IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN DOE, et al., Plaintiffs, v. STATE OF NEBRASKA, et al., Defendants.	8:09-cv-456 **POST-TRIAL BRIEF**
JOHN DOE, Plaintiff, vs. NEBRASKA STATE PATROL, et al., Defendants.	4:10-cv-3266
JOHN DOE, Plaintiff, vs. STATE OF NEBRASKA, et al., Defendants.	4:10-cv-3005

The defendants, State of Nebraska, et al., submit this post-trial brief in defense of various provisions of the Nebraska Sex Offender Registration Act.

At issue in this case is the constitutionality of several provisions of the Nebraska Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. SORA was modified by L.B. 97 (2009) and L.B. 285 (2009), which were signed into

law May 20 and May 29, 2009, respectively, for purposes of complying with the requirements set forth in the Adam Walsh Child Protection and Safety Act of 2006. Pub. L. No. 109-248, 120 Stat. 587 (July 27, 2006). Following an order on the parties' motions for summary judgment, this Court ordered a trial on the constitutionality of Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), 29-4006(2), and 28-322.05. Trial was held on July 16-18, 2012.

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FACTUAL BACKGROUND

I. The Experts

At trial, each party presented the opinions of an expert witness. For the plaintiffs, Professor David Post testified that the statutes and the statutory definitions in Neb. Rev. Stat. § 29-4001.01 are ambiguous; that they either cover "almost everything on the Net" or "might cover virtually nothing on the Internet." (74:17-21). For the past 15 years, Post has taught at Temple University, specializing in copyright, trademark, and other intellectual property law, and cyberlaw. (66:19-67:4).

Post had several opinions with respect to the definitions of chat room, instant messaging, and social networking website in Neb. Rev. Stat. § 29-4001.01. Post testified that a "broad reading" of the definition of "chat room" could include "ordinary" telephone service, cellular telephone service, email, and SMS text messages, (84:7-85:13), as well as more conventional chat rooms that fall "clearly within the bull's-eye" of the definition. (85:25). Because Post testified that the popular site Amazon.com is "primarily designated" for communication, rather than for selling merchandise, Amazon.com would also qualify as a chat room. (118:23-119:12). 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 certain terms are given a "specialized" meaning, (93:5-12), or it could include "virtually all electronic communication." (93:14). As for the definition of "social networking

website," Post's only difficulty with the definition arose out of the term "collection of websites," although he admitted that a "collection of websites" could include only those sites that share the same domain names and include multiple directories within each domain name. (127:25-128:13).

The defendants' expert witness, Hemanshu Nigam, testified about the real-world counterparts of the virtual world mediums and services at issue here. 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 stints as the Chief Security Officer for News Corporation, an officer involved in internet security issues at Microsoft, and prosecutorial experience involving online child pornography, child predator, and child trafficking cases for the U.S. Department of Justice and Los Angeles County District Attorney's Office. See Ex. 305, pages 11-15 (curriculum vitae).

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." (188:12-14). Thus, in Nigam's view, each of the media included in the statutes at issue in this case has a "real world" equivalent.

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 could talk to one another or engage in a more

private one-on-one conversation off to the side. (193:20-194:3; 253:23-254:3). Nigam's common understanding of a chat room was similar to Professor Post's, who acknowledged that a chat room merely requires the ability to communicate with another person or persons. (115: 10-12). Similarly, Nigam testified that instant messaging is the equivalent of just a private conversation between two people, with no one else listening. (193:5-11; 254:14-18). Again, Nigam's understanding of instant messaging conformed with Post's, who said that instant messaging is "any system that allows one-to-one communications." (120:9-10). Finally, Nigam testified that social networking websites 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. (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." (199:18-24). Email also would fall outside the definition of chat room because each use a "different language." (202:3-7). Nigam also testified that SMS texting would not be included in the definitions of instant messaging for several reasons. First, Nigam noted that SMS texting and instant messaging operate using different protocols. (189:6-18). Second, Nigam testified that 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 from the sender directly to recipient, bypassing the service provider in the middle ("the

company steps aside"). (191:16-192:12).

II. The Investigator

In addition to its expert witness, the defendants also called Scott Haugaard, a 14 year veteran of the Nebraska State Patrol investigator who has worked the last four years with the FBI's Cyber Crimes Task Force. (554:12-20). Haugaard has extensive experience investigating online enticement, child pornography, and other crimes against children involving the Internet. (55:7-23).

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

Haugaard testified that having a registered sex offenders' email addresses and Internet identifiers, as required by Neb. Rev. Stat. § 29-4006(1)(k) and (s), would allow law enforcement to monitor those addresses and identifiers and link them to a specific person in the event that "an investigation started." (576:13-21). Law enforcement officers currently use several programs and software packages that allow officers to "plug in, say, an email address or a[n] instant messenger

moniker … and identify an individual." (577:20-24). Without this information, law enforcement officers previously could only accomplish this by searching an individual's computer. (577:25-578:1). Haugaard testified that even when law enforcement know a sex offender's email addresses or other online identifiers, any monitoring by law enforcement would not include the content of a registrant's messages or internet activity. (576:15; 577:6-8).

III. The Does

Of the 36 plaintiffs still participating in the case, only 10 testified at trial. Doe 17 was convicted of attempted lewd or lascivious acts with a child and possession of obscene matter involving a minor in 2006, as well as lewd and lascivious acts with a child and sodomy with a person under the age of 16 in 2005. (301:15-20). One of those offenses involved the use of an internet website (www.gay.com), while the other resulted in Doe 17 attempting to solicit an undercover officer posing as a child using Yahoo chat rooms. (311:16-18; 312:1-7). Doe 17 works for a video conferencing business owned by his father, Doe F, and also runs his own online training business. (285:14-16). At his father's business, Doe 17 serves as the operations manager, helping to manage public rental of the business' own video equipment, as well as installing video conferencing systems for clients off-site. (285:21; 287:3-9). In connection with his duties renting the public room at his father's business, Doe 17 merely accepts phone calls and emails regarding rental from potential users. (314:10-15). The business acts as a vendor of video conferencing network systems and equipment, which operate over the internet.

(285:21-25; 286:7-18). Because his father and Doe 17 sometime work from separate locations – the business' office and the father's home office – they often use Google Talk instant messenger to communicate with one another, although they also frequently talk by phone (293:8-14; 315:1-6). They also communicate via text messages and an IP-based phone system for convenience and cost reasons. (293:20-294:3; 316:5-10). Doe 17 regularly uses email in both businesses. (299:21). Doe 17 speculates that Neb. Rev. Stat. § 28-322.05 would "shut down" his personal business. (304:10). Doe 17 acknowledged that he has built websites in the past, and knows how to build websites that offer limited access. (318:13-19).

Doe F is the father of Doe 17 and owns the video conference business where Doe 17 works. (322:14-21). Doe F testified that if the statutes at issue here result in restrictions upon Doe 17's involvement in the business, the business would be significantly harmed, (334:7-19), although Doe F admitted that the business, a Nebraska corporation, is not a party to this lawsuit. (335:11-13).

Doe 31 was convicted of attempted first degree sexual assault of a minor in 1997. (341:21). In his current occupation, he provides remote desktop and server support for a client, which involves basic hardware and software troubleshooting. (341:20; 342:1-3). Although his job frequently requires him to access vendor websites with chat capabilities, Doe 31 has never used those chat capabilities. (346:21). Doe 31's concern with providing his email addresses and other online identifiers under Neb. Rev. Stat. § 29-4006(1)(k) and (s) is that the information will be "out in the public." (352:1). Doe 31 does not post any information on websites for

either work-related or personal reasons. (352:3-13).

Doe 21 is the president of a music retail company and wholesaler. (353:22). Doe 21 uses email to communicate with customers, (354:21), and also uses Google Chat and text messaging. (355:17-22). He admitted that providing his email addresses and online identifiers under Neb. Rev. Stat. § 29-4006(1)(k) and (s) has not affected his ability to conduct business. (356:14).

Doe 3 was convicted of conspiracy to commit sexual assault of a child in 2001. (358:20). He is self-employed as a car audio retailer. (360:7). In connection with his business, he typically orders car audio speakers, amplifiers, security systems, and other components from vendors via email. (360:10-22). The vendor websites he uses do not allow communication through instant messaging. (361:11-18). Similarly, the manufacturer websites he uses to access technical data also allow communication only through email, and not chat rooms or instant messaging. (365:5-23). The manufacturer's websites also do not allow users to create a profile. (366:5-8).

Doe 19 was convicted of sexual assault of a child and third degree sexual assault in 2001. (388:2). Doe 19 operates a sound and lighting company and tours the country with bands and tours. (380:2). He testified that he has never used instant messaging services or chat rooms in connection with his business. (381:16-21). Instead, he uses his cell phone to call or text others, and he also relies on email. (381:22-382:5; 382:16-22). He testified that he uses social networking websites in connection with his job, but could not name even one. (384:15; 385:15).

Doe 18 is self-employed and handles "everything from fixing personal

systems that have viruses on it to hardware upgrades, software upgrades, on-call support, that sort of thing." (392:15-17). He does not use social networking websites in connection with his work. (395:4). Doe 18 also gains most of his income from working as a home remodeler. (408:4-13).

Doe 2 works as an Internet developer, supporting a variety of Internet applications that help manage demographic data, (412:20-22; 413:3), although none of the applications allow him to communicate with others. (413:21). Doe 2's employer operates a company intranet that only employees have access to and create profiles on. (413:22-415:3). Some of the websites Doe 2 uses at work allow him to chat and instant message others. (417:13-418:23). In addition to his regular employment, Doe 2 also owns his own business doing computer programming, where he often builds web sites for others (423:17-25). Most of those sites are restricted to individuals who are at least 18 years old. (425:7-10). Doe 2 testified that email is his "primary source for contacting customers." (425:19-20).

Doe 24 was convicted of online enticement of a minor in 2005. (471:11-16). He is currently on parole for a drug-related offense. (450:17). One of the terms and conditions of his parole allows his parole officer to conduct a search of his property. (Ex. 210). Doe 24 offered lengthy testimony regarding his past employment for a business consulting company and his use of computers at that job. (454:21-459:7; 467:1-470:21). Doe 24 left that job when he was incarcerated in 2010. (470:22-471:2). Following his parole in March 2012, Doe 24 started his own private consulting business. (474:7-11). Doe 24 testified regarding his current use of social

networking websites, chat rooms, and instant messaging services in connection with his current job, (475:14-476:11) but that testimony was stricken, (486:4), leaving the record void of any evidence regarding his use of those sites or services at his current job.

Doe 12 was convicted of possession of child pornography in 2001 and 2004, (515:16; 516:6), pornography he acquired from a social networking website, instant messaging, or chat room service. (527:9-528:1). He owns a business doing specialized software development and consulting. (489:11). Part of his business involves writing software applications and emailing the final product to a client for installation. (522:1-14). Doe 12 also has experience in developing password-protected websites. (524:2-15). He uses chat rooms and instant messaging services like AOL Instant Messanger, Yahoo, and Google Talk to communicate with his clients around the world. (490:23-491:2). Doe 12 also participates in a number of industry-related online forums. (500:9-503:4). In his personal life, Doe 12 uses several instant messaging and chat services, (520:7-14), as well as text messaging and email. (520:17-20).

ARGUMENT

In its Pretrial Brief, Filing #495, the defendants argued in defense of the challenged statutes with regard to the claims pending against those statutes. As the legal arguments in this case have been presented on multiple occasions, the defendants' incorporate their arguments in their Pretrial Brief, as well as the governing law under each claim, without repeating them here. Instead, the

defendants' submit this brief to highlight the evidence received at trial and to address the specific issues identified by this Court for particular focus following the trial. (589:25).

I. The plaintiffs cannot challenge Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s), and 29-4006(2) on their face, and are limited to challenging the statutes as-applied to their own unique circumstances.

Following the trial in this matter, this Court requested guidance on the issue of whether the Does each could bring facial and as-applied constitutional challenges to SORA.

This Court provided useful guidelines for determining whether a law implicating the First Amendment should be invalidated on its face or as applied in *Olmer v. City of Lincoln*, 23 F.Supp.2d 1091 (D.Neb. 1988). There, this Court described five such guidelines in detail:

> 1. "Facial" or "overbreadth" challenges to statutes in the First Amendment context have been used in cases in which (a) plaintiffs whose speech validly may be prohibited or sanctioned (i.e., "unprotected speech") challenge a statute or ordinance because the statute or ordinance threatens others who are *not before the court,* and (b) plaintiffs challenge a statute that in all its applications directly restricts protected First Amendment activity;
>
> 2. In contrast, when a statute or ordinance is challenged by plaintiffs (a) who engage in protected speech that the overbroad statute or ordinance seeks to punish or (b) who seek to engage in both protected and unprotected speech, there exists a proper party to challenge the statute and there is no concern that an attack on the statute will be unduly delayed or that protected speech will be discouraged. Under these circumstances, a facial challenge is not appropriate; instead, the statute or ordinance will be declared invalid to the extent that it reaches too far, but otherwise left intact. If the court finds nothing in the record to indicate that a statute or ordinance will have a different impact on third parties' interests in free speech than it has on the plaintiffs themselves, the court will not entertain a facial challenge

> based on overbreadth;
>
> 3. In some cases the United States Supreme Court has not invoked the facial overbreadth doctrine when a limiting construction has been or could be placed on the challenged statute. A state statute should be deemed facially invalid only if (1) it is not readily subject to a narrowing construction by the state courts and (2) its deterrent effect on legitimate expression is both real and substantial.
>
> 4. In deciding whether an overbreadth challenge should be allowed in a particular case, the United States Supreme Court has weighed the likelihood that the statute's very existence will inhibit free expression. The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. While substantial overbreadth is not easily defined, it is clear that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. Instead, the law must reach substantially beyond the permissible scope of legislative regulation and there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.
>
> 5. The "normal rule" is that partial, rather than facial, invalidation of a statute or ordinance is the required course, except when partial invalidation would be contrary to legislative intent, as when the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid. Further, a federal court should not extend invalidation of a statute or ordinance more broadly than necessary in order to dispose of the particular case before it. Rather, if a court deems a statute or ordinance unconstitutional in part, and if the constitutional and unconstitutional parts are wholly independent of each other, the constitutional portion may stand, while the unconstitutional portion should be rejected.

(Citations and quotations omitted). *Olmer*, 23 F.Supp.2d at 1105-1107.

None of these guidelines allow the plaintiffs to assert facial challenges in this case. Under the first, a plaintiff, in part, must "challenge a statute that in *all* its applications directly restricts protected First Amendment activity." (Emphasis supplied). 23 F.Supp.2d at 1105. Neither Neb. Rev. Stat. § 29-4006(1)(k) and (s) nor

Neb. Rev. Stat. § 28-322.05, in *all* their applications, restrict protected speech because using social networking websites, chat rooms, or instant messaging services to solicit sex with a minor, or posting communications on Internet blogs that solicits sex with a minor, is not protected speech.

The second guideline also points toward as-applied challenges only. The plaintiffs in this case do not purport to represent any registered sex offenders beyond themselves, and the testimony received from the 10 plaintiffs at trial relates solely to their own activity on the Internet and how the statutes will allegedly affect them. Thus, there is no indication in the trial record that the statutes at issue "will have a different impact on third parties' interests in free speech than [they have] on Plaintiffs themselves." *Olmer*, 23 F.Supp.2d at 1107. "Under these circumstances, a facial challenge is not appropriate." *Id.* at 1105.

The third guideline again calls for as-applied challenges. As argued in greater detail below, the defendants propose several narrowing constructions on the statutes that are "reasonable and readily apparent" from the plain language of the statute.

Finally, the fourth guideline tilts against a facial challenge by the plaintiffs. Here, the U.S. Supreme Court has established a high hurdle: this Court must find that the overbreadth of a statute is "substantial," that is, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). "A court will not strike down [a

statute] on overbreadth grounds if the statute's legitimate reach 'dwarfs its arguably impermissible applications.'" *Olmer*, 23 F.Supp.2d at 1106, quoting *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216, 1224 (8th Cir. 1997).

Judged against its "arguably impermissible applications," Neb. Rev. Stat. § 28-322.05's legitimate reach remains substantial. Neb. Rev. Stat. § 28-322.05, is already narrowed by its plain language to pertain only to sex offenders who offended against minors and only to social networking websites, chat rooms, and instant messaging services that allow minors to use them. By narrowing Neb. Rev. Stat. § 28-322.05's reach in such a manner, the Legislature has minimized the "arguably impermissible applications" that the statute otherwise might reach. That being the case, the fourth guideline under *Olmer* results in this Court rejecting a facial challenge on overbreadth grounds.

That leaves this Court with the fifth *Olmer* guideline: "partial, rather than facial, invalidation of a statute or ordinance", to the extent the statute should be invalidated at all. *Olmer*, 23 F.Supp.2d at 1106. Based on all of the reasons expressed above, this Court should not consider the plaintiffs' facial challenge to Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s), and 29-4006(2), and should only consider whether the statutes are unconstitutional as-applied to the plaintiffs. For all of the reasons to follow, as well as those argued in the defendants' Pretrial Brief, the plaintiffs' as-applied challenges should fail.

II. The statutes challenged in this case are not unconstitutionally vague under the Due Process Clauses of the U.S. and Nebraska constitutions.

As argued in the defendants' Pretrial Brief and incorporated here, the Due

Process Clause requires that "a person of ordinary intelligence" receive "fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). This Court, in both its Memorandum and Order on summary judgment and following trial, questioned how the statutes at issue would "work" in application and how several of the terms, both those defined and undefined, should be interpreted. (590:1-594:11). As discussed below, the statutes at issue seek to prohibit online conduct that replicates conduct already prohibited for these sex offenders in the real world. In addition, the defined terms reflect common understanding of the terms and, where necessary, are subject to narrowing constructions that further alleviate any constitutional concerns.

Recognizing the similarities between the real world and the online world, the Nebraska Legislature passed LB 97 and LB 285 to regulate sex offenders' conduct and use of certain *online* tools, just as sex offenders' conduct in the real world is regulated by other provisions of SORA. Specifically, under Neb. Rev. Stat. § 29-4006(1)(k), (s), and (2) (Cum. Supp. 2010):

> (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; … and
>
> (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.

(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.

The Legislature also passed Neb. Rev. Stat. § 28-322.05 (Cum. Supp. 2010), which provides 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:

(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.

A. The statutes at issue in this case provide the same regulation of online activities as real-world conduct.

The Internet is a reflection of our everyday lives; nearly all that we do in the physical world can also be done in the virtual world. The defendants' expert witness, Hemanshu Nigam, testified about the real-world counterparts of the virtual world mediums and services at issue here. 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 stints as the Chief Security Officer for News Corporation, an officer involved in internet security issues at Microsoft, and prosecutorial experience involving online child pornography, child predator, and child trafficking cases for the U.S. Department of Justice and Los Angeles County District Attorney's Office. See Ex. 305, pages 11-15 (curriculum vitae).

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." (188:12-14). Thus, each of the media included in the statutes at issue in this case has a "real world" equivalent. 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 could talk to one another or engage in a more private one-on-one conversation off to the side. (193:20-194:3; 253:23-254:3). Similarly, instant messaging is the equivalent of a private conversation between two people, with no one else listening. (193:5-11; 254:14-18). Social networking websites likewise 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. (253:2-19).

Few contest the dangers presented by abuse of these online forums and tools, particularly when directed toward minors. Scott Haugaard, a Nebraska State Patrol investigator working with the FBI's Cyber Crimes Task Force, testified that when investigating online child enticement cases, he would pose as a child and use social networking websites, chat rooms, and instant messaging services, and would receive "thousands" of instant messages from individuals attempting to solicit sex from minors. (568:13-570:6). Those contacts Haugaard made with individuals online were attempts by the individuals to "groom" their perceived targets, with the ultimate goal of meeting the perceived minor for sex. (572:18-573:8).

B. *The statutes enacted by Nebraska are not unique*.

Further, the statutes enacted by Nebraska are not unique. Four other states have recognized the interest and need in regulating the conduct of certain

registered sex offenders on social networking websites and have enacted laws similar to Nebraska's. Indiana's and Louisiana's statutes have been challenged in federal courts, and those decisions are discussed in detail below. In addition, in 2008 North Carolina enacted Session Law 2008-218, now codified at N.C. Gen. Stat. § 14-202.5:

> (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.

Similarly, in 2009 Kentucky enacted Ky. Rev. Stat. § 17.546, which provides in full:

(1) As used in this section:

(a) "Instant messaging or chat room program" means a software program that allows two (2) or more persons to communicate over the Internet in real time using typed text; and

(b) "Social networking Web site" means an Internet Web site that:

1. Facilitates the social introduction between two (2) or more persons;

2. Allows a person to create a Web page or a personal profile; and

3. Provides a person who visits the Web site the opportunity to communicate with another person.

(2) No registrant, as defined in *KRS 17.500*, shall knowingly or intentionally use a social networking Web site or an instant messaging or chat room program if that 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.

(3) Any person who violates subsection (2) of this section shall be guilty of a Class A misdemeanor.

To the best of the defendants' knowledge, neither the North Carolina nor Kentucky statutes are the subject of any pending litigation.

C. The statues at issue in this case are susceptible to narrowing constructions that are reasonable and readily apparent.

Recognizing the concerns raised by this Court in its Memorandum and Order on summary judgment, the defendants propose several narrowing constructions on the Nebraska statutes at issue here. Although federal courts are "generally without authority to construe or narrow state statutes," courts may adopt a party's narrowing construction if that construction is "reasonable and readily apparent" from the language and legislative history of the statute. *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988).

1. *The statutory definition of "social networking site", in using "collection of websites" to define the term, does not encompass the entire internet.*

First, the plaintiffs claim that the definition of social networking website in Neb. Rev. Stat. § 29-4001.01(13) is ambiguous because it defines social networking website to mean "a web page or *collection of web sites*." (Emphasis added). As the plaintiffs' expert witness testified, "collection of web sites" would necessarily preclude use of the entire Internet by those registered sex offenders subject to Neb. Rev. Stat. § 28-322.05. (95:18-24).

But the plaintiffs purported ambiguity can reasonably be resolved by construing "collection of web sites" to include the web pages associated with one "property," such as www.fox.com or www.foxnews.com. (206:17-207:5). That distinction is better described as delineating between domain names and directories.

The plaintiffs' expert witness explained the domain name system that governs the internet. (125:14). Top-level domains are few in number and well-

known; examples include .com, .org, .edu, and .gov. (125:15-20). Second level domain names are to the left of the top-level domain name, with additional domain names to the left of the second level domain name. (126:5-13). However, internet addresses, or URLs, often contain "directories" listed to the right of the top-level domain name; for example, www.davidpost.com/about is a webpage that may contain biographical information about David Post in the "about" directory, which is accessed from the URL www.davidpost.com. (126:17-21). Directories and subdirectories are controlled by the administrator of the URL, (127:22-24), and websites that share common domain names, but contain different directories or subdirectories, "could be a collection of web sites" in the view of the plaintiffs' expert. (128:12).

Thus, the defendants' propose that "collection of websites" under Neb. Rev. Stat. § 29-4001.01(13) include only those URLs that share common domain names, of whatever level, but contain different directories or subdirectories. To illustrate, www.espn.com and www.davidpost.com would not be considered part of the same "collection of websites" under the statute, even if one were listed as a link on the other, because they have distinct second-level domain names. However, www.davidpost.com/about and www.davidpost.com/publications would be considered part of the same "collection of websites" 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.

Courts should presume that "the legislature did not intend an absurd law," and should "favor a construction that avoids unjust or unreasonable results." *United*

of Omaha v. Business Men's Assur. Co. of Am., 104 F.3d 1034, 1037 (8th Cir. 1997). The defendants' proposed construction of the term "collection of websites" in the definition of social networking website avoids the plaintiffs' absurd result of placing the entire Internet off limits under Neb. Rev. Stat. § 28-322.05, and results in a reasonable limitation on the term "collection of websites."

2. *Social networking, chat room and instant messaging sites that "allow" minors to use their site or service include only those that expressly say so in their terms of use.*

On summary judgment and following trial, this Court noted difficulty construing the word "allows" in Neb. Rev. Stat. § 28-322.05 by questioning how an offender would know whether a particular website or service "allows" a minor to access or use the website or service. Filing #354, page 32. In response, the defendants' submit that whether a website "allows" a minor to access or use the site hinges on the terms of use of that particular site. (Ex. 305, page 7 (expert report of Hemanshu Nigam)). As Nigam testified, sites express in their terms and conditions of use what age group of individuals are allowed to use the site, whether that group must be 18 years of age or older, 13 years of age or older, or some other age group, (220:10-222:3), and often notify users when the age restrictions are changed. (263:1-16). Each time a registered sex offender "uses" a social networking website, instant messaging service, or chat room (see below for an explanation of what constitutes "use" of a social networking website, instant messaging service, or chat room under Neb. Rev. Stat. § 28-322.05), a registered sex offender must view the site's terms and conditions of use to determine, during that particular "use," the site's policy and

restrictions with regard to the age of its users.

Where a site's terms of use expressly limits use of its services to individuals 18 years of age or older, that site would not be prohibited under Neb. Rev. Stat. § 28-322.05. For example, the popular social networking website LinkedIn requires, in its terms of use, that users be 18 years of age or older to be eligible to use the site. (Ex. 108). In contrast, a site whose terms of use expressly allows individuals 13 years of age or older *would* be off-limits to sex offenders because the site expressly conveys that certain minors (14-, 15-, 16-, and 17-year-olds) *may* use the site. (Ex. 121 (Facebook terms of use prohibiting use by anyone under 13 years of age)).

However, as Nigam testified, a registered sex offender subject to Neb. Rev. Stat. § 28-322.05 would not be prohibited from using a social networking website, chat room, or instant messaging service whose terms and conditions of use are silent with regard to the age of its users. (223:2-11). In that situation, 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, because the site's terms and conditions provide no affirmative knowledge of the age of its allowed users. (223:6-11; Ex. 305, page 9). Nigam testified that the number of social networking websites, instant messaging services, and chat rooms whose terms of use are silent with regard to the age of its users is extremely small; in his experience, he knew of no social networking website, instant messaging service, or chat room whose terms of use were silent with regard to age. (225:20-23). The defendants admit, however, that several of the screenshots of websites offered by the plaintiffs into evidence

were silent with regard to age in their terms of use. These websites included such popular sites as Wikipedia (Ex. 103), Weather.com (Ex. 117), and ESPN.com (Ex. 118). But once again, these sites would not be prohibited under Neb. Rev. Stat. § 28-322.05 because a registered sex offender would have no affirmative knowledge of the age of the sites' users, and thus could not "knowingly and intentionally" use the site in violation of Neb. Rev. Stat. § 28-322.05.

The plaintiffs' expert testified that the language of Neb. Rev. Stat. 28-322.05 either prohibits registered sex offenders from using *any* site on the internet or prohibits *no* sites on the internet. As the plaintiffs' expert testified, no method is foolproof in preventing minors from using websites they are ostensibly prohibited from using. Post testified that, in his opinion, a website that required a credit card number to use the site was a website that did not "allow" minors to use the site. (117:16-118:1). However, he admitted that even in such a scenario, minors could still use the site by illicitly entering the credit card number belonging to someone else. (118:7-16). Thus, the word "allows" in Neb. Rev. Stat. § 28-322.05 cannot be construed to mean that a website "allows" minors to use it if it is theoretically possible for minors to use the site. Instead, statutes must be given a "reasonable interpretation which supports [their] constitutionality." *Keller v. City of Fremont*, 2012 U.S.Dist.LEXIS 20908, *14 (D.Neb. 2012). Here, looking to a website's own terms and conditions of use to determine what the site "allows" provides Neb. Rev. Stat. § 28-322.05 with a reasonable and sensible construction.

3. A person does not "use" a social networking website, instant messaging service, or chat room under Neb. Rev. Stat. § 28-322.05 unless that person communicates with another person on the site or service.

Finally, regardless of what a site's terms and conditions of use provide with regard to the age of its users, a registered sex offender need not worry about violating the statute unless that registered sex offender is "using" the site. Neb. Rev. Stat. § 28-322.05 prohibits certain registered sex offenders from knowingly and intentionally "us[ing]" certain social networking websites, instant messaging services, or chat rooms. "Use," as the term is used in Neb. Rev. Stat. § 28-322.05, requires communication with other individuals. (219:1-6). Merely 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.

This construction of the word "use" is readily apparent from Neb. Rev. Stat. § 28-322.05 given the statute's obvious goal of preventing registered sex offenders from committing offenses against minors using social networking websites, instant messaging services, and chat rooms. As Nigam testified, merely reading an article on a web site might constitute "use" of the site "if that's what [the site] was designed for." (218:17-19). However, social networking websites, instant messaging services, and chat rooms are, under both the statutory definitions and common usage of the terms, designed for communications. Thus, as Nigam testified, a person cannot "use" a social networking website, instant messaging service, or chat room under Neb. Rev. Stat. § 28-322.05 unless that person communicates with another person. (219:1-9).

Neb. Rev. Stat. § 28-322.05 regulates activity on social networking websites, instant messaging services, and chat rooms. Each of those share one common attribute: the ability to communicate with others. In light of that common attribute, it is reasonable to conclude that the Nebraska Legislature's intent was to prevent communication between registered sex offenders and minors using one of those three sites or services.

D. As used in Neb. Rev. Stat. § 29-4001.01(3) and (1), "virtually instantaneous" communications have the same meaning as "real time" communications.

Following the trial, this Court asked for guidance on the meaning of the term "virtually instantaneous" found in the statutory definitions of instant messaging and chat rooms in Neb. Rev. Stat. § 29-4001.01(3) and (10). Of particular concern was whether "virtually instantaneous" would necessarily result in useful online tools, such as email, being restricted from use by a registered sex offender. Few courts have considered the question, but those that have equate "virtually instantaneous" communications with "real time" communications.

In *Paragon Solutions, LLC v. Timex Corp.,* 2008 U.S. Dist. LEXIS 111267, *14 (S.D. Ohio 2008), a patent infringement case, the district court determined that "displaying real-time data means displaying data substantially immediately without contextually meaningful delay so that the information is displayed in a time frame experienced by people." On appeal, the circuit court slightly modified the district court's construction of the term "displaying real-time data," holding that real-time data display "cannot possibly mean displaying data literally

instantaneously," as "at least some amount of time" must pass. *Paragon Solutions, LLC v. Timex Corp.,* 566 F.3d 1075, 1088 (Fed. Cir. 2009). Here, as described by the plaintiff's expert, see Ex. 210 (plaintiffs' expert report), page 6, this small but measurable amount of time allows for functionalities such as chat rooms and instant messaging to appear to arrive virtually instantaneously while not literally instantaneously. *See also United States v. Johnson,* 2005 U.S. Dist. LEXIS 52 (N.D.N.Y 2005) (describing the Internet as allowing for "virtually instantaneous communication with others" and providing the "ability to have real time conversation"); *Am. Online, Inc. v. AT&T Corp.,* 243 F.3d 812, 815 (4th Cir. 2001) (describing AOL services as establishing "real-time communication ("chat") through "instant messaging.")

Equating "virtually instantaneous" with "real time" further indicates why email communications would not fall within the definitions of chat room and instant messaging in Neb. Rev. Stat. § 29-4001.01(3) and (10). As Nigam testified, instant messaging was created because, while "email was fast," people wanted to "make it even faster." (188:25). When emails are sent, the "the provider stays in the middle of that transaction [i.e., between sender and recipient] but goes even further than that. It holds the communication that was sent until somebody on the other side decides to go get it." (192:13-16). Email therefore differs from instant messaging, where the message is not "held up" by the service provider. (192:2-11). Thus, emails, like instant messages, may travel over a fiber optic network at the same speed, but emails are not a "virtually instantaneous" or "real time" communication because of

the service provider's ability to "hold" the communication "until somebody on the other side decides to go get it." (192:13-16).

Because emails are not virtually instantaneous, they are not included in the definitions of instant messaging or chat room. Accordingly, Neb. Rev. Stat. § 28-322.05 is not overly broad, nor does it foreclose alternative methods of communication by which registered sex offenders could communicate.

E. Looking to a website's terms and conditions of use to determine whether the site "allows" minors to use the site is not an improper delegation to a private party of a criminal statute's element.

This Court asked whether the defendants can allow a private entity to define an essential element of a criminal offense. Although the burden is still on the State to prove all essential elements of the crime charged, in at least two instances the State allows private entities to define one element of an offense.

Under Neb. Rev. Stat. §28-521 (Reissue 2008), an individual commits second degree criminal trespass if he enters or remains in any place as to which notice against trespass is given by, among other things, posting such notice in a manner prescribed by law or reasonably likely to come to the attention of intruders. Thus, whether an individual commits second degree criminal trespass depends in part on the actions of a land or building owner and whether that owner posted the appropriate notice forbidding trespassers. Similarly, under Neb. Rev. Stat. § 69-2441 (Reissue 2009), an individual may not carry a concealed handgun in a place or premise where the person in control of the place or premise has posted notice prohibiting concealed handguns.

Under both Neb. Rev. Stat. § 28-521 and Neb. Rev. Stat. § 69-2441, whether an individual is guilty of the crime depends in part on the notice provided by a private person or entity regarding the amount of access that private person chose to allow. The application of Neb. Rev. Stat. §28-322.05 is the same: to commit a violation, a person must knowingly access a site that they have been told they are not authorized to enter. In each instance, the private entity determines who is authorized to access the site. Here, just as in a trespass and concealed carry case, the private entity can change the terms of who is allowed access to the site at any time, but that does not relieve the person of the obligation to check the posted notice before entering.

III. The statutes at issue in this case are nonpunitive and do not violate the Ex Post Facto Clause.

In their Pretrial Brief, Filing #495, pages 10-25, the defendants argue that the statutory provisions at issue here do not violate the Ex Post Facto Clause of the U.S. Constitution and the Nebraska equivalent. That argument, including the relevant case law describing the applicable legislative intent/effects test, is incorporated here.

Without repeating that argument again, the defendants highlight one prong of the "punitive effects" test described in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963): whether the statutes involve an affirmative disability or restraint.

As noted in the defendants' Pretrial Brief, the lack of physical restraint imposed by the statutes at issue here strongly suggests that they present no affirmative disability or restraint. Filing #495, page 21, citing *Smith v. Doe*, 538

U.S. 84 (2003). Similarly, occupational debarment has been held by the U.S. Supreme Court to be nonpunitive. *Hawker v. New York*, 170 U.S. 189 (1898).

The statutes at issue here present even less restraint on the plaintiffs than occupational debarment. Indeed, Neb. Rev. Stat. § 29-4006(1)(k) and (s) place no restraint on the plaintiffs – the obligation of registered sex offenders to provide certain personal identifying information has existed for years, and was found by the U.S. Supreme Court in *Smith v. Doe*, 538 U.S. 84, 102 (2002) to *not* impose an affirmative disability or restraint. To paraphrase the *Smith* Court, "although registrants must inform the authorities" when they have created new email addresses or online identifiers, or posted information on a blog or other Internet site, "they are not required to seek permission to do so." *Id.*

Neb. Rev. Stat. § 29-4006(2), as limited by this Court's prior ruling to only registered sex offenders on probation, parole, or court-monitored supervision, also imposes no disability or restraint. So limited, Neb. Rev. Stat. § 29-4006(2) imposes no new obligation or duty on the part of the sex offender on probation, parole, or court-monitored supervision who must abide by the law. Doe 24, the only plaintiff subject to Neb. Rev. Stat. § 29-4006(2), is currently on parole, and his parole conditions subject him to suspicionless searches of his property. (Ex. 210). Thus, Neb. Rev. Stat. § 29-4006(2) merely codifies in statute the obligation Doe 24, or any other registered sex offender on probation, parole, or court-monitored supervision, must abide by.

Finally, Neb. Rev. Stat. § 28-322.05 also creates no affirmative disability or

restraint because of the numerous other ways for the plaintiffs' to conduct their lives and businesses. As mentioned, the U.S. Supreme Court has held that a law revoking a license to practice medicine by convicted felons is not punitive and thus does not violate the Ex Post Facto Clause. *Hawker v. New York*, 170 U.S. 189 (1898). Neb. Rev. Stat. § 28-322.05 places no such formal impediment before the plaintiffs to engage in any employment they desire. While many of the plaintiffs who testified may contend that Neb. Rev. Stat. § 28-322.05 effectively prevents them from performing their jobs, their testimony also reveals numerous ways to do their jobs without threat of prosecution under Neb. Rev. Stat. § 28-322.05.

For example, the popular social networking website LinkedIn, according to its terms and conditions of use, allows only individuals 18 years of age and older to use the site. (Ex. 108). Thus, LinkedIn is not a prohibited site under Neb. Rev. Stat. § 28-322.05. Several plaintiffs testified that they use LinkedIn. Doe 2 uses LinkedIn in his consulting business. (442:16). Doe 12 testified that LinkedIn "absolutely is one of the methods that I use to network." (522:21).

SMS text messaging, as argued in greater detail below, is also not prohibited by Neb. Rev. Stat. § 28-322.05, and many of the plaintiffs regularly use text messaging in their lives. Doe 17 texts his father, Doe F, "all the time" to update each other on business matters. (293:21). Doe 19 uses text messaging to contact his clients, assistant, partners, and so many other people he "[doesn't] know if [he] can name everybody [he] texts." (382:10). Doe 2 frequently uses text messaging to stay in touch with family. (520:11-25).

A close look at the testimony of plaintiffs at trial reveals that each uses communications media or websites that would not be prohibited by Neb. Rev. Stat. § 28-322.05, or performs tasks that do not implicate Neb. Rev. Stat. § 28-322.05. Doe 17, for example, accepts rental requests for his father's business' video conferencing room by phone and by email, (314:10-15), a job function that would be unaffected by Neb. Rev. Stat. § 28-322.05. Doe 31 uses email "every day" to "talk to clients and also other vendors." (346:13-17). Doe 21 also testified that he uses email "every day" to communicate with "customers, vendors, design people, product development, [and] colleagues" in his music business. (354:13).

Doe 3, a car audio retailer, frequently consults manufacturer's websites for information and products, but he testified that these manufacturer's websites only allow individuals to submit emails and do not contain chat room or instant messaging features. (365:7-23). Because the manufacturer's websites do not allow users to create a profile, (366:5-8), Doe 3 would not be prohibited from using them by Neb. Rev. Stat. § 28-322.05.

Other plaintiffs offered similar testimony. Doe 19, in addition to using text messaging as mentioned above, also uses email in his employment. In his words, "everything is done with [email]." (382:20). Because Doe 19 does "everything" with email, Neb. Rev. Stat. § 28-322.05 will prohibit "nothing."

Doe 18 does not use social networking websites in connection with his computer-related work, (395:4), and in connection with his home remodeling job (which makes up 80 percent of his income, (408:11)), Doe 18 testified that he used a

website and sent communications through the site via email, (408:19-409:3), which, again, would not be prohibited. Doe 2 testified that email is his "primary source for contacting customers." (425:19-20). Doe 12 is active on LinkedIn and Twitter at work, (522:16-523:3; Ex. 108; Ex. 112), and frequently uses text messaging and email in his personal life, (520:17-20). Neb. Rev. Stat. § 28-322.05 would prohibit none of those sites or methods of communications, and thus impose no affirmative disability or restrain upon the plaintiffs.

The conduct prohibited by Neb. Rev. Stat. § 28-322.05 is nothing more than the online equivalency of conduct already prohibited – and upheld – in the physical world. Residency restrictions on sex offenders have been upheld by the Eighth Circuit. In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), the Eighth Circuit analyzed an Iowa law that prohibited a person convicted of certain sex offenses involving minors from residing within 2,000 feet of a school or child care facility. The court held that the residency restriction did not violate the Ex Post Facto Clause. 405 F.3d at 723. Noting that "[i]mprisonment is the paradigmatic affirmative disability or restraint," *id.* at 720, the court found that Iowa's residency restriction was less disabling than a civil commitment scheme permitting complete confinement of mentally ill individuals approved by the U.S. Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Miller,* 405 F.3d at 721. Ultimately, the Eighth Circuit concluded that plaintiffs failed to show by the "clearest proof" that Iowa's residency restriction was excessive in relation to its legitimate regulatory purpose, and thus was not so punitive as to violate the Ex Post Facto Clause. *Id.* at 723.

With the passage of LB 97 and LB 285, the Nebraska Legislature has taken court-approved residency restrictions and applied them to the online world, prohibiting certain registered sex offenders from using certain social networking websites, chat rooms, and instant messaging websites. Because the statutes are narrowly drawn – that is, they apply only to certain sex offenders who offended against minors and they apply only to certain portions of cyberspace – they are not so punitive as to violate the Ex Post Facto Clause.

IV. The statutes at issue in this case do not violate the First Amendment.

A. *Neb. Rev. Stat. § 28-322.05 bears greater similarity to an Indiana statute upheld under the First Amendment than to a Louisiana statute struck down*

The defendants incorporate here their arguments with regard to the First Amendment included in their Pretrial Brief, Filing #495. Following trial, this Court requested a detailed analysis of the two federal court decisions to have judged similar statutes under the First Amendment.

The United States District Court for the Southern District of Indiana found that a statute nearly identical to Neb. Rev. Stat. § 28-322.05 was narrowly tailored to serve a significant governmental interest. *Doe v. Prosecutor, Marion County*, 2012 U.S. Dist. LEXIS 86862 (S.D. Ind., June 22, 2012). In 2008, the State of Indiana enacted a statute that prohibits certain registered sex offenders (sex offenders who committed sex offenses against minors) from using social networking websites, instant messaging, and chat room programs that allow access by persons under the age of 18. Indiana Code § 35-42-4-12. The statute was challenged on First

Amendment grounds by a registered sex offender, who claimed, like the plaintiffs in this case, that the statute would prevent sex offenders like him from performing a host of activities on the Internet: commenting on common news websites, participating in political discussions in chat rooms, advertising for businesses on social networking websites, or communicating with and sharing photos with family members on social networking websites. *Id.* at *19.

The court rejected the sex offender's argument and held that the statute was narrowly tailored. While the court acknowledged that the statute captured "considerable conduct that has nothing to do with interacting with minors," *id.*, it found that "the vast majority of the internet is still at Mr. Doe's fingertips." *Id.* at *20. Because a regulation need not "be the least restrictive means of regulation possible," *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000), the Indiana statute was constitutional because it barred only "a subset of registered sex offenders from visiting a subset of web sites," where "online predators have easy access to a nearly limitless pool of potential victims." *Doe v. Prosecutor, Marion County,* at *20. Like the Indiana statute, Neb. Rev. Stat. § 28-322.05 only applies to "a subset of registered sex offenders:" those who previously committed an offense against minors. See Neb. Rev. Stat. § 28-322.05(1)(a) – (1)(k).

Marion County distinguished another recent case, *Doe v. Jindal*, 2012 U.S. Dist. LEXIS 43818 (M.D. La. February 16, 2012), and those distinctions apply here as well. In *Jindal*, the district court struck down a Louisiana statute that barred certain sex offenders from "using or accessing" *any* social networking website, chat

room, or peer-to-peer network, holding that the statute was overbroad.

But as *Marion County* noted, *Jindal* was, and is here, distinguishable. The Louisiana statute banned the use of *any* social networking website, chat room, or peer-to-peer network, while the Indiana statute, like Neb. Rev. Stat. § 28-322.05, merely bans the use of sites or services that allow minors to use them as well. Sites or services that limit use to persons 18 years of age or older are not prohibited under either the Indiana or Nebraska statute, thereby narrowing the scope of sites that are off-limits to a subset of registered sex offenders. *Jindal* is further distinguishable because it failed to use the "narrow tailoring/alternative channels" constitutional test, *Marion County* at *31, and also relied on a U.S. Supreme Court decision involving a content-based regulation. *Id.*, citing *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577 (2010).

Jindal is distinguishable in another important way from both the Indiana statute and Neb. Rev. Stat. § 28-322.05. While the Indiana statute and Neb. Rev. Stat. § 28-322.05 prohibit certain sex offenders from "using" certain websites, Louisiana went further, prohibiting the "use *or access*" of social networking and other sites. As *Jindal* noted, the Louisiana statute was violated "once a user accesses the website." *Jindal*, at *17. The user need not "post anything to that website" or "engage in conversation with anyone on that website" for a violation to occur. *Id.* at *17-18, n. 11. Contrast the Louisiana statute with Neb. Rev. Stat. § 28-322.05, and the Indiana statute, which cannot be violated by merely "accessing" an otherwise prohibited website. Instead, "use" is required. As the defendants' expert

witness testified, a person "uses" a social networking website, instant messaging, or chat room service for purposes of Neb. Rev. Stat. § 28-322.05 when that person communicates with others on that site or service. 218:17-218:9). Anything less than communication with other individuals on the site (e.g., merely browsing) is not "use" of the site under Neb. Rev. Stat. § 28-322.05.

The limitations written into Neb. Rev. Stat. § 28-322.05 result in a narrowly tailored statute. Neb. Rev. Stat. § 28-322.05 applies only to sex offenders who have offended against minors, it prohibits the use of some, but not all, social networking websites, instant messaging, and chat room services, and it prohibits "use" of those sites and service rather than mere "access." As explained in *Marion County*, these limitations result in a narrowly tailored statute that burdens no more speech than necessary.

B. *Because Neb. Rev. Stat. § 28-322.05 does not prohibit the use of SMS text messaging or other methods of communication, it leaves open ample alternative channels of communication.*

To survive First Amendment scrutiny, Neb. Rev. Stat. § 28-322.05 must also "leave open ample alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Following trial, this Court inquired as to whether Neb. Rev. Stat. § 28-322.05 might prohibit the use of SMS texting. (591:21-592:1). It does not. As the defendant's expert Hemanshu Nigam testified, "text is different than instant messaging." (254:20).

Nigam described the difference between the forums of communication at issue, and not at issue, in this case. Instant messaging and chat rooms each use

different protocols, or languages, to send and receive messages. (189:6-11). Those protocols are not interchangeable. As Nigam described, "if you're chatting with somebody in one language, somebody who's using Instant Messenger cannot all of the sudden decide they're going to become chatters using chatting language 'cause they're not talking that language and they have been designed not to do that." (189:12-16). As Nigam testified, SMS texting using a different protocol than instant messaging and chat rooms. (189:17-18). Nigam also described the difference in more practical terms: "a text message goes to a company that then delivers it to you [while] an instant message goes to you." (191:19-22). For those reasons, SMS texting differs from instant messaging or chat rooms, and thus is not prohibited by Neb. Rev. Stat. § 28-322.05. (255:15-17).

Above, the defendants noted the various ways the plaintiffs communicate that would not be prohibited by Neb. Rev. Stat. § 28-322.05 and some of the "over 18" websites that would also not be prohibited. The defendants note here one other alternative method of communication available to the plaintiffs, many of whom testified that they have some expertise with computers: any registered sex offender subject to Neb. Rev. Stat. § 28-322.05 could develop his or her *own* website to conduct business or communicate with others, and could tailor the access restrictions and functionality of the website to prevent the website from being subject to Neb. Rev. Stat. § 28-322.05. Indeed, two plaintiffs, Doe 17 and Doe 12, testified that they have personal experience building websites and are familiar with how to limit access to such websites. (318:13-19; 524:2-15).

The First Amendment does not require that an adequate alternative method of communication "be the speaker's first or best choice … or one that provides the same audience or impact for the speech." *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000). As the defendants have noted above, the plaintiffs have alternative methods of communication available to them. The First Amendment is not violated merely because those methods are not the plaintiffs' "first or best" choices, or most convenient choices. For all of these reasons discussed above, this Court should reject the plaintiffs' First Amendment challenges to the statutes at issue.

V. *The U.S. Supreme Court's decision in* Samson v. California *dictates that Neb. Rev. Stat. § 29-4006(2) survive scrutiny under the Fourth Amendment.*

In support of its argument that Neb. Rev. Stat. § 29-4006(2) does not violate either the Fourth Amendment of the U.S. Constitution or the Nebraska equivalent, the defendants refer this Court to their arguments in their Pretrial Brief, Filing #495, pages 38-41.

To summarize, the evidence received at trial establishes that only one plaintiff (John Doe 24) is currently on probation, parole, or court-monitored supervision. Doe 24 was sentenced to 3-6 years for a drug offense in October 2010, and was paroled on March 27, 2012. (450:15-24; Ex. 210). As a condition of his parole, Doe 24 is required 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." Ex. 210. Thus, Doe 24 is already subject to a much-broader search and monitor provision and has

no expectation of privacy entitled to protection under the Fourth Amendment throughout the duration of his parole.

As the defendants more fully argued in their Pretrial Brief, Filing #495, Neb. Rev. Stat. § 29-4006(2), as applied to registered sex offenders on probation, parole, or court-monitored supervision, is constitutional under the U.S. Supreme Court's decision in *Samson v. California*, 547 U.S. 843 (2006), where the Court approved a suspicionless search conducted under authority of a state statute that required parolees to agree to be subject to a search at any time. Based upon *Samson*, this Court should reject the plaintiffs challenge to Neb. Rev. Stat. § 29-4006(2) under the Fourth Amendment.

CONCLUSION

For all of the reasons above and the evidence received at trial, this Court should reject the plaintiffs' claims and find that Neb. Rev. Stat. § 29-4006(1)(k) and (s), Neb. Rev. Stat. § 29-4006(2), and Neb. Rev. Stat. § 28-322.05 are constitutional.

Dated: September 10, 2012

STATE OF NEBRASKA, et al., Defendants.

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I electronically filed the foregoing document with the Clerk of the U.S. District Court for the District of Nebraska using the CM/ECF system, causing notice of such filing to be served on Plaintiffs' counsel of record.

By: *s/* Kevin L. Griess
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