15/2012 | 49 | ORDER Signed by Judge Thelton E. Henderson Granting in Part re 19 Plaintiffs' Motion for leave to proceed anonymously and to file declarations under seal. (tehlc1, COURT STAFF) (Filed on 11/15/2012) (Entered: 11/15/2012) |
| 11/14/2012 | | Set/Reset Deadlines as to 40 MOTION to Intervene *; Memorandum of Points and Authorities in Support Thereof.* Responses due by 11/26/2012. Replies due by 12/3/2012. Motion Hearing set for 12/17/2012 10:00 AM in Courtroom 2, 17th Floor, San Francisco before Hon. Thelton E. Henderson. (tmi, COURT STAFF) (Filed on 11/14/2012) (Entered: 11/14/2012) |
| 11/14/2012 | 48 | STIPULATION AND ORDER re Extension of Temporary Restraining Order and Briefing and Hearing Schedule for Plaintiffs' Motion for a Preliminary Injunction re 45 . Responses due by 11/26/2012. Replies due by 12/3/2012. Motion Hearing set for 12/17/2012 10:00 AM in Courtroom 2, 17th Floor, San Francisco. Signed by Judge Thelton E. Henderson on 11/14/2012. (tmi, COURT STAFF) (Filed on 11/14/2012) (Entered: 11/14/2012) |
| 11/14/2012 | 47 | STIPULATION and [PROPOSED] ORDER *re: Extending time for City of Alameda to Respond to Complaint and re: City's desire not to participate in litigation over plaintiffs' motions for preliminary injunction, to proceed anonymously, for partial sealing, and for provisional class certification* filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Attachments: # (1) Certificate/Proof of Service)(Risher, Michael) (Filed on 11/14/2012) (Entered: 11/14/2012) |
| 11/13/2012 | 46 | PROOF OF SERVICE filed by Chris Kelly, Daphne Phung (Harrison, James) (Filed on 11/13/2012) (Entered: 11/13/2012) |
| 11/13/2012 | 45 | STIPULATION and [PROPOSED] ORDER Re 36 Extension of |

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| | | Temporary Restratining Order & Briefing & Hearing Schedule Regarding Plaintiffs' Motion for Preliminary Injunction filed by Kamala D. Harris, John Doe, Jack Roe, California Reform Sex Offender Laws. (Attachments: #(1) [Proposed] Order, #(2) Certificate/Proof of Service)(Wilson, Robert) (Filed on 11/13/2012) (Entered: 11/13/2012) |
| 11/13/2012 | 44 | RESPONSE to (re 19 Administrative MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal) filed by Chris Kelly, Daphne Phung. (Harrison, James) (Filed on 11/13/2012) (Entered: 11/13/2012) |
| 11/12/2012 | 43 | PROOF OF SERVICE filed by Chris Kelly, Daphne Phung of re 40 Motion to Intervene, re 41 Declaration in Support, re 42 [Proposed] Order (Prinzing, Margaret) (Filed on 11/12/2012) (Entered: 11/12/2012) |
| 11/12/2012 | 42 | Declaration of Margaret R. Prinzing in Support of re 40 MOTION to Intervene; *Memorandum of Points and Authorities in Support Thereof* filed by Chris Kelly, Daphne Phung. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Related document(s) 40 ) (Prinzing, Margaret) (Filed on 11/12/2012) (Entered: 11/12/2012) |
| 11/12/2012 | 41 | [Proposed] Order Granting re 40 MOTION to Intervene; *Memorandum of Points and Authorities in Support Thereof* filed by Chris Kelly, Daphne Phung. (Prinzing, Margaret) (Filed on 11/12/2012) (Entered: 11/12/2012) |
| 11/12/2012 | 40 | NOTICE OF MOTION & MOTION to Intervene; *Memorandum of Points and Authorities in Support Thereof* filed by Daphne Phung, Chris Kelly. Motion Hearing set for 12/17/2012 at 10:00 AM in Courtroom 2, 17th Floor, San Francisco before Hon. Thelton E. Henderson. Responses due by 11/26/2012. Replies due by 12/3/2012. (Prinzing, Margaret) (Filed on 11/12/2012) (Entered: 11/12/2012) |
| 11/08/2012 | 39 | CERTIFICATE OF SERVICE by California Reform Sex Offender Laws, John Doe, Jack Roe *(Temporary Restraining Order-personal service on state)* (Risher, Michael) (Filed on 11/8/2012) (Entered: 11/08/2012) |
| 11/08/2012 | 38 | Proposed Order re 19 MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal by John Doe. (Lye, Linda) (Filed on 11/8/2012) (Entered: 11/08/2012) |
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| 11/08/2012 | 37 | CERTIFICATE OF SERVICE by California Reform Sex Offender Laws, John Doe, Jack Roe *(Temporary Restraining Order electronic service)* (Risher, Michael) (Filed on 11/8/2012) (Entered: 11/08/2012) |
| 11/07/2012 | | Motion Hearing on Plaintiffs' motion for a preliminary injunction set for 11/20/2012 at 10:00 AM in Courtroom 2, 17th Floor, San Francisco before the Hon. Thelton E. Henderson. (tehlc3, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 36 | ORDER Signed by The Honorable Thelton E. Henderson granting re 6 Temporary Restraining Order and Order to Show Cause as to Why a Preliminary Injunction Should not Issue. Plaintiffs to file proof of service by 11/08/2012. Oppositions due 11/13/2012. Reply due 11/16/2012. (tehlc3, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 35 | SUMMONS Returned Executed by John Doe. City of Alameda served on 11/7/2012, answer due 11/28/2012. *Proof of Service of Complaint, Motion for TRO, Class Cert and to Proceed Anonymously and Supporting Papers* (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 34 | CERTIFICATE OF SERVICE by John Doe re 1 Complaint, *Motion for TRO, Class Cert and to Proceed Anonymously and Supporting Papers on Defendant HARRIS* (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 33 | SUMMONS Returned Executed by John Doe. Kamala D. Harris served on 11/7/2012, answer due 11/28/2012. (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | | CASE DESIGNATED for Electronic Filing. (tn, COURT STAFF) (Entered: 11/07/2012) |
| 11/07/2012 | 32 | Declaration of David Finkelhor in Support of re 19 Administrative MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe.(Related document(s) 19 ) (tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 31 | Declaration of R. Karl Hanson in Support of re 19 Administrative MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe.(Related document(s) |

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| | | 19 ) (tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 30 | Declaration of Charlene Steen in Support of re 19 Administrative MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe.(Related document(s) 19 ) (tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 29 | Declaration of Brian R. Abbott in Support of re 19 Administrative MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (Related document(s) 19 ) (tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 28 | Declaration of David G. Post in Support of re 19 Administrative MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe.(Related document(s) 19 ) (tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 27 | Declaration of Janice Bellucci in Support of re 19 AdministrativeMOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe.(Related document(s) 19 ) (tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 26 | Declaration of Charlene Steen in Support of 6 MOTION for Temporary Restraining Order *OSC & Prel. Inj.* filed byJohn Doe. (Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 25 | Supplemental Declaration of "Jack Roe" in Support of re 19 AdministrativeMOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe.(Related document(s) 19 ) (tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 24 | Declaration of Karl Hanson in Support of 6 MOTION for Temporary Restraining Order *OSC & Prel. Inj* filed byJohn Doe. (Attachments: # 1 Exhibit)(Related document(s) 6 ) (Lye, Linda) |

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| | | (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 23 | Declaration of David Finkelhor in Support of 6 MOTION for Temporary Restraining Order *OSC & Prel. Inj.* filed byJohn Doe. (Attachments: # 1 Exhibit)(Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | | RECEIVED/LODGED: "FOUR UNDER SEALED DECLARATIONS" in re 19 Administrative MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal Submitted by California Reform Sex Offender Laws, John Doe, Jack Roe.(tn, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 22 | Declaration of Brian Abbott in Support of 6 MOTION for Temporary Restraining Order *OSC & Prel Inj* filed byJohn Doe. (Attachments: # 1 Exhibit)(Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 21 | Declaration of David Post in Support of 6 MOTION for Temporary Restraining Order *OSC & Prel. Inj.* filed byJohn Doe. (Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 20 | Declaration of Janice Bellucci in Support of 6 MOTION for Temporary Restraining Order *OSC & Prel. Inj* filed byJohn Doe. (Attachments: # 1 Exhibit)(Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 19 | ADMINISTRATIVE MOTION for Leave to Proceed Anonymously and to File Portions of Declarations Under Seal filed by California Reform Sex Offender Laws, John Doe, Jack Roe. (tn, COURT STAFF) (Filed on 11/7/2012) (Additional attachment(s) added on 11/7/2012: # 1 [Proposed] Order) (tn, COURT STAFF)...Modified on 11/7/2012 (tn, COURT STAFF). (Entered: 11/07/2012) |
| 11/07/2012 | 18 | Declaration of Jack Roe in Support of 6 MOTION for Temporary Restraining Order *OSC & Prel. Injunction (Supp Declaration)* filed byJohn Doe. (Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 17 | Declaration of Jack Roe in Support of 6 MOTION for Temporary Restraining Order *OSC & Preliminary Injunction* filed byJohn Doe. (Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
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| 11/07/2012 | 16 | Declaration of John Doe in Support of 6 MOTION for Temporary Restraining Order *OSC and Preliminary Injunction* filed byJohn Doe. (Related document(s) 6 ) (Lye, Linda) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 15 | Minute Entry: Telephonic Temporary Restraining Order Hearing held on 11/7/2012 before Judge Thelton E. Henderson. Request for Temporary Restraining Order is taken under submission. (Court Reporter: Lydia Zinn) (tmi, COURT STAFF) (Date Filed: 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 14 | Declaration of Lee Tien in Support of re 10 Motion for Class Certification filed by California Reform Sex Offender Laws, John Doe & Jack Roe. (Related document(s) 10 ) (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 13 | CLERK'S NOTICE SCHEDULING TELEPHONIC CONFERENCE as to 6 MOTION for Temporary Restraining Order. Temporary Restraining Order Hearing set for 11/7/2012 01:30 PM in Courtroom 12, 19th Floor, San Francisco before Hon. Thelton E. Henderson. *This is a text only docket entry. There is no document associated with this notice.* (tmi, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 12 | [Proposed] Order Granting re 10 Motion for Class Certification filed by California Reform Sex Offender Laws, John Doe & Jack Roe. (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 11 | Declaration of Linda Lye in Support of re 10 MOTION for Class Certification filed by John Doe, Jack Roe & California Reform Sex Offender Laws. (Related document(s) 6 ) (hph, COURT STAFF) (Filed on 11/7/2012) Modified on 11/7/2012 (hph, COURT STAFF). (Entered: 11/07/2012) |
| 11/07/2012 | 10 | NOTICE of Motion & Motion and Points & Authorities in Support of Class Certification filed by California Reform Sex Offender Laws, John Doe & Jack Roe. (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 9 | Proposed Temporary Restraining Order and Order to Show Cause and Order for Provisional Class Certificate by California Reform Sex Offender Laws, John Doe, Jack Roe. (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 8 | MEMORANDUM in Support re 6 MOTION for Temporary |

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| | | Restraining Order filed byCalifornia Reform Sex Offender Laws, John Doe, Jack Roe. (Related document(s) 6 ) (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 7 | Declaration of Michael T. Risher in Support of 6 MOTION for Temporary Restraining Order filed byError: party not known. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Related document(s) 6 ) (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 6 | Ex-Parte Application for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue filed by California Reform Sex Offender Laws, John Doe & Jack Roe. (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 5 | Certificate of Interested Entities by California Reform Sex Offender Laws, John Doe, Jack Roe (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 4 | CONSENT/DECLINATION to Proceed Before a US Magistrate Judge.. (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 3 | Summons Issued as to City of Alameda, Kamala D. Harris. (hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 2 | ADR SCHEDULING ORDER: Case Management Statement due by 2/4/2013. Case Management Conference set for 2/11/2013 01:30 PM in Courtroom 12, 19th Floor, San Francisco. (Attachments: # 1 Standing Order, # 2 Standing Order for all judges)(hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |
| 11/07/2012 | 1 | COMPLAINT against City of Alameda, Kamala D. Harris ( Filing fee $ 350, receipt number 34611080391. summons issued). Filed byJohn Doe, Jack Roe, California Reform Sex Offender Laws. (Attachments: # 1 Civil Cover Sheet)(hph, COURT STAFF) (Filed on 11/7/2012) (Entered: 11/07/2012) |

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9th Circuit Case Number(s)

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## CERTIFICATE OF SERVICE
## When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

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## CERTIFICATE OF SERVICE
## When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)