No. COA12-1287 14TH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	From Durham County
v.	)	
	)	
LESTER G. PACKINGHAM	)	

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DEFENDANT-APPELLANT'S BRIEF

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LESTER G. PACKINGHAM)

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DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

I. WHETHER NORTH CAROLINA GENERAL STATUTE SECTION 14-202.5 VIOLATES MR. PACKINGHAM'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREE SPEECH, ASSOCIATION, RELIGIOUS EXPRESSION, ASSEMBLY, AND THE PRESS, AND IS OVERBROAD ON ITS FACE AND AS APPLIED, WHERE MR. PACKINGHAM DID NOTHING MORE THAN POST A MESSAGE ON FACEBOOK PRAISING GOD FOR A DISMISSED TRAFFIC TICKET.

II. WHETHER SECTION 14-202.5 IS UNCONSTITUTIONALLY VAGUE.

III. WHETHER SECTION 14-202.5 ALLOWS ARREST WITHOUT PROBABLE CAUSE.

IV. WHETHER SECTION 14-202.5 VIOLATES THE EX POST FACTO CLAUSE.

V. WHETHER SECTION 14-202.5 IS A BILL OF ATTAINDER.

VI. WHETHER SECTION 14-202.5 VIOLATES CONSTITUTIONAL RIGHTS TO PRIVACY.

VII. WHETHER SECTION 14-202.5 VIOLATES PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

STATEMENT OF THE CASE

This case came on for hearing at the 5 April 2011 session of Criminal Superior Court in Durham County, the Honorable Michael Morgan presiding, on Mr. Packingham's motion to declare N.C. Gen. Stat. § 14-202.5 unconstitutional. (App p 1; R p 7). Judge Morgan joined Mr. Packingham's motion for hearing with State v. Johnson in which a similar motion had been filed. (R p 19). Judge Morgan held in a joint Order that the trial court lacked jurisdiction to consider the facial challenges. (App p 2). Judge Morgan considered the as-applied challenges but denied them altogether without reference to the individual claims. (App p 2). Mr. Johnson and Mr. Packingham filed a Joint Petition for Writ of Certiorari and Petition for Writ of Mandamus which this Court denied on 22 June 2011. Mr. Johnson's charge was ultimately dismissed.

On 28 May 2012, Mr. Packingham's case came on for trial, the Honorable Osmond Smith, presiding. A jury convicted Mr. Packingham of one count of accessing a commercial social networking Web site. Judge Smith sentenced Mr. Packingham to 6 to 8 months in prison, suspended the sentence, and placed him on supervised probation for 12 months. Mr. Packingham gave oral notice of appeal. (T p 291). The record on appeal was served on 7 September 2012 and settled by operation of Rule 11 on 8 October 2012. The record on appeal was filed by mail on 23 October 2012 and mailed to the parties on 26 October 2012. This Court allowed a two-week extension for Mr. Packingham to file his Brief, which was filed and served on 10 December 2012.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Mr. Packingham appeals pursuant to North Carolina General Statutes sections 7A-27(b) and 15A-1444(a) from a final judgment entered against him in the Superior Court of Durham County.

STATEMENT OF THE FACTS

Durham Police Officer Brian Schnee testified that in 2010, he began investigating whether any sex offenders in Durham had accessed Internet social networking Web sites. (T p 131). He said that he found a "user profile page" on Facebook that he believed was Mr. Packingham's. (T p 134). A post on the page on 27 April 2010 said "Man, God is good. How about I got so much favor, they dismiss the ticket before Court even started. No fine. No Court costs. No nothing. Praise be to God. Wow. Thanks, Jesus." (App p 13; R p 77). Officer Schnee found a traffic citation dismissal in the Durham Clerk's Office dated 27 April 2010 for Mr. Packingham. (T p 135). He served a search warrant on Facebook to get user information for the account he suspected belonged to Mr. Packingham. (T pp 139-40).

Based on information he received from Facebook, Officer Schnee obtained a search warrant for Mr. Packingham's home in Durham. (T p 142). His search turned up innocuous photographs of Mr. Packingham, documents related to sex offender registration signed in 2009, a power bill, three cell phones, a camera, and two thumb drives. (T pp 149-161). The State presented no evidence to show what was on the seized devices and never asserted anything criminal or inappropriate was on them. The trial court admitted a copy of a page from Facebook from 22

May 2010 that Officer Schnee said he viewed on his own computer. (State's Exhibit 17; R p 77; App p 13). Mr. Packingham stipulated that he had been convicted of a sexual offense involving a minor on 16 September 2002 in Cabarrus County and was subject to the North Carolina requirements for registration on the date of the alleged offense. (T pp 128-29; R pp 72-73).

At the time of the alleged offense Mr. Packingham was not on probation, parole, supervised release, or subject to satellite-based monitoring (SBM). The State presented no evidence that he used his computer or Facebook to communicate with minors, post anything inappropriate or obscene, or otherwise engage in misconduct. The State's only evidence was that Mr. Packingham posted a religious message on Facebook.

STANDARDS OF REVIEW

This court reviews a trial court's findings of fact to determine if the findings are supported by competent evidence in the record, and reviews conclusions of law de novo. State v. Ross, 173 N.C. App. 569, 573, 620 S.E.2d 33, 36 (2005). Conclusions must be legally correct, reflecting a correct application of applicable legal principles to the facts found. State v. Golphin, 353 N.C. 364, 409, 533 S.E.2d 168, 201 (2000). Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. State v. Abbott, 720 S.E.2d 437, 439 (N.C. Ct. App. 2011).

The trial court held it lacked jurisdiction to consider Mr. Packingham's facial challenges and did not address them. (App

pp 6-7).[1] The trial court also failed to specifically address the numerous as-applied challenges. (App pp 6-10). However, the record is sufficient for this Court to review the facial and as-applied challenges de novo. But if this Court believes the absence of a ruling prevents review, then Mr. Packingham asks this Court to remand for a thorough ruling on all grounds.

ARGUMENT

I. SECTION 14-202.5 VIOLATES MR. PACKINGHAM'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREE SPEECH, ASSOCIATION, RELIGIOUS EXPRESSION, ASSEMBLY, AND THE PRESS, AND IS OVERBROAD ON ITS FACE AND AS APPLIED.

Mr. Packingham and all 17,900 registered sex offenders in North Carolina are prohibited from accessing "commercial social networking Web sites" to engage in and receive speech.[2] This prohibition not only censors their speech, but also eliminates an entire means of communication and association: Web sites and their e-mail, news feeds, chat rooms, forums, and instant message functions. Here, the State convicted Mr. Packingham of a felony for publicly praising God on Facebook, and nothing more. This suppression of speech violates the First Amendment, and Article I, Section 14, of the North Carolina Constitution.

The First Amendment protects the right to communicate and express oneself on the Internet. Reno v. ACLU, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997). In Reno, the United States

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[1] Clearly a Superior Court has jurisdiction to consider a facial constitutional challenge to a criminal statute. N.C. Const. Art. IV, sec. 12; N.C. Gen. Stat. § 15A-954; Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908 (1973); State v. Bryant, 359 N.C. 554, 563, 614 S.E.2d 479, 485 (2005); State v. Mello, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479 (2009).

[2] Http://sexoffender.ncdoj.gov/stats.aspx (showing number of current registered sex offenders in North Carolina).

Supreme Court held the Communications Decency Act (CDA) was facially unconstitutional under the First Amendment. Id. The CDA's purpose was to protect minors from harmful material online by criminalizing Internet transmission of "indecent" materials to minors. The Court stated:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Id. at 870, 117 S. Ct. at 2344 (internal citation omitted). The Court held the CDA violated the First Amendment because ambiguities made enforcement difficult and it was a content-type of restriction that was not a narrowly tailored restriction of type, manner, or place of speech.[3] Id.

The First Amendment also protects the right of citizens to associate as they choose. "Freedom of association is a fundamental right, implicit in the concept of ordered liberty." Treants Enterprises, 94 N.C. App. 453, 458, 380 S.E.2d 602, 605 (quoting Thomas S. By Brooks v. Flaherty, 699 F. Supp. 1178, 1203 (W.D.N.C. 1988)). "'A state violates the fourteenth amendment when it seeks to interfere with the social relation-ship of two or more people.' " Id. at 459, 380 S.E.2d at 605 (quoting Wilson v. Taylor, 733 F. 2d 1539 (11th Cir. 1984)).

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[3] Congress' attempt to replace the CDA failed, as the Child Online Protection Act was also held an unconstitutional restriction on free speech. ACLU v. Mukasey, 534 F.3d 181 (3rd Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009).

The restrictions here eliminate Mr. Packingham's ability to use innumerable Web sites to engage in speech and association. Web sites commonly considered to fall under the statute's restrictions include Facebook and MySpace. All communicative functions of those sites are off-limits, and are off-limits regardless of whether a person engages in affirmative, public speech, or just looks at information on the sites. Numerous other sites, like Google.com, Yahoo.com, and MSN.com are swept within the definition of "commercial social net-working Web site" and are off-limits. Google.com, Yahoo.com, and MSN.com offer e-mail (G-Mail, Yahoo mail, Hotmail), "instant messaging," and chat rooms, in addition to their more commonly used features--search engines and news stories. Since the statute does not limit itself to restricting the use of subpages or discrete features of a site, the entire sites are off-limits.

The statute is a blanket prohibition of any and all speech and association on innumerable Web sites, however innocent, even if it is political or anonymous speech, a family discussion, or a religious conversation. Section 14-202.5 prohibits a person from associating with anyone on a social networking site, no matter the person's age. He cannot exchange information about heart disease on MedHelp.com, speculate about UNC sports on Scout.com, or share recipes on BettyCrocker.com. Section 14-202.5 eliminates most of the Internet as a means of speech, communication, and association for registered sex offenders.

Section 14-202.5 prohibits not only the affirmative act of speech on the Internet, but also the passive act of receiving

speech, since a person violates the section just by accessing a Web site, even if he does not communicate with anyone. A person can "access" Facebook to receive information without actually logging in to Facebook.[4] (Motions Exhibit 1, pp 145, 147, 149, 150-1). Officer Schnee testified he interprets the term "access" to mean a violation of the statute occurs when a person types "facebook.com" into his Internet browser and presses the "enter" key, not just if he actually logs in to the site. (M-T p 44-45). Therefore a person who simply tries to receive information from prohibited sites without even having an account, logging in, or engaging affirmatively in speech cannot do so for fear of criminal sanctions. The First Amendment protects Mr. Packingham's right to view and receive information and ideas just as it protects his right to speak on the Internet. Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247 (1969); Cf. Doe v. City of Albuquerque, 667 F.3d 1111 (10th Cir. 2012) (upholding sex offenders' First Amendment rights to receive information at a public library).

Although section 14-202.5 does not specifically prohibit religious speech on the Internet, or accessing religious sites, it does restrict religious expression on prohibited sites and religious-specific sites are not exempt from the ban. Off-limits religious sites include jesusklub.com, godtube.com, and the Facebook page for the Church of Christ Latter Day Saints. (Motions Exhibit 1, pp 40-54, 55-74, 147-48). The statement

[4] The trial court admitted and considered Motions Exhibit 1, screen-shots of various Web sites. (M-T pp 6, 146). Motions Exhibit 1 has been submitted to this Court pursuant to Rule 9 of the Rules of Appellate Procedure.

attributed to Mr. Packingham on Facebook is a religious expression: he thanked God and Jesus for a positive resolution of his traffic ticket. It was not just a comment on sports, the weather, or fashion, but a religiously motivated public statement that was religious in substance and content. For engaging in religious speech on Facebook, the State prosecuted and convicted Mr. Packingham of a felony. The suppression of this religious expression violates the First Amendment, and Article I, Section 13, of the North Carolina Constitution.

Internet chat rooms and real-time messaging among multiple persons on sites like Facebook provide citizens with a means to assemble. The First Amendment, and Article I, Section 12, of the North Carolina Constitution, prohibit the restriction of peaceable assembly, and should apply to virtual assembly on the Internet. Section 14-202.5 does not just prohibit a person from using an Internet chat room to communicate with minors, it also prohibits him from "assembling" with adults in chat rooms to discuss politics, health, sports, and religion. The right to assemble protects not only the right to engage in active communication while assembled with others, but also the right to simply attend an assembly and passively receive information. Here, Mr. Packingham is not just prohibited from contributing to a discussion in an assembly of citizens online, he is also prohibited from accessing a chat room and simply viewing the ongoing communications of the assembled users in the chat room.

The constant "news-feed" function of sites like Facebook, and Web sites that allow users to publish web logs ("blogs")

are the modern equivalent of the publication of information, news, and ideas, in print media. Facebook posters and bloggers are citizen-journalists. The right to freedom of the press exists to protect not just traditional newspaper and magazine reporters and their publications. It also exists to protect the rights of an individual to express, disseminate, and present his information and ideas for public consumption in any form of media, especially when reporting on actions of the government. ACLU v. Alvarez, 679 F.3d 583, 595-98 (7th Cir. 2012), cert. denied, 2012 U.S. LEXIS 8999 (November 26, 2012); Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011). Here, Mr. Packingham did nothing more than publicly post on Facebook an account of what happened in Durham County District Court--the functional equivalent of a news story in a paper.

The First Amendment prohibits prior restraint, or restrictions, of the press. Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625 (1931). Only in exceptional cases, such as in times of war, obscenity, and incitements to violence can freedom of the press be infringed. Id. at 715-16, 51 S. Ct. at 631. Otherwise, restrictions on the content and means of communi-cation by the press are unconstitutional. The North Carolina Constitution also protects an individual's right to freedom of the press. N.C. Const. Art. I, sec. 14. Corum v. University of North Carolina, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

A statute that "criminalizes a substantial amount of constitutionally permissible conduct is unconstitutionally overbroad." State v. Mello, 200 N.C. App. 561, 566, 684 S.E.2d

477, 481 (2009). "'The overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right.' " Treants, 94 N.C. App. at 458, 380 S.E.2d at 604 (quoting Clark v. City of Los Angeles, 650 F.2d 1033 (9th Cir. 1981)). In the First Amendment context, even if the person accused of a crime has not had his constitutional rights violated by a particular law, that person may still challenge the law on the basis that it infringes on the First Amendment rights of others. United States v. Stevens, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 447 (2010); Mello, 200 N.C. App. at 564, 684 S.E.2d at 481 (citing Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916 (1973)). Facial overbreadth challenges have been considered by the United States Supreme Court in cases involving restrictions on speech, association, and the time, place, and manner of expressive or communicative conduct. Broadrick, 413 U.S. at 612–13, 93 S. Ct. at 2916. Mr. Packingham may therefore challenge section 14-202.5 as facially overbroad, not just as applied to him. Id.

A significant indication that a criminal statute is facially overbroad is that it lacks any requirement for proof of criminal intent. Screws v. United States, 325 U.S. 91, 103, 65 S. Ct. 1031, 1036 (1945); Mello, 200 N.C. App. at 565, 684 S.E.2d at 480. Here, to prove a person violated 14-202.5, the State does not have to prove he acted with criminal intent or planned any wrongdoing. A person can be convicted for accessing

an ill-defined Web site even if doing so for innocent reasons, such as socializing with his family, praising God, or posting pictures of a political rally. There is no requirement for the State to prove the person intended to communicate with or seek out a minor. The offense is strict liability. A person violates the statute simply by typing the prohibited web address into his browser and pressing "enter." (M-T pp 44-45). Because it is a mere access offense without any requirement of criminal intent, a person cannot even visit a site to find out if it meets the statutory definition of a prohibited site without risking a violation of the statute.

Section 14-202.5 is the Internet version of anti-loitering and vagrancy statutes which have been held overbroad on First Amendment grounds for lack of any requirement to prove criminal intent in addition to loitering. See Papachristou v. City of Jacksonville, 405 U.S. 156, 163-64, 92 S. Ct. 839, 843 (1972); Mello, 200 N.C. App. at 566, 684 S.E.2d at 480-81 (stating "[b]ecause the Ordinance fails to require proof of intent, it attempts to curb drug activity by criminalizing constitutionally permissible conduct.") A person is prohibited not just from engaging in inappropriate communications with a minor, or from any communications with a minor, but is prohibited from innocently "being" in a cyber-place, such as Facebook or MySpace, where a minor could "be." "Future criminality" is "the common justification" for these statutes. Papachristou, 405 U.S. at 169, 92 S. Ct. at 847. The purpose of such laws is to "nip" crime "in the bud." Id. at 171, 92 S. Ct. at 848.

However, "[a]rresting a person on suspicion, like arresting a person for investigation is foreign to our system, even when the arrest is for past criminality." Id. at 169, 92 S. Ct. at 847. A "direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster." Id. "A presumption that people . . . who look suspicious to the police are to become future criminals is too precarious for a rule of law." Id. Section 14-202.5's purpose is no different than anti-loitering statutes: to prevent future crimes. In an attempt to prevent crimes, the statute criminalizes constitutionally permissible conduct--speech, association, religious expression--without a requirement that the person is using a site with the intent to commit a crime against a minor or adult. It criminalizes mere cyber presence.

"Mere presence in a public place cannot constitute a crime." State v. Evans, 73 N.C. App. 214, 217, 326 S.E.2d 303, 306 (1985). Mere presence on Facebook cannot constitute a crime. The Internet restrictions banish citizens from an entire medium of news, communication, association, social relationships, and most of mainstream cyberspace.[5] The restrictions "deter a substantial amount of their constitutionally protected conduct" "while purporting to criminalize unprotected activities." Mello, 200 N.C. App. at 564, 684 S.E.2d at 479-80.

[5] "The concept of banishment has been broadly defined to include orders compelling individuals '. . . to quit a city, place, or country, for a specific period of time, or for life.' " State v. Culp, 30 N.C. App. 398, 399, 226 S.E. 2d 841, 842 (1976). Banishment is traditionally considered a punishment that, if ordered by a court, is a void sentence. State v. Doughtie, 237 N.C. 368, 369-71, 74 S.E. 2d 922, 923-24 (1953).

It allows arrest, prosecution, and deprivation of liberty based solely on suspicion of future criminal behavior.

Two United States District Courts have recently held similar state statutes restricting sex offenders' Internet access violate the First Amendment for many of the same reasons argued above: Doe v. Nebraska, No. 8:09-CV-456 (D. Neb. Filed Oct. 17, 2012) (App p 14); Doe v. Jindal, 853 F. Supp. 2d 596 (M.D. La. 2012) (App p 43). See also Doe v. Nebraska, 734 F. Supp. 2d 882 (D. Neb. 2010) (order denying summary judgment in part and ordering trial) (App p 50). Cf. Doe v. Harris, No. C12-5713 (N.D. Cal. Nov. 7, 2012) (granting temporary restraining order against enforcement of state law requiring sex offenders to disclose online identifiers and service providers because of possible First Amendment violation) (App p 85). Contra Doe v. Prosecutor, Marion Cnty., No. 1:12-CV-62 (S.D. Ind. Filed June 22, 2012) (holding ban on sexual predators and offenders of child victims accessing social networking sites, instant messaging services, and chat room services (but not e-mail services or message boards) did not violate First Amendment) (App p 87).

1. Section 14-202.5 fails strict and intermediate scrutiny.

Section 14-202.5 is a content based regulation because it suppresses speech that facilitates the "social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." N.C. Gen. Stat. § 14-202.5(b)(2). Section 14-202.5 facially discriminates by applying only to discrete speakers and speech content. If

the speaker or speech recipient is a registered sex offender, his speech is prohibited. The content of speech is thus defined by its speaker or recipient. Content based restrictions on speech are presumptively invalid. R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 2543 (1992). Such restrictions are subject to strict scrutiny and can survive only if the State establishes a compelling interest in the regulation and that the regulation is narrowly tailored and the least restrictive means available. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459 (1994); Treants, 94 N.C. App. at 459, 380 S.E.2d at 605. "The state must also employ 'means closely drawn to avoid unnecessary abridgment of associational freedoms' in achieving its objectives." Treants, 94 N.C. App. at 459, 380 S.E.2d at 605 (quoting Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976)).

Content-neutral regulations of the time, place, and manner of speech are subject to intermediate scrutiny and violate the First Amendment unless the government can establish both that the regulation is narrowly tailored to effectuate a significant government interest and that there are other ample alternatives for communication available. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984).

Laws limiting the free exercise of religion and association are subject to strict scrutiny and require the government to establish a compelling state interest in limiting religion, and that the law is narrowly tailored to effectuate the state's interests. Wisconsin v. Yoder, 406 U.S. 205, 214, 92 S. Ct.

1526, 1532 (1972). A facially neutral and generally applicable law impacting the free exercise of religion is not subject to strict scrutiny under the federal constitution unless it also impacts other constitutional rights. Employment Div. v. Smith, 494 U.S. 872, 879, 881, 110 S. Ct. 1595, 1600 (1990). Section 14-202.5 impacts Mr. Packingham's right to the free exercise of religion and also his rights to free speech and association. Section 14-202.5 violates Mr. Packingham's right to the free exercise of religion and worship under Article I, Section 13, of the North Carolina Constitution. Religious liberty is so basic and fundamental that government action affecting it can be justified only be a compelling state interest. In re Williams, 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967).

Regardless of whether this Court applies intermediate or strict scrutiny, section 14-202.5 is not narrowly tailored or the least restrictive means available, and ample alternatives for communication do not exist.

a. Section 14-202.5 is not narrowly tailored or the least restrictive means available.

Section 14-202.5's broad definition of commercial social networking Web site covers innumerable Web sites not commonly considered social networking Web sites. Motions Exhibit 1 shows screen shots of such off-limits sites along with indications of the features that qualify them under the statute. A narrowly tailored statute would not apply to such sites. For example, BettyCrocker.com has recipes, cooking tips, and offers, but is a "commercial social networking Web site" because it: 1) derives

revenue from advertising on the Web site and other sources related to the Web site; 2) "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges"; 3) allows a user to create a "user profile" that includes personal information such as his name and photograph; and 4) has message boards, blogs, and photo sharing features. See Motions Exhibit 1, pp 2-22. The information and photo exchanges tend to be about casseroles and Crockpot recipes. Regardless, the site fits squarely within the definition of a commercial social networking Web site and is entirely off-limits.

Section 14-202.5 is not narrowly tailored because it prohibits the use of entire Web sites, even if only discrete subpages of the site could possibly allow cyber contact with minors. Google.com qualifies as a prohibited site as defined in section 14-202.5: 1) it derives revenue from advertising on the site, such as Google Ad Words; 2) its numerous functions facilitate the social introduction of two or more people; 3) it allows users, including minors, to create personal profiles, including their names and other identifying information; 4) it allows users to create e-mail, communicate in chat rooms, and post information on message boards. See Motions Exhibit 1, pp 94-120. Although these functions might be subpages of the main Google.com web address, the statute makes it illegal to "access" a commercial social networking Web site once the site has been defined as such. A person would therefore be unable to use Google's e-mail, maps, search engine, or other functions because

the statute is not narrowly tailored to differentiate which parts of sites like Google.com are prohibited.

Another example where subpages disqualify an entire site is Amazon.com: 1) it receives revenue from its Web site; 2) it facilitates the exchange of information and social introduction between two or more people on its message boards and product reviews; 3) it allows users, including minors, to create profiles with personal information and post comments on message boards; and 4) it provides users mechanisms to communicate with other users. See Motions Exhibit 1, pp 163-81. It might seem Amazon is exempt under section (c)(2), but (c)(2) exempts only those sites that facilitate commercial transactions between members or visitors. Amazon's primary purpose is to facilitate transactions between Amazon itself and its visitors, not between users of the Web site and other users. This exemption seems to be for sites like Craigslist.com, not a business like Amazon.

A final example of a site entirely off-limits because of its subpages is NewsObserver.com, the site for the Raleigh News and Observer. The site derives revenue from advertising on its site and allows anyone 13 years and older to create an online account. It allows users to create personal profiles that include their names or nicknames. The site gives visitors the "mechanisms to communicate with other users, such as a message board." It also provides an e-mail service whereby a visitor can e-mail an article through the site to up to five friends.

The statute is not narrowly tailored because it applies not only to a person using a desktop computer to access the

Internet, but it also applies to his use of mobile devices that access the Internet simply for data. Such devices would include smart phones, e-readers (Kindles, etc.), text messages that access a prohibited Web site's server, voice-over-Internet protocol (VOIP, ie. Vonage), and Skype, as those services' Web sites fit the broad statutory definition of a "commercial social networking Web site," even if the person is only retrieving data and not communicating with anyone.

Section 14-202.5 prohibits "accessing" Web sites even if the person does not have an account or membership or does not log in to the site and is not even able to communicate with minors through the site. A narrowly tailored statute would at least require some affirmative act to use the Web site in a manner beyond simply viewing publically available pages.

Section 14-202.5 is not narrowly tailored because it is a strict liability offense that does not allow for "innocent" non-criminal access. Officer Schnee testified that a sex offender who created a Facebook or MySpace account prior to his sex offense conviction and registration would not be allowed under the statute to log in to the account to close the account, because to do so would amount to "accessing" the account. (M-T p 32). When confronted with the possibility that by not closing a social networking Web site account a person might be accused of "maintaining" the site by his inaction, Officer Schnee testified this was a "delicate situation" that the law did not take into account. (M-T p 32).

Officer Schnee testified that a sex offender cannot access Facebook or MySpace as part of his employment even if the access is not for personal use. (M-T p 124). He cannot use Facebook even if he uses it exclusively to advertise his own business and sell products. (M-T p 84). Officer Schnee testified a registered sex offender who owns a business might not be allowed to have his employees access and maintain a Facebook or MySpace page for the business, even if he did not access the sites himself. (M-T p 124).

Section 14-2025 is overinclusive because it treats all registered sex offenders the same, regardless of the offense committed, the victim's age, whether a computer was used to facilitate or commit the offense, the likelihood of reoffending, and regardless of whether the person has been classified as a sexually violent predator. It burdens more people than needed to achieve the purported goal of the statute. The statute's wide reach stands in contrast to the premises restrictions statute which applies only to a discrete subset of registered sex offenders. N.C. Gen. Stat. § 14-208.18(c). For example, a man who grabbed an adult woman's breast and was convicted of misdemeanor sexual battery would be required to register as a sex offender and would be prohibited from accessing social networking sites for up to thirty years. N.C. Gen. Stat. §§ 14-27.5A; 14-208.6(5) (defining sexual battery as a sexually violent offense); 14-208.7 (setting length of registration at 30 years unless a removal petition is granted no earlier than 10 years after registration). The man convicted of sexual battery

against the adult would not, however, be banned from any particular premises. N.C. Gen. Stat. § 14-208.18(c).

There is no mechanism for "judicial tailoring" of the over-inclusive class of persons and offenses. Unlike other sex offender regulation statutes, there is no administrative or judicial determination of whether a particular person is dangerous, likely to stalk and groom children, likely to commit an offense against a child, or likely to recidivate. See N.C. Gen. Stat. §§ 14-208.6, 14-208.40A & 14-208.40B (judge determines applicability and length of registration and SBM after considering evidence); 15A-1343(b2)(4), (5), & (6) (judge sets conditions of probation related to sex offenders being around minors and on certain premises).

Section 14-202.5 is underinclusive because it arbitrarily applies only to commercial social networking Web sites. It does not apply to social networking sites that do not derive income from advertising or membership fees. Section 14-202.5 is also underinclusive because it arbitrarily applies only to North Carolina registered sex offenders, not to out-of-state registrants who commit the offense in North Carolina. Limiting the class of possible offenders to North Carolina registrants ignores out-of-state registrants who travel through or visit North Carolina and access prohibited Web sites while here.

The period of registration is also an underinclusive, arbitrary, limiting, demarcation of which sex offenders are prohibited from Web sites. Nothing in the history of the sex offender control laws or the evidence presented by the State at

trial shows that a person becomes less likely to commit an offense against a minor using the Internet simply because he is no longer on the registry. See N.C. Gen. Stat. § 14-208.12A (removal can occur after only ten years on the registry).

The overinclusive and underinclusive nature of a statute regulating speech is a good indication that it is not narrowly tailored to meet the State's actual, purported, interests. See Ladue v. Gilleo, 512 U.S. 43, 51, 114 S. Ct. 2038, 2043 (1994) (noting underinclusivity is "firmly grounded in First Amendment principles" and it "may diminish the credibility of the government's rationale for restricting speech in the first place").

Laws to protect children in the community and on the Internet that are less restrictive of First Amendment rights already exist: N.C. General Statutes Chapter 14 (prohibiting sexual assaults of minors); N.C. Gen. Stat. § 14-196.3 (prohibiting cyber stalking)[6]; 14-202.3 (prohibiting use of electronic communications to solicit a minor to engage in a sex act); 14-208.6, 14-208.7, & 14-208.40A (requiring address and online identifier registration up to 30 years and, in some cases, lifetime SBM); 14-208.15A (mandating online providers report complaints of on-line solicitation of children); 14-208.16 (prohibiting residence within 1000 feet of a school or child care center); 14-208.18 (prohibiting sex offender from being on certain premises); 15A-1340.50 (allowing permanent no

[6] Section 14-196.3(e) exempts First Amendment protected speech stating "This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly."

contact order); 15A-1343(b2) (allowing specialized sex offender probation conditions). Lack of success in enforcing these statutes is not sufficient grounds to restrict constitutional rights. Treants, 94 N.C. App. at 460, 380 S.E.2d at 606.

A narrowly tailored statute would not prohibit the mere posting of a praise God message or innocent pictures, getting information about the Governor, sharing a recipe, or sending an instant message to friends. It would not prohibit the use of a search engine. It would not prohibit the use of an e-book reader, or a smart phone that syncs with Google.

b. Other, ample, speech alternatives do not exist.

The Internet is unlike any other medium of communication. Web sites like Facebook and Twitter have literally sparked and sustained revolutions. They provide instant access to real-time news accounts of national and international events. To say that Mr. Packingham can engage in the full range of speech-related activities made possible by the banned Web sites ignores the way in which most people conduct their daily lives through the use of Internet resources. Just because other means exist for a person to exercise his rights does not eliminate the unconstitutional nature of an overly restrictive statute. Schneider v. New Jersey, 308 U.S. 147, 163, 60 S. Ct. 146, 151 (1939); Reno v. ACLU, 521 U.S. 844, 880, 117 S. Ct. 2329, 2349 (1997). Few mainstream, alternative Web sites exist which allow a person to fully engage in the speech, religious, and associational freedoms that sites like Facebook, MySpace, and Google provide without violating section 14-202.5. And no

methods of communication offer the ability to easily, instantly, and publically communicate like the Internet.

2. The vague nature of this criminal statute chills the exercise of First Amendment freedoms.

Vague criminal statutes that restrict First Amendment freedoms are particularly problematic. Reno, 521 U.S. at 870-72, 117 S. Ct. at 2344-45. As argued below, section 14-202.5 violates the Due Process Clause of the Fifth Amendment because it is vague. However, even if this Court holds the statute is not so vague as to violate the Fifth Amendment, the innumerable ambiguities concerning the scope of its coverage still have a chilling effect on the exercise of First Amendment freedoms. And because the statute provides a severe criminal penalty, even for an innocent violation, it may cause people to remain silent and avoid using even lawful Web sites to receive information. Uncertainty as to the statute's true reach undermines the likelihood that it has been carefully tailored to achieve the General Assembly's goal of protecting minors from potentially harmful predators online. Cf. Reno, 521 U.S. at 871, 117 S. Ct. at 2344 (concluding same about Communications Decency Act).

The United States Supreme Court recognizes that protecting children is an important government interest, but has said "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." Reno, 521 U.S. at 875, 117 S. Ct. at 2346. Here, section 14-202.5 is an unnecessarily broad suppression of Mr. Packingham's First Amendment rights and is unconstitutional on its face and as-applied.

II. SECTION 14-202.5 IS UNCONSTITUTIONALLY VAGUE.

Due process requires a criminal statute to be sufficiently precise to give notice of what conduct is prohibited and to ensure the law does not permit or encourage law enforcement to enforce the law and deprive a person of liberty interests in an arbitrary or discriminatory manner. City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, 1859 (1999). A criminal statute can be invalidated if the statute is vague for either reason. Vague criminal laws are disfavored because they may discourage the lawful exercise of constitutional rights, trap the innocent by not providing fair warning, and "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2299 (1972). "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' " Morales, 527 U.S. at 60, 119 S. Ct. at 1861 (quoting United States v. Reese, 92 U.S. 214, 221, 23 L. Ed. 563, 566 (1876)).

"Where the legislature declares an offense in language so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal . . . [s]uch a statute is too vague, and it fails to comply with constitutional due process standards of certainty." State v.

Graham, 32 N.C. App. 601, 607, 233 S.E. 2d 615, 620 (1977). The certainty requirement "is to enable a citizen to conform his or her conduct to the law." State v. Mello, 200 N.C. App. 561, 567, 684 S.E.2d 477, 481 (2009).

The lack of clarity in section 14-202.5 about what actually constitutes "accessing" and a "Web site" has the effect of leaving "ordinary persons uncertain on how to adhere to the law." Mello, 200 N.C. App. at 567, 684 S.E.2d at 481. Section 14-202.5 does not give notice to a reasonable person of whether his conduct is illegal. Even the written information about the statute given to Mr. Packingham by the State simply recites the statute's text without explanation or examples. (R p 74). Section 14-202.5 fails to give notice to non-sex offenders who minister to, work with, or spend time with sex offenders online so they do not unwittingly aid and abet or encourage a violation of the law. The statute's vagueness encourages law enforcement and prosecutors to enforce the law in an arbitrary and discriminatory way and puts in their hands the interpretation, application, and enforcement of the law on an ad hoc basis.

1. Which Web sites or their subpages are off-limits?

What constitutes a "Web site?" Does a person violate 14-202.5 by using the "search engine" or reading news stories on Google.com, Yahoo.com, or MSN.com? Does a person violate 14-202.5 by using Amazon.com, even if he does not use the social networking features? Section 14-202.5 does not indicate whether the actual chat room, instant message functions, or e-mail functions must be used in order to violate the section, or

whether merely typing the top-level domain address into the Internet browser and hitting "enter" constitutes the offense.

Officer Schnee presented a thoughtful but complicated analysis of the statute, all of which was based on his personal interpretation, and not on training or guidance from the Attorney General's Office. His interpretation demonstrates the pains to which a law enforcement officer, and a registered sex offender, must go to understand and apply this law. He testified how he believed section 14-202.5 applies to various scenarios. His testimony revealed an interpretation scheme that essentially classifies Internet Web sites into four categories.

First, he interprets 14-202.5 to prohibit a person from "accessing" web pages on sites commonly known to be "social" in nature, such as Facebook and MySpace. Such sites are always prohibited under the statute. (M-T pp 25-26).

Second, Officer Schnee testified sex offenders are not prohibited from accessing any pages on Internet Web sites like Amazon.com, because such sites fall within the "business exception" in section 14-202.5(c)(2). (M-T p 119). Motions Exhibit 1, pp 163-81, shows that Amazon.com has subpages which allow users to engage in social networking activity virtually identical in nature to that of Facebook and MySpace. Officer Schnee testified, however, that even though Amazon.com has features identical to Facebook, because of the "business exception" in 14-202.5(c)(2), a person would not be prohibited from using any of the Amazon Web site, including the commercial

social networking features.[7] (M-T p 119). He believed Web sites within this exception are always acceptable for a person to access, even if subpages are identical in form and substance to Facebook or MySpace. (M-T p 121).

Officer Schnee testified about a third type of Web site which is a hybrid of the first two described and includes Google.com. Google.com has subpages, including chat rooms, message boards, and e-mail functions, similar in nature and function to the social networking pages of Facebook, MySpace, and Amazon.com. See Motions Exhibit 1, pp 94-120. Those subpages would be off-limits to a person under 14-202.5 because Google.com does not fall within the "business exception" in 14-202.5(c)(2). For Google.com and similar sites, according to Officer Schnee's interpretation, the homepage and some subpages would not be off-limits, but other subpages would be off-limits if the subpages meet the criteria set out in section 14-202.5 for a social networking Web site. (M-T pp 46-50). Thus, with a hybrid site like Google.com, a person could use some, but not all of the Web site, without violating the statute.

The fourth type of Web site Officer Schnee interpreted includes sites such as Match.com, an Internet dating/match-making Web site, that purport to be off-limits to anyone under 18 years of age. As such, a person would not violate section 14-202.5 by accessing a page on Match.com. However, Officer

[7] Officer Schnee's interpretation of (c)(2) is likely incorrect. As argued above, (c)(2) exempts sites that facilitate commercial transactions between users, not between the site itself and its users. It appears the exemption is for sites like Craigslist.com, not a Web business like Amazon.com.

Schnee testified that if a Web site that purportedly prohibits minors from using the site actually had minors who used the site, even without the Web site's permission, approval, or knowledge, a registered sex offender would violate 14-202.5 if he learned minors were in fact using the site and he continued to access the site thereafter. (M-T pp 55-56).

Whether Officer Schnee properly interpreted 14-202.5 does not really matter, as his testimony demonstrates the pains to which law enforcement and sex offenders have to go to interpret and apply the statute to real-life examples.

2. What does it mean to "access" a Web site?

Does the term "access" mean logging in to an established account? Or does simply visiting the Web site constitute the offense? A person does not have to log in or have an account with Facebook or MySpace to view information about individuals or organizations that do have accounts. A person can view Governor Perdue's Facebook page and the Mormon Church Facebook page without logging in or having a Facebook account. (Motions Exhibit 1, pp 145-46, 147-48). Is viewing the pages about the Governor and the Mormon Church considered "accessing" Facebook when no login is required? What if a person receives an e-mail from a friend sent from the Facebook e-mail function? If he opens the e-mail, and content such as pictures from Facebook download in the e-mail, has the person accessed Facebook and, if so, did he violate the statute?

Officer Schnee interpreted the term "access" to mean a person commits an offense the instant he types "facebook.com" in

the browser's address bar and presses "enter." (M-T pp 44-45). Officer Schnee testified the offense does not require a person to "log in" to Facebook, MySpace, or a social networking Web site to be committed. (M-T pp 44-45). Instead, even if a person simply seeks information about the federal government, Governor Perdue, or the Mormon Church--all of which maintain public pages on Facebook not requiring a login to view--the person violates the statute by "accessing" those pages, even if he does not log in or have a Facebook account. (M-T pp 39-44).

To commit the offense, does a person have to know that he is accessing a Web site or just know that the site allows minors to use it? Compare N.C. Gen. Stat. § 14-208.18(a) (requiring knowing presence at a prohibited location). For example, does opening an e-mail using Microsoft Outlook that has come from a Facebook e-mail account, where the e-mail downloads content from Facebook into the e-mail, amount to accessing Facebook? If the e-mail recipient sees it came from a Facebook.com address, should he simply not open it? Does a person access Facebook or Google if the sites "sync" or "push" data, such as contacts, pictures, or books, onto his smart phone? Even if he knows he cannot use Amazon with his desktop computer, does he "access" Amazon (or any site that is a commercial social networking Web site) and commit the offense if he uses an e-reader device to download a book or uses his smart phone to download music?

3. What are "minor children?"

Section 14-202.5 applies only to sites that allow "minor children" to use them but does not define the age of "minor

children." Is a "minor child" a person under 18, 17, or 16?

4. Conclusion

This Court in Mello held an ordinance unconstitutionally vague for failing to clarify what behavior the ordinance covered. The statute here leaves too much room for speculation as to which sites are forbidden in whole or in part, how a person violates the statute, and leaves too much discretion to law enforcement to determine which sites and actions regarding those sites fall within the statute. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " Grayned, 408 U.S. at 108-09, 92 S. Ct. at 2298-99 (quoting Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 1323 (1964)). Asked how a person knows if he accesses an off-limits site, Officer Schnee said:

> I guess the non -- either the -- my nonofficial answer, I guess, could be if -- if you don't know, don't do it. Obviously, that's what I would tell folks out on the street. If you have a question about whether you can or can't do something, don't do it. The best way for them -- for somebody not to get in trouble is to not do something.

(M-T p 92). In other words, to avoid possibly violating the law, a person should simply "steer far wider than the unlawful zone" on the Internet. Officer Schnee's "nonofficial" answer exemplifies the chilling effect this vague statute has on the exercise of fundamental, First Amendment freedoms.

Section 14-202.5 fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, leads to arbitrary and discriminatory enforcement, and permits "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Smith v. Goguen, 415 U.S. 566, 575, 94 S. Ct. 1242, 1248 (1974). It therefore violates the Fifth and Fourteenth Amendments to the United States Constitution, and Sections 1, 12, 13, 14, and 19 of Article I, of the North Carolina Constitution.

III. SECTION 14-202.5 ALLOWS ARREST WITHOUT PROBABLE CAUSE.

Before a law enforcement officer arrests a citizen, he must have probable cause that an offense has been committed. As argued above, section 14-202.5 does not require any criminal intent in order to violate the statute. There is no requirement for probable cause or even reasonable suspicion that the person communicated with or contacted a minor. Accessing and maintaining a Web site alone are sufficient. Without a requirement of criminal intent, section 14-202.5 effectively allows law enforcement to arrest a citizen without probable cause that a crime has been committed and thereby violates the Fourth Amendment. State v. Mello, 200 N.C. App. 561, 568, 684 S.E.2d 477, 482 (2009).

IV. SECTION 14-202.5 VIOLATES THE EX POST FACTO CLAUSE.

Mr. Packingham was convicted of offenses requiring registration on 16 September 2002. Section 14-202.5 became effective 1 December 2008. N.C. Session Laws 2008-218, s. 11. Section

14-202.5's Internet ban amounts to an additional, more severe punishment. The ban is part of Article 26, Offenses Against Public Morality and Decency, and a violation is a Class I felony. This statute is not part of the civil sex offender regulation and control statutes in Article 27A. Section 14-202.5 is punitive in nature by restricting Mr. Packingham's ability to have a job, buy goods online, research health related matters, communicate with family and friends, read news, or simply observe as others communicate in chat rooms. The prohibition from entire areas of the Internet amounts to the modern day version of banishment which is traditionally considered a punishment that, if ordered by a court, is a void sentence. State v. Doughtie, 237 N.C. 368, 369, 74 S.E. 2d 922, 923 (1953). Section 14-202.5 therefore violates the Federal and State Constitutions' Ex Post Facto clauses. U.S. Const. Art. I, sec. 9; N.C. Const. Art. I, sec. 16; Cf. Kentucky v. Baker, 295 S.W3d 437 (Ky. 2009) (holding sex offender residence restrictions punitive and violate Kentucky Constitution's Ex Post Facto Clause), cert. denied, 130 S. Ct. 1738 (2010).

V. SECTION 14-202.5 IS A BILL OF ATTAINDER.

"A bill of attainder is a legislative act which inflicts punishment on a particular individual or a designated group of persons without a judicial trial." State v. Johnson, 169 N.C. App. 301, 310, 610 S.E.2d 739, 745 (2005) (citing United States v. Lovett, 328 U.S. 303, 315, 66 S. Ct. 1073, 1079 (1946)). Section 14-202.5 amounts to a Bill of Attainder because it punishes an identifiable group, registered sex offenders, with-

out the benefit of a trial or any kind or hearing, in violation of Article I, Section 10, of the United States Constitution, and Article I, Section 6, of the North Carolina Constitution.

VI. SECTION 14-202.5 VIOLATES CONSTITUTIONAL RIGHTS TO PRIVACY.

One of the basic tenants of our free society is that citizens can carry out their daily lives privately and without governmental interference with their choices. Although the right to privacy is not explicitly recognized in the United States Constitution, various other rights have been read to extend a "zone of privacy" or "penumbra" that encompasses the liberty interest of privacy held by citizens, especially in the privacy of their own homes. Stanley v. Georgia, 394 U.S. 557, 565, 89 S. Ct. 1243, 1248 (1969). Here, Mr. Packingham has a privacy right to access and view whatever Web sites he chooses, not only in the privacy of his own home, but also in the privacy of his own computer, wherever it might be located. Section 14-202.5 is an unconstitutional invasion and burden of Mr. Packingham's rights to privacy as encompassed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, and Sections 1, 19, 35, and 36, of Article I, of the North Carolina Constitution.

VII. 14-202.5 VIOLATES PROCEDURAL AND SUBSTANTIVE DUE PROCESS.

The State of North Carolina never provided Mr. Packingham with notice or a hearing before banning him from accessing commercial social networking Web sites, unlike registration and SBM, where there is an in-court hearing by a judge to determine

whether a person should be subject to such conditions. The State restricted Mr. Packingham's fundamental rights inherent in the use of the Internet in violation of substantive due process. This deprivation of his liberty and property interest without any notice and hearing violates Mr. Johnson's rights to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 18 and 19 of the North Carolina Constitution. Cf. In re Taylor, No. D059574 (Cal. Ct. App. September 12, 2012) (certified for publication) (holding residence restrictions on sex offenders as parole condition "imposes a substantially more burdensome infringement on constitutional rights than is necessary to protect children from sex crimes. . . and has been unreasonable and constitutes arbitrary and oppressive official action"). (App p 95).

CONCLUSION

For the foregoing reasons, Mr. Packingham asks this Court to declare North Carolina General Statute section 14-202.5 unconstitutional and set aside his conviction.

Respectfully submitted this the 10th day of December, 2012.

Electronic Submission
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief and Appendix has been filed by uploading the same to the North Carolina Court of Appeals' electronic filing Web site.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's Brief and Appendix has been duly served upon Roy Cooper, Attorney General, North Carolina Department of Justice, P.O. Box 629, Raleigh, NC 27602, by first-class mail, postage prepaid.

This the 10th day of December, 2012.

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No. COA12-1287 14TH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	From Durham County
v.	)	
	)	
LESTER G. PACKINGHAM	)	

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APPENDIX TO DEFENDANT-APPELLANT'S BRIEF

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§ 14-202.5. Ban use of commercial social networking Web sites by sex offenders.

(a) Offense. – It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction. – The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(e) Punishment. – A violation of this section is a Class I felony.

(2008-218, s. 6; 2009-570, s. 4.)

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS: 10 CRS 57146, 10 CRS 57148

STATE OF NORTH CAROLINA

v.

ORDER

CHRISTIAN MARTIN JOHNSON and
LESTER GERARD PACKINGHAM,
Defendants.

THIS MATTER coming on to be heard before the undersigned presiding Superior Court Judge sitting in criminal session for the County of Durham, upon the defendants' Motions to Declare N.C.G.S. § 14-202.5 Unconstitutional, and having heard evidence and arguments of counsel for the defendant and the State, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Christian Martin Johnson (hereinafter "defendant Johnson") was represented by Glenn Gerding, Esq.
2. Lester Gerard Packingham (hereinafter "defendant Packingham") was represented by Lynn Norton-Ramirez, Esq.
3. The State of North Carolina was represented by Assistant District Attorney Mark McCullough.
4. On September 20, 2010, defendants Johnson and Packingham were indicted by the Durham County Grand Jury for Use of a Commercial Social Networking Web Site by a Sex Offender.

5. The indictment in 10 CRS 57146 alleges that on February 3, 2010, defendant Johnson maintained one or more Web pages on the commercial social networking Web site MySpace.com in violation of N.C. Gen. Stat. § 14-202.5.
6. The indictment in 10 CRS 57146 further alleges defendant Johnson was convicted of Taking Indecent Liberties with a Child in the Superior Court of Franklin County on September 30, 2008, which requires defendant Johnson to comply with the North Carolina Sexual Offender and Public Protection Registration Programs, N.C. Gen. Stat. Chapter 14, Article 27A.
7. On December 30, 2010, defendant Johnson filed a Motion to Declare N.C.G.S. § 14-202.5 Unconstitutional, asking the Court to enter an Order declaring N.C. Gen. Stat. § 14-202.5 unconstitutional and thereupon to dismiss the charge against defendant Johnson.
8. The indictment in 10 CRS 57148 alleges that on or about May 22, 2010, defendant Packingham maintained one or more Web pages on the commercial social networking Web site Facebook.com in violation of N.C. Gen. Stat. § 14-202.5.
9. The indictment in 10 CRS 57148 further alleges defendant Packingham was convicted of Taking Indecent Liberties with a Child in the Superior Court of Cabarrus County on September 22, 2002, which requires defendant Packingham to comply with the North Carolina Sexual Offender and Public Protection Registration Programs, N.C. Gen. Stat. Chapter 14, Article 27A.

10. On December 9, 2010, defendant Packingham filed a Motion to Dismiss for Unconstitutionality of the Statute, asking the Court to enter an Order declaring N.C. Gen. Stat. § 14-202.5 unconstitutional and thereupon to dismiss the charge against him.

11. The interests of both defendants Johnson and Packingham are so aligned as to their respective positions that N.C. Gen. Stat. § 14-202.5 is unconstitutional based upon legal authorities upon which they respectively and jointly rely that these matters have been joined for the purpose of presentation of evidence, the submission of constitutional, statutory and case law authorities and the arguments of counsel.

12. The State and both defendants Johnson and Packingham respectively agree that the Web sites at issue in the above-captioned cases, namely MySpace.com and Facebook.com, are commercial social networking Web sites as contemplated by N.C. Gen. Stat. § 14-202.5.

13. Both defendants Johnson and Packingham, in their motions and orally through their respective counsel, contend that N.C. Gen. Stat. § 14-202.5 is unconstitutional on its face and as applied to each of the named defendants.

14. The Court's determination of the constitutionality of N.C. Gen. Stat. § 14-202.5 as applied is an express request of each named defendant respectively.

15. While the parties have provided studious and insightful analysis concerning, among other things, the treatment of an Internet Web site under the statute which has as its primary purpose the facilitation of commercial transactions involving the goods or services between its members or visitors, yet has subpages similar to MySpace.com and Facebook.com; the treatment of computer search engines like Google, which has

subpages similar to MySpace.com and Facebook.com; the treatment of governmental, quasi-governmental, religious, educational, medical and sports Web sites which have social networking components similar to MySpace.com and Facebook.com and a host of thoughtful hypothetical situations for contemplation, including the charging officer, Corporal Brian Schnee's, reflection on such hypotheticals to elicit his own views on the statute's meaning, much of this intellectual analysis is not relevant to, nor dispositive of, the legal issues to be considered by the Court regarding whether the pending criminal charges against the named defendants should be dismissed due to the claimed unconstitutionality of N.C. Gen. Stat. § 14-202.5 as the statute has been applied to them.

16. Both defendants Johnson and Packingham were convicted sex offenders registered in accordance with the provisions of Article 27A, Chapter 14 of the North Carolina General Statutes at the time they allegedly committed the indicted offenses.

17. Based upon the testimony of the charging officer, Corporal Brian Schnee of the Durham Police Department, and the items contained in Defendant's Exhibits #1 and #3, the Court finds that, for the purposes of determining the constitutionality of the application of N.C. Gen. Stat. § 14-202.5 to defendants Johnson and Packingham, MySpace.com and Facebook.com are commercial social networking Web sites within the meaning of N.C. Gen. Stat. § 14-202.5(b).

18. Based upon the testimony of the charging officer, the items contained in Defendants' Exhibits #1 and #3 and the agreement between the parties presented in closing arguments, the Court finds that, for the purposes of determining the constitutionality of N.C. Gen. Stat. § 14-202.5 to defendants Johnson and

Packingham, MySpace.com and Facebook.com are commercial social networking Web sites which allow persons aged less than 16 years to become members and/or create or maintain Web pages thereon.

19. Based upon the testimony of the charging officer and the items contained in Defendants' Exhibits #1 and #3, the Court finds that, for purposes of determining the constitutionality of N.C. Gen. Stat. § 14-202.5 to defendants Johnson and Packingham, neither MySpace.com nor Facebook.com are Internet Web sites which fall within the exceptions contemplated by N.C. Gen. Stat. § 14-202.5(c).

    a. Specifically, neither MySpace.com nor Facebook.com provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform.

    b. Further, neither MySpace.com nor Facebook.com has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

CONCLUSIONS OF LAW

1. The Court derives jurisdiction over these matters by virtue of pending criminal charges against defendants Johnson and Packingham related to their alleged maintenance of one or more Web pages on a commercial social networking Web site as outlined above.

2. In the spirit of the wisdom oft displayed by the North Carolina appellate courts to determine the specific legal questions to be decided, this trial Court, in recognizing that its jurisdiction is derived from the pending criminal charges against the defendants for maintaining one or more personal Web pages on commercial social

networking Web sites, agreed by the parties to be such Web sites, will decide the specific legal questions which determine whether the defendants' charges should be dismissed due to the manner in which N.C. Gen. Stat. § 14-202.5 has been applied to each of them, and conversely will refrain from deciding whether the provisions of N.C. Gen. Stat. § 14-202.5 render it unconstitutional when all of its provisions have not been invoked under the charges, which give the trial Court its narrow jurisdiction.

3. The North Carolina Supreme Court has said, "[We] emphasize that the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials. Rather, this Court must measure the balance struck by the legislature against the required minimum standards of the constitution." State v. Bryant, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005).

4. The disparate interests which are balanced in the current cases by the legislature, which this Court is to measure, are the activities of sex offenders on the one hand and the protection of minors on the other hand.

5. In measuring this "balance struck by the legislature against the required minimum standards of the constitution," as the standard enunciated by the Supreme Court in Bryant, this trial Court recognizes the legislature's enactment of N.C. Gen. Stat. § 14-208.5, the introduction to Chapter 14, Article 27A of the General Statutes regarding the North Carolina Sexual Offender and Public Protection Registration Programs, which state s the following as the purpose:

"The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.

The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.

Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article."

6. In applying the Bryant standard, this trial Court also notes the first paragraph of the Supreme Court's opinion rendered in that case:

> "Convicted sex offenders are a serious threat in this Nation. The victims of sex assault are most often juveniles, and 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. State v. Bryant, 359 N.C. at 554, 614 S.E.2d at 479 (quoting Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4, 155 L. Ed. 2d 98, 103, 123 S. Ct. 1160 (2003) (internal quotations omitted). Because of this public safety concern North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public from the unacceptable risk posed by convicted sex offenders." Id.

7. The High Court also stated in Bryant that "the twin aims of North Carolina Sex Offender and Public Protection Registration Program, public safety and protection, are clearly legitimate and of great importance to the State." Bryant at 560, 483.

8. The Supreme Court having found in Bryant that "the twin aims of the North Carolina Sex Offender and Public Protection Registration Program, public safety and protection, are clearly legitimate and of great importance to the State," that "the victims of sex assault are most often juveniles, and 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" and that the Court must "measure the balance struck by the legislature against the required minimum standards of the constitution," while understanding that "the role of the Court is not to sit as a super

legislature and second-guess the balance struck by the elected officials," this Court is to be guided by these principles enunciated by the State's highest Court in determining whether N.C. Gen. Stat. § 14-202.5 has been applied in an unconstitutional fashion against defendants Johnson and Packingham.

9. In light of the legal authorities cited, and applying their operation to the substantive and procedural facts presented in the case at bar, while enlightened by counsel and their respective arguments, this Court finds that:

   a. The protection of minors is a legitimate and important aim of the North Carolina Sex Offender and Public Protection Registration Program as enacted by the General Assembly of North Carolina.

   b. The General Assembly, as this State's legislature, is empowered and authorized to enact laws to facilitate the legitimate and important aim of protecting minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes.

   c. N.C. Gen. Stat. § 14-202.5 is a statutory law enacted by the legislature to facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes.

   d. The role of the legislature is to balance the weight to be afforded disparate interests and to forge a workable compromise among those interests.

10. In the provisions of N.C. Gen. Stat. § 14-202.5, the legislature has balanced the weight to be afforded the disparate interests involved, specifically the activities of sex offenders and the protection of minors, in such a way as to forge a workable compromise among those interests.

11. In measuring the balance struck by the legislature against the required minimum standards of the Constitution, this Court does not find the application of N.C. Gen. Stat. § 14-202.5 to the facts and circumstances in defendants Johnson's and Packingham's cases is unconstitutional.

12. In analyzing the application of N.C. Gen. Stat. § 14-202.5 to the actions of the authorities and entities responsible for the institution of criminal charges against defendants Johnson and Packingham in their respective pending cases, this Court does not find the application of N.C. Gen. Stat. § 14-202.5 to the facts and circumstances of defendants Johnson's and Packingham's respective cases is unconstitutional.

NOW THEREFORE IT IS ADJUDGED, ORDERED AND DECREED that N.C. Gen. Stat. § 14-202.5 is not unconstitutional as applied to defendant Christian Martin Johnson and Lester Gerard Packingham in their respective pending criminal cases and that, therefore, each of their respective motions to dismiss the charges pending against them for alleged violations of N.C. Gen. Stat. § 14-202.5 is hereby DENIED.

An oral ORDER to this effect being entered upon the record on the 7th day of April 2011, this written ORDER is hereby entered this the 11th day of April 2011, nunc pro tunc to the 7th day of April 2011.

Michael R. Morgan

The Honorable Michael R. Morgan
Superior Court Judge Presiding

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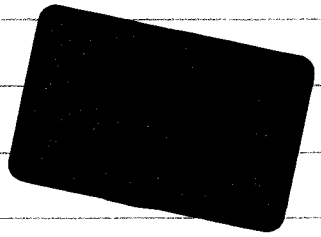

J.r. Gerrard Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent.....Praise be to GOD, WOW! Thanks JESUS!

April 27 at 9:04am

JOHN DOE, et al., Plaintiffs,
v.
STATE OF NEBRASKA, et al., Defendants.
JOHN DOE, Plaintiff,
v.
NEBRASKA STATE PATROL, et al., Defendants.
JOHN DOE, Plaintiff,
v.
STATE OF NEBRASKA, et al., Defendants.

Nos. 8:09CV456, 4:10CV3266, 4:10CV3005

United States District Court, D. Nebraska.

October 17, 2012.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM AND ORDER

RICHARD G. KOPF, Senior District Judge.

Earlier I paraphrased Justice Oliver Wendell Holmes and observed that if the people of Nebraska wanted to go to hell, it was my job to help them get there.[1] By that, I meant that it is not my prerogative to second-guess Nebraska's policy judgments so long as those judgments are within constitutional parameters. Accordingly, I upheld many portions of Nebraska's new sex offender registration laws even though it was my firm personal view that those laws were both wrong-headed and counterproductive.

However, I had serious constitutional concerns about three sections of Nebraska's new law. After careful study, I granted summary judgment regarding one claim and decided that a trial was necessary to resolve my other concerns. The trial has now been concluded, and I have decided that the remaining portions of Nebraska's sex offender registry laws are unconstitutional.

In short, I can only help Nebraskans get to the figurative hell that Holmes spoke of if they follow a constitutional path. For three sections of Nebraska's new sex offender registry law, Nebraska has violently swerved from that path. I next explain why that is so.

I. STATUTES AT ISSUE & PRIOR OPINION ON SUMMARY JUDGMENT MOTIONS

A. Statutes at Issue

Plaintiffs[2] challenge the constitutionality—both facially and as applied—of parts of three statutes: Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), 29-4006(2), and 28-322.05 (West, Operative Jan. 1, 2010). Generally, sections 29-4006(1)(k) and (s) require disclosure by persons required to register under the Nebraska Sex Offender Registration Act of remote communication device identifiers, addresses, domain names, and Internet and blog sites used; section 29-4006(2) requires registrants to consent to the search and installation of monitoring hardware and software; and section 28-322.05 criminalizes some registrants' use of social networking web sites, instant messaging, and chat room services accessible by minors.

In relevant part, these statutes provide:

Neb. Rev. Stat. § 29-4006(1)(k) and (s):

> (1) Registration information required by the Sex Offender Registration Act shall be entered into a data base in a format approved by the sex offender

registration and community notification division of the Nebraska State Patrol and shall include, but not be limited to, the following information:

. . . .

(k) The person's remote communication device identifiers and addresses, including, but not limited to, all *global unique identifiers,* serial numbers, *Internet protocol addresses,* telephone numbers, and account numbers specific to the device;[3]

. . . .

(s) All email addresses, instant messaging identifiers, chat room identifiers, *global unique identifiers,* and other Internet communication identifiers that the person uses or plans to use, all domain names registered by the registrant, and all blogs and Internet sites maintained by the person or to which the person has uploaded any content or posted any messages or information.[4]

Neb. Rev. Stat. § 29-4006(2):

(2) When the person provides any information under subdivision (1)(k) or (s) of this section, the registrant shall sign a consent form, provided by the law enforcement agency receiving this information, authorizing the:

(a) Search of all the computers or electronic communication devices possessed by the person; and

(b) Installation of hardware or software to monitor the person's Internet usage on all the computers or electronic communication devices possessed by the person.

Neb. Rev. Stat. § 28-322.05:

(1) Any person required to register under the Sex Offender Registration Act who is required to register because of a conviction for one or more of the following offenses, including any substantially equivalent offense committed in another state, territory, commonwealth, or other jurisdiction of the United States, and who knowingly and intentionally uses a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use its social networking web site, instant messaging, or chat room service, commits the offense of unlawful use of the Internet by a prohibited sex offender:

(a) Kidnapping of a minor pursuant to section 28-313;

(b) Sexual assault of a child in the first degree pursuant to section 28-319.01;

(c) Sexual assault of a child in the second or third degree pursuant to section 28-320.01;

(d) Incest of a minor pursuant to section 28-703;

(e) Pandering of a minor pursuant to section 28-802;

(f) Visual depiction of sexually explicit conduct of a child pursuant to section 28-1463.03 or 28-1463.05;

(g) Possessing any visual depiction of sexually explicit conduct pursuant to section 28-813.01;

(h) Criminal child enticement pursuant to section 28-311;

(i) Child enticement by means of an electronic communication device pursuant to section 28-320.02;

(j) Enticement by electronic communication device pursuant to section 28-833; or

(k) An attempt or conspiracy to commit an offense listed in subdivisions (1)(a) through (1)(j) of this section.

(2) Unlawful use of the Internet by a prohibited sex offender is a Class I misdemeanor for a first offense. Any second or subsequent conviction under this section is a Class IIIA felony.

Relevant definitions are found in Neb. Rev. Stat. § 29-4001.01:[5]

> (3) Chat room means a web site or server space on the Internet or communication network primarily designated for the virtually instantaneous exchange of text or voice transmissions or computer file attachments amongst two or more computers or electronic communication device users;
>
> . . . .
>
> (10) Instant messaging means a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions or computer file attachments to other selected users of the service through the Internet or a computer communications network;
>
> . . . .
>
> (13) Social networking web site means a web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator's permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile. . . .

B. Prior Opinion

In my prior memorandum and order addressing the parties' motions for summary judgment (Filing 354), I determined that the plaintiffs' facial and as-applied challenges to the above-cited statutes raised four constitutional concerns that necessitated a trial—namely, issues arising under the First Amendment, the Due Process Clause, the Ex Post Facto Clause, and the Fourth Amendment.

With regard to the First Amendment, I decided that trial was necessary as to sections 29-4006(1)(k) and (s) and 28-322.05 to determine whether the requirement that sex-offender registrants disclose information about Internet use violates their right to freedom of speech guaranteed by the First Amendment and the Nebraska equivalent and whether the partial ban on Internet use by certain offenders, upon pain of criminal conviction, violates those speech rights as well. I noted that the parties had not presented an undisputed record of material facts that "explains how these two statutes would actually work in practice and without such a record I cannot determine the implications of this statute on Plaintiffs' First Amendment rights." (Filing 354 at CM/ECF p. 35.)

Similarly, I reserved for trial the issue of whether section 28-322.05 is void for vagueness under the Due Process Clause and Nebraska's equivalent provision because the parties failed to present a sufficient factual record to show how this statute works. Thus, I could not determine whether the statute provides fair notice of what is prohibited and whether a limiting construction could be applied to save the statute. (Filing 354 at CM/ECF pp. 32-33.)

As to Plaintiffs' claim under the Ex Post Facto Clause, I decided that a trial was necessary to determine whether sections 29-4006(1)(k) and (s), 29-4006(2), and 28-322.05 violate that clause of the United States Constitution and the Nebraska equivalent for offenders (1) who had served their time and were no longer under criminal justice supervision as of the effective date of the laws, January 1, 2010, and (2) who had been sentenced prior to January 1, 2010, but remained under criminal justice supervision on or after that date. (Filing 354 at CM/ECF p. 11.)

Finally, I decided that the consent-to-search and consent-to-monitoring[6] provisions of Neb. Rev. Stat. § 29-4006(2) are unconstitutional under the Fourth Amendment and the Nebraska equivalent, Neb. Const. art. I, § 7, as to the plaintiffs who were previously convicted of sex crimes but who were not on probation, parole, or court-monitored supervision on or after January 1, 2010. (Filing 354 at CM/ECF pp. 15-27.) However, I reserved for trial the issue of the constitutionality of Neb. Rev. Stat. § 29-4006(2) under the Fourth Amendment and the Nebraska Constitution as to those who were previously convicted of sex crimes and who were on probation, parole, or court-monitored supervision on or after January 1, 2010, as well as those persons associated with them. (*Id.*)

II. FINDINGS OF FACT

A. Legislative History

The challenged legislation originated in LB 97 and LB 285, which the Nebraska Legislature passed and the Governor approved in May 2009. Among other things, LB 97 amended Neb. Rev. Stat. § 29-4006 to add the search-and-monitoring provision (now § 29-4006(2)) and to add information that sex-offender registrants must report to the Nebraska State Patrol (now § 29-4006(1)(s)). LB 97 also created two new statutes—Neb. Rev. Stat. §§ 28-322.05 (criminalizing unlawful use of the Internet by a prohibited sex offender) and 29-4001.01 (definitional section). *See* Nebraska Laws, LB 97, §§ 14, 24, 26 (2009). LB 285 amended Neb. Rev. Stat. § 29-4006 to add what is now section 29-4006(1)(k) and amended sections 14 and 24 of LB 97. *See* Nebraska Laws, LB 285, § 7 (2009).

The Nebraska Attorney General's Office was the principal drafter and editor-in-chief of LB 97, which that office brought to Nebraska Senator Scott Lautenbaugh for introduction. (Ex. 156, Attorney General's 2009 Legislative Package; Ex. 301, Judiciary Committee Transcript at pp. 1-2, 4 (Mar. 11, 2009); Ex. 301, Floor Debate at p. 2 (Apr. 22, 2009).) Assistant Attorney General Corey O'Brien was the principal architect of LB 97, and in December 2008, he indicated in an e-mail to Senator Lautenbaugh that although he "would personally like to prevent [persons with prior sex offenses] from using the internet altogether, that would be unconstitutional. However, depriving them from accessing certain parts of the internet is perfectly constitutional." (Ex. 199.)

The Introducer's Statement of Intent for LB 97, which included Neb. Rev. Stat. § 28-322.05, states that it was intended to "protect children from sexual predators by strengthening penalties and bringing Nebraska's laws up to date." (Ex. 301, Introducer's Statement of Intent.) During the Judiciary Committee session on March 11, 2009, Senator Lautenbaugh stated:

> [LB 97] was brought to me by the Attorney General's Office, and as I think I said at the outset on this, I am not sure if I'm the ideal senator to be introducing this or not, because I have sort of a . . . this area is very troubling to me, and it provokes kind of a rage and maybe a lack of perspective that I probably shouldn't have as the sponsor of this bill or probably should have the perspective as sponsor of the bill. . . . [T]his is an area that I have trouble basically dealing with and processing in my own mind. . . . And as I indicated before, I have to confess to a certain revulsion, and I don't think this sets me apart when we discuss people who have these convictions. And these are ongoing restrictions, and it is good to believe in rehabilitation, and the fact that people can change. In this area, I don't buy that. I don't think that anyone who thought this was a good idea once actually changes their view on it.

(Ex. 301, Judiciary Committee Transcript at pp. 1-2, 12 (Mar. 11, 2009).)

During the Nebraska Legislature's discussion of the scope of the search-and-monitoring provisions, Senator Lautenbaugh admitted that "some of the provisions in here do seem harsh and restrictive and that's really the point. . . . for individuals with these particular proclivities and these particular past convictions, we do want to limit and track what they're using the Internet for to avoid a repeat offense." (Ex. 301, Floor Debate Regarding LB 97 at p. 6 (Apr. 22, 2009).) In his concluding remarks, Senator Lautenbaugh stated:

> I questioned whether or not I was the ideal person to bring this [bill], because of the just revulsion I feel for people who have these convictions. Revulsion is not too strong a word. I mean these are not criminals that we're angry at. These are people that are just frightening to me and all of us, and I think rightfully so, and I don't have a lot of faith in our ability to rehabilitate people who would engage in this type of conduct.

(Ex. 301, Floor Debate Regarding LB 97 at p. 18 (Apr. 22, 2009).)

B. The Doe Plaintiffs & Experts

The parties stipulate that all plaintiffs are required to register under Nebraska's Sex Offender Registration Act and are subject to the provisions of Neb. Rev. Stat. §§ 29-4001 to 29-4014, with the exception of John and Jane Does B and D-K. The parties further stipulate that these plaintiffs are required to register under Nebraska's Sex Offender Registration Act because of a conviction for one or more of the offenses enumerated in Neb. Rev. Stat. § 28-322.05(1)(a)-(k): John Does 2, 3, 4, 6, 12, 13, 17, 18, 19, 24, 27, 35. Finally, the parties stipulate that the following plaintiffs committed one or more of the offenses in section 28-322.05(1)(a)-(k) by means of a computer or electronic communications device: John Does 2, 3, 12, 17, 24. (Filing 492 at CM/ECF p. 2.)

Ten of the plaintiffs participating in this case testified at trial, as well as the plaintiffs' expert. Their testimony is summarized below.

1. Professor David Post

For the past 15 years, Professor David G. Post has taught at Temple University's law school, specializing in copyright, trademark, other intellectual property law, and cyberlaw. (Tr. 66:19-67:4.) Prior to his position at Temple, Post twice worked as a law clerk for now United States Supreme Court Justice Ruth Bader Ginsburg; worked for more than six years at a large Washington, D.C., law firm in intellectual property and "high-tech transactions" involving software developers and systems integrators; and taught at Georgetown for three years. (Tr. 69:19-70:23.) Post has published several law journal articles and a law school casebook concerning the Internet and its legal ramifications. (Tr. 67:8-68:24.)

Post testified that Neb. Rev. Stat. § 28-322.05 and the statutory definitions for "chat room," "instant messaging," and "social networking web site" in Neb. Rev. Stat. § 29-4001.01 are ambiguous, and that these definitions either cover "almost everything on the Net" or "might cover virtually nothing on the Internet," depending upon how the terms are interpreted. (Tr. 74:17-21.)

Specifically, Post testified that a "broad reading" of the definition of "chat room" in section 29-4001.01 could include "ordinary telephone service," cellular telephone service, e-mail, and SMS text messages, as well as more conventional chat rooms that fall "clearly within the bull's-eye" of the statutory definition. (Tr. 84:7-85:25.) For example, "when I send you an e-mail—an ordinary electronic mail with text and maybe a file attachment, I think as a perfectly reasonable reading of the statute that we are now engaged in a chat room interaction because there's server space on the Internet that is designated for the instantaneous exchange of texts amongst the two of us." (Tr. 85:7-13.) Further, because *Amazon.com,* for example, "has server space that is designated for the instantaneous exchange of text between two or more computer users," it would also qualify as a chat room under the statute. (Tr. 86:8-17, 118:23-119:12.) Post acknowledged that a chat room allows "one-to-one communication and one to many" amongst those who are "in the room." (Tr. 112:21-25.)

Post also testified that the definition of "instant messaging" in Neb. Rev. Stat. § 29-4001.01 (10) could include only "old-fashioned telephone" service if the statutory language "direct, dedicated, and private communication service" means "a line of a physical piece of wire that is dedicated to our communication [which is] the way that the telephone system actually works." Alternatively, this language could include "virtually all electronic communication" if interpreted to mean "communication[] that's not publicly accessible but is only accessible to the participants." (Tr. 92:1-22.) Post stated that instant messaging is "any system that allows one-to-one communication via text," which would include *Google, Gmail, Hotmail, Facebook, Yahoo Messenger, Wikipedia,* and *YouTube* because these services allow the "virtual instantaneous transfer of texts and computer file attachments." (Tr. 93:16-94:17, 120:9-13.) Post thinks use of the word "direct" in the statutory definition of instant messaging is confusing because "anything that's traveling over the Internet . . . . gets broken up into tiny pieces [and] . . . converge[s] virtually instantaneously on your machine later." (Tr. 123:4-25.) Post's "guess is" that the Nebraska Legislature was "trying to capture a sort of private one-to-one nature of conversation as opposed to one to many or many to one." (Tr. 124:19-25.)

Post testified that the definition of "social networking web site" in section 29-4001.01(13) has a "threshold statutory ambiguity" caused by use of the term "collection of web sites" because that phrase "could cover everything that is on the World Wide Web because the World Wide Web is itself a collection of web sites." (Tr. 95:1-24.)

> Even if you take that definition, read it a little more narrowly, you still have things like Google.com. Google.com—you type in Google.com to your browser and it comes up with a search page, the familiar page. That page doesn't have profile information on it. I can't enter my profile on that page but I can enter a . . . searchable profile on any number of pages that are linked to the Google web page so I can go from the Google.com page to Blogger, to Gmail, to YouTube . . . and in one click I'm at a site where I can have a searchable profile that viewers can access. So . . . even though [Google.com] does not have this functionality, is it part of a collection of web sites that has this functionality, and I think the answer is, yeah, it is because . . . I know that they're in the same collection of web sites. Blogger is owned by Google so I suppose that makes it part of the same collection. It's one link away from Google so it's part of a collection. . . . [T]he Google.com site encourages you to go to Blogger, to go to YouTube. . . . [T]o me as a user . . . when I'm at the Google.com page, . . . I'm in a collection of web sites that has this functionality so the Google.com page is a social networking web site. Even though it does not have this functionality, it's part of the collection that does.

(Tr. 96:8-97:9.)

Aside from the "collection of web sites" issue, Post stated that the "functionality" described in this statute is the ability "to create a . . . searchable profile. If I can create a searchable profile that others can comment on or communicate with me, they can find my profile and send me a message of some kind," then it is a social networking web site within the meaning of section 29-4001.01(13). (Tr. 95:13-17.) This definition would encompass "many commercial sites that wouldn't ordinarily think of themselves as social networking but they have this functionality," such as *Amazon.com, L.L. Bean, Blogspot,* and *WordPress.* (Tr. 97:16-99:8.) All of these sites have "a way for you to post your profile and talk to other users." (Tr. 98:22-23.)

Regarding the language in section 28-322.05(1) that prohibits sex offenders from using a social networking web site, instant messaging, or chat room service "that allows a person who is less than eighteen years of age to access or use" it, Post does not know of "any instant messaging services that even purport to keep minors out. Same for chat rooms." (Tr. 77:19-23, 78:23-79:4.) Further, Post testified that anyone of any age can "access" a site, if only to read the site's terms and conditions. (Tr. 78:1-16.)

Post testified regarding the reporting requirement in section 29-4006(1)(s) of "all blogs and Internet sites . . . to which the person has uploaded any content or posted any messages or information." Post testified that "cookies files" are being invisibly uploaded to web sites people visit "hundreds of times . . . daily as you're .. . making your way around the Net." These text files—which contain information identifying when you last visited a web site and what you did there—"are being deposited on [an Internet user's] machine and then sent to the web sites from their machine the next time they go visit and that could be considered the uploading of content" within the meaning of the statute. (Tr. 108:20-109:24.)

In Post's opinion, the combined effect of the statutes at issue (depending upon how they are interpreted) could bar individuals from: (1) communicating via text message since every commercially available text messaging system could plausibly be classified as "instant messaging" under Neb. Rev. Stat. § 29-4001.01(10) and no text messaging systems prohibit minors' access; (2) communicating via cellular or landline telephone with any third party; (3) reading any blogs or online newspapers if those sites allow users to identify themselves and communicate with others via a "comments" or "discussion" functionality; (4) joining any discussion groups, listservs, or online communities; and (5) purchasing goods or services online from any site allowing user "ratings" and comments. (Ex. 304, Expert Report of David G. Post at pp. 18-19.)

2. Does 17 & F

Doe 17 is employed by his father, Doe F, and he installs and maintains video conferencing systems and runs an online training business. Doe 17 serves as the operations manager, helping to manage public rental of the business's video equipment, as well as installing video conferencing systems for clients off-site. (Tr. 285:1-287:15.) These systems use the Internet and server space, they operate virtually instantaneously, they transmit voice files, and they use hardware in the form of a CPU or electronic communication device. (Tr. 287:15-291:12.) They are also private. (Tr. 292:1-4.) Therefore, when Doe 17 performs a diagnostic check on a video conferencing system he installs, he believes he is using an instant messaging system and chat room within the meaning of the statutes at issue. (Tr. 291:16-25.)

Because Doe F and Doe 17 sometimes work from separate locations—the business's office and Doe F's home office—they often use *Google Talk* instant messenger to communicate with one another, although they also frequently talk by phone. (Tr. 293:8-14, 315:1-14.) They also communicate via text messaging and an IP-based phone system for convenience and cost reasons. (Tr. 293:20-294:3, 316:5-10.) Doe 17 regularly uses e-mail in both businesses. (Tr. 299:21-25.) Doe 17 maintains his Cisco certification through that company's web site, which requires him to create an account, give personal identifying information, review lessons, and take tests. The Cisco web site also allows one to communicate with a Cisco customer service representative or technician via e-mail and live chat and with others through help forums and blogs. (Tr. 294:4-295:11.)

Doe 17 uses chat rooms and instant messaging systems for his personal online training business, but he avoids using an industry-related online forum on the topic of video conferencing called *VC Talk* because users must create a profile, users have the ability to communicate with other users, the site has "an age limit of 13," and he is "trying to . . . in good faith comply with the current law." (Tr. 295:18-299:16.) He has built web sites for clients that he believes may qualify as "social networking web sites" or "instant messaging" within the meaning of the statutes at issue. (Tr. 300:2-21.)

Doe 17 testified that if Neb. Rev. Stat. § 28-322.05 were applied to him, his business would shut down and he would be relegated to fewer job duties than when he was on parole

because he would be prevented from answering the Internet-based phone and he could not provide training because "the method of doing training is remote training all over the web. It all involves audio and text chat." (Tr. 303:2-305:1.)

He frequently interfaces with law enforcement because he is required to update his Internet identifying information regularly because he has many web sites that he maintains for clients that require him to "upload[] data" and he "constantly" needs access to technical forums to "do new research on new issues." (Tr. 308:18-309:13.) Doe F testified that Doe 17 was integral to his small business. (Tr. 326:2-327:22.) According to Doe F, if section 28-322.05 were applied to Doe 17, Doe F would have to terminate his son's employment, and Doe F could not pass the business on to his son. (Tr. 330:6-9, 332:3-16.)

3. Doe 35

While Doe 35 does not use computers, cell phones, instant messaging, or chat rooms in the course of his work, he regularly texts his wife during the day, and occasionally his mother. (Ex. 211 at 10:20-12:4, 14:6-16.) He maintains a *Facebook* account to keep up with old friends. (Ex. 211 at 12:13-15, 15:16-16:8.)

4. Doe 31

In his current occupation, Doe 31 provides remote desktop and server support for one client, which involves basic hardware and software troubleshooting. (Tr. 341:20-342:6.) To do his job, Doe 31 must access his client's computers remotely, which allows him to share computer files back and forth and access the Internet on others' computers. (Tr. 343:4-24.) Although his job frequently requires him to access vendor web sites by creating a profile with a user name and password, Doe 31 has never used the chat capabilities that are available on those web sites. (Tr. 344:16-346:21, 350:19-23.) Doe 31 does not post any information on web sites for either work-related or personal reasons, but he e-mails and texts family and uses a cell phone for personal and business reasons. (Tr. 351:1-352:13.)

5. Doe 21

Doe 21 is the president of a music retail company and wholesaler. (Tr. 353:22.) Doe 21 uses e-mail, *Google Chat,* and text messaging to communicate with customers internationally. (Tr. 354:21-355:25.) He admitted that providing his e-mail addresses and online identifiers under Neb. Rev. Stat. § 29-4006(1)(k) and (s) has not affected his ability to conduct business. (Tr. 356:14.)

6. Doe 3

Doe 3 is self-employed, running a business that sells and installs high-end car audio and video equipment and other vehicle accessories. (Tr. 360:5-15.) He has operated the business for almost two years. (Tr. 368:20-21.) He purchases inventory from online vendors through e-mail, telephone, and vendor web sites, and some of these vendor web sites require creation of a profile. (Tr. 360:21-361:6.) He also visits manufacturer web sites that allow him to communicate with the manufacturer via e-mail from the web site. (Tr. 365:7-20.)

Doe 3 conducts much of his business through car audio forums, including contacting new global clients. (Tr. 361:20-362:9.) For example, he uses *DIYMA.com* (Do It Yourself Mobile Audio), which permits a person to create a profile, search and view another's profile, and allows some form of communication; it also allows direct messaging functions between users. (Tr. 362:15-363:3.) Doe 3 uses these forums to solicit business, find information, and ask and answer technical questions. (Tr. 363:16-24.) These forums do not require users to prove their age in order to log in or use them. (Tr. 372:22-373:4.) Doe 3 uses these forums at least once per day as his primary source of technical data, and he uses other forums "all the time . . . throughout the day." (Tr. 364:8-22.) If he were banned from these forums, he would not be able to access the full range of technical information needed or consult with car audio experts. (Tr. 373:5-17.)

Doe 3 is able to take credit card payment over the phone by having an account with the Internet-based company called *Square.com,* which requires him to have a profile, user name, and password, but does not allow him to communicate with other users. He also uses *Craigslist* to advertise and sell items for his business, as well as *Facebook,* a cell phone, text messaging, and e-mail. (Tr. 366:20-368:7, 374:8-11.)

For the type of high-end business he runs, his client base is not the local market. (Tr. 363:4-13, 373:19-374:7.) As Doe 3 put it, the impact of Neb. Rev. Stat. § 28-322.05 would be fatal if it meant he were banned from the forums: "[I]t would basically not allow me to . . . continue

the business because there isn't [sic] enough. . . customers located in our area to support this business." (Tr. 365:24-366:4.)

Doe 3 uses e-mail, text messaging, and web site access to communicate with his wife and children, as well as for things like his kids' basketball league, for which "all the information comes via e-mail. Looking up the schedule of games is on a web site. None of this information is hard copy anymore. Everything's electronic." (Tr. 369:6-370:7.)

7. Doe 19

Doe 19 registers in Lancaster County as a transient because his sound and light company and his coach company require him to leave Nebraska regularly to go on tours with entertainers. (Tr. 379:10-380:4.) He has operated his businesses since 2006 and 2008, respectively. (Tr. 389:5-9.) He uses text messaging and e-mail to keep in touch with tour managers, his partners, and his assistant; to send out bids to potential clients; and for personal communication. (Tr. 382:7-383:13.) Doe 19 has not used social networking because it is "nerve-wracking with all this going on." (Tr. 384:20-21.) He is also concerned that the mere use of these mediums is criminal. (Tr. 385:6-386:2.) He testified that he has not used social networking sites like *MySpace* and *Facebook,* but he needs to do so because he is "losing out because anybody that's got a band or a management company has a *Facebook* or a *MySpace.* . . . All bands, all artists use that." (Tr. 384:2-385:5.) Doe 19's potential clients use social networking "to advertise themselves and to also find people to fill their roles whether it be for sound and lighting or coaches or whatever." (Tr. 384:5-8.)

Doe 19 has abstained from setting up a *Twitter* account. (Tr. 389:13-15.) He testified that if Neb. Rev. Stat. § 28-322.05 prohibited e-mail or texting, it "would sink" his business because "[n]obody would know about me. There is no way to communicate. . . . [S]nail mail isn't done anymore in that kind of business so I would literally starve to death trying to find clients." (Tr. 386:24-387:9.)

8. Doe 18

Doe 18 has significant experience with both computer hardware and computer software. (Tr. 390:20-392:9.) He currently operates a computer consulting business, including removing computer viruses, upgrading hardware and software, and providing on-call support. (Tr. 392:10-20.) He communicates with clients via cell phone calls, texts, and e-mail. If a customer sends an e-mail to his cell phone, it appears as a text message on his phone, but his reply will appear as an e-mail to the client—"[i]t's technical convergence. It's . . . getting harder and harder to separate the things." (Tr. 393:4-17.)

Doe 18 gains remote access to problem computers using the program *LogMeIn,* which has the capability to allow him to chat via text with the person on the other computer and to transfer computer files. (Tr. 394:2-395:1.) He uses manufacturer web sites to obtain technical assistance, such as the web sites for Lexmark, Dell, and IBM. (Tr. 396:25-397:5.) All of the manufacturer web sites permit some form of chat function, and he has used the chat function on the Lexmark web site to obtain technical data from a person of unknown age, gender, or location. (Tr. 397:6-398:4.)

Similar to Doe 3, Doe 18 uses online forums, such as *Bleeping Computer,* to get assistance with technical problems. He is concerned that such sites might be considered social networking web sites within the meaning of the Nebraska statutory scheme. For example, *Bleeping Computer* allows one to sign up and register an account, to maintain a profile page, to view or gain access to another's profile page, and to communicate with others in a forum. (Tr. 396:1-17, 398:5-399:2.) Doe 18 has refrained from getting *LinkedIn*, *Facebook,* and *Twitter* accounts because he does not know "how the law stands on that." He is also concerned about using links and forums on various technical web sites because "it's not always clear where you're going"; he "may not be . . . in the public area of that company web site . . . if they haven't secured their internal company information"; and he may "stumble into what might be considered a social networking web site" under Nebraska law. (Tr. 395:2-15, 400:11-22, 401:13-21, 402:19-403:9.)

Doe 18's "limited presence on the Internet" has limited his work and is "odd" for a computer consulting business. "If you don't have a presence on the Internet, you don't have a company basically speaking." (Tr. 395:2-18, 403:10-20.) If Neb. Rev. Stat. § 28- 322.05 prohibited Doe 18 from using forums and manufacturer web sites, it would be difficult, if not impossible, to resolve the virus and other in-depth problems he encounters in his computer consulting business. (Tr. 401:19-402:5.) Further, if he were unable to use a cell phone or text message, it would "significantly impact" his relationships with his family, friends, and church. (Tr. 403:21 -405:1.) Doe 18 earns 80 percent of his income performing construction remodeling because he cannot generate enough income through his computer consulting business due to his

"very small digital presence. . . . the work doesn't just spontaneously occur." (Tr. 408:4-13, 409:13-410:8.)

9. Doe 2

Doe 2 develops Internet-based applications for his employer. (Tr. 412:16-21.) His employer has "intranet," which is a company-specific social networking site used only by employees. (Tr. 413:22-415:13.) This site is "only one step removed from what *Facebook* does" and allows users to generate a profile, get and use a user name and password, access others' profiles, and electronically communicate with other employees. Doe 2's employer hires interns who are under 18 years old. (Tr. 414:5-23, 441:12-15.) He collaborates with other employees in New York and Wisconsin using this medium (Tr. 415:4-10), as well as through an Internet-based phone service (Voice-over IP), *WebEx* (which contains "an instant message type of a chat"), *GoToMeeting,* and instant messaging. (Tr. 416:6-418:23.) Doe 2 uses "a few hundred" online forums to post technical questions and answers. (Tr. 420:11-423:9.) These sites require you to create a profile and some of them allow users to talk to each other "through personal messages." (Tr. 422:23-423:6.)

In addition to his employment, Doe 2 also runs a computer programming and consulting business, including web site design. (Tr. 423:15-425:10.) For some of the web sites he has developed, he is the "guy on the other end" of the "chat window" who assists others. (Tr. 424:17-425:1.) He frequently uses e-mail and text messaging for his consulting work, and 10 to 15 percent of his work is done through instant messaging. (Tr. 425:11-426:8, 442:19-25.) Doe 2 uses *LogMeIn, Remote Desktop Protocol, pcAnywhere, GoToMyPC,* and a virtual private networking product by Cisco to gain remote access to clients' computers. (Tr. 419:2-420:6, 426:16-427:5.)

If Neb. Rev. Stat. § 28-322.05 prohibited Doe 2 from using social networking, such as his company internal web site, instant messaging, or chat room systems, he does not believe his consulting business could survive, and he is not sure how he could function as an employee since his co-workers are in other parts of the country. (Tr. 427:9-428:3, 431:21-433:22.) By not using *Facebook* and *Twitter,* Doe 2 is "really struggling because [he] just can't pull people in." (Tr. 430:10-24.)

Doe 2 also uses *eBay* and *Amazon* to purchase household items and books for his college-aged children, as well as Internet news sites and sites related to sex-offender laws. (Tr. 433:5-22, 439:4-6.) There are several devices in Doe 2's home that connect to the Internet, including several computers, a Blu-ray player, Xbox products (which allow users to connect with other users), and iPods. (Tr. 437:9-438:25.)

10. Doe 24

Doe 24 is on the Nebraska sex-offender registry due to a 2005 conviction for online enticement of a minor and a sentence imposed in 2006 for one year and a day. He was not put on probation or parole for that offense. (Tr. 471:3-25.) Doe 24 was sentenced to 3 to 6 years for a drug offense in October 2010 and was paroled on March 27, 2012. Doe 24's conditions of parole require him to "obey all . . . laws, ordinances and orders" and "permit [his] parole officer and/or personnel of Parole Administration to conduct routine searches of [his] person, residence, vehicle or any property under [his] control, at such times as they deem necessary." (Tr. 450:15-24 & Ex. 210.) Doe 24 is not subject to a special condition of parole that would have required him to "consent to unannounced examination (search) of any and all computer(s) and/or devices to which you have access to." (Ex. 210 at p. 6.)

Doe 24 has a bachelor of science degree in business administration with a focus on management information systems, databases, and entrepreneurship, and he was previously employed as a consultant where he "would either go on site or remotely access [clients'] computers or their servers and resolve any . . . IT need." To gain this remote access, Doe 24 used the Internet and often communicated with "chat features." (Tr. 454:15-25, 455:12-456:25.) He "had full access to router switches, firewalls, servers, desktops, laptops, anything that was connected to the Internet or their network." (Tr. 457:19-23.)

11. Doe 12

Doe 12 operates a specialized software development and computer consulting company for clients around the world. (Tr. 489:10-13.) Because he has clients in Europe, Asia, and South America, he communicates via chat rooms and instant messaging because it would be cost-prohibitive otherwise. (Tr. 490:23-491:9.) He uses *Skype* on a daily basis, which permits communication via typed text, voice-over IP, and video-over IP, as well as *AOL Instant Messenger, Yahoo,* and *Google Talk.* (Tr. 490:23-491:9.) Doe 12 has authored technical books in his field, and as a result has an author page on *Amazon.* (Tr. 496:15-498:6.) *Amazon* allows a person to view his author web site, allows him to view a profile page of

another *Amazon* user, and permits some form of communication between these two profiles. (Tr. 498:7-18.) As with a number of the other Does, he participates in online forums, both as a consumer and as a "guru" providing expert technical data in response to questions. (Tr. 500:2-501:4.)

Doe 12 testified about how difficult it is, from a user's perspective, to know what system or protocol (SMS or Internet) is being used to communicate. For example, when Doe 12 telephones his brother in California, it rings on his brother's computer via *Skype,* leading to the question "where does the phone system end and the Internet and *Skype* begin?" Similarly, a group SMS text sent through Doe 12's Verizon account will automatically convert into an Internet-based MMS (multimedia) message "because Verizon just decided to . . . do that." (Tr. 535:25-537:17.) Doe 12's daughter's cell phone allowed her to "text using SMS to a particular number and then by proxy it would post it off to *Twitter* but the primary mechanism for all of the different clients, whether it be on the web or on my phone . . . is over the Internet Protocol." (Tr. 535:14-23.) In Doe 12's view, *Twitter* falls within the definition of "social networking web site" in Neb. Rev. Stat. § 29-4001.01(13).

When Doe 12's step-daughter and wife were in Wisconsin for two months because of a medical problem, he and his family members used videoconferencing and "most of these technologies" to keep in touch. (Tr. 521:1-16.) He also stated that if Neb. Rev. Stat. § 28-322.05 were to go in to effect, he "would cease to exist" as far as his personal, family, and business lives are concerned. (Tr. 534:21-25.)

C. Defendants' Witnesses

1. Hemanshu Nigam

The defendants' expert witness, Hemanshu Nigam, is the founder and CEO of SSP Blue, an online safety advisory firm that provides strategic business consulting services to corporations and governments on Internet safety, security, and privacy issues. (Ex. 305.) Nigam's experience in the world of Internet security and safety spans more than 20 years, through service as the Chief Security Officer for News Corporation and as an officer involved in Internet security issues at Microsoft, as well as through prosecutorial experience involving online child pornography and child predator and child trafficking cases for the United States Department of Justice and the Los Angeles County District Attorney's Office. (*See* Ex. 305, Curriculum Vitae at pp. 11-15.)

Nigam recognized that "[w]hen the Internet was being created, one of the things that people were trying to do was try to create what's happening in the real world." (Tr. 188:12-14.) For example, an online "chat room," as defined in Neb. Rev. Stat. § 29-4001.01(3), is the equivalent of a "party," or any room with multiple people present, where every person in the room can talk to one another or engage in a more private one-on-one conversation off to the side. (Tr. 193:20-194:3, 253:23-254:3.) Nigam testified that "instant messaging" is the equivalent of a private conversation between two people, with no one else listening. (Tr. 193:5-11, 254:14-18.) Finally, Nigam stated that "social networking web sites" reflect common real-world situations like book clubs or other social settings, where individuals gather with other individuals who are also members of the club or group and share things with each other. (Tr. 253:2-19.)

Nigam disagreed that the statutory terms in Neb. Rev. Stat. § 29-4001.01 could include a vast amount of the Internet. He testified that a "chat room" would not include cellular telephone service because the two operate on different "platforms" (Tr. 199:18-24), nor would it include blog postings. (Tr. 200:8-201:23.) E-mail also would fall outside the definition of chat room because each medium uses a "different language." (Tr. 202:3-7.) Nigam stated that SMS texting would not be included in the definition of "instant messaging" for several reasons—first, SMS texting and instant messaging operate using different protocols (Tr. 189:6-18), and second, the mechanics of delivery of a SMS text message and an instant message differ. A text message "goes to a company that then delivers it to you," while an instant message is sent directly to a recipient, bypassing the service-provider in the middle. (Tr. 191:16-192:12.) Therefore, Neb. Rev. Stat. § 28-322.05 would not prohibit texting. (Tr. 255:15-23.)

Nigam does not believe a "collection of web sites," as used in the definition of "social networking web site" in Neb. Rev. Stat. § 29-4001.01, means properties a company such as *Google* owns; rather, it means "one property and all the different pages that are associated to the site because those are the web pages that are part of that web site." (Tr. 206:17-207:5.) Nigam believes that one does not "use[]" a social networking web site, instant messaging, or chat room service within the meaning of Neb. Rev. Stat. § 28-322.05(1) unless they are engaging in what "all of them require which is communication." (Tr. 219:1-6.)

Regarding the language in section 28-322.05(1) that bars knowing and intentional use of a social networking web site, instant messaging, or chat room service that allows a "person

who is less than eighteen years of age to access or use" it, Nigam stated that as a practical matter, one would need to look daily at the terms of use of those sites and services in order to comply with this statute, but from "a good faith perspective, [he] would be comfortable if somebody checked it the first time they actually registered and start[ed] using it." (Tr. 258:1-260:4.)

2. Scott Haugaard

Scott Haugaard is a 14-year investigator with the Nebraska State Patrol who has worked the last four years with the FBI's Cyber Crimes Task Force. (Tr. 554:12-20.) Haugaard has experience investigating online enticement, child pornography and exploitation, and other crimes against children involving the Internet. (Tr. 555:7-23.)

When assigned to online child enticement investigations, Haugaard would present himself on the Internet as a child and wait for individuals to introduce themselves. (Tr. 569:15-23.) The introduction would frequently occur via instant message through a service like *Yahoo Instant Messenger.* Haugaard also participated in chat rooms. (Tr. 570:3, 571:8, 572:15.) From there, the individuals would begin "grooming" their victims through communication intended to "kindle a friendship" and "build up self-esteem" in their victim. (Tr. 572:19-574:3.) Then, the individual would begin discussing sex and eventually propose a meeting "for the purposes of real physical sex." (Tr. 573:6-8.)

Haugaard testified that having a registered sex offender's e-mail addresses and Internet identifiers, as required by Neb. Rev. Stat. § 29-4006(1)(k) and (s), would allow law enforcement to remotely monitor those addresses and identifiers and link them to a specific person in the event "an investigation started." (Tr. 576:13-21.) Law enforcement officers currently use several programs and software packages that allow officers to "plug in, say, an e-mail address or a[n] instant messenger moniker . . . and identify an individual." (Tr. 577:20-24.) Without this information, law enforcement officers previously could only accomplish this by searching an individual's computer. (Tr. 577:25-578:1.) Haugaard testified that even when law enforcement personnel know a sex offender's e-mail addresses or other online identifiers, any monitoring by law enforcement would not include the content of a registrant's messages or Internet activity, and such identifiers are not made public. (Tr. 576:15, 577:6-8, 578:2-4.)

III. CONCLUSIONS OF LAW

A. Facial and As-Applied Challenges

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (reaffirming the *Salerno* test outside the context of certain First Amendment challenges). This is because facial challenges "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." *Wash. State Grange*, 552 U.S. at 450, 128 S. Ct. 1184 (internal quotation marks omitted).

TCF Nat'l Bank v. Bernanke, 643 F.3d 1158, 1163 (8th Cir. 2011). *See also United States v. Stephens*, 594 F.3d 1033, 1037 (8th Cir. 2010) (discussing facial and as-applied challenges). In the First Amendment context, and as further explained below, facial challenges may be applied when there "is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Roach v. Stouffer*, 560 F.3d 860, 870 n.5 (8th Cir. 2009) (internal quotation marks & citations omitted).

B. First Amendment Challenges to Sections 28-322.05 & 29-4006(1)(k) and (s)

Plaintiffs attack section 28-322.05 because that statute's partial ban on Internet use by certain offenders, upon pain of criminal conviction, violates the plaintiffs' right to free speech under the United States and Nebraska Constitutions. Plaintiffs also challenge sections 29-4006(1)(k) and (s) because the requirement that registrants must disclose information about Internet use violates their right to freedom of speech guaranteed by the First Amendment and the Nebraska equivalent. "The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions." *State v. Hookstra*, 638 N.W.2d 829, 833 (Neb. 2002).

The Supreme Court has made clear that First Amendment protections for speech fully extend to Internet communications, as well as to anonymous speech. *See* *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (explaining that the Internet allows "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox" and that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (stating that "an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment").

States may regulate content-neutral speech[7] (a) if the regulation is narrowly tailored to serve a significant governmental interest *and* (b) if the regulation leaves open ample alternative channels for communication of information. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). It is immaterial that the government's interest might be adequately served by some less-restrictive alternative. *Id.* at 798. *See also* *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) ("To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests.").

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the `evil' it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted). This standard "does not mean that a . . . regulation may burden substantially more speech than is necessary to further the government's legitimate interests. 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. "[H]owever, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800.

> That the Government's asserted interests are important in the abstract does not mean, however, that the [regulation on speech] will in fact advance those interests. When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner, 512 U.S. at 664 (internal quotation marks & citation omitted).

If the challenged statute fails to meet *either* prong of the test—narrow tailoring or failure to leave open ample alternative channels—the statute fails. *See, e.g.,* *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1103 (D. Neb. 1998) ("The ordinance [intended to protect children from graphic visual depictions of aborted fetuses] is not narrowly tailored to serve a constitutionally important government interest. Therefore, it is unnecessary to determine whether the ordinance leaves open ample alternative channels of communication."), *aff'd,* 192 F.3d 1176 (8th Cir. 1999) (finding that because ordinance was not narrowly tailored, ordinance was facially unconstitutional; not considering alternative channels of communication).

At the outset, it should also be noted that the plaintiffs assert, as part of their First Amendment challenge, that the statues are overbroad. In the First Amendment context, overbreadth is a remedial question and not a separate reason for finding that a statute violates the First Amendment.[8] *See, e.g.,* Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto,* 98 Va. L. Rev. 301, 348 (2012) ("The overbreadth invalidation rule *only applies to the remedial question* of whether to invalidate a statute in toto—*not to the initial inquiry into whether a constitutional violation exists under the relevant decision rule.*") (emphasis added).

With these principles in mind, I next turn to an analysis of the challenges to sections 28-322.05 and 29-4006(1)(k) and (s). For the sake of clarity, I analyze each of these two sections separately regarding the plaintiffs' First Amendment challenges.

1. Section 28-322.05

Certain sex offenders who committed crimes against minors are banned from using social networking web sites, instant messaging, and chat room services under section 28-322.05 upon pain of a jail or prison sentence. The age of the triggering conviction does not matter. The fact that the offender has a clear record since the conviction does not matter. The fact that the offender is not under court supervision does not matter. The fact that the offender legitimately needs access to the banned sites to make his or her living does not matter. The fact that the offender legitimately needs access to the banned sites to obtain news that probably cannot be obtained in another way does not matter. The fact that the offender legitimately needs access to the banned sites to check on the health and well-being of his

children while they are in a distant hospital does not matter. The fact that the offender did not use any of the banned sites to commit his or her crime does not matter.

In relevant part, the statute reads as follows:

> Any person required to register under the Sex Offender Registration Act who is required to register because of a conviction for one or more of the following offenses, including any substantially equivalent offense committed in another state, territory, commonwealth, or other jurisdiction of the United States, and who knowingly and intentionally uses a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use its social networking web site, instant messaging, or chat room service, commits the offense of unlawful use of the Internet by a prohibited sex offender: [listing offenses].

Neb. Rev. Stat. § 28-322.05(1).

The plaintiffs admit that the State has a significant, even compelling, government interest in protecting minors online from sex offenses. Indeed, there is no doubt that minors access certain sites quite heavily. *See, e.g.,* J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 951 (3rd Cir. 2011) (en banc) (Judge Fisher, with Scirica, Rendell, Barry, Jordan, and Vanaskie dissenting) ("Twenty-three percent of teenagers between the ages of 12 and 17 who own cell phones use them to access social networking sites like MySpace and Facebook.") (citation omitted). Nonetheless, the plaintiffs forcibly argue that section 28-322.05 suppresses too much speech—that is, the statutes limit use of the "most popularly used mediums used in everyday life for all types of communication." (Filing 496, Pls.' Trial Br. at CM/ECF p. 13.)

After very careful deliberation, I decide that Neb. Rev. Stat. § 28-322.05 is not narrowly tailored. I also decide that the statute does not leave open ample alternative channels for communication of information. Recognizing that either decision is enough to invalidate the statute, I next explain my reasoning.

a. Narrow Tailoring

Whatever else the words of Neb. Rev. Stat. § 28-322.05 might mean, it is undisputed that those words ban the offenders described in the statute from using ubiquitous utilities such as *MySpace, Facebook, Skype, Twitter, Windows Live Messenger,* and *Google+*[9] together with a large number of other utilities. In order to understand the significance of the ban, it is important to understand the size and overarching presence of "social networking web sites" and "instant messaging" and "chat room" services on the Internet. Consider the following:

> * "By the end of 2008 and the start of 2009, social networking became even more popular than e-mail." Geelan Fahimy, *Liable for Your Lies: Misrepresentation Law as a Mechanism for Regulating Behavior on Social Networking Sites,* 39 Pepp. L. Rev. 367, 384 (2012).
>
> * Social networking sites are now used by all demographic groups—one study in 2010 showed that "forty-seven percent of Internet users aged fifty to sixty-four years old and twenty-six percent of those over sixty-five use social networking sites." *Id.* at 385.
>
> * *MySpace* has over 100 million users, and 50% of those are outside the United States. *Id.* at 386.
>
> * In May of 2012, *Facebook* had 901 million monthly active users, 3.2 billion "likes and comments" per day, 300 million photos uploaded per day, and 125 billion "friendships." Facebook, Inc., *Amendment 6 to Form S-1,* filed with Securities Exchange Commission (May 9, 2012) (p. 5 of 227) (graphic on table-of-contents page).[10]
>
> * *Skype,* which is now owned by Microsoft, had 170 million users and over 207 billion minutes of voice and video conversations in 2010. Microsoft News Center, *Microsoft to Acquire Skype* (May 10, 2011).[11] In late 2012 or 2013, *Skype* will become part of Microsoft "Office." Microsoft News Center, *Microsoft unveils the new Office* (July 16, 2012).[12] Microsoft "Office," a suite of applications including *Word, Excel,* and *PowerPoint,* has over a billion users worldwide. Ionut Arqhire, *Microsoft's Office Has over One Billion Users,* Softpedia (July 10, 2012).[13]
>
> * As of February 2012, 15% of online adults use *Twitter,* and 8% do so on a typical day. Pew Research Center, *Twitter Use 2012* (May 31, 2012).[14]

* As of February 2010, *Windows Live Messenger* was used by 300 million people in 76 countries, and that use produced 1.5 billion conversations and 9 billion messages per day. Jeff Kunins, *Windows Live Messenger* (Feb. 9, 2010).[15]

* In just over a year since its release, 400 million people have installed *Google+* and 100 million of those use the utility monthly. Vic Gundotra, *#googleplusupdate* (Sept. 17, 2012).[16]

* Thirty-six percent of American social networking web site users believe that the sites are "very important" or "somewhat important" to them in keeping up with political news. Pew Research Center, *Politics on Social Networking Sites* (Sept. 4, 2012).[17] For example, the 2012 "Republican convention alone drew 5 million tweets." Beth Fouhy, *For conventions, TV viewing down, social media up,* Associated Press (Sept. 4, 2012).[18]

* Of the 500 fastest growing companies in America, 74% of those companies use *Facebook.* Nora Ganim Barnes, Ph.D. & Ava M. Lescault, MBA, *The 2012 Inc. 500 Social Media Update: Blogging Declines as Newer Tools Rule,* UMass Dartmouth.[19] Of Fortune 500 companies, 62% have active *Twitter* accounts and 58% have a *Facebook* page. Shelly Kramer, *How Fortune 500 Companies Use Social Media,* V3 Integrated Marketing (May 28, 2012).[20]

So far as the scope of the statute is concerned, this ban precludes the offenders described in the statute from using an enormous portion of the Internet to engage in expressive activity. No reasonable person could deny that fact. The ban not only restricts the exchange of text between adults; it also restricts the exchange of oral and video communication between adults. Moreover, the ban potentially restricts the targeted offenders from communicating with hundreds of millions and perhaps billions of adults and their companies despite the fact that the communication has nothing whatsoever to do with minors.

(i) Ban Not Dependent Upon Past Use of Social Utilities

Critically, the ban is not contingent upon the past use of the banned utilities to prey upon minors. To be specific, the ban does not require a showing that the offender used social networking web sites, instant messaging, or chat room services to prey upon children.[21] Nor does it require a showing that the offender poses a present threat to use those utilities to get at children. On the contrary, the ban is triggered by the commission of a crime against children (often committed in the far-distant past) that may be entirely unrelated to whether the offender used (or threatens to use) a social networking web site, instant messaging, or chat room service to victimize minors.

In other words, the statute is not narrowly tailored to target those offenders who pose a factually based risk to children through the use or threatened use of the banned sites or services. The risk posited by the statute is far too speculative when judged against the First Amendment. The broad scope of the ban is a fatal deficiency. *See, e.g.,* *Doe v. Jindal,* 853 F. Supp. 2d 596, 607 (M.D. La. 2012) (holding Louisiana's statute precluding registered sex offenders from using or accessing social networking sites, chat rooms, and peer-to-peer networks unconstitutional; "The sweeping restrictions on the use of the internet for purposes completely unrelated to the activities sought to be banned by the Act impose severe and unwarranted restraints on constitutionally protected speech. More focused restrictions that are narrowly tailored to address the specific conduct sought to be proscribed should be pursued."); Note, Jasmine S. Wynton, *My Space, Your Space, But Not Their Space: The Constitutionality of Banning Sex Offenders from Social Networking Sites,* 60 Duke L.J. 1859, 1888-1889 (2011) ("There are less restrictive ways of serving states' compelling interest than such blanket prohibitions. . . . [S]tates can narrow the application of social-networking-site bans to only those sex offenders who used the Internet or social networking sites in the commission of their underlying offenses. Indeed, some states have taken this more narrowly tailored approach.").

I am aware of *Doe v. Prosecutor, Marion Cnty.,* No. 1:12-cv-00062, 2012 WL 2376141 (S.D. Ind. 2012) (holding that Indiana's ban on accessing social networking sites, instant messaging services, and chat room services by certain sex offenders did not violate First Amendment). With respect, and for numerous reasons, I am not persuaded by that decision. I will highlight only one point to illustrate my view that the Indiana judge's reasoning throughout the opinion is weak.

Central to the judge's ruling was a curious statement. The judge wrote that "Mr. Doe's argument is important for what it does *not* say. Tellingly, Mr. Doe never furnishes the Court with workable measures that achieve the same goal. . . ." *Id.* at *7 (emphasis in original).

Setting to one side the dubious proposition that a plaintiff making a First Amendment challenge is obligated to inform the state how to write a statute in conformity with the Constitution, there is a very easy answer to the judge's rhetorical flourish. That is, the constitutional response to the judge's concern is to narrow the statute to those who have preyed upon children using the banned sites. *Plainly put:* Concentrate on demonstrated risk rather than speculating and burdening more speech than is necessary—use a scalpel rather than a blunderbuss. For reasons that are unclear, the judge wholly ignores this seemingly obvious point.

In summary, the statute "burden[s] substantially more speech than is necessary to further the government's legitimate interests. 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. The statute therefore violates the First Amendment.

(ii) Ban Expansive And Vague

But that does not end the First Amendment concern. There is another sense in which the statute is not narrowly tailored and therefore violates the First Amendment's guarantee of free speech. The statute is so expansive and so vague that it chills offenders and their associates, including individuals and entities not before the court, from using those portions of the Internet that the defendants claim are open to them. Those twin deficiencies violate the First Amendment (as well as the Due Process Clause).

Expansively written laws designed to protect children are *not* exempt from the constitutional requirement of clarity under both the First Amendment and the Due Process Clause:

> Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-872, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). Vague laws force potential speakers to "`steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), "government may regulate in the area" of First Amendment freedoms "only with narrow specificity," *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); see also *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). *These principles apply to laws that regulate expression for the purpose of protecting children.* See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2743 (2011) (holding ban on sale of violent video games to minors violated the First Amendment) (Justice Alito, with Chief Justice Roberts, concurring) (emphasis added).

Several examples are illustrative of the expansive nature of the statute and its lack of clarity. I will start with a fairly simple example of the problem using "text messages" and "instant messaging" as the focal point. I will then proceed to use the defendants' proposed narrowing constructions to further highlight the lack of clarity.

The statute states that an offender covered by the statute may not "use" an "instant messaging" service. "Instant messaging" is then defined as "a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions or computer file attachments to other selected users of the service through the Internet or a computer communications network." Neb. Rev. Stat. § 29-4001.01(11). The defendants claim that "text messages"—as opposed to "instant messages"—are not covered because those messages are not sent and received "virtually instantaneously." If "text messages" are covered, that would pose an insurmountable burden for the defendants to overcome because there are literally billions of text messages sent every day in the United States.[22]

Put aside, for the moment, the ambiguity of the words "virtually instantaneous." Assume, for the sake of argument, that I conclude that "text messages" are not covered by the statute because the exchange between the sender and the recipient is not "virtually instantaneous." Nevertheless, there remains a big problem.

Although the defendants are apparently unaware of the technology, "text messages" can be sent and received by instant messaging services such as *Google Talk, Windows Live Messenger,* and *Yahoo Messenger. See* Brandon De Hoyos, *8 Free Text Messaging Services, Apps*[23]; David Pogue, *The Disruptive Power of iMessage,* N.Y. Times (Mar. 22, 2012) ("It started with iMessages, an iPhone/iPad app that lets you send text messages between Apple hand-held gadgets without cost. Instead of using the cellphone network (and paying 20 cents each or whatever), texts you send using this little app get sent across the Internet, costing you pretty much nothing.").[24] Indeed, there is an economic incentive to use an instant messaging service to send text messages—they are "free." Does an offender who knowingly and intentionally "uses" an "instant messaging" service *only* for the purpose of sending or receiving "text messages" commit a crime? The defendants do not know, and neither do I.[25]

(iii) Proposed Narrowing Constructions Further Illustrate Vagueness

The defendants have proposed a number of limiting constructions in apparent recognition that the statute is both overbroad and vague. They are:

> 1. "Collection of web sites," as used in the definition of "social networking web site," Neb. Rev. Stat. § 29-4001.01(13), includes only those URLs (Uniform Resource Locators) that share common domain names, but contain different directories or subdirectories. For example, www.espn.com and www.davidpost.com would not be part of the same "collection of web sites," but www.davidpost.com/about and www.davidpost.com/publications would be because they "share the same top-, second-, and third-level domain names and differ only with respect to the directories included to the right of the top-level domain name." (Filing 522 at CM/ECF p. 24.)
>
> 2. Whether a social networking web site, instant messaging, or chat room service "allows" a minor to access or use the site or service in section 28-322.05(1) includes "only those that expressly say so in their terms of use." (Filing 522 at CM/ECF p. 25.) The State maintains that each time a registered sex offender attempts to use a site or service, he or she must view the site's terms and conditions of use. If the site expressly limits use of its services to those 18 or older, section 28-322.05 would not prohibit use of the site; if the terms of use allow those 13 or older to use the site, section 28-322.05 would prohibit use of the site; and if the terms of use are silent as to the age of its users, "the registered sex offender could not be guilty of `knowingly and intentionally' using such a site, the mens rea required under Neb. Rev. Stat. § 28-322.05." (Filing 522 at CM/ECF p. 26.)
>
> 3. A registered sex offender does not "use" a prohibited site or service under section 28-322.05 unless the offender "communicates with another person on the site or service." Therefore, "[m]erely accessing a site to read the terms of use, or to read content on a page, would not constitute `use' prohibited under the language of the statute." (Filing 522 at CM/ECF p. 28.)
>
> 4. "Virtually instantaneous" for purposes of the definitions of "chat room" and "instant messaging" in Neb. Rev. Stat. § 29-4001.01(3) and (10) means "real time." (Filing 522 at CM/ECF p. 29.) Therefore, e-mail would not be encompassed within those definitions because "the provider stays in the middle of that transaction" and "holds the communication . . . until somebody on the other side decides to go get it." (Tr. 192:13-16.)

As an initial matter, I reject these proposed limiting constructions because the statute is not "readily susceptible" to the proposed interpretations. To be specific, the constructions are not "reasonable" or "readily apparent" from the language and history of the statute.

> A limiting construction cannot be supplied unless an ordinance is "readily susceptible" to such an interpretation, *see* *State of Va. v. Am. Booksellers Ass'n,* 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988), because federal courts "lack jurisdiction authoritatively to construe state legislation." *Gooding v. Wilson,* 405 U.S. 518, 520, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972), *quoting* *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971). Limiting constructions of state and local legislation are more appropriately done by a state court or an enforcement agency. *Ward v. Rock Against Racism,* 491 U.S. 781, 795-96, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

Ways v. City of Lincoln, 274 F.3d 514, 519 (th Cir. 2001). *See also United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (in applying limiting construction, court will not rewrite law to conform it to constitutional requirements because it would "constitute a serious invasion of the legislative domain" and "sharply diminish" the legislative body's "incentive to draft a narrowly tailored law in the first place") (internal quotation marks & citations omitted); *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988) (although federal courts are "generally without authority to construe or narrow state statutes," courts may adopt party's limiting construction if that construction is "reasonable and readily apparent" from language and legislative history of statute).

Nonetheless, these proposed limiting constructions are good examples of the expansive and vague nature of the statute. Without intending to cover each of the problems with these constructions, I will examine each construction in turn to illustrate my concerns.

The first proposed construction relates to the definition of "social networking web site" and "collection of web sites" and, frankly, it is among the most forceful examples of the vagueness of the statute. It proposes to define a "collection of web sites" to mean sites that share common domain names, but contain different directories or subdirectories—that is, sites that "share the same top-, second-, and third-level domain names and differ only with respect to the directories included to the *right* of the top-level domain name." (Emphasis added.) While I cannot fathom how anyone could have derived this limiting construction from the words of the statute or its history, and while it is apparent that the construction derives from the exigencies of this litigation rather than the words and history of the statute, the construction itself perfectly shows the lack of clarity.

What if one of the "directories" in a "collection of web sites" were to the *left* of the "top-level domain name" as with some *Google* products?[26] Even more confusingly, what if you could access a seemingly innocuous "homepage" such as *iGoogle,* with a "directory" to the *right* of the "top-level domain name," but that access would seamlessly take you to a site with a "directory" to the *left* of the "top-level domain name" such as *Google+, Google's "Facebook*" equivalent?[27] These are perfectly genuine questions for which the proposed construction, and the defendants, provide no answer.

The second proposed construction is a good example of this confusion as well. That construction purports to limit the word "allows" to the "terms of use" of the respective sites. It therefore delegates to a private party the meaning of the word "allows." This construction also ignores the fact that web sites may violate their own terms of use and knowingly "allow" children to use the web site despite the terms of use. *See, e.g., Xanga.com to Pay $1 Million for Violating Children's Online Privacy Protection Rule* (Federal Trade Commission Press Release, Sept. 7, 2006).[28] Keying on the vendor's terms, rather than what takes place in practice, this proposed construction is flatly inconsistent with the plain meaning of the word "allows." Still further, the second proposed construction imposes upon the offender the obligation to read and understand[29] the vendor's terms-of-use policy *each* time the offender uses the site.[30] Importantly, this construction also fails to acknowledge that the "terms of use" may be worded in such a way as to permit change without notice. In effect, defense counsel propose that the word "allows" in the statute means whatever *Google* or some other vendor says it means from one minute to the next.

The third proposed construction also proves the lack of clarity. It suggests that "use" requires that the offender "communicate[] with another person on the site or service." What if the offender registered with *Google+* and publicly posted a profile that invited business people to contact the offender at his business telephone number or business address, but the offender never had a "chat" on *Google+* or sent a text or instant message through *Google+* or responded to such a message in *Google+*? Has the offender "used" *Google+*? Again, the defendants have no answer to this basic question, and neither do I.

Without intending to be unkind, the fourth suggested construction is laughable. It states that "virtually instantaneous"—for purposes of "instant messaging" services or "chat rooms"—means "real time." What, in the world, does "real time" mean? Particularly when it comes to "text messages" sent through "instant messaging" services, the substitution of the words "real time"[31] for "virtually instantaneous" is of no help whatever in clarifying the glaring ambiguity in the statute. The proposed construction is very much like a dog chasing its tail—the dog and the tail simply turn in a humorous circle.

While there are numerous other examples of the incoherence of the statute,[32] the foregoing examples make the point starkly. The statute is expansive and unclear, even after good defense lawyers tried to make sense out of it. In short, it is not "narrowly tailored."

b. Ample Alternative Channels

Although the foregoing finding on "narrow tailoring" is enough to invalidate the statute, the plaintiffs also assert that the challenged statutes do not leave open comparable alternative channels of communication. "By completely foreclosing the popular and ubiquitous mediums of social networking websites, chat rooms, and instant message systems, there are insufficient remaining avenues of communication for speech on the Internet and in society." (Filing 496 at CM/ECF pp. 14-15.) The defendants respond that the use of the Internet is not entirely foreclosed. Frankly, this is a little like banning the use of the telephone and then arguing that First Amendment values are preserved because the user can (perhaps) resort to a walkie-talkie.

As a general matter, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). More specifically, the Supreme Court has said that even when the government has a compelling interest in restricting one channel of speech, there must be "*ample* alternative channels" left open. *Ward*, 491 U.S. at 791 (emphasis added). The Supreme Court uses the word "ample" not as an afterthought, but as a real safeguard. *See, e.g., Linmark Assoc., Inc. v. Willingboro Tp.*, 431 U.S. 85, 93 (1977) (township ordinance prohibiting posting of real estate "For Sale" and "Sold" signs for purpose of stemming what township perceived as flight of white homeowners from racially integrated community violated First Amendment because alternative methods of communication, which involved more cost and less autonomy than signs and were less likely to reach persons not deliberately seeking sales information, were insufficient).

Two examples illustrate why the statute does not leave open "ample" alternative channels. One example is taken from the headlines of a recent tumultuous and fast-moving international event. The other is taken from an event that has importance only to those few who are participants, but to those folks, the incident has great significance.

First, assume for a moment that an offender subject to the ban wanted "up-to-the-minute" information on the demonstrations that took place during the "Arab Spring." Perhaps the offender's family came from the Middle East. Perhaps the offender had family still living in that region. Perhaps the offender's relative was caught up in the turmoil. "*Twitter* and *Facebook*" played "a pivotal role in broadcasting information from inside the demonstrations in Cairo's Tahrir Square and elsewhere. . . ." Jillian C. York, *The Revolutionary Force of Facebook and Twitter,* Neiman Reports (Fall 2011).[33] Under Nebraska's ban, the offender is barred from receiving this information from *Twitter* and *Facebook*—news that might not be available from any other source—even though the hunger for that news poses no threat to children.

Second, when Doe 12's step-daughter and wife were in Wisconsin for two months because of a medical problem, he and his family members used videoconferencing to keep in touch. Put yourself in the position of an offender and imagine if your child was in a distant hospital and you could not use *Skype* to talk, see, text, and instant message with her. There is simply no alternative channel—let alone an "ample" alternative—to monitor the child's health and well-being.

In sum, if the statute were narrowed to those offenders who committed their crimes using one of the apparently banned utilities, and if the statute were purged of its breadth and vagueness, Nebraska could still allow an offender the opportunity to use utilities like *Facebook, Twitter,* and *Skype* upon the offender's truly voluntary consent to the installation of monitoring hardware and software. By doing so, Nebraska could cure the "narrowing" problem while leaving open sufficient alternative channels of communication. There is not the slightest reason to believe that such a targeted solution would be insufficient to address Nebraska's legitimate, rather than speculative, concerns for children.

c. Overbreadth Challenge

A regulation prohibiting "a broad range of protected expression may be facially challenged as overbroad." *Ways v. City of Lincoln*, 274 F.3d 514, 518 (8th Cir. 2001). The overbreadth doctrine "enables litigants `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 protected speech or expression.'" *Hill v. Colorado*, 530 U.S. 703, 731-32 (2000) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)) (emphasis added).

> Under the overbreadth doctrine, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face `because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so.'" *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987), *quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491,

> 503, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). . . . The overbreadth doctrine is "strong medicine" to be used "sparingly" and only when the overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

Ways, 274 F.3d at 518.[34]

"The 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). Section 28-322.05(1) makes it a crime for registered sex offenders to "knowingly and intentionally use[] a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use" the site or service. Section 29-4001.01 defines "social networking web site," "instant messaging," and "chat room," but "access or use" is undefined.

To put it bluntly, and as evidenced by the testimony described above, as well as the previous legal analysis, no one can truly know "what the statute covers." *Williams*, 553 U.S. at 293. The statute is simply not amendable to a reasoned construction. As Professor Post[35] explained in great detail, the terms used in section 28-322.05(1) are ambiguous, and the definitions provided in section 29-4001.01 either cover "almost everything on the Net" or "might cover virtually nothing on the Internet." (Tr. 74:17-21.) The best I can say is that the statute bars the offenders subject to the statute from having on their computers or communication devices utilities such as *MySpace, Facebook, Skype, Twitter, Windows Live Messenger,* and *Google+.*

Whatever the words of section 28-322.05 were intended to mean, it is clear that the language is properly interpreted to "criminalize[] a substantial amount of protected expressive activity," *Williams*, 553 U.S. at 297—from associating with friends, family, and business associates over the Internet (the most common method of association in the modern age) to communicating with consumers, customers, or manufacturers regarding a commercial product or service, to posting and discussing one's political opinions on an interactive blog or news web site. The ban reaches far beyond the individualized concerns of the plaintiffs.

In summary, Neb. Rev. Stat. § 28-322.05 is overbroad under the First Amendment. It is therefore facially unconstitutional.

2. Section 29-4006(1)(k) and (s)

This statute requires that *every offender* (without regard to the offense of conviction) provide the State with:

> (k) The person's remote communication device identifiers and addresses, including, but not limited to, all *global unique identifiers,* serial numbers, *Internet protocol addresses,* telephone numbers, and account numbers specific to the device;[36]
>
> . . . .
>
> (s) All email addresses, instant messaging identifiers, chat room identifiers, *global unique identifiers,* and other Internet communication identifiers that the person uses or plans to use, all domain names registered by the registrant, and all blogs and Internet sites maintained by the person or to which the person has uploaded any content or posted any messages or information.[37]

Even severing the admittedly unconstitutional portions of this statute from the remainder of the statute, I find and conclude that these portions of the statute violate the First Amendment. Much of the case law applicable to this statute has been set out above, and I will not repeat or discuss it again.

Any suggestion that the required information is not itself "speech" disregards the fact that "[a] nonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357 (holding that Ohio's statutory prohibition against distribution of any anonymous campaign literature violated First Amendment) (citations omitted). With the importance of anonymity in mind, I turn to the substance.

The statute clearly chills offenders from engaging in expressive activity that is otherwise perfectly proper, and the statute is therefore insufficiently narrow. There are several ways this occurs.

If the offender has an e-mail address, for example, and he provides his e-mail address to the State as required by Neb. Rev. Stat. § 29-4006(1)(s), he must also consent to a search of his computers and electronic communication devices in his home and elsewhere.[38] Thus, any offender who does so much as send an e-mail message to his member of Congress is faced with the real possibility that the police will come into his home without a warrant to search his computer. In other words, the offender is forced to choose between his First Amendment rights and his Fourth Amendment rights. Many a rational offender will give up a computer and the ability to express himself on the Internet to remain secure in his home. Unless the statute is properly narrowed, the Constitution does not require offenders to give up their First Amendment rights in order to preserve their Fourth Amendment rights.

There is also another way the statute improperly chills too much speech. The questioned statute requires the offender to inform the State about "*all blogs and Internet sites maintained by the person or to which the person has uploaded any content or posted any messages or information*." (Emphasis added.) Simply put, the statute requires offenders to tell the government if the offender has his own Internet site or blog and when and where the offender has expressed himself on that site or blog or any other blog.[39]

The Internet, and blogs in particular, allow "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox," and the precedents from the Supreme Court "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. at 870. Blogs frequently, and perhaps mostly, involve discussion of matters of public concern. Blogs 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. In particular, it substantially deters offenders from criticizing the government and officials of the government, including most especially overzealous prosecutors and cops.

The same thing is true of "Internet sites maintained" by the offender. A site publicly available on the Internet poses no threat to children—after all, every police officer in the world can see it. But the requirement that offenders report to the police regarding the material they post to Internet sites they operate will surely deter offenders in business[40] from maintaining such sites. In short, far too much expressive activity is unnecessarily chilled by this part of the statute.[41]

Let me be concrete. Two examples will serve that purpose.

First, assume Doe has a business selling "widgets." To promote his business, Doe has an Internet site entitled "Doe's Widgets." Because the market for "widgets" is driven largely by price and prices fluctuate daily, and because Doe has a sweet deal with a manufacturer, he markets his "widgets" by claiming to beat anyone's prices. Each day, as the market fluctuates, Doe uploads a new price sheet with that day's "best" prices. He also frequently adds testimonials from companies that have bought his "widgets." Doe processes orders on the site and responds to customer complaints.

Under the statute, each time Doe would try to market his "widgets" on his Internet site by adding content to the site, he would be obligated to tell Nebraska when and where he made that effort. He would be obligated to do that notwithstanding the fact that Nebraska could, if it drafted a statute that conformed with SORNA [the federal Sex Offender Registration and Notification Act], require Doe to give Nebraska his Internet address. Nebraska could then do its own due diligence. Far too much speech is unnecessarily burdened by the requirement that Doe report his daily business activity to the government.

Second, assume Doe is also a critic of Nebraska's Attorney General. Assume additionally that there is a law professor who maintains a blog to discuss the activities of the various state Attorneys General. The professor calls the blog "Eyes on AGs." On a daily basis, Doe has an interactive exchange, in the comment section of "Eyes on AGs," with adults who discuss their thoughts about Nebraska's Attorney General or some other Attorney General. Every time Doe adds something to the law professor's blog, Doe must tell the Nebraska State Patrol or the local sheriff that he has done so. Again, far too much speech is unnecessarily burdened by the requirement that Doe report to the government his daily political activity on blogs.

To be clear, requiring Internet identifiers and addresses, including designations for purposes of routing or self-identification, as permitted by the federal Attorney General's Guidelines, is one thing.[42] Requiring sex offenders to constantly update the government about when and where they post content to Internet sites and blogs is an entirely different thing. This is true both because the requirement is unnecessarily burdensome and because the requirement is likely to deter the offender from engaging in speech that is perfectly appropriate. *See, e.g.,*

White v. Baker, 696 F. Supp. 2d 1289, 1310 (N.D. Ga. 2010) (holding that Georgia's blog reporting requirement violated the First Amendment).

One other item is especially worth mentioning. Assistant Attorney General Corey O'Brien was the principal architect of LB 97, and in December 2008, he indicated in an e-mail to Senator Lautenbaugh that although he "would personally like to prevent [persons with prior sex offenses] from using the internet altogether, that would be unconstitutional. However, depriving them from accessing certain parts of the internet is perfectly constitutional." (Ex. 199.) Given the overly burdensome nature of the Internet and blog-uploading reporting requirement and this e-mail, there is good reason to believe that Nebraska tried to do indirectly what it could not do directly.

Finally, for the reasons I have just expressed, section 29-4006(1)(k) and (s) is plainly overbroad under the First Amendment. Most offenders are likely to use the Internet whether they are parties to this litigation or not. Virtually all such offenders are subject to this provision of the law. Therefore, I declare these provisions of the statute facially unconstitutional.

C. Due Process (Vagueness) Challenge to Section 28-322.05[43]

A criminal statute fails to comport with due process if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010); *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). "An overly vague statute `violates the first essential of due process of law,' because citizens `must necessarily guess at its meaning and differ as to its application'." *United States v. Bamberg*, 478 F.3d 934, 937 (8th Cir. 2007) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

When a law affects "core First Amendment speech," a law's failure to provide fair notice of what constitutes a violation is "a special concern" because it "inhibit[s] the exercise of freedom of expression and inevitably lead[s] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Stahl v. City of Saint Louis*, 687 F.3d 1038, 1041 (8th Cir. 2012) (finding facially unconstitutional under Due Process Clause city ordinance that prohibited expressive activity that had consequence of impeding pedestrians or vehicular traffic because ordinance failed to provide fair notice of prohibited conduct and excessively chilled protected speech) (internal quotation marks & citation omitted).

> Speech is an activity particularly susceptible to being chilled, and regulations that do not provide citizens with fair notice of what constitutes a violation disproportionately hurt those who espouse unpopular or controversial beliefs. *See NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) ("These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

Stahl, 687 F.3d at 1041-42.

"There is a two-part test to determine whether a statute is void for vagueness. The statute, first, must provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement." *United States v. Bamberg*, 478 F.3d at 937. (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). *See also State v. Rung*, 774 N.W.2d 621, 632 (Neb. 2009) ("The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). "Statutes are to be evaluated under these standards using principles of flexibility and reasonable breadth." *Agena v. Lancaster Cnty. Bd. of Equalization*, 758 N.W.2d 363, 374 (Neb. 2008).

The fact that a court can envision "hypotheticals" and "close cases" does not "render[] a statute vague" because "[c]lose cases can be imagined under virtually any statute. The problem that poses is addressed[] not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 305-06. Importantly, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.*

As I discussed regarding the plaintiffs' First Amendment challenge, section 28-322.05 is hopelessly indeterminate as to what it prohibits. There is no need to regurgitate the numerous examples of this indeterminacy that I discussed earlier. It is enough to state, by

way of reminder, that (1) no one knows what a "collection of web sites" is, and without that understanding, the whole of the Internet could be banned; (2) Mr. Nigam, the defendants' expert and a former prosecutor, did not understand the difference between the words "access or use" set forth in the statute when assessing whether minors were involved with Internet sites, although he assumed that the writer of the statute thought those two words meant different things; and (3) Nigam essentially testified that one would have to rely upon the good faith of prosecutors to cure the vagueness problem inherent in the State's reliance upon a vendor's terms-of-use policy, a policy that might change from moment to moment without notice.

In summary, section 28-322.05 is facially unconstitutional because it is vague under the Due Process Clause.

D. Ex Post Facto Challenge to Sections 29-4006(1)(k) and (s), 29-4006(2) & 28-322.05

The next issue for resolution is whether Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), 29-4006 (2), and 28-322.05 (West, Operative Jan. 1, 2010), alone or collectively, facially or as applied, violate the Ex Post Facto Clause of the United States and Nebraska Constitutions for (1) offenders who had served their time and were no longer under criminal justice supervision on January 1, 2010[44]; and (2) offenders who had been sentenced prior to January 1, 2010, but who remained under criminal justice supervision on or after January 1, 2010.[45]

As I explained in my previous memorandum and order on the parties' motions for summary judgment, "[a] law violates the Ex Post Facto Clause when it applies to events occurring before the law's enactment and the law disadvantages the offender, such as by practically increasing the punishment the offender was subject to on the date of enactment." (Filing 354, CM/ECF p. 13 n.16.) *See* U.S. Const. art. I, § 10, cl. 1; Neb. Const. art. I, § 16. While Plaintiffs challenge the statutes under both the United States and Nebraska Constitutions, I must "undertake only a single analysis because [the Nebraska Supreme Court] ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution." *Slansky v. Nebraska State Patrol*, 685 N.W.2d 335, 350 (Neb. 2004).

The question whether the statutes at issue "violate[] state and federal constitutional proscriptions against retroactive punishment is analyzed under the U.S. Supreme Court's two -prong, `intent-effects' test for analyzing punishment." *State v. Worm*, 680 N.W.2d 151, 160 (Neb. 2004) (citing *Smith v. Doe*, 538 U.S. 84 (2003)). Under this test, "[i]f the intention of the legislature was to impose punishment, that ends the inquiry." *Smith*, 538 U.S. at 92. If, however, "a court determines that the Legislature intended a statutory scheme to be civil, that intent will be rejected `only where a party challenging the [statute] provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.'" *Worm*, 680 N.W.2d at 160 (quoting *State v. Isham*, 625 N.W.2d 511, 515 (Neb. 2001)); *see also Doe v. Miller*, 405 F.3d 700, 718 (8th Cir. 2005) (ex post facto analysis in case challenging constitutionality of state statute imposing residency restrictions on sex offenders).

Deciding whether a statutory scheme is civil and nonpunitive, as opposed to criminal, "is first of all a question of statutory construction" which requires the court to "consider the statute's text and its structure to determine the legislative objective." *Smith*, 538 U.S. at 92 (internal quotation marks & citations omitted). This involves considering whether the legislature expressly or impliedly indicated a civil or criminal preference; the manner of statutory codification; the enforcement procedures the statutes establish; and the procedural mechanisms that will implement the statutes. *Smith*, 538 U.S. at 93-96.[46]

If the court decides that the legislature intended to create a civil, nonpunitive statutory scheme, the court must then determine whether the effect of a statute is so punitive as to negate the legislature's intent. To do so, a court should observe several factors that are neither exhaustive nor dispositive, but rather serve as "useful guideposts." *Smith*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)) (internal quotation marks omitted):

> "(1) `[w]hether the sanction involves an affirmative disability or restraint'; (2) `whether it has historically been regarded as a punishment'; (3) `whether it comes into play only on a finding of *scienter*'; (4) `whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) `whether the behavior to which it applies is already a crime'; (6) `whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) `whether it appears excessive in relation to the alternative purpose assigned.'"

Worm, 680 N.W.2d at 161 (quoting *State v. Isham*, 625 N.W.2d 511, 515-516 (Neb. 2001), quoting *Hudson v. United States*, 522 U.S. 93 (1997), quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)); *see also Doe v. Miller*, 405 F.3d at 719 (while *Kennedy v. Mendoza-Martinez* factors are aid to analysis, the "ultimate question always remains whether the punitive effects of the law are so severe as to constitute the `clearest proof' that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose *ex post facto* punishment").

Thus, I must decide whether (1) the Nebraska Legislature intended to maintain a civil regulatory scheme in enacting Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), 29-4006(2), and 28-322.05 and, if so, (2) whether the plaintiffs have established by the "clearest proof" that the effects of the statutory language at issue negate the Nebraska Legislature's intent to create a civil, nonpunitive statutory scheme.

I decide that the intent of the Nebraska Legislature was to punish sex offenders, and these laws therefore violate the Ex Post Facto Clause of the United States Constitution, as well as the equivalent Nebraska provision. That is, these laws are facially unconstitutional regarding (1) offenders who had served their time and were no longer under criminal justice supervision on January 1, 2010; and (2) offenders who had been sentenced prior to January 1, 2010, but who remained under criminal justice supervision on or after January 1, 2010.

The statements of the introducer of the bills, coupled with the text, structure, and history of these laws, including the enforcement procedures and the procedural mechanisms that serve to implement the laws, make this evident. Next, I explain this decision in more detail.

First, if I am to do my job as a judge (and particularly as a finder of fact), I must not shrink from the truth. The truth is that the hand-picked introducer of the bill that spawned these extraordinary statutes, acting at the behest of the chief law enforcement officer for Nebraska, the Attorney General, essentially admitted the punitive intent of these provisions. He admitted that he lacked objectivity, and he admitted that he was driven by "rage" at, and "revulsion" for, the sex offenders who were the targets of these extraordinary measures. The senator could not have been more plain.

In this vein, when the plaintiffs sought to depose Nebraska legislators on this very topic, the Nebraska Attorney General's office, the body defending the litigation while at the same time serving as the moving force behind these laws, successfully asserted legislative privileges to thwart the plaintiffs' effort to get at the truth. While the defendants and their lawyers were entitled to invoke these privileges, and while this court was duty-bound to apply the law of privilege, the defendants cannot now claim that the evidence is lacking regarding the true motives of the law-makers. That is, the defendants will not be allowed to use their privilege defenses as both a sword and shield.

Second, the Nebraska Legislature went far beyond its purported purpose of bringing the Nebraska Sex Offender Registration Act into compliance with the federal guidelines created by the Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248), otherwise known as the Sex Offender Registration and Notification Act ("SORNA").[47] (Ex. 302, Introducer's Statement of Intent, LB 285 (Mar. 18, 2009).) SORNA requires a person to disclose his or her Internet identifiers and addresses, such as e-mail addresses and instant messaging identifiers, but does not criminalize registrants' use of social networking web sites, instant messaging, or chat rooms, nor does it require registrants to subject themselves to search and monitoring of their computers and electronic communication devices within their homes, places of employment, and schools. In addition, once Internet identifiers have been provided, SORNA does not require that offenders tell the government every time the offender uploads content to an Internet site or blog. While it is true that "SORNA does not bar jurisdictions from adopting additional regulation of sex offenders for the protection of the public, beyond the specific measures that SORNA requires," *The National Guidelines for Sex Offender Registration and Notification,* 73 Fed. Reg. 38030-01, at 38034, 2008 WL 2594934 (July 2, 2008) (Ex. 303), if the Nebraska Legislature's intent was mere compliance with a civil regulatory scheme, these broad, additional, and oppressive *criminal* provisions would not have been included.

Third, the impact of these statutes is to impose what is essentially a long-term, and, in some cases, a life-term, period of "supervised release" that would be right at home in a typical federal judge's *criminal sentence* for a sex offense. Many offenders are prohibited from using enormous portions of the Internet upon pain of a jail or prison sentence.[48] All offenders who use the Internet must tell the government any time they post information to an Internet site or a blog, and the failure to do so is a felony.[49] All offenders who use the Internet must "consent" to the search of their computers whether at home or otherwise, and they must also "consent" to the installation of monitoring equipment—the failure to do so is a felony.[50]

There are, of course, two important differences between a federal judge's imposition of a term of supervised release and Nebraska's scheme. In Nebraska's scheme, the offender has

no impartial judge determining the need for the conditions, and in Nebraska the offender has no impartial judge monitoring the administration of the conditions. Under Nebraska's scheme, those things are done by law enforcement agents. Furthermore, once a federal offender has done his or her time and served his or her term of supervised release, the offender does not need to fear that the offender will be subjected anew to those restrictive conditions and criminal sanctions unless the offender violates the law again.

Fourth, and finally, these statutes are rife with other constitutional infirmities, and the blatant willingness of the Nebraska Legislature to violate the Constitution is strong evidence of animus. These laws gut the First and Fourth Amendment and the Due Process Clause. These statutes *retroactively* render sex offenders, who were sentenced prior to the effective date of these statutes, second-class citizens. They are silenced. They are rendered insecure in their homes. They are denied the rudiments of fair notice. In Nebraska's "rage" and "revulsion," they are stripped of fundamental constitutional rights. In short, sex offenders who were sentenced prior to the enactment of these laws are punished.

E. Doe 24's Fourth Amendment "As-Applied" Challenge to Section 29-4006(2)

If I have jurisdiction to do so, I must determine the constitutionality of the consent-to-search and consent-to-monitoring provisions of Neb. Rev. Stat. § 29-4006(2) under the Fourth Amendment and the equivalent provision of the Nebraska Constitution as applied to Doe 24. [51] Upon providing certain identifying information related to their electronic communications, section 29-4006(2) requires sex-offender registrants to consent to the "[s]earch of all the computers or electronic communication devices possessed by the person" and the "[i]nstallation of hardware or software to monitor the person's Internet usage on all the computers or electronic communication devices possessed by the person."

The plaintiffs "concede that they do not have standing to bring a claim for those on probation or supervised release; further, they concede that this provision could be applied constitutionally to a parolee subject to different terms of parole. However, the plaintiffs argue, because Doe 24 has an expectation of privacy as it relates to general law enforcement, Neb. Rev. Stat. § 29-4006(2) should be held to be unconstitutional as applied to him and those similarly situated." (Filing 521 at CM/ECF p. 48.) In other words, section 29-4006(2) allows searches and monitoring by general law enforcement personnel, but Doe 24's terms of parole limit such searches and monitoring to those performed only by parole officers and/or personnel of the Parole Administration.[52] (Filing 521 at CM/ECF p. 50.)

Relying on *Samson v. California*, 547 U.S. 843 (2006), the defendants contend that Doe 24, by virtue of his conditions of parole, is "already subject to a much-broader search and monitor provision" than that provided in section 29-4006(2); that Doe 24 "has no expectation of privacy entitled to protection under the Fourth Amendment throughout the duration of his parole"; and therefore, the court should reject the plaintiffs' Fourth Amendment challenge to Neb. Rev. Stat. § 29-4006(2). (Filing 522 at CM/ECF pp. 42-43.)

> In every Fourth Amendment case, courts must balance the competing values. On the one hand, we jealously guard privacy and our citizens' right to be free from unreasonable government intrusion. While on the other, we encourage zealous law enforcement to ensure our citizens can safely enjoy their liberties. Accordingly, to determine whether the Fourth Amendment forbids a search, we weigh the degree to which a search intrudes upon an individual's reasonable expectation of privacy against the degree to which the government needs to search to promote its legitimate interests.

United States v. Brown, 346 F.3d 808, 811 (8th Cir. 2003).

In *United States v. Knights*, 534 U.S. 112, 119-21 (2001), the Supreme Court noted that probationers "do not enjoy the absolute liberty to which every citizen is entitled," but instead are subject to "a form of criminal sanction imposed by a court" that is "one point . . . on a continuum of possible punishments." *Id.* at 119 (internal quotation marks & citations omitted). In *Samson,* the Court found that parolees, like Doe 24, are on that same "continuum" with even "fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." *Samson*, 547 U.S. at 850 ("The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.") (internal quotation marks & citation omitted). Further, when a probationer or parolee "consents to a search condition, his already-reduced reasonable expectation of privacy diminishes significantly." *Brown*, 346 F.3d at 811; *Samson*, 547 U.S. at 852 (petitioner's status as parolee and terms of parole search condition led Court to conclude that petitioner did not have expectation of privacy that society would recognize as legitimate).

No one argues that the State does not have an "overwhelming interest" in supervising parolees, in reducing recidivism, and in promoting "reintegration and positive citizenship among probationers and parolees," *Samson*, 547 U.S. at 853, or that the State has a significant, even compelling, government interest in protecting minors online from sex offenses.[53] But that governmental interest is tempered by the Fourth Amendment, which protects parolees under certain circumstances.

Indeed, there may be a big problem for the State. That problem is represented by *United States v. Freeman*, 479 F.3d 743 (10th Cir. 2007). There, Judge McConnell, writing for the Tenth Circuit, decided that the search of a parolee's residence by ordinary city police officers, when the parole agreement allowed such searches only by parole officers, was impermissible under the Fourth Amendment. Essential to the *Freeman* holding were the Kansas Department of Corrections policy statements that provided, "with the exception of pat-down and plain view searches, special enforcement officers are the only personnel authorized to conduct a more extensive search of offenders' person or property" and that permitted warrantless searches only when the special enforcement officer had reasonable suspicion of a parole condition violation. *Id.* at 744, 747-48. The *Freeman* court stressed that "[p]arolee searches are therefore an example of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law." The court also observed that *Samson* approved the constitutionality of general law enforcement officers' warrantless parolee searches without reasonable suspicion "only when authorized under state law." *Id.*

In reviewing Doe 24's challenge, I am confronted by the following four uncertainties: (1) Doe 24 may never face the threat of a search and the installation of monitoring hardware and software under § 29-4006(2) because the triggering mechanism—§ 29-4006(1)(k) and (s)—has been declared unconstitutional on grounds other than the Fourth Amendment; (2) Doe 24's parole may expire before these issues are finally resolved on appeal, and, if so, Doe 24's expectation of privacy would be different; (3) as the *Freeman* court noted, Doe 24's parole conditions, as they relate to his Fourth Amendment challenge, require a construction of *state law*; and (4) there is no authoritative construction of state law, such as the Kansas policy statements in *Freeman,* upon which I can rely to understand the reach of Doe 24's parole conditions, and I have no jurisdiction in this case to tell the Nebraska Parole Board what those parole conditions mean.

These contingencies force me to question whether Doe 24's challenge is "ripe." Critically, "ripeness" is a necessary component for Article III jurisdiction:

> "Standing and ripeness are sometimes closely related. In assessing ripeness, we focus on whether the case involves `contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 674 (8th Cir. 2012) (quoting *Care Committee v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011), other citation omitted). Both are requirements for Article III subject matter jurisdiction. *Care Committee*, 638 F.3d at 627. *Kennedy v. Ferguson*, 679 F.3d 998, 1001 (8th Cir. 2012) (under Arkansas law, as predicted by Court of Appeals, statute of limitations governing challenges that could be brought at any time prior to final distribution of probate estate based on discovery of another will applied to legatee's lawsuit claiming legal malpractice and constructive fraud against attorney who drafted two wills for legatee's father, even though legatee's challenge to validity of first will was supported by mere copy of newly-discovered second will, and thus, legatee's lawsuit was not ripe under Article III requirements, as legatee's challenge could have been raised in probate that had not closed, so any cognizable injury to legatee from prospective final distribution of estate was as yet unknown).

"The ripeness doctrine is aimed at preventing federal courts, through premature adjudication, from `entangling themselves in abstract disagreements.'" *Wersal v. Sexton*, 674 F.3d 1010, 1018 (8th Cir. 2012) (en banc) (judicial office candidate's First Amendment challenge to clause of Minnesota code of judicial conduct prohibiting judicial candidate from soliciting funds for political organizations or candidates was not ripe; candidate only sought to solicit funds for his own campaign committee, which he was permitted to do under the code, and not for another's campaign or himself personally, and therefore candidate could not show there was likelihood he would face sanctions for engaging in desired conduct) (quoting *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 863 (8th Cir. 2006), in turn quoting *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985)).

After careful consideration, I decide that Doe 24's "as-applied" Fourth Amendment challenge to § 29-4006(2) is not "ripe" and must be dismissed for lack of Article III jurisdiction. The four "uncertainties" that I outlined earlier convince me that Doe 24's challenge involves contingent future events that may not occur as anticipated, or indeed may not occur at all; that Doe 24's

challenge is premature; and that if I assumed jurisdiction, I would be entangling the court in the resolution of an abstract question.[54]

IV. CONCLUSION

For the sake of clarity, I now provide a summary of the rulings I have made earlier and the rulings that I have made in this opinion. The following summary is drawn from my earlier decision on the motions for summary judgment (Filing 354) and this decision:

> * Except as noted below, the new Nebraska laws that were enacted by LB 97 (2009) and LB 285 (2009) are constitutional.
>
> * Doe 24's Fourth Amendment "as-applied" challenge to Neb. Rev. Stat. § 29-4006(2) is not ripe.
>
> * Save for Doe 24's "as-applied" challenge to § 29-4006(2), Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), 29-4006(2), and 28-322.05 are unconstitutional, both facially and as applied to some of the plaintiffs.[55] As indicated in my decision on the motions for summary judgment, Neb. Rev. Stat. § 29-4006(2) is unconstitutional under the Fourth Amendment as to those plaintiffs who were previously convicted of sex crimes, but who were not on probation, parole, or court-monitored supervision on or after January 1, 2010. Neb. Rev. Stat. §§ 29-4006(1)(k) and (s) and 28-322.05 are unconstitutional under the First Amendment. Neb. Rev. Stat. § 28-322.05 is unconstitutional under the Due Process Clause. Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), 29-4006(2), and 28-322.05 are unconstitutional under the Ex Post Facto Clause.

Lastly, I compliment all the lawyers for their professionalism and civility. At the initial stages of this litigation, I found Mr. David Cookson, Nebraska's Chief Deputy Attorney General, to have been especially persuasive, candid, and helpful. I should also single out the lead lawyers for the plaintiffs. Mr. Stuart Dornan, a former FBI agent and a former County Attorney for Douglas County, Nebraska (Omaha), and Mr. Thomas Monaghan, a former United States Attorney for the District of Nebraska, took the plaintiffs' case despite the fact the plaintiffs are viewed as lepers by many Nebraskans. By taking this case, both men were sure to displease and disappoint their former law-enforcement friends and colleagues. The decision to represent these unpopular plaintiffs took courage and is an example of the highest traditions of the bar of this court.

Accordingly,

IT IS ORDERED that:

1. The Clerk of Court shall upload Court's Exhibit 1 to CM/ECF as a restricted document.

2. Except as noted below, the Nebraska laws that were enacted by LB 97 (2009) and LB 285 (2009) are constitutional.

3. Neb. Rev. Stat. §§ 28-322.05 and 29-4006(1)(k) and (s) (West, Operative Jan. 1, 2010) are facially unconstitutional under the First Amendment and the equivalent Nebraska constitutional provision.

4. Neb. Rev. Stat. § 28-322.05 (West, Operative Jan. 1, 2010) is facially unconstitutional under the Due Process Clause and the equivalent Nebraska constitutional provision.

5. Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), 29-4006(2), and 28-322.05 (West, Operative Jan. 1, 2010) are facially unconstitutional under the Ex Post Facto Clause of the United States Constitution and the equivalent Nebraska constitutional provision regarding (a) offenders who had served their time and were no longer under criminal justice supervision on January 1, 2010; and (b) offenders who had been sentenced prior to January 1, 2010, but who remained under criminal justice supervision on or after January 1, 2010.

6. Neb. Rev. Stat. §§ 29-4006(1)(k) and (s) and 29-4006(2) (West, Operative Jan. 1, 2010) are unconstitutional as applied to all those Plaintiffs listed on Court's Exhibit 1 who are identified therein as "presently a Plaintiff" and who must register as a sex offender under the Nebraska Sex Offender Registration Act, Neb. Rev. Stat. §§ 29-4001 to 29-4014.

7. Neb. Rev. Stat. § 28-322.05 (West, Operative Jan. 1, 2010) is unconstitutional as applied to Does 2, 3, 4, 6, 12, 13, 17, 18, 19, 27, and 35.[56]

8. As indicated in my decision on the motions for summary judgment (Filing 354), Neb. Rev. Stat. § 29-4006(2) (West, Operative Jan. 1, 2010) is unconstitutional under the Fourth Amendment as to those plaintiffs who were previously convicted of sex crimes, but who were not on probation, parole, or court-monitored supervision on or after January 1, 2010. Doe

24's as-applied challenge to Neb. Rev. Stat. § 29-4006(2) under the Fourth Amendment and the equivalent Nebraska constitutional provision is not ripe and is therefore dismissed for lack of Article III jurisdiction.

9. The claims of the plaintiffs who are not required to register as sex offenders are dismissed without prejudice as moot.

10. The claims of the plaintiffs who are shown on Court's Exhibit 1 to have withdrawn from participation in this lawsuit are dismissed without prejudice.

11. Final judgment will be withheld pending resolution of the attorney fee issue.

12. Counsel for the plaintiffs shall have until November 1, 2012, to submit an application, evidence, evidence index, and brief regarding attorney fees. Counsel for the defendants shall have until November 16, 2012, to respond with evidence, evidence index, and brief. Both sides shall give due attention to the local rules of practice regarding attorney fee applications. Counsel are also encouraged to settle the attorney fee issue, if they can, recognizing that the plaintiffs have been partially, but not wholly, successful.

[1] Filing 92, Case No. 8:09CV456, Memorandum and Order on Motion for Preliminary Injunction, at CM/ECF p. 18 (citing Oliver Wendell Holmes, Jr., as quoted in Ronald K.L. Collins, *As Justice Holmes said . . . Oliver Wendell Holmes Jr. on free speech & related matters: selected quotations,* First Amendment Center (May 21, 2008) (letter to Harold Laski, May 13, 1919) at http://www.firstamendmentcenter. org/ (last accessed August 29, 2012)).

[2] The numbered Doe plaintiffs are offenders required to register under the Nebraska Sex Offender Registration Act and the lettered Does are family members or people having "some connection with a Doe." (Transcript of Trial 36:2-8 ("Tr.").) The transcript of trial may be found at Filings 516-520.

[3] The parties have stipulated in the Order on Final Pretrial Conference that the italicized language is "overbroad and unduly burdensome." (Filing 492 at CM/ECF p. 2 ¶ 6.)

[4] The parties have stipulated in the Order on Final Pretrial Conference that the italicized language is "overbroad and unduly burdensome." (Filing 492 at CM/ECF p. 2 ¶ 6.)

[5] I previously decided that the definitions in this section apply to the criminal statute being challenged, section 28-322.05, because "the criminal provisions . . . and the definitions . . . were contained in the same legislation." (Filing 354 at CM/ECF p. 29 n.29.)

[6] Counsel for the defendants acknowledged that the constitutionality of the consent-to-monitoring provision as to sex offenders who were no longer on probation or parole was "a first[-]impression issue." (Filing 354 at CM/ECF p. 18.)

[7] I previously assumed that Neb. Rev. Stat. §§ 29-4006(1)(k) and (s) and 28-322.05 should be deemed content -neutral for purposes of First Amendment analysis. (Filing 354 at CM/ECF p. 36 n.35.) The parties have not persuaded me otherwise, as the statutes at issue apply "regardless of content or viewpoint." *Phelps-Roper v. Troutman,* 662 F.3d 485, 489 (8th Cir. 2011).

[8] However, the closely related but separate question of whether an expansively worded statute chills the plaintiffs' speech because it lacks clarity *is* a substantive reason for finding that a statute violates the First Amendment.

[9] I use these six utilities merely as examples because they are widely known and because it is essentially undisputed that each one would be categorized as a "social networking web site" or "instant messaging" service or "chat room" service within the meaning of the statute. Indeed, all of them appear to have the attributes of all three of these categories. For a more expansive list of sites that may potentially be banned by the statute, see Filing 354, Attachment A (Mem. & Order on Summ. J. Motions). To avoid increasing the length of this opinion, I incorporate that information (Filing 354, Attachment A) herein.

[10] http://www.sec.gov/Archives/edgar/data/1326801/XXXXXXXXXXXXXXXXXX/d 287954ds1a.htm.

[11] http://www.microsoft.com/en-us/news/press/2011/may11/05-10corpnewsp r.aspx.

[12] http://www.microsoft.com/en-us/news/Press/2012/Jul12/07-16OfficePR.aspx.

[13] http://news.softpedia.com/news/Microsoft-s-Office-Has-Over-One-Billion-Users-280426.shtml.

[14] http://pewinternet.org/Reports/2012/Twitter-Use-2012.aspx.

[15] http://windowsteamblog.com/windows_live/b/windowslive/archive/2010/0 2/09/windows-live-messenger-a-short-history.aspx.

[16] https://plus.google.com/u/0/+VicGundotra/posts/2YWhK1K3FA5.

[17] http://pewinternet.org/Reports/2012/Politics-on-SNS.aspx.

[18] http://www.boston.com/news/politics/2012/2012/09/04/for-conventions-vi ewing-down-social-media/85HHjj9XAbn2JTumPQBVaJ/story.html.

[19] http://www.umassd.edu/cmr/socialmedia/2012inc500socialmediaupdate/.

[20] http://www.v3im.com/2012/05/how-fortune-500-companies-use-social-me dia/#axzz28AfWBcwg.

[21] Does 4, 6, 13, 18, 19, 27, and 35 committed crimes that make them subject to the statute, but it is stipulated that they did not use a computer or electronic communication device to do so. (Filing 492, Pretrial Conf. Order at CM/ECF p. 2.) Thus, it is apparent that they did not use a social networking web site, instant messaging, or chat

room service to commit their crimes. Does 2, 3, 12, 17, and 24 are subject to the statute, and they used a computer or electronic communication device to commit their crimes. (*Id.*) It is not clear, however, whether these Does used a social networking web site, instant messaging, or chat room service to commit their crimes.

[22] In 2011, one commentator observed that 2.5 billion text messages were sent per day in the United States and the commentator further noted that *Apple, Google,* and *Microsoft* were beginning to provide free text messaging services. *Dead Zone* (May 26, 2011), http://www.deadzones.com/search?q=how+many+text+messages+are+ sent+a+day.

[23] http://im.about.com/od/advancedimfeatures/tp/free-text-messages.htm.

[24] http://pogue.blogs.nytimes.com/2012/03/22/the-disruptive-power-of-imessage

[25] Nor do the defendants propose a limiting construction that addresses this issue.

[26] For example, compare (1) *Google's "Facebook*" equivalent known as *Google+,* https://plus.google.com/, with (2) *Google* (the search engine), http://www.google.com/.

[27] Using *iGoogle,* http://www.google.com/ig, *Google*'s "home page," one can click on the "+You" symbol and that act takes you directly to *Google+,* https://plus.google.com/, *Google*'s "*Facebook*" equivalent, without having to log in to *Google+.* Is that scenario a "collection of web sites"? (As opposed to *Internet Explorer,* access the links in this footnote through *Google Chrome, Mozilla Firefox,* or another browser.)

[28] http://www.ftc.gov/opa/2006/09/xanga.shtm. In that case, the Federal Trade Commission alleged that *Xanga,* a social networking site with 25 million registered accounts, knowingly allowed children under age 13 to participate despite the terms of use. *Xanga* agreed to the entry of a consent degree and payment of a large penalty.

[29] If a terms of "use" policy stated that 16- and 17-year-old teenagers, *with the consent of their parents,* could use the site, but all other children are prohibited from doing so, are 16- and 17-year-olds "allowed" to use the site?

[30] As a former prosecutor, Mr. Nigam was "comfortable" in declining prosecution of an offender who violated the law after the terms of use changed if the offender checked the web site before the change, but not each time the offender used the site. (Tr. 258:1-260:4.) That attitude may not, of course, be shared by Nebraska prosecutors, and it is a prime example of the vice of this vagueness. Nigam's implicit suggestion that a vague statute can be saved by depending upon prosecutors to sort out the meaning of a statute was, to say the least, unsettling. Among other things, it evidenced a complete misunderstanding of the law.

[31] In the computer world, "real time" may simply mean "predictable." For example, "`[r]eal-time', as used in the context of the Sun Java Real-Time System product, means predictable. Real-time does not, in this context, have the sort of `in the moment' meaning that you hear in, for example, gaming circles." Sun Java Real-Time System-FAQ, General, *What does real-time Java really mean?,* http://www.oracle.com/technetwork/java/javase/tech/faq-jsp-139205.html#1.

[32] First among them is the meaning of "access or use." The statute bans use of a site that "allows a person who is less than eighteen years of age *to access or use* its social networking web site, instant messaging, or chat room service . . . ." (Emphasis added.) The former prosecutor who was called as a defense expert admitted that "[t]o me they are the same things but whoever wrote this must have thought there was some difference that they were trying to figure out." (Tr. 262.) But he could not "predict why it's written as `access or use.'" (Tr. 261.)

[33] http://www.nieman.harvard.edu/reports/article/102681/The-Revolutionary-Force-of-Facebook-and-Twitter.aspx.

[34] "The rationale for allowing an individual to assert the constitutional rights of others not before the court is that broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Ways,* 274 F.3d at 518 (internal quotation marks & citation omitted).

[35] Professor Post was the most thoughtful and knowledgeable of the experts. I found his discussion of the term "collection of web sites" in relation to *Google* products particularly helpful. It is worth remembering that I strongly suggested that the parties get together to hire one independent expert. I even suggested the name of an independent scholar of Internet law. (Filing 354 at CM/ECF p. 33.) The parties did not elect to do so. That was their right. However, candor requires that I state that the defense expert—a former prosecutor—struck me as biased, particularly when compared to Professor Post.

[36] The parties have stipulated in the Order on Final Pretrial Conference that the italicized language is "overbroad and unduly burdensome." (Filing 492 at CM/ECF p. 2 ¶ 6.) As a result, I declare this part of the statute to be unconstitutional under the First Amendment.

[37] The parties have stipulated in the Order on Final Pretrial Conference that the italicized language is "overbroad and unduly burdensome." (Filing 492 at CM/ECF p. 2 ¶ 6.) As a result, I declare this part of the statute to be unconstitutional under the First Amendment.

[38] Neb. Rev. Stat. § 29-4006(2) ("When the person provides any information *under subdivision (1)(k) or (s)* of this section, the registrant shall sign a consent form, provided by the law enforcement agency receiving this information, authorizing" a search of his computers or electronic communication devices and the installation of monitoring hardware or software) (emphasis added). While I have declared the entirety of § 29-4006(2) facially unconstitutional on Fourth Amendment grounds for offenders who were not on probation, parole, or court-monitored supervision on or after January 1, 2010 (Filing 354 at CM/ECF p. 27), based partly on the concession of the defendants, the defendants have not fully acquiesced in that decision. As a result, the discussion in the text remains relevant under the plaintiffs' First Amendment challenge.

[39] One estimate puts the number of active English language blogs at 450 million. J. Haynes, *So How Many Blogs Are There, Anyway*? (Feb. 1, 2010), http://www.hattrickassociates.com/2010/02/page/2/.

[40] Doe 17, Doe F, Doe 3, Doe 18, Doe 2, Doe 24, and Doe 12 provided testimony about their business activity using the Internet, and that testimony has relevance to the discussion in the text.

[41] As before, it is not my proper role to narrow the statute.

[42] *The National Guidelines for Sex Offender Registration and Notification,* 73 Fed. Reg. 38030-01, at 38055, 2008 WL 2594934 (July 2, 2008).

[43] Plaintiffs argue in their post-trial brief that section 29-4006(2) is unconstitutionally vague. (Filing 521 at CM/ECF p. 72.) However, my prior order limited the outstanding due process vagueness issue to section 28-322.05. (Filing 354 at CM/ECF pp. 28-34.) If the plaintiffs intended to bring a due process challenge on vagueness grounds regarding section 29-4006(2), I may have erred in failing to set that matter for trial. So far as I am concerned, the plaintiffs would not be barred from challenging section 29-4006(2) on due process vagueness grounds in another suit.

[44] This group encompasses all numbered Doe plaintiffs *except* Does 12, 13, 17, 23, and 25. (Tr. 35:7-22.)

[45] This group encompasses Does 12, 13, 17, 23, and 25. (Tr. 35:7-22.)

[46] After reviewing the evidence presented on the parties' cross-motions for summary judgment, I previously concluded that "it would be impossible to conclude that the entirety of Nebraska's new legislation was intended to be punitive in nature. In general, the record adequately establishes that Nebraska mainly intended to amend its law to comply with SORNA [the Sex Offender Registration and Notification Act]." (Filing 354 at CM/ECF p. 14 n.17.) However, I concluded that a trial was necessary with regard to sections 29-4006(1)(k) and (s), 29-4006 (2), and 28-322.05 because these provisions are foreign to SORNA; a Nebraska legislator who authored these provisions made comments about his lack of objectivity toward sex offenders; and these provisions are "far[-] reaching and novel." (Filing 354 at CM/ECF p. 13.)

[47] SORNA is codified at 42 U.S.C. §§ 16901-16991.

[48] A violation of section 28-322.05(1) (the "social networking" crime) is a misdemeanor for the first offense and a felony for the second offense. Neb. Rev. Stat. § 28-322.05(2).

[49] The failure to provide or update the information required by section 29-4006(1)(k) and (s) or to provide the "consent" form required by Neb. Rev. Stat. § 29-4006(2) violates § 29-4006(10). In turn, a violation of § 29-4006 is a crime. Neb. Rev. Stat. § 29-4011(1) ("Any person required to register under the Sex Offender Registration Act who violates the act is guilty of a Class IV felony.") Such a felony is punishable by imprisonment of up to five years and a fine of up to $10,000. Neb. Rev. Stat. § 28-105(1) (West 2009).

[50] *See supra* note 49.

[51] As described in more detail above, I have already "decided that on Fourth Amendment grounds and the equivalent provision of the Nebraska Constitution, Neb. Rev. Stat. § 29-4006(2) is unconstitutional as it regards Plaintiffs who were previously convicted of sex crimes but who were not on probation, parole or court-monitored supervision on or after January 1, 2010." (Filing 354 at CM/ECF p. 27.) In this opinion, I have also decided that the statutory triggering mechanism for the search-and-monitoring conditions—the provision of e-mail addresses and the like as required by § 29-4006(1)(k) and (s) —is unconstitutional under the First Amendment and Ex Post Facto Clause.

[52] As stated in the Findings of Fact above, Doe 24's conditions of parole require him to "obey all . . . laws, ordinances and orders" and to "permit [his] parole officer and/or personnel of Parole Administration to conduct routine searches of [his] person, residence, vehicle or any property under [his] control, at such times as they deem necessary." (Filing 522, Defs.' Post-Trial Br. at CM/ECF pp. 33, 42; Filing 521, Pls.' Closing Arg. Br. at CM/ECF pp. 5, 48-51; Filing 495, Defs.' Pretrial Br. at CM/ECF p. 38; Tr. 450:15-24 & Ex. 210.) However, Doe 24 is not subject to the special condition of parole that would have required Doe 24 to "consent to unannounced examination (search) of any and all computer(s) and/or devices to which you have access to." (Ex. 210 at p. 6.)

[53] *See* Neb. Rev. Stat. § 29-4002 ("The Legislature finds that sex offenders present a high risk to commit repeat offenses. The Legislature further finds that efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction.").

[54] Therefore, any as-applied Fourth Amendment challenge to Neb. Rev. Stat. § 29-4006(2) asserted by persons associated with Doe 24 is also not ripe. However, my earlier decision finding the statute *facially* unconstitutional as to previously convicted sex offenders who were not on probation, parole, or court-monitored supervision on or after January 1, 2010, stands. The statute is facially unconstitutional because there is no set of circumstances under which the statute would be valid as to those individuals. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Essentially, the defendants' affirmative defense to Doe 24's claim is that the parole conditions reduce his reasonable expectation of privacy and therefore the statute, even if otherwise unconstitutional as to everyone else, may survive as to Doe 24. That defense is *external* to the facial validity of the statute and turns on an interpretation of state law that I do not have jurisdiction to make. As a result, the defendants cannot assert that facial invalidation of this statute is prohibited under *Salerno*.

[55] The plaintiffs who succeed on their "as-applied" challenges are set forth in the "order" portion of this document.

[56] These are the plaintiffs (except Doe 24) who counsel stipulated are required to register under the Nebraska Sex Offender Registration Act because of a conviction for one or more of the offenses enumerated in Neb. Rev. Stat. § 28-322.05(1)(a)-(k).

853 F.Supp.2d 596 (2012)

John DOE
v.
Bobby JINDAL, et al.

Civil Action No. 11-554-BAJ-SCR.

United States District Court, M.D. Louisiana.

February 16, 2012.

599 *599 Ronald Lawrence Wilson, Justin Paul Harrison, ACLU Foundation of Louisiana, New Orleans, LA, for John Doe.

John W. Sinquefield, Bridget Benoit Denicola, S. Kyle Duncan, Uma M. Subramanian, Louisiana Department of Justice, Emalie Anne Boyce, Attorney General's Office, Kurt Lawrence Wall, Louisiana Attorney General's Office, Baton Rouge, LA, for Bobby Jindal, et al.

OPINION[1]

BRIAN A. JACKSON, Chief Judge.

Plaintiffs, John Doe and James Doe, filed suit against Defendants, James D. Caldwell, Jr., James M. LeBlanc, Hillar C. Moore, III, and John Phillip Haney, asserting that Louisiana Revised Statute 14:91.5 ("the Act") is unconstitutional, and they seek declaratory and injunctive relief against its enforcement. A bench trial was held on November 2, 2011.[2] The parties have filed pre-trial briefs (docs. 37 and 38), and post-trial briefs (docs. 48 and 49). Jurisdiction is based on 28 U.S.C. § 1331.

BACKGROUND

On June 14, 2011, Louisiana Governor Bobby Jindal signed into law LSA-R.S.14:91.5, "Unlawful use or access of social media" (doc. 1, ¶ 8). The Act took effect on Monday, August 15, 2011 (doc. 1, ¶ 15). Pursuant to R.S.14:91.5, registered sex offenders who were previously convicted of crimes involving minors or juveniles are prohibited from "using or accessing of social networking websites, chat rooms, and peer-to-peer networks." R.S.14:91.5(A)(1). The Act does not define "using" or "accessing," but defines "social networking website," "Chat room," and "Peer-to-peer network" broadly. R.S. 14:91.5(c)(1)-(4). Both Plaintiffs in this case are registered sex offenders, and both are subject to the proscriptions of the Act,[3] which reads:

> A. The following shall constitute unlawful use or access of social media:
>
> (1) The using or accessing of social networking websites, chat rooms, and peer-to-peer networks by a person who is required to register as a sex offender and who was previously convicted of R.S. 14:81 (indecent behavior with juveniles),
> 600 R.S. 14:81.1 (pornography involving *600 juveniles), R.S. 14:81.3 (computer-aided solicitation of a minor), or R.S. 14:283 (video voyeurism) or was previously convicted of a sex offense as defined in R.S. 15:541 in which the victim of the sex offense was a minor.
>
> (2) The provisions of this Section shall also apply to any person previously convicted for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law which is equivalent to the offenses provided for in Paragraph (1) of this Subsection, unless the tribal court or foreign conviction was not obtained with sufficient safeguards for fundamental fairness and due process for the accused as provided by the federal guidelines adopted pursuant to the Adam Walsh Child Protection and Safety Act of 2006.

> B. The use or access of social media shall not be considered unlawful for purposes of this Section if the offender has permission to use or access social networking websites, chat rooms, or peer-to-peer networks from his probation or parole officer or the court of original jurisdiction.
>
> C. For purposes of this Section:
>
> (1) "Chat room" means any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users.
>
> (2) "Minor" means a person under the age of eighteen years.
>
> (3) "Peer-to-peer network" means a connection of computer systems whereby files are shared directly between the systems on a network without the need of a central server.
>
> (4) "Social networking website" means an Internet website that has any of the following capabilities:
>
> (a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users.
>
> (b) Offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging.
>
> D. (1) Whoever commits the crime of unlawful use or access of social media shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence.
>
> (2) Whoever commits the crime of unlawful use or access of social media, upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.

Plaintiffs allege that the Act is facially overbroad and unconstitutional in that it significantly infringes on their First Amendment rights, as the Act will not only ban registrants from accessing Facebook and MySpace, but will also "make it a felony for registrants to browse the rest of the Internet" (doc. 1, ¶ 13). Plaintiffs further allege that, pursuant to the Act, they will be banned from accessing, *inter alia,* NOLA.com, CNN.com, FoxNews.com, ESPN, BBC or Reuters, NYTimes.com, Politico.com, Newsweek, The Economist, National Geographic, YouTube, Getagameplan.org (Louisiana's official hurricane preparedness website), Gmail, Yahoo, Hotmail, AOL, LinkedIn, Monster, USAJOBS.gov (the federal government's employment database), eBay, Zagat, Amazon, because those websites "offer a mechanism
601 for communication *601 among users" in the form of comments and content forwarding (doc. 1, ¶ 14(a); R.S. 14:91.5(C)(3)(b)).[4] Plaintiffs specifically assert that:

> They have web-based email accounts that they are afraid to use. They use internet-based information services to obtain professional information pertinent to their work to obtain safety and technical information pertinent to their work.... [for example,] [w]ebsites that would arguably ... fall within the definition of a social networking website because they contain bulletin-board features and other social networking features. And these are all websites that our clients are afraid to access because of what this law plainly prohibits.

(Transcript, p. 26:5-17). Plaintiffs further submit that the Act violates the Due Process clause of the Fourteenth Amendment, which protects the public from vague criminal statutes (doc. 37, p. 3).

Defendants assert that Plaintiffs have never attempted to avail themselves of the exemption provision of the Act, which is featured in R.S. 14:91.5(B) (doc. 49, p. 9). That section provides:

> The use or access of social media[5] shall not be considered unlawful for purposes of this Section if the offender has permission to use or access social networking websites, chat rooms, or peer-to-peer networks from his probation or parole officer or the court of original jurisdiction.

Defendants, therefore, argue that Plaintiffs "have no way of knowing whether the Act would pose any of the problems their First Amendment claim is based upon (e.g. prohibiting access to email and safety information)" (doc. 49, p. 9).

Defendants further assert that they have submitted a "Department Regulation" ("the regulation") (doc. 38-2), promulgated by defendant, James M. LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections ("Secretary LeBlanc"), to provide policies and procedures designed to offer "additional guidance about how the Act is intended to operate" (doc. 38-1, p. 1). Therefore, they argue, the Court must consider the regulation in its analysis of the constitutionality of the Act, as "it casts serious doubts on plaintiffs' predictions about the supposedly sweeping scope of the Act's enforcement" (doc. 49, p. 10). Defendants allege that the regulation "makes clear that the Act is not targeted at the sort of general media websites plaintiffs fear it will reach" (doc. 49, p. 10). Defendants strongly urged the Court to consider the regulation in its analysis of the Act under the framework of the First Amendment.

ANALYSIS

The issues presently before the Court are: (1) whether the Plaintiffs have standing to challenge the Act; (2) whether the Act is overbroad and, therefore, violates Plaintiffs' First Amendment rights; (3) whether the Act is void and unenforceable because it is unconstitutionally vague; and (4) if the Court finds that the Act violates Plaintiffs' First Amendment rights, whether the Act's constitutional deficiency is cured by the promulgation of a regulation intended to limit construction and applicability of the legislation (transcript; doc. 48, pp. 1-2; doc. 49, p. 2).

602 *602 ## I. Plaintiffs' Standing to Challenge the Act

The Court will first consider Defendants' argument that Plaintiffs' challenges to the Act are speculative and premature (transcript, p. 46:13-19; doc. 49, pp. 1-2). Defendants assert that since "no one has attempted to take advantage of the statute as it is written ..., so it's pure speculation as to what might happen as to John or James Doe" (transcript, p. 21:7-19). Therefore, Defendants contend, it is premature for the Court to consider whether injunctive relief should issue (*Id.* at 23:22). However, Plaintiffs assert that "First Amendment standing requirements are considerably more relaxed if there is a substantial chilling effect" (*Id.* at 25:11-14). Plaintiffs further assert that their First Amendment rights have been chilled because, as mentioned *supra,* they are afraid to use their personal email accounts and access information websites at work (*Id.* at 26:5-17).

"The requirement that a claimant have standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 208 (5th Cir.2011). "To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Id.,* at 208 -209. The Fifth Circuit has noted that, for a plaintiff to prove an injury in fact sufficient to raise a First Amendment facial challenge, a plaintiff must demonstrate a "serious interest in acting contrary to a statute." *Id.,* at 209.

The Fifth Circuit has also recognized that, although facial challenges are "generally disfavored," there are "concerns in the First Amendment context that are weighty enough to overcome our well-founded reticence regarding facial challenges." *Ctr. for Individual Freedom v. Carmouche,* 449 F.3d 655, 660 (5th Cir. 2006) (quoting, *Sabri v. United States,* 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004)).[6] The Fifth Circuit in *Carmouche* further noted that "the First Amendment challenge has unique standing issues because of the chilling effect, [and] self-censorship." *Id.* (quoting, *Dombrowski v. Pfister,* 380
603 U.S. 479, 486-87, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965)).[7] Specifically, *603 the Supreme Court has pronounced that "in the First Amendment context, litigants 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 protected speech or expression." *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 392-93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). Moreover, controlling precedent of the Fifth Circuit establishes that "a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing." *Carmouche,* 449 F.3d at 660.[8]

Accordingly, Plaintiffs, if their interpretation of the statute is correct, must implement significant compliance measures or risk criminal prosecution. Plaintiffs assert that their self-censorship of internet activity in light of the Act has caused a substantial chilling effect on their First Amendment rights. See, *supra* p. 602. The Court, therefore, concludes that Plaintiffs' challenges to the Act are neither premature nor speculative, and, thus, Plaintiffs have standing to pursue their claims.

II. Plaintiffs' Facial Challenge of Overbreadth

Plaintiffs assert that the Act is "facially overbroad because it criminalizes substantial amounts of protected speech in addition to whatever criminal activity it purports to restrict" (doc. 2-1, p. 6). Plaintiffs further assert that, because key terms are defined imprecisely or not at all, the Act is "unintelligible to the public, unenforceable by police and prosecutors and uninterpretable by the judiciary" (doc. 2-1, p. 3).

The First Amendment prohibits any law that abridges freedom of speech. The Supreme Court has held that "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, U.S. , 130 S.Ct. 1577 at 1587, 176 L.Ed.2d 435 (2010). In
604 the case at hand, all parties agree that the state has *604 a compelling and legitimate interest in keeping sex offenders from websites where minors congregate, and the Court agrees.[9] However, Plaintiffs submit that the Act is facially overbroad because it involves a greater intrusion on Plaintiffs' First Amendment rights than is reasonably necessary in light of the State's legitimate interest in protecting minors. Moreover, at trial, Defendants conceded that the Act, as written, could be "open" to an interpretation that would ban Plaintiffs from access to basic newspaper websites (transcript, pp. 19:22-25, 20:1-17). However, Defendants defend the Act by deferring to the proffered regulation.

The Supreme Court in *Stevens* explained that the "first step in an overbreadth analysis is to construe the challenged statute." 130 S.Ct. at 1588. Having carefully considered the Act in light of the instruction provided by the Supreme Court in *Stevens,* this Court construes the Act to impose a sweeping ban on many commonly read news and information websites, in addition to social networking websites such as MySpace and Facebook.[10] Additionally, the Court construes the offense as completed once a user accesses the website — whether intentionally or by mistake.[11] The purported definition of "Chat room" is particularly problematic, as it appears to ban an extensive array of websites — including the website for this Court.[12] Therefore, those seeking to comply with the law face confusion as to which websites they are prohibited from accessing.

Provision B of the Act exempts offenders who obtain "permission" to access websites from their "probation or parole officer or the court of original jurisdiction."[13] However, the Act does not define the standards to be used in evaluating the requests for an exemption. Moreover, the Act does not instruct offenders who are not under supervision how to obtain permission or otherwise avail themselves of the exemption.[14]

605 *605 The requirement that an offender who is no longer on court supervision following the successful completion of probation or supervisory release return to "the court of original jurisdiction" for an exemption presents fundamental jurisdictional concerns. The Supreme Court has repeatedly instructed that "[I]n origin and design, federal courts are courts of limited jurisdiction; they exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *see also DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 319 (5th Cir.2011). "It is to be presumed that a cause lies outside this limited jurisdiction...." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Del-Ray Battery Co. v. Douglas Battery Co.*, 635 F.3d 725, 730 (5th Cir.2011). A district court may not exercise jurisdiction under Article III, § 2 of the Constitution after a criminal defendant has served the imposed term of imprisonment and corresponding period of supervision, as the defendant has "no concrete and continuing injury," and there is no case or controversy. Although it may be the court of original jurisdiction, as mentioned in the exemptions provision, a federal district court would not retain jurisdiction over a criminal defendant once that defendant has completed the sentence of imprisonment and any required supervision. Moreover, a state cannot create jurisdiction for federal courts or for courts in other states. Therefore, no adequate reading of the exemptions clause would render the Act constitutional.

There can be no doubt that the state has a wholly legitimate interest in protecting children from sex offenders online.[15] However, the state's interests "can [only] be served adequately by a narrowly drawn statute tailored precisely toward the conduct the [state] wishes to proscribe." *Hill v. City of Houston,* 789 F.2d 1103, 1113 (5th Cir.1986). In its current form, the Act is not crafted precisely or narrowly enough — as is required by constitutional standards — to limit the conduct it seeks to proscribe. Accordingly, on its face, and without considering the regulation, the Act is substantially overbroad and, therefore, invalid under the First Amendment.

III. Void for Vagueness Doctrine

The Court is required to consider whether the Act fails to provide people of ordinary intelligence fair notice of what conduct it prohibits. To avoid the chilling effect a vague law might have on speech, an act is void for vagueness when it fails to give persons reasonable notice of what is prohibited. *U.S. v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).[16] The Supreme Court has held that:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important
606 values. *606 First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (internal citations omitted).

As mentioned *supra,* the Act does not clarify which websites are prohibited. As a result, Plaintiffs assert, and the State does not dispute, that they have refrained from accessing many websites that would otherwise be permissible for fear that they may unintentionally and unknowingly violate the law. Although the Act contains a section that offers definitions of selected key phrases, such definitions are insufficiently defined, considering the criminal sanctions imposed in the legislation. Accordingly, the Court finds the Act to be unconstitutionally vague and, thus, unenforceable.

IV. Limiting Instruction

A law is not invalid for overbreadth where it is "possible, applying well-established principles of statutory construction, for us to construe it narrowly so that it does not forbid protected speech."[17] *Hill v. City of Houston*, 789 F.2d 1103, 1112 (5th Cir.1986). However, the Fifth Circuit has also cautioned that "a federal court may not itself provide a limiting construction of legislation that is not so readily susceptible." *Id.* This Court declines to recognize the
607 promulgated regulation as a cure to the Act's deficiencies.[18] *607 The regulation provides relief to only a limited segment of the class of persons otherwise subject to the legislation. The Court notes, and Defendants concede, that the regulation applies only to sex offenders who are under supervision by probation officers of the State of Louisiana (transcript, p. 40:14 -19).[19] It provides no relief for offenders who were under supervision in other jurisdictions. Because neither of the Plaintiffs here are under the supervision of the State of Louisiana, the regulation is inapplicable to them. Because the regulation fails to provide any form of relief or protection to these Plaintiffs, it cannot be deemed an adequate cure to the unconstitutional features of the legislation.[20]

CONCLUSION

Although the Act is intended to promote the legitimate and compelling state interest of protecting minors from internet predators, the near total ban on internet access imposed by the Act unreasonably restricts many ordinary activities that have become important to everyday life in today's world. The sweeping restrictions on the use of the internet for purposes completely unrelated to the activities sought to be banned by the Act impose severe and unwarranted restraints on constitutionally protected speech. More focused restrictions that are narrowly tailored to address the specific conduct sought to be proscribed should be pursued.

For all of the foregoing reasons, the Court concludes that the Act is unconstitutionally overbroad and void for vagueness, and judgment shall issue in favor of Plaintiffs and against Defendants, enjoining enforcement of the Act.

IT IS ORDERED that, within ten days of the issuance of this Opinion, the parties shall submit a joint proposed judgment that accords with this Opinion.

[1] This Opinion follows a bench trial between the above-captioned parties and serves as the Court's findings of fact and conclusions of law, as required by Federal Rule of Civil Procedure 52.

[2] On August 19, 2011, 2011 WL 3664496, this Court issued a ruling (doc. 8) denying Plaintiffs' Motion for a Temporary Restraining Order (doc. 2).

[3] John Doe, a resident of East Baton Rouge Parish, was convicted in 2002 of possessing child pornography in violation of R.S. 14:81.1, a qualifying offense enumerated in the Act. John Doe is neither currently incarcerated nor under post-release supervision. He was not assigned a probation or parole officer upon his release from prison several years ago. (Doc. 1, ¶ 5).

James Doe, a resident of Iberia Parish, pled guilty in another state to the qualifying charge of having a sexual encounter with a minor. He served his sentence in that state's prison system and, after completing his probation and parole requirements, relocated to Iberia Parish, where he registered as a sex offender. Though his offense had nothing to do with the internet or computers, but he is, nonetheless, subject to the proscriptions of the Act because his offense involved a minor. (Doc. 37, p. 2, n. 2).

[4] At the trial, the Court noted that "this Court's own website would qualify as a prohibited website" (transcript, p. 17:15-16).

[5] The term "social media" is not defined in the Act.

[6] The Supreme Court noted in *Sabri* that it recognizes "the validity of facial attacks alleging overbreadth in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." 541 U.S. at 609-10, 124 S.Ct. 1941. However, in *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), it specifically recognized the validity of the facial attack alleging overbreadth of a law infringing on the First Amendment right of free speech. *Sabri,* at 609-10, 124 S.Ct. 1941.

[7] The Supreme Court in *Dombrowski* observed that:

A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. For the threat of sanctions may deter almost as potently as the actual application of sanctions. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression — of transcendent value to all society, and not merely to those exercising their rights — might be the loser. For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. We have fashioned this exception to the usual rules governing standing, because of the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. If the rule were otherwise, the contours of regulation would have to be hammered out case by case — and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

380 U.S. at 486-87, 85 S.Ct. 1116 (internal citations omitted). *See also* *Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383, 392, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (stating that "the alleged danger of [the challenged statute] is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.").

[8] The Fifth Circuit in *Carmouche* also observed that for a plaintiff to satisfy standing requirements, self-censorship "must arise from a fear of prosecution that is not imaginary or wholly speculative." *Id.,* at 660.

[9] Defendants assert that they have "an overriding interest — one which plaintiffs concede is legitimate — in keeping registered child predators off of social networking websites altogether," and the Court agrees (doc. 38, p. 2).

[10] Including, but not limited to those listed *supra* on p. 600.

[11] Plaintiffs assert, that:

Because it's an access restriction, if my client is browsing the internet, he doesn't know if he's reached a prohibited website until he's here. Because, obviously, he has to be given an opportunity to look at the content of the website in order to say, well, hey, this website has publicly visible user profiles, or this website has a mechanism for communication among texts. Or, you know, oh, look, here's a bulletin board. I really shouldn't be here. Well, by that point it's too late. He's already completed the offense, because it's an access restriction. It doesn't require him to post anything to that website. It doesn't require him to engage in conversation with anyone on that website.

(Transcript, pp. 64:24-25, 65:1-14). At trial, Defendants did not contest that the offense would be completed upon access to a prohibited site.

[12] LSA-R.S. 14:91.5(C)(1) defines "Chat room" as: "any Internet website through which users have the ability to communicate via text and which allows messages to be visible to all other users or to a designated segment of all other users."

[13] See, *supra* n. 3.

[14] Plaintiffs assert that "this whole notion of having to go back and get again and get again permission to look at every new website would create, first of all, a train wreck in terms of enforcement and judicial economy and things like that. But it also doesn't account for our clients' very real First Amendment right to simply receive information and participate in browsing the internet" (transcript, p. 64:6-14).

[15] Plaintiffs assert that the behavior and crimes which this statute seeks to prevent are already prevented and criminalized by current legislation (transcript, p. 36:1-25).

[16] The Supreme Court in *Williams* further noted that:

Although ordinarily a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.

Williams, at 304, 128 S.Ct. 1830 *quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, and nn. 6 and 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

[17] The Court also notes that, if applicable in the present case, a limiting instruction might also cure the claim that the Act is unconstitutional under the void for vagueness doctrine in that it might clarify the proscribed acts.

[18] Defendants argue that since Plaintiffs bring a facial challenge to the act, the 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, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (Noting that "[a]dministrative interpretation and implementation of a regulation are, of course, highly relevant for our analysis, for in 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. Any inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction."). *See also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (Noting that "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 664 (5th Cir.2006) (Imposing a limiting construction that construed a statute in a way that saved it from "constitutional infirmity.").

However, in *Stevens,* the Supreme Court refused to construe ambiguous statutory language to avoid constitutional doubts. 130 S.Ct. at 1591-92:

Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.,* 556 U.S. [502, 516], 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009). "[T]his Court may impose a limiting construction on a statute only if it is `readily susceptible' to such a construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). We "`will not rewrite a ... law to conform it to constitutional requirements,'" *id.,* at 884-885, 117 S.Ct. 2329 (quoting *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); omission in original), for doing so would constitute a "serious invasion of the legislative domain," *United States v. Treasury Employees*, 513 U.S. 454, 479, n. 26, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place," *Osborne* [*v. Ohio*], 495 U.S. [103], at 121, 110 S.Ct. 1691 [109 L.Ed.2d 98 (1990)] To read [the statute at issue] as the Government desires requires rewriting, not just reinterpretation.

[19] At trial, Defendants alleged that "the regulation that was put into effect as of October 12th of 2011 applies, of course, to essentially the people who will be responsible for enforcing this regulation or this act" (transcript, p. 38:17-21).

[20] The regulation is not binding on District Attorneys or the Judiciary.

734 F.Supp.2d 882 (2010)

John and Jane DOE 1-36, et al., Plaintiffs,
v.
State of NEBRASKA, et al., Defendants.
John Doe, Plaintiff,
v.
Nebraska State Patrol, et al., Defendants.
John Doe, Plaintiff,
v.
State of Nebraska, et al., Defendants.
John Doe, Plaintiff,
v.
State of Nebraska, et al., Defendants.

Nos. 8:09CV456, 4:09CV3266, 4:10CV3004, 4:10CV3005.

United States District Court, D. Nebraska.

August 16, 2010.

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MEMORANDUM AND ORDER

RICHARD G. KOPF, District Judge.

At issue in these consolidated cases is the constitutionality of amendments to Nebraska's Sex Offender Registration Act that became operative January 1, 2010.[1] On cross-motions for summary judgment, I find there are genuine issues of material fact regarding three new sections of the Act which will necessitate a trial, but in all other respects I find as a matter of law that the legislation does not violate either the United States Constitution or the Nebraska Constitution.

BACKGROUND

Case No. 8:09CV456 was filed in this court on December 16, 2009, by twenty convicted sex offenders (John and Jane Does 1-20) and thirteen of their spouses, children, parents, and employers (John and Jane Does A-K). In an amended complaint filed on March 15, 2010, sixteen additional convicted sex offenders (John Does 21-36) were added as Plaintiffs. All Plaintiffs allegedly reside in Nebraska. Named as Defendants are the State of Nebraska, the Nebraska Attorney General, the Nebraska State Patrol and its Superintendent, county attorneys and sheriffs for each of Nebraska's ninety-three counties, and police chiefs for the cities of Lincoln, Omaha, Papillion, Fremont, Bennington, Ralston, Columbus, and York, Nebraska. Individual Defendants are only sued in their official capacity.

Plaintiffs in Case No. 8:09CV456 allege that Nebraska's Sex Offender Registration Act (SORA), as amended, violates several provisions of the United States Constitution, including: (1) the Ex Post Facto Clause of Article I, § 10; (2) the Fifth Amendment's Double Jeopardy Clause; (3) the Eighth Amendment's prohibition against cruel and unusual punishment; (4) the Fourth Amendment's prohibition against unreasonable searches and seizures; (5) the Fourteenth Amendment's Due Process Clause; (6) the Fourteenth Amendment's Equal Protection Clause; (7) the First Amendment's guarantee of free speech; and (8) the Contracts Clause of Article I, § 10. Plaintiffs also allege violations of eight corresponding

provisions of the Nebraska Constitution, plus violations of Article III, § 18, which prohibits special legislation, and Article II, § 1, which mandates the separation of powers.

Case No. 4:09CV3266 was filed in the District Court of Douglas County, Nebraska, on
893 December 24, 2009, by a convicted sex offender (John Doe) who allegedly is *893 employed in Douglas County. On December 28, 2009, the action was removed to federal court by Defendants, who include the Nebraska State Patrol and its Superintendent, the Nebraska Attorney General, the Douglas County Attorney, the Douglas County Sheriff, and the Omaha Police Chief.

Plaintiff's complaint in Case No. 4:09CV3266 is substantially similar to the amended complaint filed in Case No. 8:09CV456, except that it does not include claims that the amended Act violates the Equal Protection Clause, constitutes special legislation, or violates the Contracts Clause.

Case No. 4:10CV3004 was filed in the District Court of Lincoln County, Nebraska, on January 4, 2010, by an individual (John Doe) who allegedly is required by the amended Act to register as a sex offender in Lincoln County. On January 7, 2010, the action was removed to federal court by Defendants, who include the State of Nebraska, the Nebraska Attorney General, the Nebraska State Patrol and its Superintendent, the Lincoln County Attorney, the Lincoln County Sheriff, and the Chief of Police for the City of North Platte, Nebraska.

Plaintiff in Case No. 4:10CV3004 does not claim any violations of the United States Constitution, but he alleges the amended Act violates the same eight provisions of the Nebraska Constitution that are involved in Case No. 4:09CV3266, namely: (1) Article I, § 16 (ex post facto law); (2) Article I, § 12 (double jeopardy); (3) Article I, § 9 (cruel and unusual punishment); (4) Article I, § 7 (unreasonable search and seizure); (5) Article I, § 3 (due process); (6) Article I, § 5 (free speech); (7) Article II, § 1 (separation of powers); and (8) Article I, § 16 (contracts clause).

Case No. 4:10CV3005 was filed in the District Court of Sarpy County, Nebraska, on December 31, 2009, by a convicted sex offender who allegedly resides in Sarpy County. Defendants removed the action to federal court on January 8, 2010. Defendants include the State of Nebraska, the Nebraska Attorney General, the Nebraska State Patrol and its Superintendent, the Sarpy County Attorney, and the Sarpy County Sheriff.

As in the preceding case, Plaintiff in Case No. 4:10CV3005 only alleges violations of the Nebraska Constitution. His complaint contains seven causes of action which are identical to the first seven claims alleged in Case No. 4:10CV3004.

These four cases were consolidated for all purposes, including trial and discovery, on January 21, 2010.[2] Case No. 8:09CV456 was designated as the "lead case." Because the amended complaint filed in Case No. 8:09CV456 contains every constitutional claim that is alleged in the other three cases, in my discussion of those claims I will cite only to that pleading.

Plaintiffs in Case Nos. 8:09CV456, 4:09CV3266, and 4:10CV3005 are represented by the same counsel, and have filed a joint response to Defendants' motion for summary judgment.[3] They have also jointly filed a motion for summary judgment against Defendants. Plaintiff in
894 *894 Case No. 4:10CV3004 is represented by different counsel, who has neither responded to Defendants' motion for summary judgment nor filed a cross-motion.[4]

The Challenged Legislation

Plaintiffs seek to prohibit enforcement of parts of Legislative Bills 97 (LB 97) and 285 (LB 285), which were passed by the Nebraska Legislature and approved by the Governor in May 2009. LB 97 was enacted first.

Among other things, LB 97 amended Sections 29-4001, 29-4003, 29-4006, 29-4007, and 29-4008 of Nebraska's Sex Offender Registration Act (SORA). *See Nebraska Laws 2009,* LB 97 §§ 23, 25, 26, 27, 28. LB 97 also created two new statutes, which are codified as Neb.Rev.Stat. §§ 28-322.05 and 29-4001.01. *See Nebraska Laws,* LB 97, §§ 14, 24. Section 28-322.05 is a new criminal statute (unlawful use of the Internet by a prohibited sex offender), while Section 29-4001.01 is a new definitional statute for SORA.

LB 285 made further amendments to SORA Sections 29-4003 (applicability of the Act), 29-4006 (registration format), and 29-4007 (notification), and also amended SORA Sections 29-4004 (registration procedure), 29-4005 (registration duration), 25-4009 (information not confidential), 29-4011 (violation penalties), and 29-4013 (rules and regulations). *See Nebraska Laws 2009,* LB 285, §§ 4 through 11. In addition, LB 285 amended Sections 14 and 24 of LB 97. *See Nebraska Laws 2009,* LB 285, §§ 1, 3. Finally, LB 285 outright

repealed SORA Section 29-4010 (expungement procedure). *See Nebraska Laws 2009,* LB 285, § 17.

Appended to Defendants' brief is a table ("Appendix II, Sex Ofeender [sic] Registration Law Comparison") that summarizes the amendments made to SORA by LB 97 and LB 285. (Filing 339-2) For ease of reference, I have attached the table to this opinion as Attachment B.[5]

895 *895 Defendants have also appended to their brief a table comparing Nebraska's registration requirements to federal requirements established by Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, also known as the Sex Offender Registration and Notification Act ("SORNA").[6] This detailed and helpful table ("Appendix I, Sex Ofeender [sic] Registration Law Comparison—Adam Walsh Act") is attached to this opinion as Attachment C.[7]

SORNA, which was enacted on July 27, 2006, requires every jurisdiction to maintain a sex offender registry conforming to federal requirements or else lose federal funding. *See* 42 U.S.C. §§ 16912, 16925. As also required by SORNA, 42 U.S.C. § 16912(b), the Attorney General of the United States has published guidance to interpret and implement the law. *See The National Guidelines for Sex Offender Registration and Notification,* 73 Fed. Reg. § 38030-01 (July 2, 2008). The *National Guidelines* make it clear that SORNA sets a floor and not a ceiling for the states. That is, while the states must enact the minimum federal requirements, "SORNA does not bar jurisdictions from adopting additional regulation of sex offenders for the protection of the public, beyond the specific measures that SORNA requires." *National Guidelines,* at 38034.

The Attorney General has also made it clear that SORNA applies to sex offenders whose convictions occurred *prior* to the adoption of SORNA, stating:

> The applicability of the SORNA requirements is not limited to sex offenders whose predicate sex offense convictions occur following a jurisdiction's implementation of a conforming registration program. Rather, SORNA's requirements took effect when SORNA was enacted on July 27, 2006, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment. See 72 FR 8894, 8895-96 (Feb. 28, 2007); 28 CFR 72.3. The application of the SORNA standards to sex offenders whose convictions predate SORNA creates no ex post facto problem "because the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions) against sex offenders whose predicate convictions occurred prior to the creation of these requirements. See *Smith v. Doe*, 538 U.S. 84 [123 S.Ct. 1140, 155 L.Ed.2d 164] (2003)." 72 FR at 8896.

National Guidelines, at 38046.

DISCUSSION

In considering a motion for summary judgment the court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue. *Great Plains Real Estate Development, L.L.C. v. Union Central Life Ins. Co.*, 536 F.3d 939, 943-44 (8th Cir. 2008). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is
896 no genuine issue as to any material fact and that the moving party is entitled *896 to a judgment as a matter of law." *Sensient Technologies Corp. v. SensoryEffects Flavor Co.*, 613 F.3d 754, 760 (8th Cir.2010) (quoting Fed.R.Civ.P. 56(c)). Disputes that are not "genuine," or that are about facts that are not "material," will not preclude summary judgment. *Eng v. Cummings, McClorey, Davis & Acho, PLC,* F.3d, 611 F.3d 428, 432 (8th Cir. July 9, 2010).

The discussion which follows is in two parts: In Part One, I will identify and discuss genuine disputes that exist regarding three sections of Nebraska's law that diverge from SORNA's minimum requirements, and will also grant in part Plaintiffs' motion for summary judgment regarding one of those sections.[8] In Part Two, I will analyze the remainder of the new law and explain why it is constitutional.

As a preliminary matter, however, I must address Defendants' contention that Plaintiffs' claims as against the State of Nebraska and the Nebraska State Patrol are barred by the Eleventh Amendment to the United States Constitution, which grants states and their agencies immunity from suit in federal court.[9] *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). A state waives immunity when it voluntarily removes an action to federal court. *See Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 618-623, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002).

Defendants removed Case Nos. 4:09CV3266, 4:10CV3004, and 4:10CV3005 to federal court and filed motions on December 28 and 29, 2009, to consolidate Case No. 8:09CV456 with Case Nos. 4:09CV3266 and 4:09CV3258. (Filings 82, 88) At a hearing on January 21, 2010, Defendants also requested consolidation of the other cases. (Filing 308 (audio file), at 9:48-10:05.) I conclude that by these voluntary actions the State of Nebraska and the Nebraska State Patrol unequivocally waived their Eleventh Amendment immunity from suit in federal court.

PART ONE-THREE SECTIONS OF NEBRASKA'S NEW LAW ARE EITHER UNCONSTITUTIONAL OR A TRIAL IS REQUIRED TO DETERMINE THEIR CONSTITUTIONALITY

Three sections of Nebraska's new law are either unconstitutional or a trial is required to determine their constitutionality. Those sections are:

> (1) Neb.Rev.Stat. § 29-4006(1)(k) & (s) (West, Operative Jan. 1, 2010) (requiring disclosure of registrant's remote communication device identifiers and addresses together with email addresses, instant messaging identifiers, chat room identifiers, global unique identifiers, and other Internet communication identifiers that the registrant uses or plans to use, all domain names registered by the registrant, and all blogs and Internet sites maintained by the registrant or to which the registrant has uploaded any content or posted any messages or information);
>
> (2) Neb.Rev.Stat. § 29-4006(2) (West, Operative Jan. 1, 2010) (requiring registrants to consent to search and installation of monitoring hardware and software); and
>
> (3) Neb.Rev.Stat. § 28-322.05 (West, Operative Jan. 1, 2010) (making it a
897 crime to use Internet social networking *897 sites or instant messaging or chat room services accessible by minors by certain persons required to register under the Sex Offender Registration Act).

The constitutional provisions that are violated or may be violated are primarily the Ex Post Facto Clause (retroactive punishment), the First Amendment (freedom of speech), the Fourth Amendment (unreasonable search) and the Due Process Clause of the Fourteenth Amendment (vagueness of a criminal statute).[10] A more detailed explanation follows.

I.

First and Second Causes of Action—Ex Post Facto Claim—Regarding Neb. Rev.Stat. § 29-4006(1)(k) & (s) (West, Operative Jan. 1, 2010), Neb. Rev.Stat. § 29-4006(2) (West, Operative Jan. 1, 2010), and Neb.Rev.Stat. § 28-322.05 (West, Operative Jan. 1, 2010)

The Constitution, art. I, § 10, cl. 1, provides, among other things, that: "No State shall . . . pass any . . . ex post facto Law . . . ." These laws are challenged on the basis of the *Ex Post Facto Clause* of the Constitution and the Nebraska equivalent. (*E.g., Id.* at CM/ECF pp. 15, 20, 51.) Plaintiffs bring a facial and an as-applied challenge. (Filing 329 at CM/ECF p. 60.)

Either in kind or degree, these three statutes are foreign to the federal *Sex Offender Registration and Notification Act (SORNA)*.[11] Initially, Neb.Rev.Stat. § 29-4006(1)(k) & (s) requires an offender to disclose numerous details regarding his or her use of the Internet, particularly including "all blogs . . . to which the person has uploaded any content or posted any messages or information." SORNA has a counterpart but it is far more limited. *See* 42 U.S.C. § 16915a; *The National Guidelines for Sex Offender Registration,* 73 Fed.Reg. § 38030-01, Part VI (July 2, 2008), available at 2008 WL 2594934, *38055 (requiring that the information included in the registries "include all designations used by sex offenders *for purposes* of *routing* or *self-identification* in Internet communications or postings") (emphasis added). In addition, Neb.Rev. Stat. § 29-4006(2) imposes a consent to search and monitoring requirement on offenders who use the Internet. The consent to search and monitoring requirement apparently permits law enforcement officers to search homes, businesses and computers and install monitoring equipment on computers without any suspicion of criminal activity. Failure to give "consent" appears to be a felony. *SORNA* has no counterpart. Still further, Neb.Rev. Stat. § 28-322.05 makes it a crime for certain offenders to use social

networking sites and instant messaging or chat room services that allow a person under 18 to access or use such sites or services.[12] *SORNA* has no counterpart.

898 *898 I conclude that a trial is required to determine whether these three statutes, alone or collectively, violate the *Ex Post Facto Clause* of the Constitution (and the Nebraska equivalent) for (1) offenders who had served their time and were no longer under criminal justice supervision on January 1, 2010; and (2) offenders who had been sentenced prior to January 1, 2010, but who remained under criminal justice supervision on or after January 1, 2010.[13] A trial is required for both the facial and as applied *Ex Post Facto* challenges brought by Plaintiffs. Accordingly, the motions for summary judgment submitted by Plaintiffs and Defendants will be denied. A brief explanation follows.

In upholding *SORNA* against an *Ex Post Facto* challenge, the United States Court of Appeals for the Eighth Circuit has outlined the proper analysis. *United States v. May*, 535 F.3d 912 (8th Cir. 2008)(the application of the registration requirements of *SORNA* to a defendant who was registered as a sex offender pursuant to state law before *SORNA's* enactment, and who traveled to another state after *SORNA's* enactment, did not violate the *Ex Post Facto Clause;* the statute did not punish an individual for previously being convicted of a sex crime, but rather for not registering as a sex offender, or failing to update his registration after traveling in interstate commerce).

The analytic outlined by the Eighth Circuit is as follows:

> 1. Determine whether the legislature intended the subject statute to impose punishment for a pre-existing crime. If so, the statute violates the Ex *Post Facto Clause.*
>
> 2. If the legislative intent was to enact a civil and non-punitive regulatory scheme, determine whether the statute is so punitive either in purpose or effect as to negate the legislative intention to deem it civil. If so, the statute violates the *Ex Post Facto Clause.* However, only the "clearest" proof will suffice in this instance.

Id. at 919-920 (citations omitted).

As to the first level of analysis suggested by the Court of Appeals, there is evidence that the Nebraska legislator[14] who authored these (and other) provisions stated that he doubted his own objectivity and therefore his suitability to introduce this legislation. The legislator expressed "rage" and "revulsion" regarding persons who have "these convictions." In particular, while commenting upon recidivism, he stated that he did not "buy" the idea of "rehabilitation" or that "people could change . . . [i]n [this] area" and he did not "like the odds" that registrants would offend again. (Filing 319-3 at CM/ECF pp. 3-5, 14-16.)[15] Inasmuch as
899 these statutory *899 provisions are foreign to *SORNA,* and the foregoing comments, when read together with the far reaching and novel substance of these statutes, could be characterized as punitive in nature regarding offenders who had been sentenced and who had completed their supervision prior to the effective date or who had been sentenced prior to the effective date but remain under supervision thereafter,[16] I conclude that a trial is necessary to determine whether the legislature intended these three statutes to impose punishment such that these statute violate the *Ex Post Facto Clause.*[17]

As to the second level of analysis suggested by the Court of Appeals, these three provisions, apparently unique to the American legal system, are obviously onerous. I also conclude that a trial is necessary to determine whether these statutes (separately or collectively) are so punitive either in purpose or effect as to negate any legislative intention to deem them civil.

In short, the factual record produced by Plaintiffs and Defendants in support of their motions is both lacking in detail and in dispute as to material matters. Therefore, Plaintiffs' *Ex Post Facto* claims regarding these three statutes require a trial. An example will illustrate the point.

Factually, both sides have failed to produce a record that would allow me to determine how Neb.Rev.Stat. § 28-322.05 (making it a crime for certain offenders to use social networking sites and instant messaging or chat room services that allow a person under 18 to access or use such site or service) would actually impact particular Plaintiffs or offenders more generally. Whether the challenge is "as-applied" or "facial," I must understand, as a factual matter, how the statute works. The parties have failed to give me an undisputed record upon which to judge that question. Moreover, my independent research suggests that § 28-322.05 may have far reaching (and, perhaps, unintended) consequences. I have attached to this opinion Attachment A.[18] It gives numerous examples of sites that might plausibly be banned for offenders subject to the criminal provisions of Neb.Rev.Stat. § 28-322.05. At trial, the parties would be well-advised to present evidence regarding how the ban works and how far it extends. A similarly detailed factual exposition of both the workings and reach of the other

statutes will also be required at trial in order to fairly judge the *Ex Post Facto* claims and defenses.

II.

Seventh and Eighth Causes of Action— Fourth Amendment—Regarding Neb.Rev.Stat. § 29-4006(2) (West, Operative Jan. 1, 2010)

Plaintiffs attack Neb.Rev.Stat. § 29-4006(2) and the "consent to search" and "consent to monitoring" requirements. Plaintiffs claim that these provisions violate the Fourth Amendment
900 and Nebraska's equivalent constitutional provision. *900 (Filing 329 at CM/ECF pp. 15-19, 53 -54.) They bring a facial and an as-applied challenge. (*Id.* at CM/ECF p. 59.)

A person who is required to register must supply that "person's remote communication device identifiers and addresses, including, but not limited to, all global unique identifiers, serial numbers, Internet protocol addresses, telephone numbers, and account numbers specific to the device[.]" Neb.Rev.Stat. § 29-4006(1)(k). A registrant must also supply:

> All email addresses, instant messaging identifiers, chat room identifiers, global unique identifiers, and other Internet communication identifiers that the person uses or plans to use, all domain names registered by the registrant, and all blogs and Internet sites maintained by the person or to which the person has uploaded any content or posted any messages or information.

Neb.Rev.Stat. § 29-4006(1)(s).

Providing the foregoing information then triggers a broad "consent to search" and "consent to monitoring" requirement. That is:

> When the person provides any information under subdivision (1)(k) or (s) of this section, the registrant shall sign a consent form, provided by the law enforcement agency receiving this information, authorizing the:
>
> (a) Search of all the computers or electronic communication devices possessed by the person; and
>
> (b) Installation of hardware or software to monitor the person's Internet usage on all the computers or electronic communication devices possessed by the person.

Neb.Rev.Stat. § 29-4006(2).

A refusal to provide "consent" is a Class IV felony and a refusal is punishable by a prison sentence. Neb.Rev.Stat. § 29-4011(1)("Any person required to register under the Sex Offender Registration Act who violates the act is guilty of a Class IV felony.") Such a felony is punishable by imprisonment of up to five years and a fine of up to $10,000. Neb.Rev.Stat. § 28-105(1) (West, 2009).

A. Persons Not Presently Under Probation, Parole or Court-Monitored Supervision

1. Search

Defendants concede that the "consent to search" provisions are unconstitutional regarding offenders who are no longer under supervision.[19] To be specific, "Defendants acquiesce to entry of a permanent injunction prohibiting enforcement of the consent to search provision set forth in Neb. Rev.Stat. § 29-4006(2) as against individuals no longer on probation, parole, or other court-monitored supervision." (Filing 337 at CM/ECF p. 12.)[20]

Defendants' concession is well-founded because this portion of Nebraska's law clearly violates the Fourth Amendment rights of persons who are not presently on probation, parole or court-monitored supervision. *See Doe v. Marion County,* 566 F.Supp.2d 862, 883 (S.D.Ind. *901 2008)[21] (holding requirement in Indiana sex and violent offender registration statute that offenders not currently on parole or probation consent to warrantless searches of personal computers or devices with Internet capability at any time, or be subject to felony prosecution, violated Fourth Amendment and stating that Indiana's legislature had "taken an unprecedented step in stripping plaintiffs of their right to be secure in their homes, `papers,' and personal effects") Accordingly, summary judgment is granted in favor of Plaintiffs

901 regarding those Plaintiffs who were not on probation, parole or court-monitored supervision on January 1, 2010.

2. Monitoring

Defendants apparently *do not* concede that § 29-4006(2)(b) (providing that the execution of the consent also authorizes installation of hardware or software to monitor the person's Internet usage on all the computers or electronic communication devices possessed by that person) is unconstitutional as to persons who are no longer on probation, parole or court-monitored supervision. During the preliminary injunction hearing, the following exchange took place between the undersigned and counsel for Defendants:

> THE COURT: ... [F]or those plaintiffs who are not presently on probation or parole, including those who are not subject to a lifetime of supervision, the State of Nebraska does not—does not object to the imposition of a preliminary injunction with respect to the consent to search requirement?
>
> MR. COOKSON: That's correct, Your Honor.
>
> THE COURT: Okay. That concession does not extend, as I understand it, to the—to the—to the monitoring question, the installation of software and hardware?
>
> MR. COOKSON: That's correct, Your Honor.
>
> THE COURT: Do you have any case law to support the—the point of view that that particular provision is ...
>
> MR. COOKSON: Yes, just one second, Your Honor. That would be on page 23.
>
> THE COURT: Uh-huh.
>
> MR. COOKSON: And 24 of our brief.
>
> THE COURT: Yeah.
>
> MR. COOKSON: It is—
>
> THE COURT: Is there any federal case law that says that, for someone who is not on probation or parole, that you can require that they consent to the installation of software or hardware on their computers?
>
> MR. COOKSON: No, Your Honor. I believe that's a first impression issue.
>
> (Filing 326 at CM/ECF p. 10.)

Neb.Rev.Stat. § 29-4006(2)(b) is plainly unconstitutional under the Fourth Amendment as it pertains to persons who are no longer on probation, parole or court-monitored supervision. Without a "consent to search," Nebraska would have no ability to enter homes or business or other places where Plaintiffs have a reasonable expectation of privacy or to "[i]nstall[]... hardware or software to monitor the person's Internet usage on all the computers or electronic communication devices possessed by the person." In short, a cop would have to *search for* computers and then (at least to some degree) *search in* computers[22] to install
902 monitors. *Doe,* *902 566 F.Supp.2d at 881 ("[I]f the defendants' intended monitoring of the plaintiffs' computers and internet use would not amount to a search under the Fourth Amendment, then the defendants do not need [the challenged statute] or the plaintiffs' consent at all").

Thus, the identical Fourth Amendment analysis that drove Judge Hamilton's decision in *Doe, id.* at 874, 878-88, applies equally to the "monitoring" provision of Nebraska's statute. When that analysis is applied, this provision of Nebraska law fails to meet the requirements of the Fourth Amendment because (1) it allows entry by law enforcement officers into places where there is a reasonable expectation of privacy by means of a coerced consent (2) followed by the installation of monitoring equipment on property for which there is a reasonable expectation of privacy by means of a coerced consent (3) without a warrant issued by a neutral judge (4) and without a showing of probable cause. *Id.* at 874. ("[t]he Fourth Amendment protects the privacy of Americans by placing a neutral judicial officer between the police and the privacy of the home and papers (and now computers), by requiring a warrant based on probable cause, and by requiring that the warrant be specific.... To suggest that removing a neutral judicial officer as a barrier does not significantly impair a citizen's privacy in his home is to imply that the warrant requirement is no big deal, and that it imposes no meaningful restraints upon law enforcement. The `most basic constitutional rule in this area is that `searches conducted outside the judicial process, without prior approval by judge

or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.' The exceptions are `jealously and carefully drawn,' and there must be `a showing by those who seek exemption ... that the exigencies of the situation made that course imperative.'") (citations omitted).

Several observations are in order. Initially, cases dealing with installing equipment to monitor persons during periods of court or parole supervision are not persuasive. Those cases are inapposite because they either (1) involve a judicial determination based on an individualized assessment of need or (2) deal with persons who have a lessened expectation of privacy because they have not yet been released from criminal justice supervision. *Id.* at 882, n. 7.

Furthermore, Defendants have cited no case where a "sex offender" who has completed his or her punishment and supervision for a sex crime was held to have a weaker claim to Fourth Amendment protection than ordinary citizens. Without precedent (or at least an analogous and well-reasoned case), I am unwilling to vitiate the Fourth Amendment for individuals who have paid their debt to society. *Id.* at 883 ("[a] person's status as a felon who is no longer under any form of punitive supervision therefore does not permit the government to search his home and belongings without a warrant.").

Finally, to the extent that Nebraska contends this portion of the statute can be saved by a limiting judicial construction, I reject such an approach as wholly inappropriate. The statute is unambiguous. That is, a person who has served his or her probationary or parole term and prison or jail time for a sex offense must "consent" to the installation of monitoring equipment on computers he or she possesses. Such a consent then authorizes a search incident thereto to find the computers in places where the person who gave the consent has a
903 reasonable expectation of privacy *903 and is followed by the installation of monitoring equipment on computers for which there is a reasonable expectation of privacy.

As Chief Justice Roberts has recently reiterated regarding an unambiguous statute, the federal courts "`may impose a limiting construction on a statute *only* if it is `readily susceptible' to such a construction'" and the federal courts "`will not rewrite a ... law to conform it to constitutional requirements'...." *United States v. Stevens*, U.S. , 130 S.Ct. 1577, 1591, 176 L.Ed.2d 435 (2010) (federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, the statute was facially invalid under the First Amendment protection of speech) (citation omitted) (emphasis added). Nebraska follows that familiar rule as well. *See, e.g., State v. Woods*, 255 Neb. 755, 587 N.W.2d 122, 128 (1998) (holding that notice-of-alibi statute would not be construed to allow a court to order the disclosure of the identity of the defendant's alibi witness prior to trial; stating that a statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous).

Here, the challenged provision needs no construction. The words are (chillingly) plain.

(3) Summary

The consent to search and the consent to monitoring provisions of Neb.Rev.Stat. § 29-4006 (2) violate the Fourth Amendment both facially[23] and as applied as those provisions pertain to previously convicted "sex offenders" who were not on probation, parole, or court-monitored supervision on January 1, 2010, because they had served their time. Since Defendants have repeatedly asserted that Nebraska law mirrors the federal constitution, (*e.g.,* filing 335 at CM/ECF pp. 4-5) it follows that the law violates the Nebraska constitution as well for this category of "sex offenders." *See* Neb. Const. art. I, § 7 (Fourth Amendment equivalent).

With the previous discussion in mind, the parties are directed to provide me with a stipulation designating those Plaintiffs who fit within this category—"sex offenders" who were not on probation, parole or court-monitored supervision as of January 1, 2010—together with the date when the offender was no longer under criminal justice supervision. That stipulation shall be provided within thirty days after the issuance of this Memorandum and Order. If, for some reason, the parties cannot reach agreement, they shall arrange a telephone conference with me by contacting my judicial assistant.

Given the foregoing determination, it is unnecessary to decide whether the challenged statute violates the constitutional rights of persons associated with this group of Plaintiffs (like spouses, mothers or employers). Stated more simply, if those Plaintiffs previously convicted of a "sex offense" but who have served their time are not obligated to give a consent to search and consent to the installation of computer monitors, then those persons associated with such Plaintiffs have nothing to fear.

B. Persons Presently on Probation, Parole or Court-Monitored Supervision

Plaintiffs also argue that the statutory consent to "search" and consent to "monitoring"
904 requirements violate the protections *904 afforded by both the Fourth Amendment, and the Nebraska equivalent, to persons on probation, parole or court-monitored supervision. (Filing 329 at CM/ECF pp. 195-203.) Additionally, Plaintiffs argue that the Fourth Amendment privacy interests of persons associated with these offenders are violated by these provisions. (*E.g., id.* at CM/ECF pp. 45-49.)

The amended complaint asserts both "facial" and "as-applied" challenges. (*Id.* at CM/ECF pp. 59-60.) In addition, the amended complaint sets out specific allegations by each Plaintiff regarding the harm he or she may suffer as a result of the new law. Some Plaintiffs complain of harm associated with this consent to search provision. (*Id.* at CM/ECF pp. 24-49.) In particular, and for example, the amended complaint describes a Plaintiff who is "still on probation,"[24] who uses a computer for work and whose family utilizes a website that could be called a social networking site to keep in touch with family and friends. (*Id.* at CM/ECF p. 35.) Defendants have denied the individual Plaintiffs' specific allegations of the amended complaint because Defendants lack sufficient knowledge or information. (Filing 333 at CM/ECF pp. 13-17.)[25] Furthermore, the parties have not agreed on a general statement of undisputed facts or a particularized statement of facts regarding the specific claims of each of the Plaintiffs.

After careful consideration, Plaintiffs' motion for summary judgment, as well as Defendants' motion for summary judgment, are denied regarding the statutory consent to "search," and consent to "monitoring" requirements pertaining to persons who have been convicted of sex crimes and who are presently on probation, parole or court-monitored supervision and also respecting persons associated with such registrants. As briefly explained in the following discussion, a trial is necessary to resolve the constitutionality of this section of Nebraska's new law as applied to this category of offenders and those associated with them.

The Supreme Court has declared that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be `reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). But, like most things, context is critical when evaluating principles enunciated by the Supreme Court. In *Griffin,* the Court upheld a Wisconsin law permitting any probation officer to search a probationer's home without a warrant so long as there were "reasonable grounds" to support a search. *Id.* The Court explained that "the special needs of Wisconsin's probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by `reasonable grounds.'" *Id.* at 876, 107 S.Ct. 3164.

Subsequently, in *United States v. Knights*, 534 U.S. 112, 121, 122 S.Ct. 587, 151 L.Ed.2d 497(2001), the Court elected not to apply the "special needs" doctrine in upholding a warrantless search of a probationer that was supported by "reasonable suspicion." Rather, the Court held that the search was reasonable "under [the] general Fourth Amendment approach of `examining the totality of the circumstances.'" *Id.* at 118, 122 S.Ct. 587 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996)). In explaining its decision, the Court noted that the probationer had signed a probation order agreeing to
905 submit to a search of his person and property by a law enforcement *905 officer "at any[] time, with or without a search warrant, warrant of arrest or reasonable cause." *Id.* at 118, 122 S.Ct. 587. The Court concluded that "the balance of these considerations requires no more than reasonable suspicion," ultimately holding that "the warrantless search..., supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.* at 121-122, 122 S.Ct. 587. However, the Court explicitly refused to consider whether Knights' acceptance of the search condition constituted a voluntary consent under the requirements of *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). *Id.* at 118, 122 S.Ct. 587.

In *Samson v. California*, 547 U.S. 843, 852, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), the Court applied a "totality of the circumstances" analysis in upholding a suspicionless search of a parolee conducted pursuant to a California law providing that, as a condition for release from prison, every prisoner eligible for state parole agreed to be subject to a search or seizure by a parole officer with or without a search warrant and with or without cause. After reiterating *Knights*' holding that "probationers `do not enjoy the absolute liberty to which every citizen is entitled,'" *id.* at 849, 126 S.Ct. 2193 (quoting *Knights*, 534 U.S. at 119, 122 S.Ct. 587), the Court explained that "[e]xamining the totality of the circumstances pertaining to petitioner's status as a parolee, ... including the plain terms of the parole search condition, ... petitioner did not have an expectation of privacy that society would recognize as legitimate." *Id.* at 852, 126 S.Ct. 2193 (citations omitted). Just as in *Knights,* the Court explicitly refused to consider whether acceptance of the parole condition by an inmate in order to gain his release from prison was a voluntary consent under *Schneckloth. Id.* at 852, n. 3, 126 S.Ct. 2193.

While the foregoing cases dealt with persons on probation or parole, it is worth remembering that some of the Plaintiffs are not sex offenders but they may be impacted by the requirement

that an offender with whom they are associated is required to give consent. In that regard, the Supreme Court has made plain that a warrantless search of marital residence, on the basis of consent given to police by a defendant's wife, was an unreasonable and invalid search as to the defendant, who was physically present and expressly refused to consent. *Georgia v. Randolph*, 547 U.S. 103, 123, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). It is clear, therefore, in some circumstances, Fourth Amendment protections exist even though one party has given a consent that might otherwise constitute a waiver of Fourth Amendment rights regarding the property subject to the waiver. Moreover, the *Randolph* case illustrates how the consent of one party may be used by law enforcement as a justification to impair the Fourth Amendment rights of another party.

After considering the foregoing cases (and others), and having not received any comparable case law from the parties, I will undertake an examination of the statute within a discrete factual context presented by a trial in order assess the relative interests of sex offenders who are now on probation, parole or court-monitored supervision, persons associated with those offenders, and the State of Nebraska. With respect to the necessity of a trial, one must appreciate that Plaintiffs bring both a facial and an as-applied challenge and, additionally, that the parties have not agreed on a general statement of undisputed facts or a particularized statement of undisputed facts regarding the specific claims of each of the
906 Plaintiffs. While it might be possible to resolve the facial challenge *906 without a trial,[26] since a trial is required for the as-applied challenge, it makes more sense to resolve both challenges after trial.

There are several important caveats that apply to a trial respecting the category of persons presently on probation, parole or court-monitored supervision. Initially, the record may suggest that *none* of the Plaintiffs will be on probation, parole or court-monitored supervision at the time of trial because they will have served their time.[27] If it turns out that none of the Plaintiffs will be on probation, parole or court-monitored supervision because they have served their time, then the "as-applied" challenge to the statute regarding persons on probation, parole or court-monitored supervision is probably moot, or at least not ripe, because none of the Plaintiffs fit into that category and there is no threat to them.[28] Additionally, if none of the Plaintiffs are on probation, parole, or court-monitored supervision at the time of trial, one wonders whether Plaintiffs have standing to assert a facial challenge to the extent the statute pertains to persons who are probation, parole or court-monitored supervision.

The parties have also given too little thought to another potential class of persons. The parties do not adequately address the class of persons who have not yet committed a sex offense, but who may commit such an offense in the future and thus become subject to this law. Do Plaintiffs purport to represent such a group? If they do, one must ask whether Plaintiffs have standing to assert a claim for that group. Because of these concerns, the lawyers are directed to confer. After that, they should address these matters (preferably by stipulation) as the case moves forward.

C. Fourth Amendment-Recapitulation

I have decided that on Fourth Amendment grounds and the equivalent provision of the Nebraska Constitution, Neb.Rev. Stat. § 29-4006(2) is unconstitutional as it regards Plaintiffs who were previously convicted of sex crimes but who were not on probation, parole or court-monitored supervision on or after January 1, 2010. In this regard, Plaintiffs' motion for
907 summary *907 judgment is granted and Defendants' motion for summary judgment is denied. For persons who were previously convicted of sex crimes and who were on probation, parole or court-monitored supervision on or after January 1, 2010, a trial is required to determine the constitutionality of Neb.Rev.Stat. § 29-4006(2) under the Fourth Amendment and the equivalent provision of the Nebraska Constitution. In this regard, Plaintiffs' motion for summary judgment and Defendants' motion for summary judgment are denied.

III.

Ninth and Tenth Causes of Action—Due Process—Regarding Neb.Rev.Stat. § 28-322.05 (West, Operative Jan. 1, 2010)

Plaintiffs attack Neb.Rev.Stat. § 28-322.05, which makes it a crime for certain offenders to use portions of the Internet. Plaintiffs claim that this statute violates the Due Process Clause of the Fourteenth Amendment and Nebraska's equivalent constitutional provision. (Filing 329 at CM/ECF pp. 20-21, 54-55, n. 12.) They bring a facial and an as-applied challenge. (*Id.* at CM/ECF p. 59.)

In its entirety, Neb.Rev.Stat. § 28-322.05 states:

> (1) Any person required to register under the Sex Offender Registration Act who is required to register because of a conviction for one or more of the following offenses, including any substantially equivalent offense committed in another state, territory, commonwealth, or other jurisdiction of the United States, and who knowingly and intentionally uses a social networking web site, instant messaging, or chat room service that allows a person who is less than eighteen years of age to access or use its social networking web site, instant messaging, or chat room service, commits the offense of unlawful use of the Internet by a prohibited sex offender:
>
> (a) Kidnapping of a minor pursuant to section 28-313;
>
> (b) Sexual assault of a child in the first degree pursuant to section 28-319.01;
>
> (c) Sexual assault of a child in the second or third degree pursuant to section 28-320.01;
>
> (d) Incest of a minor pursuant to section 28-703;
>
> (e) Pandering of a minor pursuant to section 28-802;
>
> (f) Visual depiction of sexually explicit conduct of a child pursuant to section 28-1463.03 or 28-1463.05;
>
> (g) Possessing any visual depiction of sexually explicit conduct pursuant to section 28-813.01;
>
> (h) Criminal child enticement pursuant to section 28-311;
>
> (i) Child enticement by means of an electronic communication device pursuant to section 28-320.02;
>
> (j) Enticement by electronic communication device pursuant to section 28-833; or
>
> (k) An attempt or conspiracy to commit an offense listed in subdivisions (1)(a) through (1)(j) of this section.
>
> (2) Unlawful use of the Internet by a prohibited sex offender is a Class I misdemeanor for a first offense. Any second or subsequent conviction under this section is a Class IIIA felony.

908 Relevant definitions[29] are found in Neb. *908 Rev.Stat. § 29-4001.01, to wit:

> (3) Chat room means a web site or server space on the Internet or communication network primarily designated for the virtually instantaneous exchange of text or voice transmissions or computer file attachments amongst two or more computers or electronic communication device users;
>
> ...
>
> (10) Instant messaging means a direct, dedicated, and private communication service, accessed with a computer or electronic communication device, that enables a user of the service to send and receive virtually instantaneous text transmissions or computer file attachments to other selected users of the service through the Internet or a computer communications network;
>
> ...
>
> (13) Social networking web site means a web page or collection of web sites contained on the Internet (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users or visitors to the web site, with or without the creator's permission, consent, invitation, or authorization, and (C) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile and users who have viewed or accessed the creator's profile;

In particular, Plaintiffs claim that this criminal statute is "void for vagueness." As I next briefly explain, I shall deny Plaintiffs' motion for summary judgment, and Defendants' motion for summary judgment, because the record is inadequate to resolve this claim without a trial.

First, there is good reason to believe that some of the Plaintiffs who are convicted offenders would be subject to this criminal statute as they have qualifying convictions and regularly use computers for work and otherwise. (*E.g.,* filing 6-1 at CM/ECF pp. 23-25; filing 346-11 at CM/ECF pp. 7-8.)[30] There is also good reason to believe that these Plaintiffs, their coworkers and family members would be adversely impacted by the inability of such offenders to use portions of the Internet while attempting to comply with this statute. (*E.g.,* filing 6-1 at CM/ECF p. 23-24.)

Second, the vagueness doctrine is not an outgrowth of the First Amendment (although it is
909 applied in cases where there are First Amendment issues), but *909 rather the doctrine is a function of the Due Process Clause of the Fifth Amendment.[31] *See, e.g., United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act provision criminalizing the pandering or solicitation of child pornography is not overbroad under the First Amendment, and that provision also is not impermissibly vague under the Due Process Clause). A criminal statute fails to comport with due process if the statute fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so lacking in standards that it authorizes or encourages seriously discriminatory enforcement. *Id.*; *See also, Skilling v. United States,* U.S. , 130 S.Ct. 2896, 2933-34, 177 L.Ed.2d 619 (2010); *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Importantly, "what renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams,* 553 U.S. at 306, 128 S.Ct. 1830.

Third, a trial is necessary on this claim because both parties have failed to present an undisputed record of material facts showing how this statute actually works. In particular, but not by way of limitation, I do not have a factual record that is undisputed showing how an offender would know whether using a particular site or service is banned because that site or service "*allows* a person who is less than eighteen years of age to access or use" the site or service.

My independent research (Attachment A) shows that certain sites prohibit, as a matter of policy, use by persons whose ages are 18 or under, but, as a matter of practice, allow access to the sites simply by typing in any qualifying birthday. (*E.g.,* Attachment A at p. 20 (example 2), regarding "travel hospitality."[32]) If a lot of minors actually log into such a site, has such a site "allowed" the youngsters to use the site because the site has done nothing to stop them? How does an offender know whether a site or service "allows a person who is less than" 18 to "access or use" the site or service? What does "allows" mean in practice? Does it only cover sites or services that explicitly permit use by youngsters as a matter of stated policy? If so, does an offender violate the statute if the offender fails to look for such a policy as a part of his "use"? Does the word "allows" include any site or service that lacks a policy but actually permits youngsters, as a matter of practice, to use the site or service? If so, how is
910 the offender *910 to determine whether young people are "allowed" to use the site or service as a matter of practice? If a site has no age restriction and thus "allows" minors to "access" the site, but no minors actually "use" the site, has an offender who "uses" the site committed a crime when everyone else who "uses" the site is an adult? Other examples abound,[33] but the point is made. I need to know how this statute works in practice in order to judge the "void for vagueness" claim both facially and as-applied, and the present record is insufficient. Moreover, I need to know how the statute is likely to be applied in practice to judge whether a limiting construction could be used to save the statute. *Cf. Skilling,* 130 S.Ct. at 2926 (before applying a limiting construction to avoid a "void for vagueness" challenge to an "honest services" prosecution under 18 U.S.C. § 1346, the Court said: "[t]o place Skilling's [void for vagueness] constitutional challenge in context, we first review the origin and subsequent application of the honest-services doctrine").

Given the myriad of Internet options, the parties would be well-advised to present a fair sample of the relevant universe at trial. In this regard, I encourage the parties to think about the use of a joint expert to present objective testimony on this claim and the other "Internet" claims that will be resolved at trial. A person who is both legally and technically trained would be ideal. Someone like Professor Eugene Volokh, who holds a degree in mathematics and computer science, who worked for 12 years as a computer programmer, and who is a highly regarded legal academic might be such a person. *See Eugene Volokh Biography,* available at www.law.ucla.edu. And, to be frank, rather than dueling experts, I would appreciate hearing from someone who has no particular allegiance to the positions of either side. Thus, I strongly suggest that the parties consider jointly hiring an expert. Again, however, it is the lawyers' responsibility to present the evidence, and I will respect their decisions.[34]

IV.

Fourteenth and Fifteenth Causes of Action —First Amendment—Regarding Neb.Rev.Stat. § 29-4006(1)(k) & (s) (West, Operative Jan. 1, 2010) and Neb.Rev.Stat. § 28-322.05 (West Operative Jan. 1, 2010)

Plaintiffs attack section 29-4006(1)(k) & (s) and section 28-322.05 because the requirement that registrants must disclose information about Internet use violates their right to freedom of speech guaranteed by the First Amendment (and the Nebraska equivalent) and because the partial ban on Internet use by certain offenders, upon pain of criminal conviction, violates those speech rights as well. (*E.g.,* filing 329 at CM/ECF pp. 17, 56-57.) Plaintiffs bring both a facial and an as-applied challenge. (*Id.* at CM/ECF p. 60.)

A person who is required to register must supply their "remote communication device identifiers and addresses, including, but not limited to, all global unique identifiers, serial numbers, Internet protocol addresses, telephone numbers, and account numbers specific to the device[.]" Neb. Rev.Stat. § 29-4006(1)(k). A registrant must also supply:

911 *911 All email addresses, instant messaging identifiers, chat room identifiers, global unique identifiers, and other Internet communication identifiers that the person uses or plans to use, all domain names registered by the registrant, *and all blogs* and Internet sites maintained by the person or *to which the person has uploaded any content or posted any messages or information.*

Neb.Rev.Stat. § 29-4006(1)(s) (emphasis added).

In pertinent part, Neb.Rev.Stat. § 28-322.05 significantly restricts Internet use by some offenders and states the following:

> (1) Any person required to register under the Sex Offender Registration Act who is required to register because of a conviction for one or more of the following offenses, including any substantially equivalent offense committed in another state, territory, commonwealth, or other jurisdiction of the United States, and who knowingly and intentionally uses a social networking web site, instant messaging, or chat room service *that allows a person who is less than eighteen years of age to access or use its social networking web site, instant messaging, or chat room service,* commits the offense of unlawful use of the Internet by a prohibited sex offender:
>
> [listing specific offenses] ...

I find and conclude that a trial is required regarding the First Amendment challenges to these two statutes. Accordingly, I will deny the motions for summary judgement submitted by both parties. I do so for essentially the same reasons that I have previously decided a trial is necessary. The parties have not given me an undisputed record of material facts that explains how these two statutes would actually work in practice and without such a record I cannot determine the implications of this statute on Plaintiffs' First Amendment rights. Once again, I refer the parties to Attachment A as an example of the void in this record. Briefly, I next explain in somewhat more detail why a trial is required.

People who are convicted of crimes, even felony crimes related to children, do not forfeit their First Amendment right to speak by accessing the Internet. *See, e.g., United States v. Crume,* 422 F.3d 728, 733 (8th Cir.2005) (condition of supervised release, imposed upon a man who had been convicted of receiving and possessing child pornography, which completely barred defendant's access to computers and the Internet was a greater deprivation of defendant's First Amendment rights than was reasonable). Indeed, the Eighth Circuit Court of Appeals has described Internet access as "an important medium of communication, commerce and information-gathering" and has required that restrictions imposed for criminal justice supervision purposes be "narrowly-tailored." *Id.* The requirement that restrictions upon the speech of a sex offender must be narrowly tailored[35] applies equally to the *civil regulation* of sex offenders who use the Internet. *See, e.g., White v. Baker,* 696 F.Supp.2d 1289 (N.D.Ga.2010) (requirement for former sexual offender to provide his Internet e-mail addresses, usernames, and passwords to law enforcement personnel was not sufficiently narrow to accomplish state's legitimate interest in protecting children from Internet predators, in violation of offender's anonymous First Amendment free speech rights, where there was possibility of public disclosure and broad use of that information and, further, offender had to
912 *912 report user names and passwords used on "interactive online forums" when that term arguably included forums (such as blogs) in which protected speech occurred).

A content-neutral regulation of speech is permitted *if* the regulation is narrowly tailored to serve a significant governmental interest, and *if* it leaves open ample alternative channels for communication of information. *See, e.g.,* *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). It is immaterial that the government's interest might be adequately served by some less-speech-restrictive alternative. *Id.* at 798, 109 S.Ct. 2746. However, this standard "does not mean that a ... regulation may burden more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden does not serve to advance its goals." *Id.* at 799, 109 S.Ct. 2746.

Several examples will show why a trial is necessary.[36] In particular, the examples illustrate the need for concrete facts regarding the "narrowly tailored" requirement.

Example 1: Considering Neb.Rev.Stat. § 29-4006(1)(s), one wonders whether a sex offender's posting to a blog site maintained by a law professor for the purpose of discussing sentencing issues,[37] where the posting decried sex offender registration laws, would be covered by the statute and thus reportable. If so, one wonders whether the foregoing statute is narrowly tailored.

Example 2: Considering Neb.Rev.Stat. § 28-322.05, one wonders what the word "allows" means. In that same vein, one wonders whether a site that allows users to connect with individuals who speak different languages for the purposes of enhancing language learning as native speakers and to help non-native speakers improve their language skills is off limits because persons over the age of 13 can, as a matter of the site's policy, access the site.[38] If so, one wonders whether the foregoing statute is narrowly tailored.

Example 3: Doe 35 is probably covered by the offenses listed in Neb.Rev.Stat. § 28-322.05 because, at 23 years of age and after having consensual sex (once) with a 14 year old female, he was convicted of "child molestation" under Washington law.[39] (Filing 330 at CM/ECF p. 33.) There is no indication that Doe 35 used a computer to commit his crime. If it is true that Doe 35 did not use a computer to commit his crime and if it is also true that he is subject to the ban found in section 28-322.05, one wonders whether the statute as applied to him and others like him is narrowly tailored. *Cf.* *Crume*, 422 F.3d 728, 733 (stating that "we are particularly reluctant to uphold sweeping restrictions on important constitutional rights[,]" and noting that "the record is devoid of evidence that [the defendant] ever used his computer
913 beyond simply possessing child pornography[,]" the Court of Appeals reversed *913 a "broad ban" so "the district court can impose a more narrowly-tailored restriction"); *United States v. Mark*, 425 F.3d 505, 509 (8th Cir.2005) (citing and following *Crume;* remanding for a determination whether special supervised release condition completely barring defendant from Internet access was the least restrictive means reasonably necessary to deter further criminal conduct and protect the public).

PART TWO—ALL OTHER SECTIONS OF NEBRASKA'S NEW LAW ARE CONSTITUTIONAL[40]

Federal courts, including the United States Court of Appeals for the Eighth Circuit, have consistently upheld SORNA as against claims that it is unconstitutional. *See, e.g.,* *United States v. May*, 535 F.3d 912 (8th Cir.2008) (holding that SORNA does not violate the Ex Post Facto Clause, the Commerce Clause, or the non-delegation doctrine); *United States v. Howell*, 552 F.3d 709, 717 (8th Cir.2009) (finding that section of SORNA containing underlying registration requirements was valid exercise of congressional power under Necessary and Proper Clause; registration requirements were appropriate and reasonably adapted means by Congress to attain legitimate end of monitoring and regulating interstate movement of sex offenders); *United States v. Waddle*, 612 F.3d 1027 (8th Cir.2010) (adhering to *May*).

I.

First and Second Causes of Action— Ex Post Facto Claim

"Both U.S. Const. art. I, § 10, cl. 1, and Neb. Const. art. I, § 16, provide that no ex post facto law shall be passed." *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335, 350 (2004). The Nebraska Supreme Court "ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution." *Id.* (citing *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004), *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999)). "[U]nder the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited." *Id.*

Plaintiffs claim that "[s]ome of the previously-held statuses, rights, or abilities [they have been] deprived [of] by virtue of the retroactive application of the New Act include:

> a. Ability to challenge the need for global notification on the Internet through the State Patrol website, Neb. Rev.Stat. § 29-4013(2)(b) (Rev. 2007);
>
> b. Status as a low or moderate risk registrant as determined by the State using an individualized risk assessment tool, and corresponding level of public notification, Neb.Rev.Stat. § 29-4013(2)(c) (Rev. 2007);
>
> c. Limited ability to expunge registration information after successful completion of the registration period, Neb. Rev.Stat. § 29-4010 (Rev. 2002);
>
> d. Right to the confidentiality of the registry information, Neb.Rev.Stat. § 29-4009 (Rev. 2006);
>
> e. Ability to have the sentencing court exempt certain defendants from the obligations of registration, Neb.Rev. Stat. § 29-4003(2) (Rev. 2006);
>
> f. Right to rely on the finality of the sentence and criminal process; and
>
> 914 *914 g. Right to rely on the plea agreement entered into by some registrants."

(Filing 345, CM/ECF pp. 6-7, ¶ 4.)

Plaintiffs also claim that "[i]n addition to those restrictions already in place under the prior registry, some of the increased restrictions and disabilities imposed on registrants through the retroactive application of the New Act include:

> a. Increased registration period, extending some individuals from a ten year registration period to a lifetime obligation, Neb.Rev.Stat. § 29-4005(1)(b) (Rev. 2009);
>
> b. Mandatory public notification through the State Patrol sex offender website, regardless of the State-determined level of risk, Neb.Rev.Stat. § 29-4013(2)(b) (Rev. 2009);
>
> c. Mandatory characterization as posing `a high-risk to reoffend' and as `violent sex offenders,' regardless of the known risk to reoffend, Exhibit 5, [Filing 346-6], p. 1; Filing 319-7, p. 6;
>
> d. Mandatory in-person periodic reporting, versus the previous written reporting requirement, Neb.Rev.Stat. § 29-4006(3)-(6) (Rev. 2009);
>
> e. Increased frequency of periodic reporting, up to four times per year, Neb.Rev.Stat. § 29-4006(3)-(6) (Rev. 2009);
>
> f. Mandatory in-person updating of certain information, including addresses, employment, school, vehicles, travel and immigration documents, professional licenses and certificates, email addresses, Internet identifiers and telephone numbers, Exhibit 7 [Filing 346-8];
>
> g. Increased obligation to provide greater and more identifying types of information to law enforcement, Neb. Rev.Stat. § 29-4006(1) (Rev. 2009);
>
> ...
>
> j. Mandatory updating of that electronic information within one work day, so law enforcement is never far behind, Neb.Rev.Stat. § 29-4006(13) (Rev. 2009); and
>
> k. Threat of a strict liability felony offense for failure to provide or timely update any of the registry information, Neb.Rev.Stat. § 29-4008 (Rev. 2009)."

(Filing 345, CM/ECF pp. 7-8, ¶ 5.)

In this regard, Plaintiffs represent that "Does 1-36 [in Case No. 8:09CV456] and the two John Does [in Case Nos. 4:09CV3266 and 4:10CV3005] were convicted of registrable offenses and sentenced before the passage or enforcement of the New Act." (Filing 345, CM/ECF p. 9, ¶ 8.) Under the old law, they were "subjected to an individualized risk assessment, and certified by the State as posing a particular risk to reoffend." (Filing 345, CM/ECF p. 9, ¶ 9.)

"Some were assigned as Tier 3, which represented a high risk to reoffend. Filing 1, p. 5-6. These individuals were subject to public notification by informing law enforcement, schools,

daycares, and other groups in the area, and through the State Patrol website. Neb.Rev.Stat. § 29-4013(2)(c)(iii) (Rev. 2007)." (Filing 345, CM/ECF p. 9, ¶ 9.)

"Others were assigned as Tier 2, which represented a moderate risk to reoffend. Filing 1, p. 5 -6. These individuals were subject to public notification by informing law enforcement, schools, daycares, and other groups in the area. Neb.Rev.Stat. § 29-4013(2)(c)(ii) (Rev. 2007)." (Filing 345, CM/ECF pp. 9-10, ¶ 10.)

"Still others were designated as Tier 1, which represented those who were determined by the State to pose a low risk to reoffend. Filing 1, p. 5-6. Because of the nature of their crimes and circumstances, public notification for these individuals only entailed notification to law
915 enforcement. Neb.Rev.Stat. § 29-4013(2)(c)(i) *915 (Rev. 2007). Some of the low risk Does include the following:

> a. In 1996, Doe 1 was found guilty of sexual assault of a child in 1996, and was sentenced to three years of probation. His crime: when he was nineteen, he had a consensual sexual relationship with his fifteen year-old girlfriend. Filing 6-1, p. 1-2.
>
> b. In 2006, Doe 21 was found guilty of third degree sexual assault. His crime: he slapped a girl on the buttocks as she walked up some stairs. Filing 330-1, p. 1-2.
>
> c. In 2006, Doe 28 was convicted of third degree sexual assault. His crime: grabbing a woman's buttocks as he walked by her in the bakery. At the time of the offense, he was over forty and the victim was approximately the same age. Filing 330-1, p. 18-19.
>
> d. In 1997, Doe 31 was found guilty of attempted sexual assault in the first degree. His crime: when he was twenty, he impregnated his girlfriend a couple months before she turned sixteen. Filing 330-1, p. 25-26.
>
> e. In 2007, Doe 33 plead guilty to third degree sexual assault to avoid a trial. His crime: he had sex with an adult approximately his same age, but she later claimed it was not consensual. Law enforcement did not use a rape kit to investigate because she had sex with another person between the time Doe 33 had intercourse with her and the time she filed a report. Filing 330-1, p. 29-30."

(Filing 345, p. 10, ¶ 11.)

Plaintiffs complain that under the new law "[d]isregarding the reality of the low-and moderate-risk individuals, all registrants are presently subject to public notification via the State Patrol website. Neb. Rev.Stat. § 29-4013(2)(b) (Rev. 2009). Such website states that sex offenders pose a high risk to reoffend. Exhibit 5, p. 1. In addition, the rules and regulations describe all registrants as `violent sex offenders' and that the registry was `passed to protect the public, in particular children.' Filing 319-7, p. 6." (Filing 345, CM/ECF p. 11, ¶ 12.)

Plaintiffs allege that "[a]fter the New Act was implemented and all registrants were portrayed as high-risk sex offenders on the Internet, registrants felt the fallout almost immediately." (Filing 345, CM/ECF p. 11, ¶ 13.) In particular, Plaintiffs contend the new registration system has resulted in:

> a. Loss of housing. Exhibit 8, p. 2; Filing 330-1, p. 15.
>
> b. Loss of employment. Filing 330-1, p. 30. In addition, added difficulty finding and/or maintaining employment. Exhibit 9, p. 1-2; Exhibit 11, p. 1; Exhibit 13; Exhibit 10, p. 2.
>
> c. Restricted ... growth of business. Filing 6-1, p. 23-25; Exhibit 12, p. 1.
>
> d. Mistreatment or threats from former friends and neighbors, and loss of associations. Exhibit 10, p. 1-2; Exhibit 11, p. 2; Exhibit 15.
>
> e. Increased monitoring by law enforcement. Exhibit 9, p. 2; Exhibit 10, p. 3; Exhibit 16.
>
> f. Banish[ment] from school grounds or public places. Exhibit 14, p. 1.

(Filing 345, CM/ECF p. 11, ¶ 13.)

Even if I were to assume that Plaintiffs can produce sufficient admissible evidence to support their "statement of material facts" as quoted above,[41] I would *916 conclude that the SORA amendments (excluding those discussed in Part One of this opinion) do not violate the Ex Post Facto Clause of the United States Constitution and the equivalent provision of the

916 Nebraska Constitution. The same is true with respect to any other constitutional claim as to which these assumed facts may be material.

In *State v. Worm*, the Nebraska Supreme Court considered whether retroactive application of 2002 amendments to SORA violated the Ex Post Facto Clause. As described by the Court, the changes made to the law were as follows:

> In April 2002, the Nebraska Legislature amended the Act to bring it in compliance with the federal law. The 1996 original Act required a person convicted of an enumerated sex offense, or its equivalent in another jurisdiction, to register with the Nebraska State Patrol's sex offender registry. Under this Act, the offender had to verify that registration on an annual basis for a period of 10 years after his or her release from a correctional facility or other institution, or after discharge from probation, parole, or supervised release. See §§ 29-4003 to 29-4005 (Cum.Supp.2000).
>
> In addition, the amendments added new sex offenses, aggravated offenses and repeat offenses, which require the offender to verify his or her registration annually. §§ 29-4003 and 29-4005(2) (Cum.Supp.2002). An aggravated offense is defined as "any registrable offense... which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years." § 29-4005(4)(a). The amendments require the sentencing court to make the finding of an aggravated or repeat offense as part of the sentencing order. § 29-4005(2).
>
> The amendments also require an offender to provide his or her place of vocation and any school which he or she attends in addition to the previous requirement of providing the offender's address and place of employment. 2002 Neb. Laws, L.B. 564. Under both versions, the Act is retroactive to defendants convicted of or pleading guilty to most registrable offenses on or before January 1, 1997. *Id.*
>
> The amendments, however, did not substantively change the sections concerning community notification. The Nebraska State Patrol's registration and community notification division is responsible for assigning a notification level after an offender initially registers. The assigned notification corresponds to the offender's assessed recidivism risk, which can be assessed as low, moderate, or high. See § 29-4013(2). If the risk is low, law enforcement officials who are likely to encounter the offender are notified of the registry information. § 29-4013(2)(c)(i). If the recidivism risk is moderate, schools, daycare centers, and youth and religious organizations are additionally notified. § 29-4013(2)(c)(ii). If the recidivism risk is high, individuals likely to encounter the offender must also be notified, in addition to those notified for low and moderate notification levels. § 29-4013(2)(c)(iii). If a risk assessment indicates that public notification is warranted, it can be accomplished by direct contact, news releases, or a method using a telephone system, including an electronic database. *Id.* See, also, 272 Neb. Admin. Code, ch. 19, § 013.06 (2003). The State Patrol maintains a public Web site, which disseminates specified information about offenders only if they are assigned a high-risk notification level.

680 N.W.2d at 157-158.

917 At sentencing, the defendant in *Worm* was determined to have committed an aggravated *917 offense prior to the effective date of the 2002 amendments. The Nebraska Supreme Court observed that "whether the amendment violates state and federal constitutional proscriptions against retroactive punishment is analyzed under the U.S. Supreme Court's two-prong, `intent-effects' test for analyzing punishment." *Id.,* at 160 (citing *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003)). Under this test, "[i]f a court determines that the Legislature intended a statutory scheme to be civil, that intent will be rejected `only where a party challenging the [statute] provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.'" *Id.* (quoting *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511, 515 (2001)).

Regarding the legislative intent prong, the Nebraska Supreme Court stated:

> Whether the Legislature intended the amendments to be civil or criminal is primarily a matter of statutory construction. However, we must also look at the statute's structure and design....
>
> ...
>
> When looking at the statute's structure and design, the primary consideration is the procedural mechanisms established by the Legislature to enforce the statute. The regulations use an administrative hearing and an appeal process

> under Nebraska's Administrative Procedure Act for challenging the registration and notification requirements... [which] evidences a civil, nonpunitive statute."

Id. (citations omitted).

Plaintiffs complain that the 2009 amendments to SORA did away with the administrative hearing and appeal process; they argue that "[t]he elimination of due process protection indicates a criminal, punitive statute." (Filing 345, at CM/ECF p. 116.) What LB 285 actually did, of course, was to replace a system that required individualized risk assessments of sex offenders with an "offense of conviction" methodology. It is only because the Nebraska State Patrol is no longer required to judge each sex offender's risk of recidivism under Neb.Rev.Stat. § 29-4013 that the administrative hearing and appeal procedures no longer apply. The replacement method, which conforms to SORNA, *see National Guidelines,* at 38031 ("[J]urisdictions are not required by SORNA to look beyond the elements of the offense of conviction in determining registration requirements except with respect to victim age."), does not evidence a legislative intent to adopt a criminal statute.

Plaintiffs also point to a statement made by the Nebraska Supreme Court in *Worm* that "prompt notification of the Act's requirements and its criminal penalty for noncompliance is essential in some cases," 680 N.W.2d at 161, and then proceed to argue that "retroactively changing the requirements to be significantly more onerous without notice, or without prior notice that such a change was even possible, infers [sic] a punitive intent." (Filing 345, at CM/ECF pp. 116-117.) The Court in *Worm* was simply explaining that SORA required the sentencing court to provide notice when entering judgment because the Act's registration requirement would begin immediately if the offender was not incarcerated pending an appeal or sentenced to probation. The Court concluded that the sentencing requirement was not criminal in nature. Plaintiffs' argument that lack of notice implies a punitive intent is misplaced.

Plaintiffs next contend that in *State v. Payan,* 277 Neb. 663, 765 N.W.2d 192 (2009), the Nebraska Supreme Court established a "high water mark for the permissible level of
918 monitoring and restrictions that [a] statutory scheme may impose *918 before Nebraska law compels a conclusion that the legislative intent was punishment under Nebraska's *ex post facto* clause," and that "[t]he New Act goes far beyond these maximums." (Filing 345, at CM/ECF p. 118.) This is a misreading of the *Payan* decision.[42]

The legal issue presented in *Payan* was whether a factual finding that the defendant committed an aggravated offense, as defined by SORA, should have been made by the jury, rather than the trial judge, for purposes of lifetime community supervision requirement under Neb.Rev.Stat. § 83-174.03 (not part of SORA). Applying the same "intent-effects" test used in *Worm,* the Court decided that § 83-174.03 imposed a criminal penalty:

> A key factor in determining the legislative intent of § 83-174.03 is the fact that the statute requires persons subjected to lifetime community supervision to be supervised by the Office of Parole Administration, a component of the Department of Correctional Services, which is responsible for all parole services in the community.... The term `parole' has a distinctively penal connotation....
>
> Unlike the SORA registration requirements, § 83-174.03 subjects the offender who has completed a prison sentence to significant affirmative restraints which may be imposed by the Office of Parole Administration. Some of these are similar to restrictions which may be imposed upon incarcerated persons paroled before their mandatory release date. These include restrictions on place of residence; required reporting to a parole officer; and submission to medical, psychological, psychiatric, or other treatment. In addition, persons subject to lifetime community supervision may be subject to drug and alcohol testing, restrictions on employment and leisure activities, and polygraph examinations.
>
> ...
>
> ... Lifetime community supervision under § 83-174.03 begins upon completion of the offender's term of incarceration or release from civil commitment. It involves affirmative restraints and disabilities similar to and arguably greater than traditional parole. It is not dependent upon any finding that the offender poses a risk to the safety of others at the time he or she completes a period of incarceration or civil commitment. We therefore conclude that the legislative intent in enacting § 83-174.03 was to establish an additional form of punishment for some sex offenders.

765 N.W.2d at 202 (footnotes omitted).

Unlike a requirement of lifetime community supervision, SORA's registration requirements are not analogous to a term of parole.[43] The *Payan* decision therefore does not support a determination that the Nebraska Legislature, by conforming Nebraska's law to SORNA, intended to impose a criminal penalty rather than "to create a civil regulatory scheme to protect the public from the danger posed by sex offenders,...." *Worm,* 680 N.W.2d at 161.

919 *919 Factors used to determine whether the effect of a statute is so punitive as to negate the Legislature's intent include:

> "(1) `[w]hether the sanction involves an affirmative disability or restraint'; (2) `whether it has historically been regarded as a punishment'; (3) `whether it comes into play only on a finding of scienter'; (4) `whether its operation will promote the traditional aims of punishment-retribution and deterrence'; (5) `whether the behavior to which it applies is already a crime'; (6) `whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) `whether it appears excessive in relation to the alternative purpose assigned.'"

Id. (quoting *State v. Isham,* 261 Neb. 690, 625 N.W.2d 511, 515-516 (2001), quoting *Hudson v. United States,* 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), quoting *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)). Plaintiffs make two basic arguments regarding these factors.

First, Plaintiffs argue that the legislation places affirmative disabilities and restraints on registrants because "[t]he New Act's constant in-person reporting has a punitive effect." (Filing 345, CM/ECF p. 121.) In particular, Plaintiffs complain that: (1) As amended by LB 285, SORA compels all registrants to report in-person annually, semiannually, or quarterly, depending on the registration duration. *See* Neb.Rev.Stat. § 29-4006(4)-(6) (West, Operative Jan. 1, 2010).(2) In-person reporting is also required every time a registrant has a new address, habitual living location, temporary domicile, job, or enrolls in a school. *See* Neb.Rev.Stat. § 29-4004 (West, Operative Jan. 1, 2010).(3) A registrant must give notice, in writing, by the next working day of "any changes in or additions to such person's list of email addresses, instant messaging identifiers, chat room identifiers, global unique identifiers, and other Internet communication identifiers that the registrant uses or plans to use, all domain names registered by the person, and all blogs and Internet web sites maintained by the person or to which the person has uploaded any content or posted any messages or information." Neb.Rev.Stat. § 29-4006(13) (West, Operative Jan. 1, 2010). In *Worm,* Plaintiffs note, the Nebraska Supreme Court found that the Act's former registration requirements imposed only a "slight" burden. 680 N.W.2d at 162.

Second, Plaintiffs emphasize that "[a]ll registrants are subjected to public notification via the Internet." (Filing 345, CM/ECF p. 123.) They point out that in *Welvaert v. Nebraska State Patrol,* 268 Neb. 400, 683 N.W.2d 357, 366 (2004), the Nebraska Supreme Court found that the Act's former provisions did not impose an affirmative restraint because "[t]he extent to which an offender is subject to public notification under SORA has been tailored to mirror the level of risk an offender presents to their community." The law previously provided that:

> If the risk of recidivism is low, only law enforcement officials who are likely to encounter the offender must be notified. § 29-4013(2)(c)(i). If the risk of recidivism is moderate, the circle of notification is broadened to include schools, daycare centers, and religious and youth organizations. § 29-4013(2)(c)(ii). If the risk of recidivism is high, notification must also be given to members of the public who are likely to encounter the offender. § 29-4013(2)(c)(iii).

Id. Under the current law, by contrast, certain information regarding all registrants is
920 disclosed to the public.[44] *See* *920 Neb.Rev.Stat. §§ 29-4009, 29-4013 (West, Operative Jan. 1, 2010). This second point, regarding publication of information about all registered sex offenders (as opposed to only those assessed as "high risk" under the former law) is repeated by Plaintiffs with respect to all seven Mendoza-Martinez factors.[45]

While the current law's reporting requirements are more stringent, and the public notification provisions are more expansive, than in the versions of SORA that were upheld against ex post facto challenges in *Worm* and *Welvaert,* I am not convinced that the purpose or effect of the amendments that were made in order to bring Nebraska's law into compliance with SORNA are punitive. As I stated in ruling on Plaintiffs' motion for a preliminary injunction:

> Nebraska requires the offender to appear in person at various times, and this requirement mirrors SORNA. 42 U.S.C. §§ 16913(c), 16916. *See also Doe v. Pataki,* 120 F.3d 1263, 1284-85 (2nd Cir.1997) (finding that registration provisions of New York's Sex Offender Registration Act (SORA), or "Megan's Law," imposing duty to register in person every 90 days for minimum of ten years, did not inflict "punishment" within meaning of Ex Post Facto Clause;

> registration served legislature's nonpunitive goals of facilitating law enforcement and protecting public; and burdens of registration were not so punitive in form or effect as to constitute punishment). Likewise, Nebraska has chosen to publicize the names of anyone who must register as a sex offender, and not just some of those persons. SORNA does the same thing, but it gives states an option to exempt certain offenders. *Compare* 42 U.S.C. § 16918(a) *with* 42 U.S.C. § 16918(c). Nebraska has elected not to use that option, and there is nothing unconstitutional about such a choice.

(Filing 92, at CM/ECF pp. 9-10.)

In *Smith v. Doe*, the United States Supreme Court rejected arguments that Alaska's Sex Offender Registration Act violated the Ex Post Facto Clause because it applied to all convicted sex offenders, without regard to their future dangerousness, and placed no limits on public access to non-confidential information. The Court found that the law had a "rational connection" to a "legitimate nonpunitive purpose of `public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].'" 538 U.S. at 103, 123 S.Ct. 1140 (quoting lower court's opinion). It then stated:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); *see* *921 *also id.,* at 33, 122 S.Ct. 2017 ("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" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).
>
> The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. . . . The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause.
>
> . . . In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, non-private information about the registrants' convictions without violating the prohibitions of the Ex Post Facto Clause.
>
> . . .
>
> [T]he notification system is a passive one: An individual must seek access to the information [on the State's web site]. . . . Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment.

538 U.S. at 103-105, 123 S.Ct. 1140. The same can be said of Nebraska's law.

Because Plaintiffs cannot show by the "clearest proof" that the effects of Nebraska's SORNA-conforming amendments negate the legislative intent to maintain a civil regulatory scheme, Defendants are entitled to the entry of partial summary judgment on Plaintiffs' ex post facto claim. For the reasons discussed in Part One of this opinion, however, Defendants' motion will be denied insofar as the claim concerns Neb.Rev.Stat. §§ 28-322.05, 29-4006(1)(k) &(s), and 29-4006(2).

II.

Third and Fourth Causes of Action— Double Jeopardy Claim

No person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Constitution, Amend. V. "No person shall . . . be twice put in jeopardy for the same offense." Neb. Const., Art. 1, § 12.

"The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution." *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666, 670 (2009). "The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions

protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Id.*

Plaintiffs complain the SORA amendments impose a second punishment on convicted sex offenders. This claim fails because the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (emphasis in original). As already discussed in connection with Plaintiffs' ex post facto claim (in Part Two of this opinion), Nebraska's new registration requirements do not amount to criminal penalties.

922 *922 ***III.***

Fifth and Sixth Causes of Action— Cruel and Unusual Punishment Claim

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Constitution, Amend. VIII.; Neb. Const. Art. 1, § 9. "[W]ith reference to cruel and unusual punishment, the Nebraska Constitution does not require more than does the [Eighth Amendment to the] U.S. Constitution." *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668, 675 (2003) (quoting *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86, 95 (1999)).

Plaintiffs contend that "[f]or those offenders who have served their periods of incarceration and were determined by the State to be lower-risk to reoffend, the extension of the registration period is unusual given the goal of preventing recidivism. Mandatory public notification via the State Patrol website is a cruel punishment not remotely proportional to the risk posed." (Filing 345, at CM/ECF p. 138.) Again, this argument fails because SORA's registration and notification requirements do not constitute punishment.

IV.

Ninth and Tenth Causes of Action— Due Process Claim

No State shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Constitution, Amend. XIV, § 1. "No person shall be deprived of life, liberty, or property, without due process of law." Neb. Const. Art. I, § 3.

The Nebraska Supreme Court has indicated that the federal and state constitutions contain similar due process language, and has applied the same analysis to such claims. *See Scofield v. State, Dept. of Natural Resources*, 276 Neb. 215, 753 N.W.2d 345, 356 (2008). More particularly, "[i]n the context of a right to privacy, [the Nebraska Supreme Court has] effectively stated that the due process provision of the Nebraska Constitution is congruent with the federal Constitution and that the Nebraska Constitution does not contain any rights broader than the federal Constitution." *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512, 524 (2006) (citing *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005)).

Plaintiffs advance four due process arguments: "First, the New Act is unconstitutionally vague. Second, the New Act violates substantive due process. Third, the New Act violates procedural due process by eliminating both fundamental and state law-generated rights without a hearing. Finally, the retroactive application of the New Act is irrational and arbitrary." (Filing 345, at CM/ECF p. 139.)

A. Vagueness

Plaintiffs claim that "[t]he New Act detailing the registration requirements and the Unlawful use of the Internet crime are both unconstitutionally vague under the due process clause." (Filing 345, at CM/ ECF p. 139.) I address here only the claim that the registration requirements are vague. The vagueness claim concerning Neb.Rev.Stat. § 28-322.05, and associated definitions from Section 24 of LB 97,[46] is addressed in Part One of this opinion.

"An overly vague statute `violates the first essential of due process of law,' because citizens `must necessarily guess at its meaning and differ as to its application'." *United States v. Bamberg*, 478 F.3d 934, 937 (8th Cir.2007) (quoting *923 *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). "There is a two-part test to determine whether a statute is void for vagueness. The statute, first, must provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). *See also State v. Rung*, 278 Neb. 855, 774 N.W.2d 621, 632 (2009) ("The void-for-vagueness doctrine

923 requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). "Statutes are to be evaluated under these standards using principles of flexibility and reasonable breadth." *Agena v. Lancaster County Bd. of Equalization*, 276 Neb. 851, 758 N.W.2d 363, 374 (2008).

Plaintiffs first complain that SORA, as amended, "applies to any person who on or after January 1, 1997 . . . [h]as *ever* pled guilty to, pled nolo contendere to, or been found guilty of any of the following [listed offenses]. . . ." Neb.Rev. Stat. § 29-4003(1)(a)(i) (West, Operative Jan. 1, 2010) (emphasis supplied). According to Plaintiffs, "[t]his section appears to simultaneously both limit its application to offenses after January 1, 1997, and apply to the enumerated offenses regardless of when they were committed." (Filing 345, at CM/ECF p. 140.)

Before being amended by LB 285, the statute provided that SORA "shall apply to any person who on or after January 1, 1997 . . . [p]leads guilty to or is found guilty of [listed offenses]. . . ." Neb.Rev. Stat. § 29-4003(1)(a) (Reissue 2008). SORA's original effective date was January 1, 1997. *See* Neb. Laws 1996, LB 645, § 20. By retaining the date, the legislature clearly intended the 2009 amendments to apply only to persons convicted since January 1, 1997. Use of the word "ever" does not negate this legislative intent. Although inartfully drafted, the statute simply means that SORA's registration requirements apply to a person who at any time on or after January 1, 1997, whether by plea or trial, has been found guilty of a listed sex offense. The statute does not lend itself to arbitrary enforcement.

Plaintiffs next complain that "Neb.Rev.Stat. § 29-4004 imposes confusing in-person reporting requirements on all registrants when he or she has a new address, temporary domicile, or habitual living location. `Temporary domicile' is defined as any place at which the person actually lives or stays for a period of at least three working days. § 29-4001.01(15). `Habitual living location' is defined as any place that an offender may stay for a period of more than three days even though the sex offender maintains a separate permanent address or temporary domicile. § 29-4001.01(9). This notification must occur within three working days
924 before the change. § 29-4004(2)-(4).[47] The *924 New Act fails to define `working days,' leaving the entire reporting structure vague. For example, this could mean Monday through Friday, but it could also include weekends and nonconsecutive days. Law enforcement generally works 24/7, so the statute could have an additional meaning." (Filing 345, at CM/ECF p. 142.)

The term "working days" is commonly understood to mean Monday through Friday, excluding holidays.[48] A term left undefined by a statute carries its ordinary meaning. *Carton v. General Motors Acceptance Corp.*, 611 F.3d 451, 458-59 (8th Cir.2010). *See also Schuyler Apartment Partners, LLC v. Colfax County Bd. of Equalization*, 279 Neb. 989, 783 N.W.2d 587, 591 (2010) ("Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning."). A person of reasonable intelligence would also understand that "a *period* of at least three working days" (emphasis supplied) refers to three consecutive working days.

Plaintiffs state that "[a] habitual living location includes anywhere a registrant may stay for a period of more than three days, which includes virtually anywhere on the planet. . . . No registrant would believe that he had an obligation to report all places he may stay, rendering the requirement to report all habitual living locations a nullity and adding to the confusion." (Filing 345, at CM/ECF p. 142.)

This argument is self-defeating because "[a] penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence." *State v. Hochstein*, 262 Neb. 311, 632 N.W.2d 273, 280 (2001). "Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served." *Id.* As Plaintiffs concede, it is evident the statute only requires a registrant to report his or her intended relocations.

Plaintiffs next complain that "Neb.Rev.Stat. § 29-4006 broadens the amount and nature of the information that a registrant must provide under the New Act to a bewildering and confusing extent. This information includes the confusing temporary domicile and habitual living location. It also includes the license plate, description and regular storage location of any vehicle owned or operated by the person. Since `vehicle' is not defined, it might include various manners of transportation, as has been the case in criminal driving under the influence cases, *e.g.* bicycles, riding lawnmowers, tractors, boats, etc. It is also unclear whether this would include vehicles used by a registrant for work." (Filing 345, at CM/ECF pp. 142-143.)

The term "vehicle" is not defined by the Act, but only vehicles with license plates are subject
925 to the registration requirement.[49] The Act provides that any vehicle *925 "owned *or* operated" (emphasis supplied) by the registrant must be reported. This language is unambiguous.

Finally, Plaintiffs state that "Neb.Rev. Stat. § 29-4006(1) requires that the State Patrol collect certain information, `but not limited to' that enumerated data." This gives the State Patrol unfettered discretion to collect an unforeseeable amount of information. Once the State Patrol collects whatever it wants, the New Act provides that only limited information will be confidential, and the rest will not be confidential. Neb.Rev.Stat. § 29-4009(1). The New Act also provides for the release of "public notification information" to third parties. Neb.Rev.Stat. § 29-4013(4) and (5). "But no provision regulates whether such third parties may disclose such confidential information, and it places no limitation on third parties as to how they disseminate information gathered under the New Act, confidential or otherwise." (Filing 345, at CM/ECF p. 146.)

Plaintiffs do not appear to be arguing that Section 29-4006(1) is "void for vagueness," but rather that it involves an unlawful delegation of legislative authority to the Nebraska State Patrol. "It is a well-established principle that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute." *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101, 109-110 (2010). Plaintiffs make no contention that the Nebraska State Patrol's rules and regulations require them to disclose any information that is not specifically listed in Section 29-4006(1).

Regarding Plaintiffs' privacy concerns, the Nebraska State Patrol has provided that confidential information "shall only be released upon written request to law enforcement agencies" and "shall be treated as confidential by law enforcement agencies and shall not be considered public record information." Neb. Admin. Code, Title 272, Ch. 19, §§ 013.01 & 13.06 (effective Jan. 1, 2010). "Certain groups and agencies approved by the National Sex Offender Registry shall have access to additional public notification information (not provided on the web site) about registered sex offenders," but "[s]uch information excludes confidential information as provided in section 013.06." Neb. Admin. Code, Title 272, Ch. 19, § 13.07 (effective Jan. 1, 2010).

B. Substantive Due Process

To address Plaintiffs' substantive due process claim, I must first determine whether SORA's registration and public notification requirements implicate a fundamental right. *See Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir.2003). "If the statute implicates a fundamental right, the state must show a legitimate and compelling governmental interest for interfering with that right." *Id.* (citing *Graham v. Richardson*, 403 U.S. 365, 376, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)). "If the statute does not implicate a fundamental right, . . . a less exacting standard of review [applies] under which the statute will stand as long as it is rationally related to a legitimate governmental purpose." *Id.* (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).

Plaintiffs claim that the amended Act "infringes on the right in one's reputation and name, right to the integrity of a family, right to travel, right to earn a living, and the right to
926 privacy." (Filing 345, at CM/ECF p. 148.) I determine that any *926 injury caused to Plaintiffs' reputations does not constitute the deprivation of a liberty interest, and that any claimed infringement of their recognized liberty interests is merely incidental.

1. No Fundamental Right Implicated

Plaintiffs complain that "[p]ublic notification for all registrants deprives them of their liberty interest in their names, reputations and standing in their communities by failing to differentiate between high- and lower-risk persons on the sex offender registry."[50] (Filing 345, at CM/ECF p. 149.) This claim does not implicate a fundamental right. "[M]ere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 6-7, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) (citing *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)).

Plaintiffs argue that a "stigma plus" test applies. *See Gunderson*, 339 F.3d at 640 ("The loss of reputation must be coupled with some other tangible element to rise to the level of a protectible property interest."). The "stigma plus" test, however, is designed for *procedural* due process claims. It does not apply to substantive due process claims. *See Doe v. Michigan Dept. of State Police*, 490 F.3d 491, 502 (6th Cir.2007) ("Our review of the caselaw has failed to identify any case that applies the stigma-plus test to a substantive due process claim."); *Does v. Munoz*, 507 F.3d 961, 966 n. 1 (6th Cir.2007) ("Plaintiffs obscure the correct analysis by urging us to apply the "stigma plus" test. That test applies only to *procedural* due process claims.") (emphasis in original). *But cf. Zutz v. Nelson*, 601 F.3d 842, 849 (8th Cir.2010) (holding that district court correctly dismissed substantive due process claim where plaintiffs "have not even vaguely pleaded any other harm" than injury to their reputations).

In *Doe v. Moore*, 410 F.3d 1337 (2005), the Eleventh Circuit Court of Appeals considered a substantive due process challenge to Florida's Sex Offender Act, brought by several persons who were required by the law to register as sex offenders and, without regard to their likelihood to reoffend, have their photographs and identifying information posted on the state's website. The Court followed a two-step process to determine whether a fundamental right was implicated:

> We must analyze a substantive due process claim by first crafting a "careful description of the asserted right." *Flores*,[51] 507 U.S. at 302, 113 S.Ct. at 1447; accord *Glucksberg*,[52] 521 U.S. at 720-21, 117 S.Ct. at 2268. Second, we must determine whether the asserted right is "one of `those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Williams v. Attorney Gen. of Alabama*, 378 F.3d 1232, 1239 (11th Cir.2004) (quoting *Glucksberg*, 521 U.S. at 720-21, 117 S.Ct. at 2268), *cert. denied*, *Williams v. King*, 543 U.S. 1152, 125 S.Ct. 1335, 161 L.Ed.2d 115 (2005).

927 *927 *Id.*, at 1343. Regarding the first step, the Court stated:

> Although the Supreme Court has recognized fundamental rights in regard to some special liberty and privacy interests, it has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection. *See Paul* [*v. Davis*], 424 U.S. at 713, 96 S.Ct. at 1166 (noting that personal privacy rights protected by substantive due process "must be limited to those which are `fundamental' or `implicit in the concept of ordered liberty'"). Further, in order to trigger substantive due process protection the Sex Offender Act must either directly or unduly burden the fundamental rights claimed by Appellants. *See Maher v. Roe*, 432 U.S. 464, 473-74, 97 S.Ct. 2376, 2382, 53 L.Ed.2d 484 (1977) (holding that the substantive due process clause "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"); *see also Paul P. v. Verniero*, 170 F.3d 396, 405 (3rd Cir.1999) (holding that the indirect effects caused by a sex offender registration statute are "too substantially different from the government actions" in prior case law "to fall within the penumbra of constitutional privacy protection."). Thus, a careful description of the fundamental interest at issue here allows us to narrowly frame the specific facts before us so that we do not stray into broader "constitutional vistas than are called for by the facts of the case at hand." *Williams*, 378 F.3d at 1240. To do so we use the Sex Offender Act itself to define the scope of the claimed fundamental right. *Id.* at 1241. After reviewing the provisions of the Sex Offender Act and the briefs, the right at issue here is the right of a person, convicted of "sexual offenses," to refuse subsequent registration of his or her personal information with Florida law enforcement and prevent publication of this information on Florida's Sexual Offender/Predator website.

Id., at 1343-1344 (footnote omitted). At the second step, the Court concluded that such a right was not "deeply rooted in this Nation's history and tradition," stating:

> Though the Supreme Court has not addressed whether substantive due process invalidates sex offender registration statutes, *see Connecticut Dep't of Public Safety*, 538 U.S. at 8, 123 S.Ct. at 1165, we can find no history or tradition that would elevate the issue here to a fundamental right. In fact, the case law we have found supports the contrary conclusion. We can certainly understand how a person may be shunned by a person or group that discovers his past offense. However, a state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy. Therefore, we do not review the statute with strict scrutiny, but only under a rational basis standard.

Id., at 1344. I agree with this analysis.[53]

Plaintiffs next claim that "[l]abeling a non-dangerous registrant as high-risk to reoffend intrudes on matters of personal choice as related to marriage and family life." (Filing 345, at CM/ECF p. 158.) The Eight Circuit's decision in *Doe v. Miller*, 405 F.3d 700 (8th Cir.2005), upholding an Iowa statute that prohibited a person who had committed a sex offense against
928 a minor from residing within two thousand feet of school or child care facility, *928 establishes that this claim does not require strict scrutiny of SORA. Addressing the plaintiffs' substantive due process claim, the Court stated:

> We do not believe that the residency restriction of § 692A.2A implicates any fundamental right of the Does that would trigger strict scrutiny of the statute. In evaluating this argument, it is important to consider the Supreme Court's admonition that "`[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for `[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Flores*, 507 U.S. at 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). While the Court has not directed that an asserted right be defined at the most specific level of tradition supporting or denying the asserted right, *cf. Michael H. v. Gerald D.*, 491 U.S. at 127 n. 6, 109 S.Ct. 2333 (1989) (opinion of Scalia, J.), the Does' characterization of a fundamental right to "personal choice regarding the family" is so general that it would trigger strict scrutiny of innumerable laws and ordinances that influence "personal choices" made by families on a daily basis. The Supreme Court's decision in *Griswold*[54] and the plurality opinion in *Moore*[55] did recognize unenumerated constitutional rights relating to personal choice in matters of marriage and family life, but they defined the recognized rights more narrowly, in terms of "intimate relation of husband and wife," *Griswold*, 381 U.S. at 482, 85 S.Ct. 1678, or "intrusive regulation" of "family living arrangements." *Moore*, 431 U.S. at 499, 97 S.Ct. 1932 (plurality opinion).
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> Unlike the precedents cited by the Does, the Iowa statute does not operate directly on the family relationship. Although the law restricts where a residence may be located, nothing in the statute limits who may live with the Does in their residences. The plurality in Moore emphasized this distinction, observing that the impact on family was "no mere incidental result of the ordinance," because "[o]n its face [the ordinance] selects certain categories of relatives who may live together and declares that others may not." 431 U.S. at 498-99, 97 S.Ct. 1932 (plurality opinion). Thus, the reasoning of the Moore plurality does not require strict scrutiny of a regulation that has an incidental or unintended effect on the family, *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir.1985) (upholding requirement that firemen reside within city limits), or that "affects or encourages decisions on family matters" but does not force such choices. *Gorrie v. Bowen*, 809 F.2d 508, 523 (8th Cir.1987) (upholding regulation requiring that applications for public assistance for dependent children include siblings living in same household). Similarly, the Court in *Griswold* disclaimed authority to determine "the wisdom, need, and propriety" of all laws that touch social conditions, but held unconstitutional a state statute that "operate[d] directly on an intimate relation of husband and wife." 381 U.S. at 482, 85 S.Ct. 1678.

Id., at 710-711. *See also Weems v. Little Rock Police Dept.*, 453 F.3d 1010, 1015 (8th Cir.2006) (upholding comparable residency restriction in Arkansas statute).

929 *929 The Eighth Circuit's decision in *Doe v. Miller* also provides controlling precedent for Plaintiffs' claim that "[t]he in-person reporting requirements imposed on Plaintiffs by the New Act constitute an actual barrier to interstate and intrastate movement guaranteed to all citizens." (Filing 345, at CM/ECF p. 159.) Regarding the plaintiffs' claim that Iowa's residency restrictions interfered with their constitutional right to travel, the Eighth Circuit said:

> The modern Supreme Court has recognized a right to interstate travel in several decisions, beginning with *United States v. Guest*, 383 U.S. 745, 757-58, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), and *Shapiro v. Thompson*, 394 U.S. 618, 629-30, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). The Court subsequently explained that the federal guarantee of interstate travel "protects interstate travelers against two sets of burdens: `the erection of actual barriers to interstate movement' and `being treated differently' from intrastate travelers." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n. 6, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982)). Most recently, the Court summarized that the right to interstate travel embraces at least three different components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that *State." Saenz v. Roe*, 526 U.S. 489, 500, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999).
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> . . .
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> . . . The Iowa statute imposes no obstacle to a sex offender's entry into Iowa, and it does not erect an "actual barrier to interstate movement." *Bray*, 506 U.S.

> at 277, 113 S.Ct. 753 (internal quotation omitted). There is "free ingress and regress to and from" Iowa for sex offenders, and the statute thus does not "directly impair the exercise of the right to free interstate movement." *Saenz*, 526 U.S. at 501, 119 S.Ct. 1518. Nor does the Iowa statute violate principles of equality by treating nonresidents who visit Iowa any differently than current residents, or by discriminating against citizens of other States who wish to establish residence in Iowa. We think that to recognize a fundamental right to interstate travel in a situation that does not involve any of these circumstances would extend the doctrine beyond the Supreme Court's pronouncements in this area. That the statute may deter some out-of-state residents from traveling to Iowa because the prospects for a convenient and affordable residence are less promising than elsewhere does not implicate a fundamental right recognized by the Court's right to travel jurisprudence.
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> . . .
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> We find it unnecessary in this case to decide whether there is a fundamental right to intrastate travel under the Constitution, because assuming such a right is recognized, it would not require strict scrutiny of § 692A.2A.

405 F.3d at 709-714 (footnote omitted).

I am not persuaded that SORA's in-person reporting requirements create an actual barrier to travel. *See Doe v. Moore*, 410 F.3d at 1348 (requirement that registrants notify law enforcement of every change in their permanent or temporary residences did not unreasonably burden right to travel).

2. Rational Relationship to Legitimate Governmental Purpose

930 Plaintiffs argue that "[t]he stigmatization of lower-risk offenders is not rationally *930 related to the State's interest in protecting the public from violent sexual predators." (Filing 345, at CM/ECF p. 170.) The expressed purpose of SORA is not so limited, however. The Nebraska Legislature made a finding "that sex offenders [in general] present a high risk to commit repeat offenses." Neb.Rev.Stat. § 29-4002 (West, Operative Jan. 1, 2010). The Legislature further found "that efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction" and "that state policy should assist efforts of local law enforcement agencies to protect their communities by requiring sex offenders to register with local law enforcement agencies as provided by the Sex Offender Registration Act." *Id.*

In *Doe v. Michigan Dept. of State Police*, the Sixth Circuit Court of Appeals rejected a substantive due process claim by pointing to similar legislative findings:

> Michigan contends that its interest in the SORA and the PSOR is "to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." Mich. Comp. Laws § 28.721a (2002). The State further argues that the public has an "interest in knowing the whereabouts of sex offenders" that "outweighs any privacy interest [that] Plaintiffs have in their criminal records, home addresses and other public registration information." Although we believe that the State's justification sweeps too broadly, especially with reference to the plaintiffs in the present case, we are constrained to conclude that the rationale articulated in the statute itself satisfies the rational-basis standard.

490 F.3d at 501. *See also Does v. Munoz*, 507 F.3d at 966 (same result).

The Eleventh Circuit similarly rejected a substantive due process claim in *Doe v. Moore*, stating:

> Here, the state articulates its reasoning for the Sex Offender Act as "protect [ing] the public from sexual abuse." Appellee's Br. at 32. The state argues that the public can use the registration "to determine whether any sex offenders live in their neighborhood, make an individual assessment of the risk, and take any precautions appropriate under the circumstances." *Id.* at 33. We agree with the state that the Sex Offender Act meets the rational basis standard. It has long been in the interest of government to protect its citizens from criminal activity and we find no exceptional circumstances in this case to invalidate the law. We join with other courts, *see, e.g., Gunderson* [*v. Hvass*], 339 F.3d at 643-44, in

> holding that the Sex Offender Act is rationally related to a legitimate government interest.

410 F.3d at 1345-1346.

In conformity with these opinions, I conclude that Nebraska's registration and public notification requirements are relationally related to a legitimate governmental purpose. Plaintiff's substantive due process claim therefore fails.

C. Procedural Due Process

"Procedural due process limits the ability of the government to deprive people of interests which constitute `liberty' or `property' interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard." *Murray v. Neth,* 279 Neb. 947, 783 N.W.2d 424, 432 (2010).

931 *931 In *Doe v. Miller*, the Eighth Circuit ruled that the Iowa statute imposing residency restrictions on persons convicted of committing certain criminal offenses against minors did not offend procedural due process principles by not requiring individual risk assessments. The Court stated:

> The Does also argue that § 692A.2A unconstitutionally forecloses an "opportunity to be heard" because the statute provides no process for individual determinations of dangerousness. This argument misunderstands the right to procedural due process. As the Supreme Court recently explained in connection with a comparable challenge to Connecticut's sex offender registration law, "even assuming, *arguendo,* that [the sex offender] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the [state] statute." *Conn. Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 7, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). States "are not barred by principles of `*procedural* due process' from drawing" classifications among sex offenders and other individuals. *Id.* at 8, 123 S.Ct. 1160 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion)) (emphasis in original).
>
> We likewise conclude that the Iowa residency restriction does not contravene principles of procedural due process under the Constitution. The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren. Unless the Does can establish that the substantive rule established by the legislative classification conflicts with some provision of the Constitution, there is no requirement that the State provide a process to establish an exemption from the legislative classification. *Id.* at 7-8, 123 S.Ct. 1160. Thus, the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.

405 F.3d at 709.

Plaintiffs argue their case is distinguishable from *Connecticut Dep't of Pub. Safety v. Doe* and *Doe v. Miller* for two reasons: "First, unlike *Doe* and *Miller,* Nebraska previously afforded the specific right to the confidentiality of a registrant's information and a hearing to determine risk of reoffending." (Filing 345, at CM/ECF p. 171.) "Second, the concurring opinions in *Doe* clearly focused on the fact that the Connecticut law provided for procedures by which certain sex offenders could be exempted from the registration requirements and their information." (Filing 345, at CM/ECF p. 172.) I am not persuaded by either argument.

First, I reject Plaintiffs' unsupported contention that they have a liberty interest in their classification under the former law as low- or moderate-risk offenders whose personal information was not to be publicly disclosed. "The legislature that creates a statutory entitlement (or other property interest) is not precluded from altering or terminating the entitlement by a later enactment." *Packett v. Stenberg,* 969 F.2d 721, 726 (8th Cir.1992) (citing *Gattis v. Gravett,* 806 F.2d 778, 780 (8th Cir.1986)). "While the legislative alteration or
932 elimination of a previously conferred property interest may be a deprivation, *932 the legislative process itself provides citizens with all the process they are due." *Id.* Plaintiffs are not entitled to perpetual application of the repealed SORA sections. *See Nolan v. Thompson,* 2007 WL 148815, at *4 (W.D.Mo.2007) (state prisoner had no continuing liberty interest in application of old parole statute), *aff'd* 521 F.3d 983 (8th Cir.2008).

Second, I find no authority for the proposition that a sex offender registry act must provide an exemption procedure in order to satisfy due process. The concurring opinion in *Connecticut Dep't of Pub. Safety v. Doe* did not imply such a requirement, but instead "merely note[d] that the Court's rejection of respondents' procedural due process claim does not immunize publication schemes like Connecticut's from an equal protection challenge." 538 U.S. at 10, 123 S.Ct. 1160 (Souter, J., concurring). That is, Justice Souter simply pointed out that the exemptions provided by Connecticut's law remained open to challenge on equal protection grounds.

D. Retroactivity

Plaintiffs' final due process argument is that "[i]n addition to violating the *ex post facto* clause, the retroactivity of the New Act violates the due process clause because it is simply unfair, illegitimate, and arbitrary." (Filing 345, at CM/ECF p. 174.) In making this argument, Plaintiffs rely on *Doe v. Sex Offender Registry Board*, 450 Mass. 780, 882 N.E.2d 298 (2008), in which the Massachusetts Supreme Judicial Court ruled that a person with a rape conviction, who had been released from probation 20 years before Massachusetts' sex offender registration law went into effect, was entitled to a hearing to determine whether he should be exempt from registration despite the law's mandatory registration requirement for persons convicted of sexually violent offenses. The Court concluded that "the retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe's conviction, violates his right to due process under the Massachusetts Constitution." *Id.,* at 309.

This case is unpersuasive because it is based on a "reasonableness" test that is unique to Massachusetts. As explained by the Massachusetts court:

> Retroactive laws must meet the test of "reasonableness" to comport with State constitutional due process requirements. [*American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 372 N.E.2d 520 (1978)] at 190, 372 N.E.2d 520. "[O]nly those retroactive statutes `which, on a balancing of opposing considerations, are deemed to be unreasonable, are held to be unconstitutional.'" *St. Germaine v. Pendergast*, 416 Mass. 698, 702, 626 N.E.2d 857 (1993), quoting *Leibovich v. Antonellis*, 410 Mass. 568, 577, 574 N.E.2d 978 (1991). The burden is on the challenger to make a factual showing that the statute is irrational in its application. Ultimately, the "principal inquiry—as to reasonableness—is essentially a review of whether it is equitable to apply the retroactive statute against the plaintiffs." *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., supra* at 191, 372 N.E.2d 520.

882 N.E.2d at 305.

In the present case, the reasonableness test of the Due Process Clause of the United States Constitution "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Ass'n*, 110 F.3d 547, 555 (8th Cir.1997) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984)). *933 I have no reason to believe Nebraska would apply a different test.

933

It is reasonable to conclude that retroactive application of SORA furthers the public safety purpose of the legislation. No further showing is required.

V.

Eleventh and Twelfth Causes of Action—Equal Protection Claim

No State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amend. XIV. "No person shall ... be denied equal protection of the laws." Neb. Const., Art. I, § 3. "The Equal Protection Clause keeps governmental decision makers from treating disparately persons who are in all relevant respects similarly situated." *Bills v. Dahm*, 32 F.3d 333, 335 (8th Cir.1994) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)).

Plaintiffs claim "[t]he New Act violates the Equal Protection Clauses in the United States and Nebraska Constitutions because it is intended solely to disadvantage an unpopular group, and because it treats similarly situated individuals differently with stigmatizing effect." (Filing 345, at CM/ECF p. 177.) They also claim that "the New Act infringes on fundamental rights, specifically the right in one's reputation and name, right to the integrity of a family, right to travel, right to earn a living, and the right to privacy." (Filing 345, at CM/ECF p. 178.)

Convicted sex offenders may be an "unpopular group," but they are not a "suspect class" for equal protection purposes. The SORA amendments therefore are subject to scrutiny under the rational basis test. *See* Cutshall v. Sundquist, 193 F.3d 466, 482-483 (6th Cir.1999) (holding Tennessee Sex Offender Registration and Monitoring Act did not violate plaintiff's right to equal protection of the laws because "[g]iven the indications that sex offenders pose a particular threat of reoffending, we cannot say that the Act is irrational.").

I have already determined in connection with Plaintiffs' substantive due process claim that Nebraska's registration and public notification requirements are relationally related to a legitimate governmental purpose. This determination also disposes of Plaintiffs' equal protection claim. *See* Executive Air Taxi Corp. v. City of Bismarck, 518 F.3d 562, 569 (8th Cir.2008) ("A rational basis that survives equal protection scrutiny also satisfies substantive due process analysis.") (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 n. 12, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), and Indep. Charities of Am., Inc. v. Minnesota, 82 F.3d 791, 798 (8th Cir.1996)).

VI.

Thirteenth Cause of Action—Special Legislation Claim

"The Legislature shall not pass local or special laws in any of the following cases, that is to say: Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever.... In all other cases where a general law can be made applicable, no special law shall be enacted." Neb. Const., Art. III, § 18.

"The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants `special favors' to a specific class." Yant, 784 N.W.2d at 106. Plaintiffs make no such claim. In fact, they argue just the opposite, claiming that "[t]he `privilege' or `special favor' is gained by everyone not on the registry...." (Filing 345, at CM/ECF p. 182.)

934 *934 ***VII.***

Sixteenth and Seventeenth Causes of Action—Contracts Clause Claim

"No State shall ... pass any ... Law impairing the Obligation of Contracts,...." U.S. Constitution, Art. 1, § 10. "No ... law impairing the obligation of contracts ... shall be passed." Neb. Const., Art. I. § 16.

"A three-part test determines whether a statute violates the Contracts Clause. `The first question is whether the state law has, in fact, operated as a substantial impairment on pre-existing contractual relationships.'" Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 436 (8th Cir.2007) (quoting Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842, 850 (8th Cir.2002)). "This question `has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.'" *Id.,* (quoting Gen. Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992)). *See also* Halpin v. Nebraska State Patrolmen's Retirement System, 211 Neb. 892, 320 N.W.2d 910, 913 (1982) ("Where ... it is claimed that the contract clause prohibits a state's statutory modification of its own obligations, the court must determine whether contractual obligations within the purview of the contract clause exist; if so, whether the state legislation under attack impaired those obligations; and if there is an impairment of contract, whether it is forbidden by the Constitution.") (quoting Pineman v. Oechslin, 494 F.Supp. 525, 538 (D.Conn.1980)). "The second prong of the three-part test is whether the state has a `significant and legitimate public purpose behind the regulation.'" Hawkeye Commodity Promotions, Inc., 486 F.3d at 438 (quoting Janklow, 300 F.3d at 850). "The third prong is `whether the adjustment of the "rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption."'" *Id.,* at 439 (quoting Janklow, 300 F.3d at 850 (alterations in original)).

Plaintiffs contend that plea agreements are treated as contracts both in the Eighth Circuit and in Nebraska. *See* King v. United States, 595 F.3d 844, 853 (8th Cir.2010) ("Plea agreements are essentially contracts between the defendant and Government"); State v. Thompson, 15 Neb. App. 764, 735 N.W.2d 818, 826 (2007) ("[P]lea agreements are contracts"). *But cf.* United States v. Olesen, 920 F.2d 538, 541 (8th Cir.1990) ("Plea agreements are *like* contracts; however, they are not contracts, and therefore contract doctrines do not always apply to them.") (emphasis in original). Although it may be questioned whether plea agreements fall within the reach of the Contracts Clause, *see, e.g.,* State v. Holt, 233 P.3d

828, 834-35 (Utah App.2010) (raising but not deciding issue), I will assume this element is satisfied.

Plaintiffs next contend that "[t]he New Act retroactively changes the previous obligations and increases the restrictions on registrants. It lengthens the registration duration; significantly increases the frequency of in-person reporting, potentially to an everyday occurrence; eliminates due process hearings; subjects registrants to public notification who were previously low and moderate risk offenders; increases the depth and breadth of registry information collected; infringes on the right to free speech; undermines the Fourth Amendment; etc., etc." (Filing 345, at CM/ECF p. 184.) The principal problem with this contention is the lack of a showing by Plaintiffs that any provisions of the prior law were incorporated into their plea agreements. Plaintiffs simply claim that "[w]hen the Does who
935 entered into plea *935 agreements did so, they did so knowing that *by operation of law* they would be subject to the sex offender registry ... for a period of ten years, they understood the classification system and how it determined risk and that they would only be subject to notification if they were classified as high risk." (Filing 345, at CM/ECF p. 186 (emphasis supplied).)[56]

It is generally presumed "that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Honeywell, Inc.*, 110 F.3d at 552 (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985)). "[A] statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)). There is nothing in the former Nebraska law that evidences an intent to give plea bargainers a contractual or vested right in the law's registration and notification provisions.

Because Plaintiffs have failed to show any impairment of the terms of their plea agreements, their Contracts Clause claim fails the first prong of the three-part test described in *Hawkeye Commodity Promotions, Inc.*[57] Summary judgment will be entered in favor of Defendants.

VIII.

Eighteenth Cause of Action— Separation of Powers Claim

"The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution." Neb. Const., Art. II § 1(1). "The separation of powers doctrine prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." *Slack Nursing Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285, 294 (1995), disapproved on other grounds, *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

Plaintiffs argue the Nebraska Legislature has usurped the power of the courts by amending SORA to modify the sentences of registrants who were sentenced prior to January 1, 2010:

> Before implementation of the New Act, the sentencing court had discretion to exempt a defendant from the registration requirements for specified crimes. Neb.Rev.Stat. § 29-4003(2) (Rev. 2006). That determination was made a part of the sentencing order. *Id.* If the defendant was subject to lifetime registration,
> 936 the sentencing court must find that the defendant committed *936 an aggravated offense, had a prior conviction for a registrable offense, or was required to register for life in another jurisdiction. Neb.Rev.Stat. § 29-4005(2) (Rev. 2006). That, too, was made a part of the sentencing order. *Id.* If the sentencing order failed to include one of the three lifetime triggering factors, the defendant was subject to a ten-year registration period. Neb.Rev. Stat. § 29-4005(1) (Rev. 2006). The sentencing court advised a defendant of the obligation to register during sentencing. Neb.Rev.Stat. § 29-4007(1) (Rev. 2006). *See also* *State v. Blythman*, 201 Neb. 285, 267 N.W.2d 525 (Neb.1978) (orders determining current status and current treatability of sexual sociopath are final orders).
>
> All registrants received final orders when originally convicted and sentenced, and many received further final orders when they appealed their classification of risk. Under the previous registration act, the sentencing court was required to include in the sentence order registration information and provide information

> about the registration obligation. The sentence also included a finding that the defendant was required to register for life (through inclusion in the order) or for ten years (through omission from the order). The New Act retroactively changed these sentence orders, and now imposes a new sentence through the alteration of terms contained within the orders.

(Filing 345, at CM/ECF pp. 189-190.)

For this argument, Plaintiffs rely on a recent decision by the Ohio Supreme Court, *State v. Bodyke*, 126 Ohio St.3d 266, 933 N.E.2d 753 (Ohio 2010), which held that amendments made to Ohio's sex offender registration law, requiring the attorney general to reclassify offenders who previously were classified by Ohio judges, violates the separation-of-powers doctrine. The court determined that the "provisions governing the reclassification of sex offenders already classified by judges under Megan's Law violate the separation-of-powers doctrine for two related reasons: the reclassification scheme vests the executive branch with authority to review judicial decisions, and it interferes with the judicial power by requiring the reopening of final judgments." *Id.,* at 278, 933 N.E.2d 753. This case is readily distinguishable since under Nebraska's former law, the classification of offenders was made by the Nebraska State Patrol, not the courts. *See* Neb.Rev.Stat. § 29-4013 (Reissue 2008).

Plaintiffs state that under the former law "the sentencing court had discretion to exempt a defendant from the registration requirements for specified crimes" (filing 345, at CM/ECF p. 189), but this is not accurate. As I read the law, there was no discretionary exemption; instead, courts were required to make a determination of whether persons convicted of certain offenses were within the scope of the registration requirements. Both before and after being amended by LB 97 and LB 285, Section 29-4003(1) provided that persons required to register included those convicted of "[k]idnapping a minor pursuant to section 28-313, except when the person is the parent of the minor and was not convicted of any other offense in this section;" "[f]alse imprisonment of a minor pursuant to section 28-314 or 28-315;" and "[d]ebauching a minor pursuant to section 28-805[.]" Former Section 29-4003(2) provided that "[i]n the case of a person convicted of a violation of section 28-313, 28-314, 28-315, or 28-805, the convicted person shall be subject to the Sex Offender Registration Act, unless the sentencing court determines at the time of sentencing, in light of all the facts, that the convicted person is not subject to the act." Neb.Rev.Stat. § 29-4003(2) (Reissue 2008).

937 *937 Plaintiffs also state that under the former law "[i]f the defendant was subject to lifetime registration, the sentencing court must find that the defendant committed an aggravated offense, had a prior conviction for a registrable offense, or was required to register for life in another jurisdiction." (Filing 345, at CM/ECF p. 189.) Again, these are findings that did not involve an exercise of discretion by the sentencing court. *See State v. Worm*, 680 N.W.2d at 161 ("[T]hat the sentencing court must find whether an aggravated offense occurred as part of the sentencing order does not indicate an intent to impose punishment because the court has no discretion; the finding is mandatory.").

Under former Section 29-4007, as now, the sentencing courts simply notified those persons convicted of registrable offenses of their obligations under SORA. This notification procedure does not prevent the legislature from changing the law.

CONCLUSION

A trial is necessary to determine the constitutionality of Neb.Rev.Stat. §§ 29-4006(1)(k) & (s), 29-4006(2), and 28-322.05 (West, Operative Jan. 1, 2010), except insofar as I have determined that § 29-4006(2) violates the Fourth Amendment rights of Plaintiffs who were previously convicted of sex crimes but who were not on probation, parole or court-monitored supervision on or after January 1, 2010. As to all other statutory provisions enacted or amended by Nebraska Laws 2009, LB 97 and LB 285, I find no merit to Plaintiffs' constitutional challenges.[58]

Accordingly,

IT IS ORDERED:

> 1. Defendants' original motion for summary judgment (Case No. 8:09CV456 filing 317, Case No. 4:09CV3266 filing 23, Case No. 4:10CV3004 filing 22, Case No. 4:10CV3005 filing 17) is denied without prejudice, as moot.
>
> 2. Defendants' amended motion for summary judgment (Case No. 8:09CV456 filing 336, Case No. 4:09CV3266 filing 35, Case No. 4:10CV3004 filing 34, Case No. 4:10CV3005 filing 29) is granted in part and denied in part, as follows:
>
> a. The motion is granted as to all claims alleged by Plaintiffs, except their claims challenging the constitutionality of:

(1) Neb.Rev.Stat. § 29-4006(1)(k) & (s) (West, Operative Jan. 1, 2010);

(2) Neb.Rev.Stat. § 29-4006(2)(West, Operative Jan. 1, 2010); and

(3) Neb.Rev.Stat. § 28-322.05 (West, Operative Jan. 1, 2010).

b. As to those excepted claims, the motion is denied.

3. Plaintiffs' motion for summary judgment (Case No. 8:09CV456 filing 344, Case No. 4:09CV3266 filing 41, Case No. 4:10CV3005 filing 35) is granted in part and denied in part, as follows:

a. The motion is granted with respect to their claim that Neb.Rev. Stat. § 29-4006(2) violates the Fourth Amendment rights (and corresponding rights under Nebraska Constitution, Art. I, § 7) of Plaintiffs who were previously convicted of sex crimes but who were not on probation, parole or court-monitored supervision on or after January 1, 2010.

938 *938 b. In all other respects, the motion is denied.

4. Defendants' objections to Plaintiffs' exhibits (Case No. 8:09CV456 filing 349, Case No. 4:09CV3266 filing 46, Case No. 4:10CV3005 filing 40) are denied without prejudice.

5. Within 30 days, the parties shall provide me with a stipulation designating those Plaintiffs who fit within this category—"sex offenders" who were not on probation, parole or court-monitored supervision as of January 1, 2010—together with the date when the offender was no longer under criminal justice supervision. If, for some reason, the parties cannot reach agreement, they shall arrange a telephone conference with me by contacting my judicial assistant.

6. These cases are referred to Magistrate Judge Zwart for further progression, as appropriate.

[1] On December 30, 2009, however, I preliminarily enjoined Defendants from enforcing certain provisions of the amended Act against convicted sex offenders who have completed their criminal sentences and who are not on probation, parole, or court-ordered supervision.

[2] Two other actions, Case Nos. 4:09CV3258 and 4:10CV3003, were subject to the consolidation order, but they were dismissed with prejudice for non-prosecution on July 16, 2010.

[3] Defendants originally moved for summary judgment on February 25, 2010. After the amended complaint was filed in Case No. 8:09CV456, Defendants filed an amended motion for summary judgment in all cases, on April 6, 2010. The original motion for summary judgment in each case will be denied without prejudice, as moot.

[4] The failure to file an opposing brief alone is not considered confession of Defendant's motion. *See* NECivR 56.1(b)(2). However, "[w]hen a motion for summary judgment is properly made and supported, and . . . the opposing party does not . . . respond [by affidavits or otherwise setting out specific facts showing a genuine issue for trial], summary judgment should, if appropriate, be entered against that party." Fed.R.Civ.P. 56(e)(2). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the nonmovant. *Torgerson v. City of Rochester*, 605 F.3d 584, 594 (8th Cir.2010)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Thus, the non-responding Plaintiff is entitled to the benefit of all evidence filed by the other Plaintiffs.

[5] With the following additions and corrections, Plaintiffs admit the accuracy of Defendants' Appendix II:

a. Previously, Neb.Rev.Stat. § 29-4004(5) required registrants residing in another state to report employment vocation and school attendance. [Appendix II], p. 4.

b. Previously, Neb.Rev.Stat. § 29-4005(2) required lifetime registration for a prior sexual offense when the sentencing court found a prior conviction for a registrable offense. [Appendix II], p. 7-8.

c. The registration information "shall include, but not be limited to" the information listed by Defendants. [Appendix II], p. 9-10.

d. Previously, there was no comparable search, seizure, and monitoring provision for registrants. [Appendix II], p. 11.

e. Previously, Neb.Rev.Stat. § 29-4009(7) permitted the release of relevant information necessary for the protection of the public. [Appendix II], p. 14-15.

f. The current version of Neb.Rev.Stat. § 29-4009(1)(d) addresses "remote communication devices," not computers and electronic communication devices identifiers and addresses. [Appendix II], p. 14.

g. Neb.Rev.Stat. § 29-4008 was modified to include strict liability for failure to provide or timely update law enforcement of any registration information.

h. Neb.Rev.Stat. § 29-4010 was repealed, eliminating the possibility to expunge the registry records upon successful completion. (Filing 345, CM/ECF pp. 12-13, ¶ 2.)

[6] SORNA (including two provisions enacted in 2008) is codified at 42 U.S.C. §§ 16901-16991.

[7] Plaintiffs have admitted the accuracy of Defendants' Appendix I. (Filing 345, CM/ECF p. 14, ¶ 13)

[8] I determine that Neb.Rev.Stat. § 29-4006(2) violates the Fourth Amendment rights of Plaintiffs who were previously convicted of sex crimes but who were not on probation, parole or court-monitored supervision on or after January 1, 2010.

[9] Plaintiffs do not contend that immunity extends to the Nebraska Attorney General or the Superintendent of the Nebraska State Patrol.

[10] Plaintiffs also attack these statutory provisions on numerous other grounds. To the degree that I grant summary judgment in favor of Plaintiffs, I decline to decide claims not mentioned in the text as it is unnecessary to do so. To the degree that I require a trial, and deny the summary judgment motions of Plaintiffs and Defendants, the other claims not mentioned in the text regarding these statutes will also be resolved after trial. The foregoing said, except for the claims discussed in the text, most (perhaps all) of Plaintiffs' other claims appear to be quite weak.

[11] *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 590 (2006). Title I of the Act, entitled the *Sex Offender Registration and Notification Act ("SORNA")*, creates a national sex offender registry law. *SORNA,* together with two provisions added in 2008, that are codified with *SORNA,* may be found at 42 U.S.C. §§ 16901-16991.

[12] Definitions pertinent to this statute are found at Neb.Rev.Stat. § 29-4001.01 (West, Operative Jan. 1, 2010).

[13] There is some question about whether any of the Plaintiffs fit this later category and there is some question whether any Plaintiff will be under criminal justice supervision at the time of trial. See the discussion of these issues in the analysis of Plaintiffs' Fourth Amendment claims. Counsel should follow my directions set out in that discussion regarding standing, mootness and ripeness questions as those questions relate to these *Ex Post Facto* claims.

[14] LB 97 §§ 14, 26 (2009) contained the provisions noted in the text. *See* Slip Law Copy available at http//:nebraskalegislature.gov/bills (use "LB 97" and "101st Legislature 1st and Second Sessions" as search terms). Senator Lautenbaugh was the "[p]rincipal [i]ntroducer" (filing 319-3 at CM/ECF p. 1) of LB 97 and he was asked by the Nebraska Attorney General to introduce the bill. (Filing 319-3 at CM/ECF p. 4.)

[15] These are not stray remarks. They cannot be dismissed as the rants of a rogue legislator. They were made by the man who was the principal sponsor of the challenged statutes and the specially chosen designate of the Nebraska Attorney General.

[16] A law violates the *Ex Post Facto Clause* when it applies to events occurring before the law's enactment and the law disadvantages the offender, such as by practically increasing the punishment the offender was subject to on the date of enactment. *See, e.g., Lynce v. Mathis,* 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) (a statute retroactively canceling provisional release credits resulting in re-incarceration of the offender violated the *Ex Post Facto Clause*).

[17] To be clear, it would be impossible to conclude that the entirety of Nebraska's new legislation was intended to be punitive in nature. In general, the record adequately establishes that Nebraska mainly intended to amend its law to comply with *SORNA.*

[18] Attachment A is solely intended to illustrate the void in the summary judgment record and nothing more. It is up to counsel to present the facts.

[19] As a factual matter, there is no doubt that many of the Plaintiffs fit into this category; that is, many Plaintiffs were once on probation, parole or court-monitored supervision and must register as "sex offenders," but were not on probation, parole or court-monitored supervision at the time this provision became effective on January 1, 2010. (*E.g.*, filing 330 at CM/ECF p. 1, Declaration of Doe 21: "In 2006, I was found guilty of third degree sexual assault . . . following a trial I received a two-year probation sentence and was released after one year.")

[20] Nebraska's new law contains a severability clause. A slightly more detailed discussion of this severability provision may be found in the preliminary injunction ruling. (Filing 92 at CM/ECF p. 12, n.8)

[21] The author of this opinion, *Judge David Hamilton,* was elevated to the United States Court of Appeals for the Seventh Circuit on November 23, 2009. Federal Judicial Center, *History of the Federal Judiciary,* available at http://www.fjc.gov/history/home.nsf (click on "Judges of the United States Courts" and "Biographical Directory of Federal Judges" and insert search term "Hamilton, David Frank").

[22] This search might occur by actually looking at the guts of the computer or, under certain circumstances, by using technology to do the same thing. In either case, the computer would be searched.

[23] With respect to sex offenders who were not on probation, parole or court-monitored supervision on January 1, 2010, there is no set of circumstances where the statute would satisfy the Fourth Amendment.

[24] But, as discussed later, there may be mootness, ripeness and standing problems despite this allegation.

[25] On motion of Defendants, Judge Zwart stayed discovery. (Filing 328.)

[26] As I have noted in other contexts, for district judges who must decide whether trials are necessary, it is hard to differentiate between facial and as-applied challenges where both types of challenges are asserted. This is particularly true when First Amendment claims (where a statute may be voided without a showing that it is unconstitutional in every application) are interwoven with other constitutional claims. In this regard, Plaintiffs who are mothers, spouses and employers of sex offenders presently on probation, parole or court-monitored supervision (if any) may be claiming that the "consent" provision chills their First Amendment right of free speech when jointly using computers and the Internet. That issue will be resolved at trial as well.

[27] At the preliminary injunction hearing, Mr. Dornan, Plaintiffs' counsel, stated the following:

THE COURT:.... And secondly, Mr. Dornan, are at least some of the plaintiffs in this group people who have been convicted of sexual offenses but who have served their time and are no longer on probation or parole?

MR. DORNAN: My understanding, Judge, is that all of the numbered Does except for number 12 fit in that status. My understanding of number 12 is that he is on supervised release until January the 7th of 2010.

(Filing 326 at CM/ECF p. 7.)

[28] The problem of mootness and ripeness would seem to be exacerbated by the ruling just announced that the statute is unconstitutional as to Plaintiffs who have served their time and who are no longer under supervision.

[29] I reject out of hand Plaintiffs' assertion that these definitions do not apply to the criminal statute because the definitions were codified in another portion of the Nebraska statutes. While it is true that these provisions were codified in different sections, the criminal provision discussed in the text and the definitions discussed in the text were contained in the same legislation. *See* LB 97 § § 14, 24 (2009), Slip Law Copy available at http://nebraskalegislature.gov/bills (use "LB 97" and "101st Legislature First and Second Sessions" as search terms). Nebraska follows the standard rule of construction that statutes are construed together when they relate to the same subject matter. *See, e.g., Fontenelle Equip., Inc. v. Pattlen Enter., Inc.*, 262 Neb. 129, 629 N.W.2d 534, 540 (2001). I will follow that customary rule here because these statutes relate to the same subject matter.

[30] One of Plaintiffs' attorneys has submitted a signed and sworn affidavit that he has "the signature pages of the (declarations regarding) Does 1 through 20 and A through K on file, and each of the declarations, while submitted anonymously, has been signed under penalty of perjury." (Filing 7.) To the extent that Defendants object to the declarations of Doe 12 (*see* filing 349) that objection is overruled.

[31] The Fourteenth Amendment's reference in Section 1 to "due process of law" incorporates the "void for vagueness" notion found in the Fifth Amendment and thus makes that doctrine applicable to the states. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (California statute requiring persons who loiter or wander on streets to provide "credible and reliable" identification and to account for their presence when requested by peace officer under circumstances that would justify stop under standards of *Terry v. Ohio,* with "credible and reliable" identification being defined as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself," was unconstitutionally vague within meaning of the due process clause for failing to clarify what was contemplated by requirement that suspect provide "credible and reliable" identification).

[32] Again, I emphasize that Attachment A is solely intended to illustrate the void in the summary judgment record and for no other purpose. It is up to the lawyers to present the facts.

[33] For example, *iGoogle* appears to combine a browser, email capability, and chat capability (among other things) into *one* personalized platform. Does an offender who "uses" that personalized platform run afoul of the criminal statute when persons under the age of 18 are allowed to access Google chat capabilities even if the offender never clicks on the chat feature on his personalized *iGoogle* platform?

[34] I have no present intention of engaging an expert on my own.

[35] I assume at this point in the litigation that these statutes should be deemed "content neutral" for the purposes of First Amendment analysis.

[36] By providing examples, I do not mean to suggest that these examples are the only objects of my concern or even the most important. They are merely illustrations.

[37] *See, e.g.,* Douglas A. Berman, *Sentencing Law and Policy,* available at *http: //sentencing. typepad.com/sentencing_law_and_policy/.*

[38] *See* Attachment A at page 21 (example 3).

[39] Neb.Rev.Stat. § 28-319.01 (West 2009) is Nebraska's "statutory rape" law. The offense described in § 28-319.01 is a listed offense under the provisions of Neb.Rev.Stat. § 28-322.05(b). Neb.Rev.Stat. § 28-322.05 pertains not only to listed offenses but also to "substantially equivalent offenses" committed in other states. *Id.*

[40] To be clear, in Part Two of this opinion I consider all statutory provisions that were enacted or amended by LB 97 and LB 285, *except* Neb.Rev.Stat. §§ 29-4006(1)(k) & (s), 29-4006(2), and 28-322.05. My rulings on Plaintiffs' claims in Part Two do not apply to those statutory provisions, which are discussed separately in Part One of this opinion.

[41] Defendants deny these statements and object to most of Plaintiffs' evidence. Because I am not convinced by Plaintiffs' arguments, I find it unnecessary to examine Defendants' objections in detail. I therefore will deny Defendants' objections (filing 349) without prejudice.

[42] Plaintiffs also argue that "*Payan* and *Worm* lead to the conclusion that the Nebraska *ex post facto* clause expands the legislative intent analysis to grant protection beyond its federal counterpart." (Filing 345, at CM/ECF p. 120.) This conclusion is unfounded.

[43] Among other differences, "[p]robation and supervised release [or parole] entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to [SORA] are free to move where they wish and to live and work as other citizens, with no supervision.... A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense." *Smith v. Doe*, 538 U.S. at 101-102, 123 S.Ct. 1140 (citations omitted).

[44] Plaintiffs complain about the wording of the Nebraska State Patrol's website, which recites that "Nebraska State Statute 29-4002 declares that sex offenders present a high risk to commit repeat offenses...." (Filing 346-6, at CM/ECF p. 1.) They claim this statement is untruthful because it labels all sex offenders as "high risk."

[45] Plaintiffs additionally urge me to consider whether SORA, as amended, (1) detrimentally impacts the collateral consequences of their convictions; (2) imposes restrictions and obligations identical to those imposed upon probationers and parolees; (3) eliminates a status, right, or ability previously afforded by the government; and (4) is imposed exclusively and directly at a politically unpopular group. (Filing 345, at CM/ECF pp. 101-112.) To the extent these considerations are not already encompassed by the *Mendoza-Martinez* factors, I decline to do so.

[46] LB 97's definitions are codified as Neb. Rev.Stat. § 29-4001.01(2), (3), (4), (6), (7), (8), (10), (11), & (13) (West, Operative Jan. 1, 2010). Subsections (1), (5), (9), (12), (14) and (15) of that statute are definitions added by LB 285, § 3.

[47] SORA's reporting requirements include the following:

(2) Any person required to register under the act shall inform the sheriff of the county in which he or she resides, in person, and complete a form as prescribed by the Nebraska State Patrol for such purpose, if he or she has a new address, temporary domicile, or habitual living location, within three working days before the change. . . .

(3) Any person required to register under the act shall inform the sheriff of the county in which he or she resides, in person, and complete a form as prescribed by the Nebraska State Patrol for such purpose, if he or she has a new address, temporary domicile, or habitual living location in a different county in this state, within three working days before the address change. . . . The person shall report to the county sheriff of his or her new county of residence and register with such county sheriff within three working days after the address change.

(4) Any person required to register under the act shall inform the sheriff of the county in which he or she resides, in person, and complete a form as prescribed by the Nebraska State Patrol for such purpose, if he or she moves to a new out-of-state address, within three working days before the address change. . . .

Neb.Rev.St. § 29-4004 (West, Operative Jan. 1, 2010).

[48] In fact, the regulations promulgated by the Nebraska State Patrol to carry out the registration provisions of the Sex Offender Registration Act, as directed by Neb.Rev.Stat. § 29-4013(1) (West, Operative Jan. 1, 2010), define "working days" to mean "Monday through Friday but shall not include any day which is a state holiday." Neb. Admin. Code, Title 272, Ch. 19, § 002.36 (effective Jan. 1, 2010). The state holidays are also listed.

[49] The statute provides that the registration information shall include "[t]he license plate number and a description of any vehicle owned or operated by the person and its regular storage location[.]" Neb. Rev. St. § 29-4006(g) (West, Operative Jan. 1, 2010). The Nebraska State Patrol rules and regulations use the same language. *See* Neb. Admin. Code, Title 272, Ch. 19, § 008.06G (effective Jan. 1, 2010).

[50] Plaintiffs also claim that SORA, as amended, "undermines the fundamental right to earn a living and maintain gainful employment." (Filing 345, at CM/ECF p. 160.) "The right to `make a living' is not a `fundamental right,' for either equal protection or substantive due process purposes." *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir.2005).

[51] *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

[52] *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

[53] Applying a rational basis standard, the Eleventh Circuit went on to hold that the plaintiff's substantive due process claim failed.

[54] *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[55] *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

[56] The Nebraska Supreme Court has held that SORA's registration requirements are a "collateral consequence" of a plea that do not need to be explained before a plea is accepted. *See* *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8, 12 (2002)

[57] While I do not reach the other two prongs, I note that the 2009 amendments to SORA generally were intended to bring Nebraska law into compliance with the federal Adam Walsh Act, the declared purpose of which is "to protect the public from sex offenders and offenders against children,...." 42 U.S.C. § 16901.

[58] I have considered all claims alleged by Plaintiffs, and all arguments presented in their briefs. If a particular claim or argument is not discussed in this opinion, it is only because I deemed such a discussion redundant or otherwise unnecessary to an understanding of the opinion.

JOHN DOE, et al., Plaintiffs,
v.
KAMALA D. HARRIS, et al., Defendants.

No. C12-5713 TEH.

United States District Court, N.D. California.

November 7, 2012.

ORDER GRANTING TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE AS TO WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

THELTON E. HENDERSON, District Judge.

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, 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' 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, 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.

[1] The hearing was recorded by a court reporter.

[2] The two individual plaintiffs' motion to proceed anonymously is currently pending before the Court.

[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.

JOHN DOE, on his own behalf and on behalf of those similarly situated, Plaintiff,
v.
PROSECUTOR, MARION COUNTY, INDIANA, Defendant.

Case No. 1:12-cv-00062-TWP-MJD.

United States District Court, S.D. Indiana, Indianapolis Division.

June 22, 2012.

ENTRY FOLLOWING BENCH TRIAL ON THE MERITS

TANYA WALTON PRATT, District Judge.

In an effort to prevent the sexual exploitation of Hoosier children and protect the public at large, the State of Indiana prohibits certain registered sex offenders from using social networking sites, instant messaging programs, and chat room programs that allow access by persons under the age of 18. *See* Indiana Code § 35-42-4-12(e). The statute, enacted in 2008, makes the knowing or intentional use of these sites a Class A misdemeanor. *Id.* Plaintiff John Doe ("Mr. Doe"), on his own behalf and on behalf of those similarly situated, contends that this statute runs afoul of the targeted sex offenders' First Amendment rights. Initially, Mr. Doe filed a motion for a preliminary injunction asking the Court to temporarily enjoin enforcement of the statute by Defendant, Prosecutor of Marion County, Indiana ("State"). (Dkt. #34.) Since then, the parties have agreed that it would be appropriate for the Court to merge the preliminary injunction motion with a bench trial (Dkt. #40); *see also* Fed. R. Civ. P. 65(a)(2). Accordingly, Mr. Doe now asks the Court to issue a declaratory judgment declaring Indiana Code § 35-42-4-12 unconstitutional on its face and to permanently enjoin the State's enforcement of the statute. The Court presided over oral arguments on May 31, 2012, and the Court thanks counsel for their excellent and thoughtful advocacy.

As discussed below, the Court finds that this content-neutral statute is narrowly tailored, leaves open ample alternative channels of communication, and is not overly broad. It follows, then, that the statute does not violate Mr. Doe's First Amendment rights. Accordingly, Mr. Doe's requests to enjoin enforcement of the statute (Dkts. #34 and #42) are DENIED and final judgment is entered in favor of the State.[1]

I. BACKGROUND

As Plaintiff notes, "[t]he use of computer-based social networking web sites, instant messaging, and chat rooms has become ubiquitous in today's society." (Dkt. #35 at 1). In particular, social networking has evolved with astonishing speed. The most prominent social networking site, Facebook, was founded in 2004, just eight years ago. *Facebook Newsroom,* FACEBOOK, http://newsroom.fb.com/content/default.aspx?NewsAreaId=22 (last visited June 22, 2012) (hereinafter "Facebook Newsroom"). Originally created for college students the domain is now opened up to everyone over the age of 13. *Statement of Rights and Responsibilities,* FACEBOOK, http://www.facebook.com/legal/terms (last visited June 22, 2012).

It now has 901 million active users, including 526 million daily active users, and is available in more than 70 languages. *Id.* As Plaintiff notes, 3.1 million Hoosiers use Facebook, just shy of 50% of Indiana's population. (Dkt. #35 at 7). Importantly, Facebook recently announced that it is developing a technology that would allow children younger than 13 years old to use the social-networking site under parental supervision. Anton Troianovski & Shayndi Raice, *Facebook Explores Giving Kids Access,* WALL ST. J., June 4, 2012, at A1. That same article noted that "many kids lie about their ages to get accounts," and as many as "7.5 million under the age of 13" use the site. *Id.* And, to make matters even more troubling, a Consumer Reports survey projects that more than 5 million Facebook users are 10 years old or younger. *That Facebook friend might be 10 years old, and other troubling news,* CONSUMER REPORTS http://www.consumerreports.org/cro/magazine-

archive/2011/june/electronics-computers/state-of-the-net/facebook-concerns/index.htm (last visited June 22, 2012).

As social networking continues to grow and integrate itself into society, social networking sites become inextricably linked with other access points on the internet. For instance, in order to comment on online stories on the *Indianapolis Star's* web site, commenters must now do so through their Facebook accounts. *The Indianapolis Star,* FACEBOOK, http://www.facebook.com/indianapolis.star (last visited June 22, 2012). The same goes for certain popular political web sites like Politico. Ben Smith, *Facebook Comments,* POLITICO, http://www.politico.com/blogs/bensmith/0811/Facebook_comments.html (last visited June 5, 2012). Moreover, the mass proliferation of social networking has greatly enhanced the interconnectedness of the world. By March 2012, more than 125 billion `friend' connections had occurred on Facebook alone. *See* Facebook Newsroom. And, as evidenced by the "Arab Spring" uprisings in the Middle East, sites like Facebook and Twitter have helped animate numerous social movements, providing activists with a powerful launch pad to communicate with their fellow citizens. *See* William Saletan, *Springtime for Twitter:* Is the Internet Driving the Revolutions of the Arab Spring?, Slate, http://www.slate.com/articles/technology/future_tense/2011/07/springtime_for_twitter.html (last visited June 5, 2012).

But the advent of new technology always engenders new concerns. One such concern is that social networking, chat rooms, and instant messaging programs have effectively created a "virtual playground" for sexual predators to lurk. This fear is reinforced by countless news stories, many criminal cases, and television shows like MSNBC's "To Catch a Predator" — which, as the State notes, "sadly never seems to run out of material for new episodes." (Dkt. #47 at 1); *see also United States v. Henzel,* 668 F.3d 972, 973 (7th Cir. 2012) (defendant challenged sentence that this Court issued after defendant raped 12-year-old victim after luring her across state lines using a chat room frequented by fans of online video games). And, beyond anecdotes and isolated cases, certain statistics paint a startling picture of the pervasiveness of online sexual exploitation of minors. According to one 2006 report funded through a grant issued by the United States Congress, one in seven youths has received online sexual solicitations and one in three youths has received online exposure to unwanted sexual material. Janis Wolak et al., *Online Victimization of Youth: Five Years Later,* NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, at vii (http://www.missingkids.com/en_US/publications/NC167.pdf) (last visited June 5, 2012). Additionally, Mr. Doe himself states that his son, who is on Facebook, "has had questionable `friend' requests'". (Dkt. 35 at 9). Simply stated, the real world and the virtual world can be dangerous places for vulnerable minors.

Given this backdrop, numerous states, including Indiana, have attempted to combat online sexual exploitation.[2] To that end, in 2008, Indiana passed a law banning certain sex or violent offenders from knowingly or intentionally using or accessing certain platforms of online communication that could be frequented by minors. Specifically, Indiana Code § 35-42 -4-12, in its entirety, reads as follows:

> (a) This section does not apply to a person to whom all of the following apply:
>
> (1) The person is not more than:
>
> (A) four (4) years older than the victim if the offense was committed after June 30, 2007; or
>
> (B) five (5) years older than the victim if the offense was committed before July 1, 2007.
>
> (2) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term "ongoing personal relationship" does not include a family relationship.
>
> (3) The crime:
>
> (A) was not committed by a person who is at least twenty-one (21) years of age;
>
> (B) was not committed by using or threatening the use of deadly force;
>
> (C) was not committed while armed with a deadly weapon;
>
> (D) did not result in serious bodily injury;
>
> (E) was not facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC XX-XX-XX-X(1)) or a controlled substance (as defined in IC XX-XX-X-X) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge; and

(F) was not committed by a person having a position of authority or substantial influence over the victim.

(b) This section applies only to a person required to register as a sex or violent offender under IC 11-8-8 who has been:

(1) found to be a sexually violent predator under IC XX-XX-X-X.5; or

(2) convicted of one (1) or more of the following offenses:

(A) Child molesting (IC XX-XX-X-X).

(B) Child exploitation (IC XX-XX-X-X(b)).

(C) Possession of child pornography (IC XX-XX-X-X(c)).

(D) Vicarious sexual gratification (IC XX-XX-X-X(a) or IC XX-XX-X-X(b)).

(E) Sexual conduct in the presence of a minor (IC XX-XX-X-X(c)).

(F) Child solicitation (IC XX-XX-X-X).

(G) Child seduction (IC XX-XX-X-X).

(H) Kidnapping (IC XX-XX-X-X), if the victim is less than eighteen (18) years of age and the person is not the child's parent or guardian.

(I) Attempt to commit or conspiracy to commit an offense listed in clauses (A) through (H).

(J) An offense in another jurisdiction that is substantially similar to an offense described in clauses (A) through (H).

(c) As used in this section, "instant messaging or chat room program" means a software program that requires a person to register or create an account, a username, or a password to become a member or registered user of the program and allows two (2) or more members or authorized users to communicate over the Internet in real time using typed text. The term does not include an electronic mail program or message board program.

(d) As used in this section, "social networking web site" means an Internet web site that:

(1) facilitates the social introduction between two (2) or more persons;

(2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members;

(3) allows a member to create a web page or a personal profile; and

(4) provides a member with the opportunity to communicate with another person.

The term does not include an electronic mail program or message board program.

(e) A person described in subsection (b) who knowingly or intentionally uses:

(1) a social networking web site; or

(2) an instant messaging or chat room program;

that the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program commits a sex offender Internet offense, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior unrelated conviction under this section.

(f) It is a defense to a prosecution under this section that the person:

(1) did not know that the web site or program allowed a person who is less than eighteen (18) years of age to access or use the web site or program; and

> (2) upon discovering that the web site or program allows a person who is less than eighteen (18) years of age to access or use the web site or program, immediately ceased further use or access of the web site or program.

Indiana Code § 35-42-4-12 (emphasis added). Laws like Indiana's are part of a growing trend in many states and cities throughout the country. As a recent article in the *New York Times* noted, "communities around the country have gone beyond regulating where sex offenders can live and begun banning them outright from a growing list of public places." Ana Facio-Krajcer, *Public-Place Laws Tighten Rein on Sex Offenders,* N.Y. TIMES, May 29, 2012, at A15. Some commentators have argued that these laws lack efficacy and are merely low-hanging fruit for legislatures — "laws that can be passed to make people feel good[.]" *Id.* Others, however, have emphasized the deterrent effect of such laws and have argued that they are common sense measures to protect children. *Id.*[3]

Here, the focal point of Mr. Doe's challenge to the statute is subsection (e), which makes it a Class A misdemeanor for certain sex offenders (those described in subsection (b)) to knowingly or intentionally use "a social networking web site" or "an instant messaging or chat room program" if the offender knows that minors are allowed "access or use" of that site. Under the statute, subsection (a) exempts certain offenders from the statute, primarily those who were involved in what the State has dubbed "Romeo and Juliet" type relationships (where the victim has reached a certain age but is below the age of consent, and enters into a "consensual" sexual relationship with an adult who is under the age of 21). Subsection (c) defines "instant messaging or chat room program" while subsection (d) defines "social networking web site." Subsections (c) and (d) clarify that the phrases "instant messaging or chat room program" and "social networking web site" do not include message boards or email.

For good reasons, the Court has allowed Mr. Doe, an adult resident of Indianapolis, Indiana, to proceed anonymously in this case. (Dkt. #26.) But, through the briefing, Mr. Doe has revealed certain information about himself which sheds light on why he is challenging the statute. Mr. Doe was arrested in Marion County in 2000 and convicted of two counts of child exploitation. He was released from prison in 2003 and from probation in 2004, and is not currently on any form of parole, supervised release or similar restrictions. Mr. Doe has physical custody of his teenage son. Under Indiana law, Mr. Doe is required to register on Indiana's sex and violent offender registry for the remainder of his life. Because Indiana Code § 35-42-4-12(e) applies to him, Mr. Doe is barred from knowingly or intentionally accessing a social networking site, instant messaging program, or a chat room, if he knows that site allows someone under the age of 18 to use or access the site. Mr. Doe would like to access such sites and programs for legitimate and lawful reasons. For example, Mr. Doe would like to: (1) use Facebook to monitor his teenage son's social networking activity; (2) participate in certain political speech online that requires social networking accounts; (3) advertise for his small business using social networking; (4) view photographs and videos of family members who are scattered throughout the United States; and (5) participate in certain communications and petitions relevant to pilots (Mr. Doe is also a pilot).

Mr. Doe challenges Indiana's statute on First Amendment grounds, writing that "[t]o the extent that this ban is applied to former offenders who are not on parole, probation, or other forms of supervised release, it denies them the ability to communicate and associate in violation of the First Amendment of the United States Constitution." (Dkt. #35 at 1). The State counters that the statute does not violate Mr. Doe's (or similarly situated persons') First Amendment rights, highlighting that "the statute is narrowly directed at those found most likely to commit repeat offenses and who have victimized children." (Dkt. #47 at 3). Additional facts are added below as needed.

II. DISCUSSION

A. First Amendment Rights Affected

Mr. Doe makes a facial challenge to the statute at issue on First Amendment grounds. The First Amendment provides that "Congress shall make no law . . . 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." U.S. CONST. amend. I. According to Mr. Doe, the statute affects three rights secured by the First Amendment: (1) the right to communicate; (2) the right to receive information; and (3) the right to associate.

It appears well-settled that all three of these rights are secured by the First Amendment. *See, e.g.,* *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (the First Amendment protects "the right of every citizen to reach the minds of willing listeners") (citations and internal quotations omitted); *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) ("[T]he First Amendment protects modern forms of communications."); *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality) ("the right to receive ideas follows

ineluctably from the *sender's* First Amendment right to send them") (emphasis in original); *Christian Legal Society v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (noting that the First Amendment protects "the freedom to gather together to express ideas — the freedom to associate") (citations omitted). Moreover, it is also settled that the First Amendment's protections "extend fully to communications made through the medium of the internet." *Doe v. Shurtleff*, 628 F.3d 1217, 1222 (10th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1617 (2011) (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (explaining that the internet allows "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox" and that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium")).

B. What standard applies to the constitutional analysis of this statute?

Having established that his First Amendment rights are affected by the statute, Mr. Doe argues that the statute fails the requisite scrutiny. Significantly, Mr. Doe concedes that the statute is "content neutral," which means that it is a speech regulation that is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation and internal quotations omitted). In other words, the law is not related to the subject matter or topic of speech. "For First Amendment purposes, content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do; thus, they are subject to a less rigorous analysis, which affords the government latitude in designing regulatory solutions." 16A AM. JUR. 2D *Constitutional Law* § 478 (citation omitted).

Specifically, a content neutral regulation is upheld if it: (1) is "narrowly tailored to serve a significant governmental interest"; and (2) "leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (emphasis added). If the statute satisfies these criteria, then it is deemed to be a "reasonable time, place and manner regulation[.]" *United States v. Grace*, 461 U.S. 171, 177 (1983). Mr. Doe argues that the Indiana statute at issue is not narrowly tailored and fails to leave open alternative channels of communication; therefore, it fails on both fronts. Obviously, the State disagrees. The Court considers these requirements in turn.

1. Narrow Tailoring

As an initial matter, throughout the briefing, Mr. Doe emphasizes both the overly broad nature of the statute and its lack of narrow tailoring. As Mr. Doe's counsel conceded at oral arguments, however, these are two sides of the same coin — not two separate and distinguishable arguments. (This makes sense, as a statute presumably cannot be both "overly broad" and "narrowly tailored.") Moreover, it is worth noting that the overbreadth doctrine is not needed where, as here, "[t]he plaintiffs in this case assert their legitimate intention to engage in the protected expression themselves" and "a plaintiff class has been certified which includes everyone who might be affected by the statute." *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004) (citations omitted). Thus, Mr. Doe "need not really rely on the overbreadth doctrine to assert [his] facial challenge." *Id.* Accordingly, the Court will confine its analysis to whether or not the statute is "narrowly tailored." But, in doing so, the Court will of course consider whether the statute is "overly broad."

"[T]he 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. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. 799-800 (emphasis added; citations and internal quotations omitted). To defend the regulation on speech, the government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994).

Mr. Doe does not dispute that the statute promotes "a substantial government interest"; nor does he dispute that the harms posed by online sexual predators are "real." *See, e.g., Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (the government has "a compelling interest in protecting the physical and psychological well-being of minors"). Instead, Mr. Doe argues that the "means chosen are substantially broader than necessary." According to Mr. Doe, the statute's "vast breadth" is illustrated by the fact that it precludes certain sex offenders from: making comments about current events on the *Indianapolis Star* web site; participating in political discussions in certain chat rooms; advertising for businesses using certain social networking sites; or sharing photos and having group discussions with family members through Facebook. On this point, the Court readily

acknowledges that the statute captures considerable conduct that has nothing to do with interacting with minors.

That said, Mr. Doe's argument is important for what it does *not* say. Tellingly, Mr. Doe never furnishes the Court with workable measures that achieve the same goal (deterrence and prevention of online sexual exploitation of minors) while not violating his First Amendment rights. Here, the statute bars a subset of registered sex offenders from visiting a subset of web sites that minors (and the public at large) use with regularity, which include Facebook, Twitter, Google Plus, various chat rooms, and various instant messaging programs. In other words, Mr. Doe is only precluded from using web sites where online predators have easy access to a nearly limitless pool of potential victims.

Notably, the vast majority of the internet is still at Mr. Doe's fingertips. *Cf. United States v. Miller*, 594 F.3d 172, 188 (3d Cir. 2010) (vacating special condition of supervised release forever banning person convicted of receiving child porn from ever accessing the internet); *United States v. Holm*, 326 F.3d 872, 877-79 (7th Cir. 2003) ("We find that to the extent that the condition is intended to be a total ban on Internet use, it sweeps more broadly and imposes a greater deprivation on Holm's liberty than is necessary, and thus fails to satisfy the narrow tailoring requirement of § 3583(d)(2)."). For example, Mr. Doe could create or participate in a LISTSERV (a computer program that allows people to create, manage and control electronic mailing lists) in order to communicate with fellow pilots or persons who have other similar interests. And, importantly, Mr. Doe (and those similarly situated) can still communicate through email, message boards, and social networking sites that require the user to be 18 years old.

Although there was some confusion on this point during the briefing, it is seemingly clear that Mr. Doe can use the professional networking web site LinkedIn. *See* LinkedIn Privacy Policy, Section 5A, *Important Information,* http://www.linkedin.com/static?key= privacy_policy (last visited June 5, 2012) ("Children under the age of 18 are not eligible to use our service.").[4] Therefore, Mr. Doe is incorrect when he writes that he "cannot communicate with peers and potential clients and employers on . . . LinkedIn[.]" (Dkt. 35 at 18).

As the State argued, because the statute prohibits only certain sites that allow minors, if a minor untruthfully accesses that site, that is not the same thing as being *allowed* by the site to have access. Further, the statute at issue provides a defense to prosecution if the person (1) did not know that the web site or program *allowed* a person who is less than eighteen (18) years of age to access or use the web site or program; and (2) upon discovering that the web site allows a person who is less than eighteen years of age to access or use the program, immediately ceased further use or access of the web site or program.

In short, the Court finds that Indiana's statute is not "substantially broader than necessary" to achieve its goals of prevention and deterrence. Under these circumstances, courts are deeply reluctant to invalidate a statute and prohibit a State from enforcing conduct that is within its power to proscribe. See *Broadrick v. Oklahoma*, 413 U.S. 601 at 614 (1973). Perhaps this Court could devise a "less-speech-restrictive alternative" that still achieved the same basic goals. However, the Court's role is not to draft a perfect law. Instead, the Court is only tasked with ensuring that means chosen are not "substantially broader than necessary." As described above, this law fulfills this criterion.

Mr. Doe makes a separate, but related, argument under the heading of narrow tailoring: namely, this law is unnecessary because Indiana already prohibits the solicitation of children "by using a computer network." *See* Indiana Code § 35-42-4-6(a)(4); *see also* Indiana Code § 35-42-4-13(c) (barring person who is at least 21 from knowingly or intentionally communicating with an individual whom the person believes to be less than 14 concerning "sexual activity with intent to gratify . . . sexual desires"). According to Mr. Doe, there is no point in criminalizing the mere use of a web site when the real wrongs — online solicitation and age-inappropriate sexual communication — are already criminalized. This argument has some appeal, but the Court is not persuaded. Significantly, the statutes serve different purposes. One set of statutes aims to *punish* those who have *already committed* the crime of solicitation. The challenged statute, by contrast, aims to *prevent and deter* the sexual exploitation of minors by barring certain sexual offenders from entering a virtual world where they have access to minors.

In making this distinction, it is worth emphasizing that the risk of recidivism by sex offenders has been described by the United States Supreme Court as "frightening and high." *Smith v. Doe* 538 U.S. 84, 103 (2003) (citation and internal quotations omitted); *see also Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003) ("[W]hen 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.") (citation and internal quotations omitted).[5] Given the high recidivism rates, it is obvious that many sex offenders have difficulty controlling their internal compulsions to commit these crimes. It stands to reason that many sex offenders might sign up for social networking with pure intentions, only to succumb to their inner demons when given the opportunity to interact with potential victims.

Logically following, society has a strong interest in ensuring that sex offenders do not place themselves in these potentially dangerous situations. That is what this law attempts to do, and laws with similar purposes have been upheld. *See, e.g.,* United States v. Comstock, U.S. , 130 S.Ct. 1949, 1954 (2010) (Congress has the authority under the Constitution to allow the continued civil commitment of sex offenders after they have completed their criminal sentences); *Smith*, 538 U.S. at 93 ("[A]n imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded.") (citation and internal quotations omitted); *see also* Indiana Code § 35-42-4-11(c) (prohibiting certain registered sex offenders from residing within 1,000 feet of a school, park or youth activity center).

As the Seventh Circuit noted in *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004), "[t]he City was not bound to wait until Mr. Doe again committed [a crime against children] in order to act." *Id.* at 767, n.8. That principle applies with considerable force here, notwithstanding the distinguishing features between that case and the present one. Or, as the State writes, it "need not wait until a child is solicited by a sex offender on Facebook; rather, it can bar predators from haunting social networking websites in the first place." (Dkt. 47 at 8). In sum, the need to deter sexual predators reinforces that the statute at issue is not rendered unnecessary by a separate Indiana statute criminalizing online child solicitation. The statute at issue bars a subset of sex offenders from using a subset of web sites that could easily facilitate communications between sexual predators and their prey. Accordingly, the Court finds that the statute at issue is narrowly tailored to advance a substantial government interest.[6] *See Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) ("By limiting the ordinance's restrictions to only those certain times and places where citizens naturally would feel most insecure in their surroundings, the city has effectively narrowed the application of the law to what is necessary to promote its legitimate interest.").

2. Alternative channels of communication

But that does not end the inquiry, as the statute must also leave open ample alternative channels for communication. It is well-established that "[a]n adequate alternative does not have to be the speaker's first or best choice . . . or one that provides the same audience or impact for the speech." *Id.* (citations omitted). However, the choice must be more than "theoretically available"; it must be "realistic as well." *Id.* Mr. Doe argues that his access to alternative channels of communications has been severely and unnecessarily curtailed. On this point, Mr. Doe contends that the challenged statute "totally forecloses various methods of communication." (Dkt. #35 at 21).

The Court respectfully disagrees. Facebook, Twitter, Google Plus, and the like are important communicative tools, but Mr. Doe still has myriad feasible alternative forms of communications at his disposal, including the ability to congregate with others, attend civic meetings, call in to radio shows, write letters to newspapers and magazines, post on message boards, comment on online stories that do not require a Facebook (or some other prohibited account), email friends, family, associates, politicians and other adults, publish a blog, and use social networking sites that do not allow minors (e.g. LinkedIn and a number of other sites which allow only adults). The Court readily concedes that social networking is a prominent feature of modern-day society; however, communication does not begin with a "Facebook wall post" and end with a "140-character Tweet." As previously indicated, Mr. Doe points out that "In Indiana there are 3.1 million persons, slightly less that 50% of the population, who use Facebook" (Dkt. #35 at 7), which would mean that slightly more than 50% of Hoosiers do not use Facebook. It is evident that robust supplies of alternative forms of communication are easy to use, realistic, and effective. It is true, as Mr. Doe emphasizes, that some of the banned forms of communication may be superior in numerous respects to their "old-fashioned" counterparts. But, again, to be "adequate," the channel of communication does not have to be "the speaker's first or best choice." *Gresham*, 225 F.3d at 906.; *see also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) (an ample alternative does not need to be the most efficient one for speaker's purposes). Accordingly, the Court finds that, notwithstanding Indiana Code § 35-42-4-12, Mr. Doe still has an adequate number of substitute forms of communication at his disposal.

C. Is *Doe v. Jindal* on-point?

Before concluding, the Court pauses to acknowledge the District Court of the Middle District of Louisiana's non-binding decision in *Doe v. Jindal,* 2012 WL 540100 (M.D. La. Feb. 16, 2012). In *Jindal,* the district court ruled that a Louisiana statute barring certain sex offenders who had committed crimes against children from accessing social networking sites, chat rooms, and peer-to-peer networks was unconstitutionally overbroad. The court concluded that:

> [t]here can be no doubt that the state has a wholly legitimate interest in protecting children from sex offenders online. However, the state's interests can [only] be served by a narrowly drawn statute tailored precisely toward the conduct the [state] wishes to proscribe. . . . In its current form, the Act is not crafted precisely or narrowly enough — as is required by constitutional standard — to limit the conduct it seeks to proscribe. Accordingly, on its face . . . the Act is substantially overbroad and, therefore, invalid under the First Amendment.

Id. at *6. For obvious reasons, Mr. Doe highlights the strong resemblance between this case and *Jindal.*

However, for numerous reasons, *Jindal* is distinguishable. First, the *Jindal* court observed that Louisiana's statute appeared to ban an extreme array of web sites-including the web site for the court and potentially imposed "a sweeping ban on many commonly read news and information websites, in addition to social networking websites such as MySpace and Facebook." *Id.* at *5. Importantly, Indiana's statute does not pose similar concerns; the State readily concedes that Mr. Doe is free to surf all manner of basic news and information sites. Second, here, the parties agree that the statute is content-neutral, and therefore should be analyzed using the "narrow tailoring/alternative channels" framework. The *Jindal* court did not mention, let alone employ, this framework. Third, the *Jindal* court relied heavily on the Supreme Court's decision in *United States v. Stevens,* U.S. , 130 S.Ct. 1577 (2010). However, *Stevens* did not deal with a content-neutral statute, like the Indiana statute. Instead, *Stevens* involved a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty. Accordingly, the federal statute "explicitly regulate [d] expression based on content[.]" *Id.* at 1584 (emphasis added). Thus, *Stevens* is not particularly applicable to the present case. For these three reasons, the Court finds that *Jindal* is distinguishable.

III. CONCLUSION

For the above reasons, the Court DENIES Mr. Doe's Motion for Preliminary Injunction and his request for permanent relief in the form of a declaratory judgment and a permanent injunction. (Dkts. #34 and #42.) Final judgment in favor of the State will accompany this entry.

SO ORDERED.

[1] This Entry serves as the Court's findings of fact and conclusions of law, as required by Federal Rule of Civil Procedure 52.

[2] Interestingly, in the past, both Facebook and MySpace have taken measures to regulate the use of their social networking sites by sex offenders. At the behest of state attorneys general, between May 1, 2008 and January 31, 2009, Facebook eliminated 5,500 sex offenders from its web site. Similarly, over a two-year period, MySpace removed 90,000 sex offenders from its site. *See* Charlotte Chang, *Internet Safety Survey: Who will Protect the Children?,* 25 BERKELEY TECH. L.J. 501, 503-06 (2010).

[3] No statistics concerning the efficacy of Indiana's statute (or other similar measures) are in the record, probably because reliable statistics are difficult to ascertain. After all, it is exceedingly difficult to prove a negative as it would likely be impossible to accurately determine exactly how many incidents of sexual exploitation of minors have been *prevented* as a result of this legislation.

[4] At oral arguments, the State conceded that if, in fact, this was LinkedIn's policy, Doe would be able to use it.

[5] That being said, the Court has also located articles calling the accuracy of these statements into question. *See* Carl Bialik, *Underreporting Clouds Attempt to Count Repeat Sex Offender,* WALL ST. J., January 25, 2008, http://online.wsj.com/article/SB120122376053515485.html (last visited May 31, 2012) ("Conventional wisdom says people released after serving time for sex crimes are likely to strike again. The numbers aren't as certain. Among convicted criminals released from prison, sex offenders released from prison are less likely to be arrested for any new crime than most other offenders, with the notable exception of murderers, researchers say.").

[6] Although the Court did not explicitly address it for the reasons described above, this same basic reasoning would apply to Mr. Doe's arguments regarding "substantial overbreadth." Moreover, to the extent this statute applies to persons who committed sex crimes against adults (e.g. rape and criminal deviate conduct), and not children, the same basic reasoning and concerns apply. Additionally, the rapists and criminal deviates that have victimized adults are likely not similarly situated to Mr. Doe as they are not members of the class. The class encompasses the offenses noted in Indiana Code § 35-42-4-12(b)(2). (Dkt. 33 at 1). The rapist and criminal deviates required to register as sex or violent offenders are covered under Indiana Code § 35-42-4-12(b)(1).

In re WILLIAM TAYLOR et al. on Habeas Corpus.

No. D059574.

Court of Appeals of California, Fourth District, Division One.

Filed September 12, 2012.

Kamala D. Harris, Attorney General, Jennifer A. Neill, Acting Senior Assistant Attorney General, Phillip Lindsay and Gregory J. Marcot, Deputy Attorneys General, for Appellant.

Office of the Primary Public Defender, County of San Diego, Randy Mize, Chief Deputy, and Laura Beth Arnold, Deputy, for Respondents.

CERTIFIED FOR PUBLICATION

BENKE, Acting P. J.

Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation (CDCR), appeals the order enjoining CDCR from enforcing the residency restriction of "Jessica's Law" on the ground that the blanket restriction is unconstitutional as a parole condition as it applies to registered sex offenders on parole in San Diego County.

In November 2006, the voters of California adopted Proposition 83, "The Sexual Predator Punishment and Control Act: Jessica's Law." Among other things, the proposition enacted revisions to the Penal Code,[1] including one that made it illegal for registered sex offenders "to reside within 2000 feet of any public or private school, or park where children regularly gather." (Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 135.) The residency restriction is codified at section 3003.5, subdivision (b) (section 3003.5(b)). The drafters of Jessica's Law assured voters this provision would establish "predator free zones around schools and parks to prevent sex offenders from living near where . . . children learn and play." (Ballot Pamp., Gen. Elec. (Nov. 7, 2006) argument in favor of Prop. 83, p. 46.) Subsequently, the CDCR adopted a policy to enforce the residency restriction as a parole condition for registered sex offenders.

William Taylor, Jeffrey Glynn, Julie Briley and Stephen Todd (collectively, petitioners) are four of the more than 150 registered sex offender parolees in San Diego County who filed habeas corpus petitions challenging the constitutionally of the residency restriction. The petitions of Taylor, Glynn, Briley and Todd were chosen to be the lead cases for purposes of establishing an evidentiary record to address the "`as-applied'" constitutionality of the restriction. (*In re E.J.* (2010) 47 Cal.4th 1258, 1281.)

BACKGROUND

This proceeding is an outgrowth of our Supreme Court's decision in *In re E.J., supra*, 47 Cal.4th 1258, a consolidated habeas corpus proceeding, in which four[2] registered sex offenders on parole for nonsex offenses committed before the passage of Proposition 83, but released on parole afterward, challenged the constitutionality of the residency restriction as a parole condition pursuant to CDCR policy. (*Id.* at pp. 1263-1264.) The Supreme Court rejected arguments that CDCR's enforcement of the residency restriction as a condition of parole was a retroactive application of the law and violated constitutional prohibitions against ex post facto laws. (*Id.* at pp. 1264, 1272, 1280.)

However, the *E.J.* petitioners also claimed that "section 3003.5(b) is an unreasonable, vague and overbroad parole condition that infringes on various state and federal constitutional rights, including their privacy rights, property rights, right to intrastate travel, and their substantive due process rights under the federal Constitution." (*In re E.J., supra*, 47 Cal.4th at p. 1280.) Noting that these claims were "considerably more complex `as applied' challenges" and the evidentiary record before it was insufficient to decide them, the Supreme Court remanded the cases to the trial courts of the counties to which the *E.J.* petitioners had been paroled to hold evidentiary hearings. (*Id.* at pp. 1281, 1284.)

By May 2010, the two *E.J.* petitioners from San Diego County had been discharged from parole and their cases were dismissed as moot. Meanwhile, about three dozen other registered sex offender parolees had filed habeas corpus petitions in San Diego Superior Court and had been granted temporary stays of the enforcement of section 3003.5(b). The parties agreed the evidentiary hearing ordered by the Supreme Court in *E.J.* would focus on the petitions filed by Taylor, Glynn, Briley and Todd.

On February 18, 2011, following an eight-day evidentiary hearing, the trial court issued its statement of decision (SOD). The court found the residency restriction—when enforced as a parole condition—was "unconstitutionally `unreasonable' "as applied to the lead petitioners because it violated petitioners' right to intrastate travel, their right to establish a home and their right to privacy and was not narrowly drawn and specifically tailored to the individual circumstances of each sex offender parolee. The court found "the fundamental vice of section 3003.5(b) as a parole condition . . . [is i]t is not narrowly drawn, much less specifically tailored to the individual. It applies as a blanket proscription, blindly applied to all registered sex offenders on parole without consideration of the circumstances or history of the individual case."[3] The court ordered the CDCR to cease applying section 3003.5(b) as a parole condition against the four lead petitioners.

At the same time, the court pointed out parole agents will continue to have the discretion to impose special conditions on sex offender parolees that mirror the residency restriction of section 3003.5(b) or are even more restrictive than its 2,000-feet minimum requirement based on the specific circumstances of the individual parolee.

On March 10, the court issued a supplemental statement of decision (Supp. SOD), which ordered the CDCR to cease applying section 3003.5(b) as a blanket parole condition against all registered sex offender parolees under supervision in San Diego County.[4]

FACTS

In *In re E.J., supra,* 47 Cal.4th at pages 1283 to 1284, the Supreme Court set forth an agenda for the remanded evidentiary hearings: to "find the relevant facts necessary to decide the claims . . . includ[ing], but not necessarily limited to, establishing each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest `public or private school, or park where children regularly gather' (§ 3003.5(b)); a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and communities to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in each particular jurisdiction; and a complete record of the protocol CDCR is currently following to enforce section 3003.5(b) in those respective jurisdictions."

A. *Petitioners' Status*

1. *Taylor*

Taylor was paroled in January 2008 after serving a sentence for failing to register as a sex offender. (§ 290.)[5] He is required to register as a sex offender because in 1991 he was convicted of sexual assault in Arizona.[6] (§ 290.005.) The victim in that case was an adult woman. Although Taylor has a long criminal history, including convictions for theft offenses, weapon possessions and drug offenses, he has never been convicted of another sex crime or a crime involving a child.

Taylor has AIDS and throat cancer. He also suffers from diabetes, chronic hypertension, scleroderma, peripheral neuropathy, sciatica, kidney stones, a torn ligament in his right knee, glaucoma and sleep apnea. Taylor has had three strokes and one heart attack. He is chronically depressed, suffers from paranoid schizophrenia and is addicted to cocaine.

Taylor had planned to live in Spring Valley with his nephew and his nephew's wife, who is a health care professional. However, the nephew's residence is not compliant with the 2,000-foot residency restriction of section 3003.5(b). Taylor, who is destitute, asked his parole agent for financial assistance housing, but was turned down. Subsequently, Taylor slept outside in the alley behind the parole office—a location pointed out to him by his parole agent. He remained homeless for a month and then was arrested for using cocaine.

When Taylor was re-released on parole, he was admitted to the Etheridge Center, a residential drug treatment program near downtown San Diego and near the clinic where he was receiving treatment for AIDS. However, the Etheridge Center is not compliant with the residence restriction of section 3003.5(b). CDCR allowed Taylor to stay there while his application for a waiver of the 2,000-foot restriction was processed. When Taylor's

application was denied, he was given two days to move out. On October 2, 2009, the court issued Taylor an emergency 120-day stay, which enjoined the CDCR from requiring him to leave Etheridge Center unless alternative accommodations for medical treatment could be arranged.

However, the Etheridge Center suspended Taylor for 30 days for nonsexual misconduct on Halloween, and he was subsequently arrested for another parole violation. While in custody, his temporary injunction expired. Upon his release on parole, Taylor was homeless for a few weeks until CDCR placed him in a boarding house in Vista, which was a three-hour bus ride from his parole office, the outpatient clinic he was required to attend and the medical facility that had agreed to provide his medical care. While in the Vista facility, Taylor collapsed and was hospitalized in the intensive care unit. His parole agent warned Taylor he would be arrested if did not register the hospital address with local authorities within five days. Taylor's parole was revoked for not registering the hospital address and for possession of drug paraphernalia. Upon his release on parole, Taylor lived in a compliant hotel with the CDCR paying the rent for 60 days. At the time of the evidentiary hearing, Taylor was living in the hotel.

2. *Glynn*

In 2009, Glynn was released on parole after serving a sentence for a theft related crime. He is a registered sex offender because of his 1989 conviction of misdemeanor sexual battery committed against an adult woman he had been dating.[7] That conviction is his only sex crime, but he has numerous convictions for theft offenses and drug offenses.

Glynn planned to live with his wife and their three children when he was paroled, but the family's residence was not compliant with the residency restriction of Jessica's Law. Glynn's wife did not want to move, and he was unable to find compliant housing in the area. Glynn purchased a van and lived in it as a transient. In December 2009, the court granted Glynn's motion for a temporary injunction against the residence restriction. However, this occurred a week after Glynn committed a burglary. When Glynn was paroled again in August 2010, he moved into the family's noncompliant apartment by virtue of the previously issued injunction and was living there at the time of the evidentiary hearing.

3. *Briley*

In April 2009, Briley was released on parole after serving a prison term for failing to register as a sex offender. Briley is required to register because of her 1988 conviction of committing a lewd and lascivious act on a child under the age of 14 years. (§288, subd. (a).) The victim was Briley's daughter and occurred inside the family residence. Since then, Briley has been sex offense free, but has numerous convictions for drug offenses and failing to register as a sex offender.

Briley had planned to live with her sister upon her release, but her sister's residence is not compliant with the 2,000-foot residency restriction.[8] The residency restriction also prevented Briley from living with her sister-in-law or in any of the women shelters with an available bed or sober living houses for women. After learning from a parole agent that other homeless parolees slept in an alley near the parole office, Briley began sleeping there. She was not alone; about 15 to 20 people slept there. Briley, who has hepatitis C, high blood pressure, thyroid problems and osteoarthritis, which is aggravated by exposure to cold temperatures, lived there for approximately one and one-half years.

In July 2009, the court granted Briley a temporary injunction against the residency restriction, but she was unable to find affordable housing until November 2010. At the time of the evidentiary hearing, Briley lived in a recreational vehicle parked at a noncompliant location in return for five hours of work each week. She has two other part-time jobs, which together pay her approximately $250 a month.

4. *Todd*[9]

In June 2008, Todd was released on parole after serving a prison term for drug possession. He is required to register as a sex offender because in 1981, when he was 15 years old, he molested his 10-year-old sister. The juvenile court made a true finding that Todd committed a lewd and lascivious act with a child under 14 years old. (§ 288, subd. (a).)[10] Todd does not have any other sex crime convictions or convictions of crimes involving children, but his criminal history includes convictions for assault with a deadly weapon, burglary, vehicle theft, receiving stolen property and drug offenses.

Todd suffers from bipolar disorder. He is also diabetic and subject to seizures, which are exacerbated when he is homeless. Todd is unable to hold his head up for long periods

because of nerve damage along the right side of his body. Todd also is a recovering heroin addict and has been addicted to methamphetamine for 18 years.

Upon his release from prison in 2008, Todd planned to stay with a friend at the Plaza Hotel in downtown San Diego, but he could not because of the 2,000-foot residency restriction. Unable to find compliant housing, Todd followed his parole agent's suggestion that he live in the bed of the San Diego River.

Over the next one and one-half years, Todd was arrested and his parole was revoked numerous times for violating various parole conditions. Throughout that time, Todd was homeless except for the periods he was in custody.

By the time of the evidentiary hearing, Todd had suffered another drug conviction and was in prison.

B. *Compliant Housing in San Diego County*

In June 2006, Julie Wartell, a crime analyst for the San Diego County District Attorney's Office, collected data and prepared an electronic map depicting the expected effect of the residency restriction of Jessica's Law on available housing in San Diego County. Wartell mapped the location of all public and private schools in the county (kindergarten through 12th grade) and all "active park" locations.[11] Using an automated mapping program, Wartell used data from the tax assessor's office to show the location of residential land parcels throughout the county. Wartell drew shaded circles around each school and each park on the map to show a 2,000-foot zone or buffer around each of these locations. Thus, Wartell's map showed the location of residences that were not compliant with Jessica Law's residency restriction: any residence within the shaded circles (buffers or exclusion zones) was off limits for registered sex offenders.

In 2010, Wartell twice updated her analysis and map for this litigation to reflect the recent additions of parks and schools in the county. Two analysts with the county's Department of Planning and Land Use refined Wartell's work into a 288-page hard copy Thomas Brothers-like map book, and an online map application, both of which allow a person to view specific areas in much greater detail. In its SOD, the trial court said the map "graphically show[s] huge swaths of urban and suburban San Diego, including virtually all of the downtown area, completely consumed by the [residency] restrictions."

Wartell's research and the maps show about one-quarter (24.5%) of all residential parcels in San Diego County are compliant with the residency restriction of Jessica's Law—that is, are located outside the exclusion zones. If the single family residences are eliminated,[12] the percentage of multifamily parcels that are compliant with the residency restriction is less than three percent (2.9%).[13]

However, as the trial court acknowledged, the entire 2.9 percent of multifamily parcels located outside the buffer zones around schools and parks is not available to parolees to rent for a number of reasons. For one thing, the tax assessor residential parcel file used by Wartell include all parcels *authorized* for residential structures—not just those on which residential structures have been built and are in use. Also, the demand for low cost housing in San Diego County has more than doubled in recent years. At the time of the evidentiary hearing, the vacancy rate for rental housing in San Diego County was five to eight percent. Therefore, at any given time, only five to eight percent of the multi-family compliant residences could reasonably be expected to be available for rent.

Petitioners' counsel asked four investigators for the Public Defender's Office to identify a reasonable portion of potential rental units outside the 2,000-foot buffer zones, considering various factors that make it difficult for registered sex offender parolees to secure housing. Such factors include the parolees' limited financial resources that typically made rent exceeding $850 per month[14] prohibitive, their criminal background and the lack of credit history. The investigators each took a portion of Wartell's map (excluding rural areas) and located complaint multi-family parcels with at least five units.[15] The investigators spent approximately 75 hours searching the Internet for the information. The investigators found 13 out of 54 apartment complexes containing more than 60 units rented units for $850 or less per month, but none of these were in downtown San Diego. Of the 57 apartment complexes with between 15 and 60 units, only nine had units that rented for $850 or less per month. There were 167 apartment buildings with five to 14 units, but the investigators were only able to find the rental price of units in four of the complexes.

The investigators turned over their list of apartment buildings with five to 14 units to two professors from National University who volunteered to do field investigations. The professors phoned 61 apartment complexes that listed a number for the property manager, and received only 16 responses despite repeatedly calling and leaving messages. The professors spent approximately 30 hours making phone calls. In an attempt to acquire

information about the remaining apartment buildings, the professors drove hundreds of miles around San Diego County; this took approximately 60 hours. The professors made contact with people at 45 out of 61 complexes. Twenty-six of these were excluded because they did not rent units for less than $850 per month. Of the remaining 45, only two had all the criteria—a monthly rent of $850 or less, acceptable move-in costs, and no criminal record or credit check. Neither of these two had a rental unit available. Thomas Green, one of the professors, noted the difficulty in finding the two suitable, compliant residences: "Besides making phone calls, besides driving all over the county to only find two, made—it seems to me like it would be a very difficult proposition to try to find affordable housing that was compliant."

Between September 2007 and August 2010, the number of registered sex offenders on active parole in the city of San Diego who registered as "transient" with the San Diego Police Department increased by four to five times. Prior to Jessica's Law, many registered sex offender parolees lived in residential hotels in downtown San Diego—a situation favored by law enforcement because it fostered better surveillance and supervision. But these hotels either have been demolished as result of redevelopment or they are not compliant with the 2000-foot residency restriction.

At the time of the evidentiary hearing, CDCR's CALPAROLE database showed there were 482 registered sex offenders on active parole in San Diego County who were not in custody or in parolee-at-large status. CDCR officials said 165 of these parolees were transient or homeless. There were 317 sex offender parolees who had a residential address on file with their parole office. The 317 figure presumably included those who had been afforded injunctive relief.[16]

C. *CDCR Protocol for Jessica's Law Residency Restriction*

Before a sex offender is released from prison, prison officials provide the offender with his or her parole conditions, including the residency restriction of Jessica's Law. Within one day of his or her release, the sex offender parolee is required to report to the assigned parole agent and disclose the address of his or her intended residence. The agent has six working days to verify whether the parolee's intended residence is compliant—that is, it is not within 2,000 feet of a school or park—and inform the parolee. Using a handheld GPS device, the agent measures the distance from the front door of the intended residence to the closest boundary of the school or park. The parolee cannot move into the residence before the agent confirms it is compliant. If the proposed residence is not compliant, the parolee must immediately provide a compliant address or declare himself "transient" and register with the local police accordingly.

"Transient" for this purpose is defined as a registered sex offender parolee "who has no residence." (§ 290.011, subd. (g).) "Residence" is defined as an address "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, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles." (*Ibid.*) It is a parole violation for a transient parolee to be in a noncompliant residence except for up to two hours twice a day to charge his or her GPS device.[17]

The sex offender parolee bears the responsibility for locating compliant housing, which is reflected in Policy No. 07-36. Parole agents are not authorized to tell sex offender parolees where to live or to recommend areas where they should look for compliant housing.

Among other things, CDCR policies require supervisory parole agents (unit supervisors) of agents who handle a sex offender caseload to "continue to collaborate with community-based programs and local law enforcement to facilitate the identification of compliant housing for sex offender parolees." (Policy No. 07-36.) The CDCR policy also requires unit supervisors to "utilize all available resources to obtain a current listing of all public and private schools, and parks within their communities" and to provide "[u]pdated information" from the list to parole agents at least once a month. (*Ibid.*)

CDCR has set up a procedure for waivers of the residency restriction for parolees who are mentally ill and are housed in a mental health facility and for parolees who are in need of medical care in a licensed medical facility that provides 24-hour care.

Parolees who cannot afford compliant housing may apply for financial assistance in emergency situations if no other resources are available. The assistance, which is considered a loan, is limited to 60 days and cannot exceed $1,500.

D. *Enforcement of Statute as Parole Condition in San Diego County*

Parole Agent Maria Dominguez testified that before Jessica's Law was enacted, she did not allow sex offender parolees on her caseload to live "on the street." Many lived in residential programs or in downtown San Diego hotels, where they could be easily supervised. When her office began enforcing in 2007 the residency restriction of Jessica's Law, agents would show parolees areas they considered compliant or tell them about specific addresses. But when her supervisor was transferred, agents were no longer allowed to advise parolees about compliant areas. If a parolee asked where he or she could live, the agent was instructed to say: "I can't tell you where you could live, but if you bring me an address I will check it and make sure that it's compliant."

Parole Agent Manuel Guerrero, the unit supervisor for one of two San Diego County units supervising sex offender parolees, testified parole agents share information about compliant addresses among themselves, but not with parolees. Guerrero said CDCR policy prohibits parole agents from supplying parolees with specific compliant addresses or neighborhoods for them to consider in pursuing housing.

CDCR has not issued a policy statement defining either "school" or "park" for purposes of enforcing Jessica's Law. Nonetheless, Guerrero defined "school" as any public or private school from kindergarten through 12th grade, but acknowledged some sex offender parolees in San Diego County have received Jessica Law parole conditions that extended the definition to daycare centers. Guerrero defined "park" as an area "where kids would normally be at." Guerrero said he would look at whether the location contains, among other things, open grassy areas, playground equipment or soccer and baseball fields, and whether the area is designated as a park. Guerrero conceded the definition of park sometimes differs among parole agents depending on how an agent interprets the word "park."

Guerrero, who has been a unit supervisor for three and one-half years, was not familiar with CDCR's requirement that unit supervisors work together with community based programs and local law enforcement to improve the identification of compliant housing for sex offender parolees. Guerrero had not done this during his tenure as a unit supervisor. Guerrero also was unaware that he was charged with maintaining a current listing of local schools and parks and providing updates of that list to parole agents at least once a month.

John "Jack" Chamberlin provided psychotherapy counseling for sex offenders at parole outpatient clinics. He testified homelessness among sex offenders hinders the success of their therapy because they lack stability in the lives. Upon learning that the Public Defender's Office had gathered information about compliant housing, Chamberlin invited a deputy public defender to talk to one of the sex offender groups he counseled. Afterward, his supervisor told Chamberlin not to invite the public defender to his other sex offender groups.

Michael Feer, a clinical social worker, provided group and individual counseling to sex offenders at a parole outpatient clinic. When Jessica's Law was implemented, Feer tried to assist the offenders he counseled to find compliant housing by using Google Earth, which was on his office computer. In October 2010, Google Earth was removed from all CDCR computers and Feer received an e-mail from the sex offender parole supervisor telling him to stop helping sex offender parolees find housing.

E. *Trial Court's Findings of Fact*

The trial court made, among others, the following factual findings:

- Despite certain imprecisions, the map book prepared by Wartell is the most accurate assessment of housing that is reasonably available to sex offender parolees in San Diego County.

- Sex offender parolees are unlikely candidates to rent single-family homes; they are most likely to be housed in apartments or low-cost residential hotels.

- "[B]y virtue of the residency restriction alone, [sex offender parolees are] barred from access to approximately 97 [per cent] of the existing rental property that would otherwise be available to [them]."

- The remaining three percent of multi-family rental housing outside the exclusion areas is not necessarily available to sex offender parolees for a variety of reasons, including San Diego County's low vacancy rate, rent prices that are too high and the unwillingness of some landlords to rent to sex offenders.

• In addition to CDCR policy prohibiting parole agents from supplying sex offender parolees with specific information about the location of compliant housing, parole authorities in San Diego County have taken" affirmative steps to prevent" parole employees from helping parolees find compliant housing.

• "[R]igid application of the residency restriction results in large groups of parolees having to sleep in alleys and riverbeds, a circumstance that did not exist prior to Jessica's Law."

• The residency restriction places burdens on parolees that "are disruptive in a way that hinders their treatment, jeopardizes their health and undercuts their ability to find and maintain employment, significantly undermining any effort at rehabilitation."

DISCUSSION

I

Introduction

At issue is the petitioners' claim that section 3003.5(b) is an unreasonable parole condition that infringes on various constitutional rights, including their privacy rights, property rights, right to intrastate travel and substantive due process. (See *In re E.J., supra*, 47 Cal.4th at p. 1270.) "[T]he threshold question common to all of petitioners' remaining as-applied challenges to section 3003.5(b) is whether the section, when enforced as a statutory parole condition against registered sex offenders, constitutes an unreasonable parole condition to the extent it infringes on such parolees' fundamental rights." (*Id.* at p. 1282, fn. 10, italics omitted.)

In addressing the issue, three basic principles are noteworthy. First, statutes, including those enacted through the initiative process, "are presumed valid and must be upheld unless their constitutionality is positively and unmistakably demonstrated." (*People v. Basuta* (2001) 94 Cal.App.4th 370, 397; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 826.)

Second, it is important to distinguish the limited rights of parolees from the rights of other citizens. Parolees have fewer constitutional rights than do ordinary persons. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 482 [92 S.Ct. 2593].) "Although a parolee is no longer confined in prison[,] his [or her] custody status is one which requires and permits supervision and surveillance under restrictions which may not be imposed on members of the public generally." (*People v. Burgener* (1986) 41 Cal.3d 505, 531, disapproved on other grounds as stated in *People v. Reyes* (1998) 19 Cal.4th 743, 754, 756.) The parolee "is constructively a prisoner in the legal custody of state prison authorities until officially discharged from parole. [Citations.] Clearly, the liberty of a parolee is `partial and restricted,' [citations] not the equivalent of that of an average citizen . . . ." (*Prison Law Office v. Koenig* (1986) 186 Cal.App.3d 560, 566-567.)

Nonetheless, parole authorities do not have unbridled license to impose any restriction or parole condition they deem proper. (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1234.) "Parole conditions, like conditions of probation, must be reasonable since parolees retain `constitutional protection against arbitrary [and] oppressive official action.' [Citation.]" (*Ibid.; Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 874; see also *People v. Thompson* (1967) 252 Cal.App.2d 76, 84; § 3053, subd. (a) [state may impose any condition reasonably related to parole supervision].)

Third, it is also important to clarify the nature of the challenge before us —this is an as-applied challenge to section 3003.5(b) as a parole condition—not a facial challenge. "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) In contrast, an as-applied challenge seeks "relief from a specific application of a facially valid statute . . . to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied." (*Ibid.*) An as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute . . . has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right. [Citations.]" (*Ibid.*)

We review the grant of a writ of habeas corpus by applying the substantial evidence test to pure questions of fact and de novo review to questions of law. (*In re Collins* (2001) 86 Cal.App.4th 1176, 1181.) "[W]hen the application of law to fact is predominantly legal, such

as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, this court's review is de novo." (*Ibid.*)

From our review of the record, we conclude the trial court's factual findings set forth *ante* in "FACTS, [section] E. *Trial Court's Findings of Fact*" are supported by substantial evidence. Accordingly, we proceed to our de novo review of the legal issues.

II

CDCR's Contentions

CDCR contends the residency restriction of section 3303.5(b) is constitutional because (1) it does not infringe upon any constitutional right of parolees, and, (2) even if it did, the restriction is reasonably related to a legitimate government purpose—namely, the protection of children from sex offenders.

CDCR argues the trial court failed to make the standard constitutional inquiry as follows: (1) consider whether the statute infringes on a constitutional right of parolees; (2) if so, settle on the proper level of scrutiny (e.g., strict scrutiny or rational basis); and (3) apply the appropriate scrutiny to determine if the statute impermissibly infringes on the parolee's right. Further, CDCR claims the trial court erred by focusing on whether the residency restriction was narrowly drawn or tailored to the individual parolee.

As CDCR would apply its syllogistic approach, the inquiry properly should have been short-lived because the 2,000-foot residency restriction does not impinge upon any constitutional rights of a registered sex offender parolee. Further, CDCR maintains even if there were an infringement of a registered sex offender parolee's constitutional rights, none of the constitutional interests of such persons is a fundamental constitutional right meriting the higher level of strict scrutiny. CDCR completes its syllogism by arguing section 3303.5(b) is constitutional because it is rationally related to its intended purpose of providing greater protection to children from sex crimes.

III

Analysis

The problem with CDCR's suggested analytical approach is that it ignores the direct mandate of our Supreme Court—namely, to determine "whether [section 3003.5(b)], *when enforced as a statutory parole condition against registered sex offenders,* constitutes an unreasonable parole condition to the extent it infringes on *such parolees'* fundamental rights." (*In re E.J., supra,* 47 Cal.4th at p. 1283, fn. 10.) This directive implicitly assumes that registered sex offender parolees have some fundamental rights. Moreover, although the Supreme Court recognized the "limited nature" of the constitutional rights of registered sex offender parolees, it nonetheless pointed out that their parole "`conditions must be reasonable, since parolees retain constitutional protection against arbitrary and oppressive official action.'" (*Id.* at p. 1282, 1283, fn. 10, quoting *Terhune v. Superior Court, supra,* 65 Cal.App.4th at p. 874.)

Here, the trial court correctly identified and followed the Supreme Court's directive by applying a reasonableness analysis to the residency restriction to determine if it, as a parole condition, constituted arbitrary and oppressive official action.

CDCR is correct that it, as the designated state agency, has constructive custody of parolees and serves the compelling interest of ensuring public safety; this is accomplished through supervision and surveillance of parolees under restrictions and conditions that are designed to prevent them from reverting to a criminal lifestyle. (§ 3000, subd. (a)(1); *People v. Burgener, supra,* 41 Cal.3d at p. 531.) To this end, "[t]he Legislature has given the CDCR . . . expansive authority to establish and enforce rules and regulations governing parole, and to impose any parole conditions deemed proper." (*In re E.J., supra,* 47 Cal.4th at p. 1282, fn. 10.) Conditions of parole typically bar a parolee from having contact with old associates or engaging in past activities; they are designed to prevent the parolee from reverting to a former crime-inducing lifestyle. (*People v. Denne* (1956) 141 Cal.App.2d 499, 508-509; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 752, p. 1174.) CDCR also may impose parole conditions that "`*govern a parolee's residence,* his associates or living companions, his travel, his use of intoxicants, and other aspects of his life.'" (*In re E.J., supra,* at p. 1283, fn. 10.) However, such parole conditions must be related to the parolee's crime or "`reasonably related to deter future criminality.' [Citation.]" (*In re Corona* (2008) 160 Cal.App.4th 315, 321, quoting *In re Stevens, supra,* 119 Cal.App.4th at p. 1234.)

CDCR's argument that the residency restriction of section 3003.5(b) does not impinge on any constitutional right is unpersuasive. The trial court found the residency restriction implicated

three constitutional rights—the right to travel, the right to privacy and the right to establish a home. We consider the residency restriction in light of the right to travel as the other two rights are closely related to the right to intrastate travel in this context.

The constitutional right to travel, including intrastate travel, has been recognized by California courts. (*In re King* (1970) 3 Cal.3d 226, 234-235; *In re White* (1979) 97 Cal.App.3d 141, 148.) "[T]he right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law." (*In re White, supra*, 97 Cal.App.3d at p. 148; see also *People v. Smith* (2007) 152 Cal.App.4th 1245, 1250 [registered sex offender on probation has constitutional right to intrastate travel].)

Petitioners claim the residency restriction infringes on their constitutional right to travel because the restriction has made it virtually impossible for them to find affordable compliant housing in San Diego County. Petitioners further claim the restriction has led to widespread homelessness among the County's registered sex offender parolees and has inhibited their freedom of movement within the state. Petitioners liken the effect of the residency restriction to impermissible banishment.

CDCR counters that the residency restriction does not implicate petitioners' right to travel and has no relation to banishment. As CDCR puts it, "[P]etitioners remain free to live or associate with whomever they want, and may, subject to the terms of their parole, travel throughout and access anywhere within California. The only constraint the law imposes is that registered sex offenders may not establish a permanent residence near a school or park."

California courts have held overly broad or unreasonable residency restrictions unconstitutional. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084-1085; *People v. Bauer* (1989) 211 Cal.App.3d 937, 943-944; *People v. Beach* (1983) 147 Cal.App.3d 612, 620-623; *In re White, supra*, 97 Cal.App.3d 141; *In re Scarborough* (1946) 76 Cal.App.2d 648, 650; see also *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385.)[18] CDCR objects to the reliance on such cases, which involve probation conditions, because the rights of a parolee are significantly more limited than the rights of a probationer. (See e.g. *Samson v. California* (2006) 547 U.S. 843, 850 [126 S.Ct. 2193].) We acknowledge that a probationer has more liberty rights than a parolee, but here we are not concerned with their comparative rights; rather, we are focusing on the reasonableness of parole conditions, which is judged by the same standard developed for probation conditions. (See *People v. Burgener, supra*, 41 Cal.3d at p. 531 [same criteria applying to constitutionality of probation condition applies to condition of parole]; *In re Naito* (1986) 186 Cal.App.3d 1656, 1661 [same].)

In *In re Babak S., supra*, 18 Cal.App.4th at page 1082, the juvenile court suspended a commitment to the California Youth Authority and imposed a probation condition that the minor reside with his parents in Iran for two years. Observing that the probation condition effectively constituted a two-year banishment from the United States, the Court of Appeal found it did "not pass constitutional muster." (*Id.* at p. 1084.) "Notwithstanding the good intentions of all the concerned parties in this case, the probation condition lacked any reasonable nexus to Babak's present or future criminality, violated his constitutional rights of travel, association and assembly, and constituted a de facto deportation." (*Id.* at p. 1085.) "[I]n order to survive constitutional scrutiny, such conditions not only must be reasonably related to present or future criminality, but also must be narrowly drawn and specifically tailored to the individual probationer." (*Id.* at p. 1084.)

In *In re White, supra*, 97 Cal.App.3d at pages 143 to 144, a woman convicted of soliciting prostitution challenged a condition of probation that excluded her from three high volume prostitution areas of the city. The Court of Appeal found the blanket prohibition unreasonable and overly broad, noting that there was no direct relationship between the commission of prostitution and the exercise of the right to travel. (*Id.* at p. 150.) The appellate court also said the condition should be more narrowly drawn: "No case has been called to our attention upholding such a broad condition which completely prohibits mere presence in a geographical area *at all times* . . . ." (*Ibid.*)

In *People v. Bauer, supra*, 211 Cal.App.3d 937, a probationer convicted of false imprisonment and assault successfully challenged a condition requiring his residence be approved by his probation officer. (*Id.* at p. 943.) The Court of Appeal struck the condition because there was no showing that it was reasonably related to future criminality. (*Id.* at pp. 943-944.) Further, the appellate court found the residency restriction "is all the more disturbing because it impinges on constitutional entitlements—the right to travel and freedom of association. Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad. The condition gives the probation officer the discretionary power, for example, to forbid appellant from living with or near his parents—that is, the power to banish him." (*Id.* at p. 944.)

In *People v. Beach, supra*, 147 Cal.App.3d at page 618, an elderly defendant was convicted of involuntary manslaughter and was granted probation for five years on various conditions, including that she absent herself from her community. The appellate court agreed with the defendant that her banishment from the community where she had lived in her own home for 24 years was both an unconstitutional and unreasonable condition of probation. (*Id.* at pp. 620-622.)

The residency restriction contained in section 3003.5(b), of course, is not a full banishment in the historical sense as practiced by the colonialists as a form of punishment in which an offender was "expelled . . . from the community." (*Smith v. Doe* (2003) 538 U.S. 84, 98 [123 S.Ct. 1140]; see also *United States v. Ju Toy* (1905) 198 U.S. 253, 269-270 [25 S.Ct. 644].) The residency restriction does not prevent registered sex offender parolees from living in every community in San Diego, nor from visiting communities in which they are not allowed to live.

Nonetheless, the residency restriction prevents petitioners from living in large areas of San Diego County. With the large number of schools and parks in the county's densely populated areas, the 2,000-foot exclusion buffers remove three-quarters of all the residential parcels in the county as potential homes for petitioners. Almost all of the residential parcels in the cities of San Diego, Chula Vista, Vista, El Cajon, Lemon Grove and National City are off limits to petitioners as residences. Further, the housing situation for registered sex offender parolees in San Diego County is worse because they are unlikely to be able to afford to live in single family homes. When single family residential parcels are eliminated from consideration, only 2.9 percent of the county's multifamily residential parcels fall outside the buffer zones and are therefore compliant with Jessica's Law.

Moreover, when considered from a real world perspective, the housing picture for registered sex offender parolees in San Diego County is even more grim. Given the county's low vacancy rate, the petitioners' general inability to pay more than $850 to $1,000 per month for rent, and the unwillingness of many landlords to rent to petitioners with their criminal histories, significantly less than three percent of the county's multifamily residences are realistically available to registered sex offender parolees in the county. There are so few legal housing options in urban areas in the county that many offenders face the choice of living in rural areas or becoming homeless.

Indeed, for more than a year, Briley—following the suggestion of her parole agent—slept in an alley, where 20 registered sex offender parolees also spent their nights. A homeless Taylor also was advised by his parole agent to sleep in an alley and did so for a month. Todd lived along a riverbed with other registered sex offender parolees who had no place else to live. Glynn, too, became a transient, living in a van. As the trial court found, before the residency restriction of Jessica's Law was enforced as a parole condition, there were not large groups of parolees living in alleys and riverbeds in San Diego.

CDCR points out Briley, whose monthly income from three jobs is only $250, remained homeless for more than one year after she received injunctive relief from the residency restriction. Regarding Taylor, CDCR notes he received assistance for housing, but it was short-lived because of his misconduct. Todd, who is without financial resources, had a hard time staying out of custody because of repeatedly violating parole conditions and committing crimes. Moreover, CDCR notes Briley, Taylor and Todd have been homeless a number of times before Jessica's Law was enacted.

We are not persuaded by this argument. These individuals obviously have plenty of problems, which are reflected in their past experiences. However, each of them had plans on where to live upon his or her release from prison that were thwarted by the residency restriction. Taylor planned to live with his nephew, but his nephew's residence was not compliant. Briley could not live with her sister-in-law or at a shelter because of Jessica's Law. (See fn. 8, *ante*.) Todd was going to live in a downtown low cost residential hotel with a friend, but downtown San Diego is basically an exclusion zone. The residency restriction was not merely incidental to petitioners' homelessness; it was a substantial cause of it.

As to Glynn, CDCR claims that like the others, his homelessness had more to do with his criminality than with Jessica's Law. Further, CDCR maintains Glynn's "affirmative decision not to relocate" his family to a compliant location that he had found and could afford "shows . . . the residency restriction has no impact on whether he would become homeless."

We find disingenuous CDCR's attempts to shift blame to Glynn for his homelessness. Glynn would not have been in the position of having to choose between his living in a van and the upheaval of his family from a location that best suited them *but for* the residency restriction. To suggest that Glynn is bereft of constitutional rights because he did not force his wife and children to move to a compliant location against their wishes is unrealistic and unsound.

Petitioners aptly demonstrated that it is no easy task for them to find compliant, affordable housing in San Diego County. The investigative team put together by the Public Defender's Office, armed with a detailed map book showing all compliant parcels in the County and with the Internet, spent months trying to locate such rental housing. The record shows the team came up with only five affordable compliant apartment complexes containing between five and 14 units, which from a practical point of view could be rented by a registered sex offender parolee. For registered sex offender parolees without a map book, use of the Internet, private transportation and telephone access, it is a daunting undertaking to find affordable complaint housing in the county, particularly in light of the CDCR policy prohibiting parole agents from supplying sex offender parolees with specific information about the location of compliant housing.

The residency restriction has other serious implications for petitioners. Rehabilitative and medical treatment services for parolees are generally located in the densely populated areas of the county. Relegated to rural areas of the County, petitioners are cut off from access to employment, public transportation and medical care. For petitioners, such as Taylor and Todd who have serious health issues, access to medical care is critical. For example, Taylor, a cocaine addict who has AIDS, had been accepted at Etheridge Center, a residential drug facility which was close to the clinic where he was receiving treatment for AIDS. But the Etheridge Center is in a residential exclusion zone under Jessica's Law, and Taylor's application for a waiver was ultimately denied.

Petitioners also face disruption of family life because of the residency restriction. Although the restriction is silent regarding whether a sex offender parolee can live with his or her family, if the family member's residence is not in a compliant location, the parolee cannot live there. Upon his release from prison, Glynn was unable to live with his wife and three children because the family residence was within 2,000 feet of a school or park. Until the court granted him injunctive relief, Glynn was living in a van and was limited to spending only two, two-hour periods (one in the morning and one in evening) in the family home—to recharge the battery for his GPS ankle bracelet.

Similarly, Taylor and Briley expected to live with relatives when they were released from prison, but could not do so because their relatives' residences were within a 2,000-foot exclusion area. In the case of Taylor, who has a myriad of serious health problems, the residency restriction prevented him from living with his nephew, who is married to a health care professional.

Cases such as *In re Babak S., supra,* 18 Cal.App.4th 1077, *In re White, supra,* 97 Cal.App.3d 141 and *People v. Bauer, supra,* 211 Cal. App.3d 937, teach that restrictions on constitutional rights should be narrowly tailored rather than overbroad. "If available alternative means exist which are less violative of the Constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used [citations]." (*In re White, supra,* at p. 150.)

Such concerns were voiced in *People v. Smith, supra,* 152 Cal.App.4th at page 1247, in which the appellate court struck down a probation condition imposed by the Los Angeles County Probation Department on all registered sex offenders that prohibited them from leaving the county for any reason. The Court of Appeal noted the blanket travel restriction was not reasonably related to Smith's crime (*id.* at p. 1252) and was imposed without consideration to Smith's circumstances, such as his employment (*id.* at pp. 1251-1252). "Smith has a constitutional right to intrastate travel [citations] which, although not absolute, may be restricted only as reasonably necessary to further a legitimate governmental interest [citation]." (*Id.* at p. 1250.) The appellate court reversed the condition and remanded the case to the trial court "with directions to fashion a less restrictive limitation based on Smith's particularized circumstances or, in the alternative, to eliminate the travel restriction with regard to Smith's work." (*Id.* at p. 1253.)

We find the blanket residency restriction, as applied in San Diego County, excessive and unduly broad in relation to its purpose—namely, to establish predator free zones around schools and parks where children gather. The statute limits the housing choices of all sex offenders identically, without regard to the type of victim or the risk of reoffending.

In addition, the record shows the residency restriction effectively bars sex offender parolees from living in about 97 percent of the existing multifamily rental property that otherwise would be available to them, including in affordable housing located in downtown San Diego where the record shows they are more apt to receive other needed and vital services. The record also reflects that the percentage of multifamily rental housing ostensibly available to sex offender parolees is substantially less than the remaining three percent of that market because of San Diego County's low vacancy rate, high rent prices and the unwillingness of landlords to rent to sex offenders, among other factors.

In light of these findings, we conclude the blanket residency restriction exceeds the scope of its stated objective—the protection of children—because as applied it eliminates nearly *all* existing affordable housing in San Diego County for sex offender parolees, in essence banishing them from living within most if not all of the County (see *Alex O. v. Superior Court, supra*, 174 Cal.App.4th at p. 1183), and because it treats all parolees the same regardless of whether his or her crime involved the victimization of children or adults (and thus the need for the residency restriction in the first place).

Glynn and Taylor are registered sex offenders because each of them committed a sex crime against an adult; there is no hint of pedophilia in their histories. The exclusion of parolees with backgrounds similar to Glynn and Taylor from living near schools and parks does not substantially protect children, but as the record here shows, it has tremendous impact on such parolees' rights and liberty without bearing a substantial relation to their crimes. As in the cases of Glynn and Taylor, it prevented them from living with family members. In Taylor's case, it also decreased his proximity to needed services and treatment. By banning all sex offenders, the absolute residency restriction of Jessica's Law, when enforced as a parole condition, imposes a substantially more burdensome infringement on constitutional rights than is necessary to protect children from sex crimes. As such, the blanket enforcement of section 3303.5(b) as a parole condition in San Diego County has been unreasonable and constitutes arbitrary and oppressive official action.

As noted by the trial court, its orders do not prohibit CDCR from individually enforcing the residency restriction of Jessica's Law as a parole condition for registered sex offender parolees in San Diego County. The orders merely disallow CDCR from blanket enforcement of the residency restriction. Parole agents retain the discretion to regulate aspects of a parolee's life, such as where and with whom he or she can live. (§§ 3052, 3053, subd. (a).) Agents may, after consideration of a parolee's particularized circumstances, impose a special parole condition that mirrors section 3303.5(b) or one that is more or less restrictive. It is only the *blanket* enforcement—that is, to all registered sex offender parolees without consideration of the individual case—that the trial court prohibited and we uphold.

DISPOSITION

The orders are affirmed.

NARES, J. and McDONALD, J., concurs.

[1] Statutory references are to the Penal Code.

[2] Two of the four petitioners in *In re E.J.* were from San Diego County.

[3] The court rejected petitioners' other constitutional challenges, which are not the subject of this appeal, including a claim that the restriction was unconstitutionally vague. The court also found two policies adopted by the CDCR to implement the residency restriction violated the Administrative Procedures Act, but this is not an issue on appeal. Finally, we decline petitioners' invitation to revisit their retroactivity and ex post facto claims that the Supreme Court rejected in *In re E.J., supra*, 47 Cal.4th at pages 1264, 1272, 1280. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [we are bound by the rulings of our Supreme Court].)

[4] By the time the court issued its Supp. SOD, an additional 155 other habeas corpus petitions raising the same issues had been filed.

[5] Section 290 imposes a lifetime requirement for persons convicted of specified sex crimes to register with local law enforcement authorities as a sex offender as long as they reside, work or go to school in California. (§ 290, subds. (b), (c).)

[6] After Taylor returned to California, the state Department of Justice determined his Arizona conviction was the equivalent of a rape conviction under California law (e.g., § 261, subd. (a)(2)).

[7] At the time of Glynn's conviction, section 243.4 was not an offense that required sex offender registration under section 290. (Stats. 1987, ch. 1418, § 3.1, p. 5225.) Effective January 1, 2000, section 243.4 was included as an offense that required sex offender registration. (Stats. 1999, ch. 902, § 1.5, pp. 6561-6562.)

[8] Briley would not have been able to live with her sister in any event because a different condition of her parole prohibits her from having contact with children. Briley's nephew lives with her sister.

[9] At the time of the evidentiary hearing, Todd was the only one of the four lead petitioners who was not on parole. Todd had been returned to prison following his conviction for a new drug offense. The court and parties agreed his petition should not be dismissed as moot because of the original agreement to hear the four cases as a representative range of cases.

[10] At the time Todd committed the sex crime, the law required him, as a juvenile sex offender, to register only until his 25th birthday. (Former § 290, subd. (d)(4); Stats. 1993, ch. 595, § 8, pp. 3134-3137.) Effective January 1, 1995, the limited duration of the registration requirement for juvenile sex offenders was abolished and a lifetime registration requirement was imposed. (Former § 290, subd. (d)(1); Stats. 1994, ch. 867, § 2.7, pp. 4389, 4391; see now §290.008; see also *People v. Allen* (1999) 76 Cal.App.4th 999, 1001.)

[11] "Active park" is taken from section 810.102 (a) of the County of San Diego, Code of Regulatory Ordinances, Vol. II, which reads: "`Active Recreational Uses' means recreation facilities occurring on level or gently sloping land (maximum 10 %) restricted for park and recreation purposes in a planned development which are designed

to provide individual or group activities of an active nature common to local parks in San Diego County, including, but not limited to, open lawn, sports fields, court games, swimming pools, children's play areas, picnic areas, recreation buildings, dance slabs, and recreational community gardening. Active Recreational Uses do not include natural open space, nature study areas, open space for buffer areas, steep slopes, golf courses, riding and hiking trails, scenic overlooks, water courses, drainage areas, water bodies (lakes, ponds, reservoirs), marinas and boating areas, parking areas, and archaeology areas."

[12] When released from prison, an individual is given $200 in "gate money." The vast number of sex offender parolees, such as petitioners, are destitute and have scarce employment possibilities. They are not likely candidates to purchase or rent single family homes. More typically, they find housing in apartments or low cost residential hotels.

[13] During the hearing, Wartell was asked to rework her analysis using data from land use files rather than tax assessor files. Using the substitute data, the percentage of residential parcels that were complaint with the 2,000-foot restriction was 25 percent, and the percentage of multifamily parcels that was complaint was 0.7 percent.

[14] The $850 figure was chosen because it is within the range of $800 to $1,000 that Social Security Disability Income and Supplemental Security Income recipients in San Diego typically receive per month.

[15] The investigators limited their search to parcels with at least five units because they did not have enough time to research all multiple housing units.

[16] CDCR posits that if 140 registered sex offender parolees in the county received injunctive relief and they would otherwise have been homeless because of the residency restriction, that leaves 177 parolees (317-140) —more than 36 percent (177 out of 482)—who were in compliance with Jessica's Law without the injunctive relief. In its SOD, the trial court discounted this figure because the current status of the parolees receiving injunctive relief—that is, how many continued to be transient and how many were living in noncompliant, but authorized housing—was unclear at that time.

[17] A transient parolee also is allowed to be in a residence for approved employment, conducting legitimate business and/or obtaining care and treatment from licensed providers.

[18] This court has similarly rejected as unconstitutional unreasonable residency restrictions imposed as probation conditions. (*In re James C.* (2008) 165 Cal.App.4th 1198, 1204-1205; *Alex O. v. Superior Court* (2009) 174 Cal.App.4th 1176, 1183.)