IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

John Doe and Jane Doe 1 through 36, et al, Plaintiffs, vs. State of Nebraska, et al., Defendants.	8:09-cv-456 **PLAINTIFFS' CLOSING ARGUMENT**
John Doe, Plaintiff, vs. State of Nebraska, et al., Defendants.	4:10-cv-3005
John Doe, Plaintiff, vs. Nebraska State Patrol, et al., Defendants.	4:09-cv-3266

COME NOW the Plaintiffs, by and through their attorneys of record, and, pursuant to the Court's direction, hereby submit this Closing Argument in lieu of oral closing argument and statements.

TABLE OF CONTENTS

I. Status of the Case.

Trial was held in this case from July 16 through July 18, 2012, regarding various challenges to the constitutionality of Neb. Rev. Stat. § 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2). At the end of the presentation of the evidence, the parties were directed to submit written closing arguments within twenty-one (21) days of the filing of the transcript. The transcript of the trial was filed on August 20, 2012. Based on the evidence presented at trial, the Plaintiffs file this Closing Argument is support of a finding that the above-referenced statutes are unconstitutional on a number of grounds and for a variety of reasons, as stated further below.

II. Distinguishing a "facial" from an "as-applied" constitutional challenge.

The Plaintiffs raised both facial and as-applied challenges, but they concede that each Plaintiff cannot raise both types of challenges to all statutes at issue. As it relates to "as applied" constitutional challenges, this Court concisely noted the following:

> A plaintiff bringing an 'as-applied' challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act. If a statute is held unconstitutional 'as applied,' the statute may not be applied in the future in a similar context, but the statute is not rendered completely inoperative.

Olmer v. City of Lincoln, 23 F.Supp.2d 1091, 1104 (D. Neb. 1998) aff'd, 192 F.3d 1176 (8th Cir. 1999) (internal citations omitted).By contract, 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 (1987). This seems to pose a particularly troublesome and, frankly, insurmountable obstacle for a plaintiff bringing a facial challenge.

However, this strict test is mitigated for certain constitutional challenges.

> Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face.

Olmer, 23 F.Supp.2d at 1104 (internal citations omitted). Similarly, the Supreme Court mitigated application of the strict test when examining the constitutionality of a statute under the "void-for-vagueness" analysis. The Court stated that "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." City of Chicago v. Morales, 527 U.S. 41, 55 (1999). This makes sense because both overbreadth and vagueness challenges involves consideration of hypotheticals. One considers the amount of protected yet proscribed speech, not just specific speech, and the other examines a "person of ordinary intelligence," not just the specific plaintiff bringing the case, as well as a hypothetical law enforcement officer, not the subjective knowledge of any particular law enforcement officer.

Consequently, because of the mitigation of the strict facial test, the particulars of a plaintiff bringing either an overbreadth or vagueness challenge are not conclusive. Naturally, if application of the law to a plaintiff is unconstitutional, then the law will be facially unconstitutional. But that evidence is not required, and a plaintiff can argue hypothetically and succeed under a facial overbreadth or vagueness challenge.

III. Standing, ripeness and mootness of the Plaintiffs' causes of action.

At the outset, the Plaintiffs concede that not all have standing to challenge every statute at issue, but collectively at least one Plaintiff has standing to challenge all of the

statutes at issue. Standing "arises from Article III, § 2, of the United States Constitution, which limits the subject matter jurisdiction of federal courts to actual cases and controversies." McClain v. Am. Econ. Ins. Co., 424 F.3d 728, 731 (8th Cir. 2005).

Plaintiffs Doe 1, 8, 15, 20, 22, 29, 30, 32, 34, A & C were dismissed without prejudice. Except the lettered Does, all other remaining Plaintiffs in this case are subject to the Nebraska Sex Offender Registration Act, including Neb. Rev. Stat. § 29-4006(1)(k) and (s), thereby giving them standing to challenge these subsections. Filing 492, p. 2.

Mootness is also derived from Article III, and it "occurs when the parties lack a legally cognizable interest in the outcome." Olin Water Services v. Midland Research Laboratories, Inc., 774 F.2d 303, 305 (8th Cir. 1985). As of January 1, 2010, Does 12, 13, 17, 23 and 25 were serving their respective criminal sentences, whether probation, parole or supervised release. These Plaintiffs completed their criminal sentences and were no longer under criminal jurisdiction as of the following dates: Doe 12, January 4, 2011; Doe 13, June 1, 2010; Doe 17, May 7, 2012; Doe 23, May 10, 2011; Doe 25, February 2011. In light of this Court's order for summary judgment, their challenge to Neb. Rev. Stat. § 29-4006(2) is moot. However, Doe 24 was placed on parole on March 27, 2012, so his challenge to Neb. Rev. Stat. § 29-4006(2) is not moot.

The doctrine of ripeness is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. It requires that before a federal court may address itself to a question, there must exist a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037-38 (8th Cir. 2000). Doe 24's challenges to Neb. Rev.

Stat. § 29-4006(2) is ripe because he "faces either prosecution…or the immediate loss of [his] expectation of privacy in [his] homes, papers and effects." Doe v. Prosecutor, Marion County, Ind., 566 F. Supp. 2d 862, 876 (S.D. Ind. 2008).

The free speech challenges to Neb. Rev. Stat. §§ 28-322.05 and 29-4006(1)(k) and (s) are ripe because "the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression." 281 Care Comm. v. Arneson, 638 F.3d 621, 631 (8th Cir. 2011). Of those remaining, Does 2, 3, 4, 6, 12, 13, 17, 18, 19, 24, 27 and 35 are subject to the Nebraska Sex Offender Registration Act because of a conviction for a crime enumerated in Neb. Rev. Stat. § 28-322.05.

IV. The crime of Unlawful Use of the Internet, Neb. Rev. Stat. § 28-322.05, violates the First Amendment to the United States Constitution and the Nebraska constitutional counterpart, both facially and as applied.

The crime of Unlawful Use of the Internet by a Registered Sex Offender, Neb. Rev. Stat. § 28-322.05, is an unconstitutional restrictions on the freedom of speech, both facially and as-applied. In sum, enforcement and application of this statute would render off limits, under pain of criminal prosecution, the use of many of the most common means of electronic communication and information gathering. It is so broad that encapsulating its scope is challenging.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. The First Amendment applies to the States through the Fourteenth Amendment. McIntyre v. Ohio Elections Comm., 514 U.S. 334, 336 (1995). "Every

person may freely speak." Neb. Const. art. 1, § 5. The parameters of the right to free speech under the Nebraska and U.S. Constitutions are the same. State v. Hookstra, 263 Neb. 116, 120 (2002).

"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." Ways v. City of Lincoln, 274 F.3d 514, 518 (8th Cir. 2001) (internal citations omitted). Does 2, 3, 4, 6, 12, 13, 17, 18, 19, 24, 27 and 35 bring these challenges. Neb. Rev. Stat. 28-322.05 is wildly overbroad and should be declared unconstitutional under U.S. Const. amend. I and Neb. Const. art. 1, § 5, both facially and as applied to those Plaintiffs toiling under threat of its enforcement.

A. Neb. Rev. Stat. § 28-322.05 violates the right to free speech under the United States and Nebraska Constitutions because it is overbroad.

A statute is overbroad if it prohibits a substantial amount of protected speech, "not only in an absolute sense but also relative to the statute's plainly legitimate sweep." United States v. Williams, 553 U.S. 285, 292 (2008). The first step in an overbreadth analysis is to construe the challenged statute. Williams, 553 U.S. at 293. When construing Neb. Rev. Stat. § 28-322.05, the evidence established that the statute criminalizes all social networking websites, instant messaging systems, and chat rooms, regardless of any service-specific age limitation. The evidence further established that social networking websites, instant messaging systems, and chat rooms, as statutorily defined, include most, if not all, of the most common forms of communication and Internet sites, innocently used for every day living, socializing, information gathering, employment and commerce.

> (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.

Neb. Rev. Stat. § 28-322.05.

1. The statute does not provide for any meaningful age-specific demarcation between those social networking web sites, instant messaging systems, or chat room services included within Neb. Rev. Stat. § 28-322.05, and those that are not.

Although the statute purports to be limited in scope because it applies to only those social networking web sites, instant messaging systems, or chat room services that allow a person who is less than eighteen years of age to access or use its service, this limitation is merely a fallacy. Therefore, the use of <u>all</u> social networking web sites, instant messaging systems or chat room services are prohibited.

Prof. David Post is a law professor at Temple University, an Internet scholar, and an expert on the Internet and Internet law. Exhibit 304, p. 24-29; Tr. Transcr. 66:15-73:3. (Hereafter, references to the Trial Transcript will be made to "TT," without reference to volume since pagination continues from one to the next.) He testified that it would be difficult to think of a social networking web site, instant messaging system or chat room service that prohibits persons under the age of 18 from "accessing" its service or website. Using his example, any 13 year old can "access" all social networking web sites, instant messaging systems and chat room services if only for the purpose of reading the terms of use to determine whether he or she can "use" the service. TT 77:16-80:14; Exhibit 304, p. 17.

At one point, the State argued that "access" means looking at a website. TT 55:4-7; 55:12-13. Then the meaning of "access" became less clear. TT 55:14-60:7. Mr. Nigam agreed that a 15 year-old could access Yahoo, if only to read the terms of service, TT 232:24-233:2, and he stated that "the most basic way of thinking of accessing something is by looking at it." TT 234:2-3. While he did not explicitly state that reading the terms of use is access, his own reasoning leads to no other conclusion.

Prof. Post further testified that a 12 year-old can view his profile on Linkedin, thereby accessing it in the normal sense of the word. TT 272:20-273:4. If access is looking at a website, to which the State and Mr. Nigam sometimes appear to agree, then the 18 year-old age limitation imposed by Linkedin is of no consequence. See Exhibit 108, p. 6 ("To be eligible to use the Service, you must meet the following criteria and represent and warrant that you: (1) are 18 years of age or older…"). A person of any age can view another's profile without reading the terms of use. TT 273:21-25. This is really

the point, which the Court noted in its dialogue with the witnesses: access does not require and is different from use, and the self-imposed age limitations in the terms of use only pertain to "use."

The difference between "access" and "use" was front-and-center in Doe v. Jindal, 2012 WL 540100. In that case, the Federal District Court for the Middle District of Louisiana struck down a statute that was less prohibitive and narrower than the one at issue in this case. The plaintiff in that case challenged a law that prohibited individuals convicted of certain offenses against minors from using or accessing social networking websites, chat rooms and peer-to-peer networks. Doe v. Jindal, 2012 WL 540100, p. 1 (M.D.La., February 16, 2012). Examining the facial overbreadth, the Jindal Court first construed the statute's prohibition and concluded that "the offense was completed once a user accesses the website-whether intentionally or by mistake." Id. at 5. In the case before this Court, if a person uses any social networking website, chat room or instant messaging service, regardless of a stated age restriction, he is committing a crime because all such mediums unambiguously permit access to all ages without use. The difference between "access" and "use" is important.

Further, Prof. Post also testified that it was "well known" that age prohibitions are unenforced and possibly unenforceable. His testimony was that, practically speaking, persons under the stated age in the terms of use are using these various services. TT 80:15-81:15. Further, his opinion was that, at least for those services that are not somehow policing the age limitation, these services allow "use" by those under the stated age in the terms of use. TT 81:16-82:20. See also Exhibit 304, pp. 14-18. Implicitly,

Mr. Nigam acknowledged this reality by discussing the "2 million" underage and adult users at Myspace who indicated an age of 99 years-old. TT 161:6-12.

In Snow v. DirecTV, Inc., the Eleventh Circuit determined that "simply clicking a hypertext link, after ignoring an express warning" rendered a website "publically accessible" for purposes of the Stored Communication Act. Snow v. DirecTV, Inc., 450 F.3d 1314, 1321 (11th Cir. 2006). There seems to be little dispute that persons under the age stated in the terms of use "use" a social networking web site, instant messaging, or chat room service.

2. When the terms of a social networking web site, instant messaging, or chat room service are silent as to age, that service necessarily permits persons of all age to access, use or do any other permitted activity.

If the terms of use are silent, the only logical conclusion is that persons of all ages can "use" the social networking web site, instant messaging, or chat room service; any other conclusion is ludicrous. Prof. Post's testimony was coherent on that point: if there is no restriction, there is no restriction. TT 270:13-272:2. That testimony makes sense.

Mr. Nigam's testimony made less sense. He first testified that the best way to view the terms of use is that they identify what is not allowed. TT 221:2-14. In other words, the terms of use contain the prohibitions. Relying on prosecutorial restraint apparently, he then seems to testify that if the terms of use do not prohibit persons under the age of 18, that service still does not "allow" persons under the age of 18 to access or use its service. TT 223:2-11. This is illogical and the proper analysis is really quite simple: if there is no age limit stated, then there is no age limit desired or imposed and all ages are "allowed" to use or access the social networking web site, instant messaging, or chat room service.

The Court inquired if a private entity can define the elements of a criminal statute. In Nebraska, a person commits criminal trespass if enters or remains on property and "is not licensed or privileged to do so" or he "does not have the consent of a person who has the right to give consent to be in or on the facility." Neb. Rev. Stat. § 28-520. In Oklahoma, it is unlawful to "willfully and without authorization, gain or attempt to gain access to a computer, computer system, computer network or any other property." Okla. Stat. § 21-1953. Whether a person has "authorization" would be determined by the owner of that computer, computer system, computer network or any other property. So in the sense that this might be trespassing, a private person can determine what is permitted and what is not. However, that would necessarily require the assistance of the person or entity that owned the system or property subject to the trespass. However, in a general sense, at least the element of "permission" as determined by a private person or entity is allowed.

In any event, Prof. Post summed this idea of any purported age limitation up by stating that, out of the vast array of social networking web sites, instant messaging systems, and chat room services (as more fully addressed below), the age limit has not restricted that universe in any meaningful way. TT 100:10-101:5.

3. As defined by the statute, social networking web sites, instant messaging systems, and chat room services cover most of the most common forms of communication.

Once we get past the quagmire of access versus use and age limits, we are next faced with the shockingly broad definitions of social networking web sites, instant messaging systems, and chat room services. We must look to Chapter 29 for these definitions. Each will be addressed in turn.

a. Social networking website: The term social networking web site is defined as follows:

> 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.

Neb. Rev. Stat. § 29-4001.01(13).

The scope of this definition is vast. Websites that permit a user to create a profile and input personal information, search, view or access that profile information, and facilitate some means of communication are "enormously (and increasingly) popular; though reliable estimates are impossible to obtain, [Prof. Post] estimate[s] that the number…[is in the] millions, if not hundreds of millions." Exhibit 304, p. 8. Many, if not most, commercial sites and blogs would also fall within the statutory functionalities. Id.

The first ambiguity of note within this definition is the scope of a "collection of websites." The interconnected nature of the Internet could render a collection of websites "colossally broad" enough to cover the entirety of the Internet. TT 95:6-96:7.

Assuming a "collection of websites" to be something short of the whole Internet, what is that construction? If the interpretation is that this means corporate ownership, then Blogger, Google, Google Plus, Gmail, Youtube are included within that collection of websites, and thus all are prohibited. TT 96:8-97:15. Even a narrow reading of this statute is very broad and includes a "vast array of sites." TT 97:12-13.

Prof. Post displays the ease with which one goes from one website to the next, exemplifying the problem with defining the extent of a "collection of websites" in Exhibit 304, pp. 9-14. At the hearing on December 23, 2009, the State admitted that it "concluded that there are aspects of [ESPN.com and YouTube]" websites that meet the definition of social networking website; apparently the same conclusion was reached for CNN. Filing 346-2, p. 28. Consequently, these popular sites would be off limits under the umbrella of a "collection of websites."

Another possibility is that a "collection of websites" is that material in the control of a website administrator, as was discussed during cross examination of Prof. Post. TT 127:16-128:23. The problem with this interpretation is that one network administrator can link directly to another file on the Internet, and place that link in the directory for the website. TT 136:17-139:7. The administrator has control to place a link on davidpost.com to another website, such as temple.edu. This is, again, part of the same collection of websites.

One extreme possibility is to strike that phrase altogether or interpret it to be a nullity. Even operating under a narrowed definition, "social networking web site" would statutorily include a great many commercial sites, as well as blogging sites. TT 97:16-99:8. The trajectory of the Internet is that this type of functionality will become the norm, as there has been an explosion in the proliferation of websites that rely on "user-generated content" which fall within the definition of a social networking website. Exhibit 304, p. 8. In short, this definition is very broad, and it will only get broader.

b. Instant messaging: The term instant messaging is 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(10).

There is a significant uncertainty surrounding the meanings of "direct" and "dedicated." Dedicated unambiguously means a dedicated line, just for that transmission of communication. This definition could be seen as an attempt to include the landline service only since it mediates communication through a physical piece of wire connecting two phones. Exhibit 304, p. 6. However, the landline service does not facilitate the transmission of text transmissions or computer file attachments. Notably, this reading would exclude communication over the Internet. TT 91:20-92:19; 123:11-124:11. In short, read this way the definition of instant messaging system covers no mediums of communication.

If a broadening construction is imposed and the definition is read a little more liberally, then "direct, dedicated and private" could be interpreted to mean just private (again, by striking language.) Under this tweaking, then all email, all texting and all Internet communication is included in this definition. TT 92:20-93:15. The statutory definition of email dovetails neatly. "Email means the exchange of electronic text messages and computer file attachments between computers or other electronic communication devices over a communications network, such as a local area computer network or the Internet." Neb. Rev. Stat. § 29-4001.01(7). The "enormous swath" of communication would include Gmail, Hotmail, Facebook, Yahoo Messenger, Wikipedia and Youtube, to name a few of the more readily identifiable. TT 93:16-94:17.

The term "virtually instantaneous" is also confusing and ambiguous. All messages travel at the same speed over the Internet, so the limitation to "virtually instantaneous" communication provides no real restriction. Exhibit 304, pp. 5-6. It could mean a tenth of a second, possibly four seconds, but likely not four minutes. TT 116:17-117:5. A search of all caselaw indicates that some cases have noted that electronic communication is "virtually instantaneous" but has not defined a set length of time in that context. Lexmark v. Static Control, 387 F.3d 522 (6th Cir. 2004); United States v. Elcom, Ltd., 203 F.Supp.2d 1111 (N.D.Cal., May 8, 2002); Organizacion JD v. U.S. Department of Justice, 1996 WL 162271 (E.D.N.Y., April 2, 1999); GFI Wisconsin v. Reedsburg Utility, 440 B.R. 791 (W.D.Wisc., November 12, 2010). In the context of knock-and-announce, the Tenth Circuit stated that a maximum of three (3) seconds was "virtually instantaneously." United States v. Moore, 91 F.3d 96, 98 (10th Cir. 1996).

Regular texting is also included. Pursuant to Neb. Rev. Stat. § 28-833(4), Enticement by electronic communication device, defines "electronic communication" device as "any device which, in its ordinary and intended use, transmits by electronic means writings, sounds, visual images, or data of any nature to another electronic communication device." As Sen. Lautenbaugh clarified that this crime "take[s] into account texting and whatnot." Exhibit 301, p. 4. So a cell phone is an electronic communication device. It sends and receives text. It is virtually instantaneous. And it may use the Internet or computer communication network.

Construing the term "instant messaging" poses a monumental problem of statutory construction. If it is read narrowly, although reasonably, then it includes nothing. If it is read more broadly by changing the meaning of a couple words, or if

some of the language is a nullity, then it includes virtually all forms of electronic communication using a computer of electronic communication device that utilizes the Internet.

c. Chat room system: The term chat room is defined as

> 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.

Neb. Rev. Stat. § 29-4001.01(3).

Applying this to the real world, this definition is broad, to put it mildly. This definition covers what are considered the conventional "chat rooms" where people congregate and communicate online. TT 85:14-86:3.

But a broad, although reasonable and perfectly plausible, reading of the definition also covers both the landline and cellular telephone service. Prof. Post testified that the cell service is a "communication network", "primarily designed for the instantaneous exchange", of "text or voice transmissions", "amongst electronic communication devices." This would include the regular SMS texting system. TT 84:7-16; 90:12-21. Of course, this would also include the mediums discussed below.

A more narrow reading of the statute requires inferring a comma after "space" and a comma after "network." This more narrow reading may exclude the phone system. TT 90:22-91:15. However, this narrower definition would still include email since it uses "server space on the Internet", "primarily designated for the virtually instantaneous exchange", of "email (text) transmissions or computer file attachments", "amongst two or more computers." The statutory definition of email also falls within a reasonable reading of a "chat room." TT 84:17-13; Neb. Rev. Stat. § 29-4001.01(7).

A blog is defined as "a web site contained on the Internet that is created, maintained, and updated in a log, journal, diary, or newsletter format by an individual, group of individuals, or corporate entity for the purpose of conveying information or opinions to Internet users who visit their web site." Neb. Rev. Stat. § 29-4001.01(2). All online communication is conveyed "virtually instantaneously," so a blog falls under this definition.

Reasonably construing the breadth of the statutory language, Amazon.com and "lots of commercial sites" would also be a statutory "chat room." It is a "web site" "on the Internet" "primarily designated for the virtually instantaneous exchange" of "text or computer file attachments" "amongst two or more computers." This is not uncommon, and there are virtually hundreds of thousands, if not millions, of similar commercial sites that would fall within this definition. TT 86:4-90:11; Exhibit 304, p. 4. This definition necessarily also includes VOIP, such as ViBar, since it is a "communication network" "primarily designated for the virtually instantaneous exchange of voice transmissions" "amongst two or more electronic communication device users." TT 143:4-13.

4. Construing Neb. Rev. Stat. § 28-322.05 as a whole, it would prohibit vast parts of both the Internet as well as everyday forms of communication.

Under even the most restrictive interpretation of Neb. Rev. Stat. § 28-322.05, the statute criminalizes a substantial amount of protected speech, both relatively and absolutely, and is therefore unconstitutionally overbroad. Once the statute is construed, the next step in an overbreadth challenge is to determine whether the statute criminalizes a substantial amount of protected speech. Williams, 553 U.S. at 297. The overbreadth must be "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id.; Ways, 274 F.3d at 518.

Under one reasonable reading of Neb. Rev. Stat. § 28-322.05, it prohibits the entire Internet, including its use for news gathering, debate, political discussion, buying and selling, use for locating and keeping employment, keeping in touch with family and friends, researching legal issues as well as any other conceivable use for the Internet. This prohibition is absolute, real and substantial. Admittedly, it would criminalize whatever is already criminal activity that could be perpetrated via the Internet, but that is slight when juxtaposed with the substantial amount of protected speech that it criminalizes.

Under a reasonable reading of Neb. Rev. Stat. § 28-322.05, it also prohibits all telephone conversations, whether landline, cell or VOIP. It prohibits all email, all texting, all conventional instant messaging services, all blogs and virtually all what we know to be electronic communication. This prohibition is absolute, real and substantial, and whatever criminal activity would be further prohibited is slight when compared to the fact that application of this statute would throw a person subject to it back to the communication dark ages. These are every-day forms of communication and mediums that we take for granted.

5. Neb. Rev. Stat. § 28-322.05 is not susceptible to a limiting instruction.

No limiting instruction can save this statute. It is simply not readily susceptible to such salvation. A "Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction. [A Court cannot] rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish [the Legislature's] incentive to draft a narrowly

tailored law in the first place." United States v. Stevens, 130 S. Ct. 1577, 1591-92 (2010).

a. Age limitation and "access" versus "use"

To eliminate the confusion and application that results from the word "access," this Court would first have to strike the troublesome language from Neb. Rev. Stat. § 28-322.05. Or interpret it to be a nullity.

Second, the Court would have to accept the State's and Mr. Nigam's position that the terms of use dictate whether the various social networking web sites, instant messaging systems, or chat room services allow use or access by someone under the age of 18. TT 54:23-55:3; 222:4-24. This is nowhere in the statute, but if accepted, it creates other perplexing issues.

There are at least two challenging scenarios here: a change in the terms of use from under 18 years of age to at least 18 years of age, and from at least 18 years of age to under 18 years old. Under the first scenario, a social networking web site, instant messaging system or chat room service changes its terms of use from permitting persons under 18 years of age to prohibiting those under 18 years old. In that case, the hypothetical person would conduct the simple two-step analysis, TT 54:6-55:3, promoted by the State to determine that the terms of use for the medium permit persons under 18 to use or access that medium. (This two-step analysis must, again, be imputed into the statute by the Court.) She would then know not to use it, and going forward, she would be required to monitor that social networking web site, instant messaging system or chat room service to check if the terms of use are modified to restrict the age limit to a permissible range. If and when that change is made, then she can use the service.

In the second scenario, a social networking web site, instant messaging system or chat room service changes its terms of use from prohibiting persons under 18 years of age to permitting those under 18 years old. In other words, use of the service goes from permitted to criminal. In those situations, there could be the potential to violate Neb. Rev. Stat. § 28-322.05 "intentionally and knowingly" if a person failed to check each and every time she used a covered medium. TT 269:24-270:12.

Another legitimate layer of ambiguity comes into play if the terms of use specifically state that the terms can change without notice. Some sites give active notice of at least "material" changes. See e.g. Exhibit 116, p. 11; Exhibit 124, p. 4; Exhibit 127, p. 9. Some sites explicitly state that the terms of use can change without active notification. In that scenario, a person who checked the terms of use when she signed up to check the age limitation, as the State argues she should, would also know that the terms of use can change without notice. See e.g. Exhibit 101, p. 5; Exhibit 102, p. 6; Exhibit 107, p. 5; Exhibit 109, p. 7; Exhibit 110, p. 3. For example, the terms for "Blogger" state that they can be changed "with or without notice at any time." Exhibit 136, p. 7. Prof. Post also testified that many times the terms of use change without notice. TT 269:24-270:9. If a person knows that the terms can change without active notification, she would be required to check the terms for changes each time she uses the service. A related question is what about a person who signs up for a social networking website, and then fails to check the terms for, say, five years? TT 375:20-23. Even if a person does not have to check each time a service is used, can a prosecutor argue that, simply due to the passage of half a decade, failure to check the terms of service is willful ignorance in this scenario? Maybe.

Here is the point: the age limit touted by Mr. Nigam as a "significant demarcation," Exhibit 305, p. 7, is, unfortunately, also a moving target. The State's interpretation "requires rewriting, not just reinterpretation." Stevens, 130 S. Ct. at 1592. This Court would have to strike language that the Legislature inserted, define the term "allows" to incorporate alien terms of use for each social networking web sites, instant messaging systems, or chat room services that now exists or will in the future. The Court was also have to accept that a layperson would have the knowledge of and ability to conduct the "two-step process" that even Mr. Nigam conceded was not in the statute. TT 236:3-8. The criminal code requires more certitude than that, and this is not permitted without intruding on the providence of the Legislature.

b. Definitions of social networking website, instant messaging and chat room

The definition of chat room, in order to mean something short of all electronic communication and phone usage, must be narrowed. Instant messaging must be broadened to mean something at all, while the definition of a social networking website has to be narrowed so that the entire Internet is not included. Given the need for inconsistent and significant "monkey-ing around" with the criminal code and its definitions, these cannot be susceptible to a limiting construction. Even with this re-tooling of the statute, the criminal Internet sites and communication means are immense

In Doe v. Jindal, the United States District Court for the Middle District of Louisiana struck down a similar, yet narrower, ban. In that case, the "Unlawful use or access of social media" crime prohibited a person convicted of certain sexual offenses against minors from using or accessing social networking websites, chat rooms, and peer-to-peer networks. Doe v. Jindal, 20012 WL 540100, p. 1 (M.D. La., Feb. 16, 2012). In

that case, the terms "chat room," "peer to peer" and "social networking website" were all more narrowly defined than under the Nebraska definitions. Notably, there was no mention of a "collection of websites," no prohibition against voice communication, and a general limitation to Internet websites. Id. at 1-2. Unlike under the Nebraska law, there was an exception if permission was sought and received from parole or the court. Id. at 1. While there was no attempted age limitation, the evidence shows that there is no meaningful age limitation under the Nebraska law, either.

> The Jindal Court construed the Act and determined that it would
>
> > impose a sweeping ban on many commonly read news and information websites, in addition to social networking websites such as MySpace and Facebook. Additionally, the Court construes the offense as completed once a user accesses the website—whether intentionally or by mistake….Therefore, those seeking to comply with the law face confusion as to which websites they are prohibited from accessing.

Doe v. Jindal, 2012 WL 540100, p. 5 (M.D.La., Feb. 16, 2012).

The Court found that the law was "not crafted precisely or narrowly enough-as is required by constitutional standards-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.

Recently, the Southern District of Indiana upheld a ban that appears to be similar in some respects to Neb. Rev. Stat. § 28-322.05, but much narrower in others. As argued in the pretrial briefs, this case should be disregarded by this Court. In Doe v. Prosecutor of Marion County, 2012 WL 2376141, the statute at issue was narrower in the sense that there is an exception to the application of the prohibition if certain criteria are met, which is not present in the Nebraska statute. Prosecutor of Marion County, 2012 WL 2376141, p. 3 (S.D.Ind., June 22, 2012). Unlike the Nebraska statute, the Indiana statute did not

include voice communications, and it explicitly excluded email and message boards. Id. at 3-4. It also did not cover a "collection of websites." Id.

The Plaintiffs stand by their assertion made in pretrial briefs that this case was not as thorough as it needed to be. The analysis failed to differentiate between "access" and "use," and in fact did not mention the manifest broadening of the statute that this engenders. Prosecutor of Marion County, 2012 WL 2376141. The Court focused its opinion almost exclusively to the websites Facebook and Twitter, and it failed to contemplate the prohibition's scope or its likely impact on other common forms of communication. Id. Further, the Plaintiff either did not raise or the Court failed to employ the overbreadth analysis, as is before this Court. The Indiana Court stated that "Mr. Doe is only precluded from using web sites where online predators have easy access to a nearly limitless pool of potential victims." Id. at 7.

This is simply not the case for Neb. Rev. Stat. § 28-322.05. As noted before, this statute applies to the most popularly used social websites, as well as those used for religious purposes, commerce, news, sports, etc. Further, it appears to encompass communication used as a requirement of employment. Exhibit 304, pp. 18-20. Therefore, the Indiana case is distinguishable.

Neb. Rev. Stat. § 28-322.05 criminalizes all social networking websites, instant messaging systems, and chat rooms, likely without regard to any age restriction. The evidence and testimony show that social networking websites, instant messaging systems, and chat rooms, include most, if not all, of the most common forms of communication and Internet sites, innocently used for every day living, socializing, information gathering, employment and commerce. Since the prohibition of protected speech is

substantial in both an absolute sense and relative to any legitimate application, the statute is constitutionally overbroad and should be struck down facially under the First Amendment and Article I, § 5 of the Nebraska Constitution.

B. Neb. Rev. Stat. § 28-322.05 violates the right to free speech under the United States and Nebraska Constitutions because it fails examination under any level of scrutiny.

Construed in any reasonable manner, Neb. Rev. Stat. § 28-322.05 encompasses all speech through social networking websites, chat rooms and instant messaging systems. A complete ban on all communication through these mediums fails to pass scrutiny, regardless of the level of examination employed. Therefore, Neb. Rev. Stat. § 28-322.05 should be struck down as an unconstitutional infringement on the right to free speech guaranteed under the United States and Nebraska Constitutions.

1. Neb. Rev. Stat. § 28-322.05 burdens political speech, but it fails to pass strict scrutiny analysis.

The prohibitions in Neb. Rev. Stat. § 28-322.05 encompasses all types and topics of speech, including political discourse and debate, through the use of the prohibited mediums. Exhibits 102, 122, 123, 124, 144-146. The Supreme Court has applied "exacting scrutiny" when examining a law that infringes on political speech. See McIntyre v. Ohio Elections Commission, 514 U.S. 334, 347 (1995). The Eighth Circuit has clarified that strict scrutiny analysis apples when political speech is curtailed, which means that the State must show that the law "advances a compelling state interest and is narrowly tailored to serve that interest." Republican Party of Minnesota v. White, 416 F.3d 738, 749 (8th Cir. 2005). The State has "a compelling interest in protecting the physical and psychological wellbeing of minors." Sable Communications v. FCC, 492

U.S. 115, 126 (1989). Plaintiffs do not and have not disputed that the State has this interest.

However, Plaintiffs do dispute that, under strict scrutiny, Neb. Rev. Stat. § 28-322.05 is narrowly tailored.

> [W]hether or not a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is (1) one that actually advances the state's interest (is necessary), (2) does not sweep too broadly (is not overinclusive), (3) does not leave significant influences bearing on the interest unregulated (is not underinclusive), and (4) could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative). In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as *precisely* tailored as possible.

Republican Party of Minnesota v. White, 416 F.3d 738, 751 (8th Cir. 2005) (internal citations omitted; numbers added for clarity).

Under the first White factor, Neb. Rev. Stat. § 28-322.05 does not advance the State's goals. The State, through Mr. Nigam, appears to concede that there is no harm from just viewing or reading a website. TT 219:10-12. Consequently, there can be no nexus between the stated goal (protecting children), and mere browsing of the Internet. That point is apparently conceded. There is also no evidence that communication between adults through a social networking websites, chat rooms and instant messaging systems exposes a child to a risk for harm. So that type of communication (adult to adult) does not further, in any way, the State's purported goal. This factor weighs against a finding that the law is narrowly tailored.

Under the second White factor, Plaintiffs stand on their previous argument that the statute is overbroad, as more fully developed in III(A) above. Therefore, this factor weighs against a finding that the law is narrowly tailored.

Under the third White factor, the criminal activity sought to be curtailed is not covered by Neb. Rev. Stat. § 28-322.05. "Chat rooms" are only websites and server space, but fails to include Internet Relay Chat or any of the cell chat functions within its definition. Exhibit 304, p. 5. Without treading that ground again, depending on the interpretation of "direct, dedicated, and private," the system may include only the landline phone system. Exhibit 304, p. 6. Even the definition of social networking website only includes those on the Internet, and does not include applications that run on other networks, such as the cell phone networks. Exhibit 304, p. 7. While it was somewhat confusing, Mr. Nigam agreed that texting application using the Internet is not included in the statute. TT 255:18-23. Given the gaping holes in these definitions, the prohibition appears to leave much to be desired while criminalizing the more conventional, everyday mediums. Again, this factor weighs against a finding that the statute is narrowly tailored.

Under the final White factor, other regulations could more surgically address the State's concerns. In fact, they already do. Neb. Rev. Stat. § 28-322.05 is clearly intended to prevent online predation, but criminal child enticement is already a crime pursuant to Neb. Rev. Stat. § 28-311, child enticement by means of an electronic communication device is a crime pursuant to Neb. Rev. Stat. § 28-320.02, and enticement by electronic communication device is a crime pursuant to Neb. Rev. Stat. § 28-833. The activity intended to be curtailed by Neb. Rev. Stat. § 28-322.05 applies to behavior that is already a crime, and therefore unnecessary.

Prof. Post testified that a narrower statute could address the State's interest. The Legislature could craft language that was more targeted to one-to-one communication

between registrants and minors. Or it could prohibit use or access of websites or services that are targeted specifically at minors. TT103:3-16. Alternatively, the State could prohibit websites that have minors as a certain percentage of their user demographic. TT104:5-12. These would all be less restrictive than the prohibition at issue here, and more targeted at the State's interest while not banning a person from movie sites and books sites and blogs and show sites and Wikipedia. TT 104:13-105:17. Alternatively, the State can employ a risk-assessment tool to determine who is a higher risk to commit these types of crimes; that is a policy decision.

In Ashcroft v. Free Speech Coalition, the government argued it had a compelling interest in protecting children from criminal acts that may result from pornography that appeared to include minors, noting the potential for crime; but the Supreme Court rejected that notion and stated that the "prospect of crime…by itself does not justify laws suppressing protected speech." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002). The Court also stated that "the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the right of free speech." Id. (internal citations omitted). This idea holds true even if there is no cure-fire means of shielding minors from receiving indecent material. Sable Communication v. FCC, 492 U.S. 115, 130-31 (1989).

All four White factors weigh against a finding that Neb. Rev. Stat. § 28-322.05 is narrowly tailored. Nor could it be as written. Other statutes have been struck down that foreclose one particular medium of speech or expression. "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a

common means of speaking, such measures can suppress too much speech." City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994). "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." Frisby v. Schults, 487 U.S. 474, 485 (1988). By eliminating not only a particular medium, but those most popularly used mediums used in everyday life for all types of communication, Neb. Rev. Stat. § 28-322.05 proscribes significant amounts of protected speech and is not adequately tailored.

2. Even under intermediate scrutiny, Neb. Rev. Stat. § 28-322.05 is not narrowly tailored and does not leave open ample alternative channels of communication.

If Neb. Rev. Stat. § 28-322.05 is construed as a "time, place or manner" regulation, or if intermediate scrutiny would otherwise apply, the statute still fails constitutional examination. A time, place, or manner regulation of speech is permitted only if the statute does not discriminate on the basis of the content of the speech, it is narrowly tailored to serve a significant governmental interest, and it leaves open ample alternative channels for communication of the information. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Phelps-Roper v. Nixon, 545 F.3d 685, 691 (8th Cir. 2008). While the Plaintiffs continue to agree that the State has a significant government interest, Neb. Rev. Stat. § 28-322.05 is not narrowly tailored to serve that interest, and it fails to leave open ample alternative channels.

"For a statute to be narrowly tailored, it must not burden substantially more speech than necessary to further the state's legitimate interests." Phelps-Roper, 545 F.3d at 692. As argued previously, the evidence shows just how all-encompassing the definitions are, and how this statute is overbroad. The evidence shows just how ineffective the purported age restriction is, or at the very least it shows its minimal

efficacy. See VI(A) and (B)(1) above. This statute burdens substantially more speech than just illegal speech between an adult and a minor; it criminalizes all speech through particular mediums, irrespective of the recipient. No need to re-hash the evidence.

Finally, Neb. Rev. Stat. § 28-322.05 does not leave adequate alternative channels of communication. First, the Supreme Court has noted "particular concern with laws that foreclose an entire medium of expression." City of Ladue, 512 U.S. at 55 (internal citations omitted). "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." Id.

Second, there are no comparable mediums in existence to social networking websites, instant messaging systems and chat rooms. The Eighth Circuit has noted that the Internet is "an important medium of communication, commerce and information gathering." United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005). So if the entire Internet is off limits, which is one plausible reading of the statute, then there are clearly no alternative channels through which to communicate. Assuming no practical age limit, a person subject to this crime would lose the ability to text, to use the phone of any kind, to email, to read online newspapers or blogs, certainly to post comments to many online news stories or blogs, participate in online communities, conduct commerce online using the most popular e-commerce sites, and losing the ability to participate in the 20 most popular online sites. Exhibit 304, p. 18-20; see VI(A).

Other federal courts have recognized the ubiquity of the Web and its public nature. See Snow v. DirecTV, Inc, 450 F.3d 1314 (11th Cir. 2006) (acknowledging the

"Web's ubiquitous and public nature"); Guinness World Records, Ltd. v. Doe, 662 F.Supp.2d 927 (N.D.Ill., October 20, 2009) (calling websites "ubiquitous"); DFSB Kollective Co. Ltd. v. Bourne, 2012 WL 2376209 (N.D.Cal. June 22, 2012) (noting that "it has become ubiquitous for businesses—large and small—to maintain Facebook or Twitter accounts for marketing purposes").

It is challenging to pigeon-hole the broad statutory definitions of a social networking websites, instant messaging or chat room into a "real world" (in other words, non-electronic communication) setting. Briefly stepping away from the statutory language for a moment, a statutory social networking website can be equated to the old town square. A person could see, he or she could be seen, and there was the ability to communicate with others in the square. People would congregate in the square for all types of purposes: engage in political debate, play checkers, gather information, trade their wares, drive in to town and attend the church on Sundays, gossip, or buy needed goods. The traditional town square consisted of parks, public streets or other rights of way, sidewalks, etc., as well as private businesses and government businesses.

This is analogous to this Court's decision in Olmer v. City of Lincoln and subsequent appeal. In that case, the City of Lincoln banned a person from engaging in "targeted picketing" which basically meant displaying a placard while on a sidewalk or right of way near a religious organization during specific times when people were entering or leaving the organization. Olmer v. City of Lincoln, 192 F.3d 1176, 1179 (8th Cir. 1999). All agreed that the City had the requisite interest to protect children from grotesque pictures, but the ban went too far by banning all types of expression, no matter what the content of that speech was, no matter if the expression was targeted at children

or adults, and without regard to whether the recipient wanted to receive the message being displayed. Id. at 1180. The Court, generously assuming a content-neutral ordinance, found that the ban was not narrowly tailored. Id. at 1182. The result would be the same if the Court concluded that a social networking website is analogous to a book club or biking club, or any other type of private congregation of people. TT 253:2-19. The statute is just not tailored to any degree whatsoever.

A non-electronic, "real world" analogy for a chat room would be anywhere or any medium where people can exchange information. This would include various forms of communication, such as giving a speech on the courthouse steps, sending a telegraph, talking in front of an audience, or attending class as a student. It could also include a tea party. TT 253:20-254:12. A non-electronic, "real world" analogy for an instant messaging service would be essentially the same as a chat room, anywhere or any medium where people can exchange information, with the requirement that the expression be of a private nature. This would now include a face-to-face conversation, TT 254:14-18, sending a letter via bicycle courier to a specific person, whispering a secret in someone's ear, or writing a note and setting it in front of the intended recipient. The "real world" applications for these terms include a vast universe.

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. The alternate forms of communication left are lesser used, and becoming more marginalized as time marches on. This banishes a person subject to its restrictions, and relegates them to living a life that is not "normal" by today's standards. Exhibit 304, p. 20.

Consequently, using any standard of scrutiny, Neb. Rev. Stat. § 28-322.05 should be struck down as an unconstitutional infringement on the right to speech guaranteed under the United States and Nebraska Constitutions.

C. As applied, Neb. Rev. Stat. §§ 28-322.05 is unconstitutional.

In addition to the facial invalidity, the challenged statutes would be unconstitutional under the circumstances in which the plaintiff has acted or proposes to act. Olmer, 23 F.Supp.2d at 1104. To keep the length of this Brief within reason, Plaintiffs argue that all who testified use texting, email, cell phones, landline phones, IP phones (VOIP), instant messaging, chat room, or the like for either legitimate business or personal purposes, or in many case both. If need be, the Plaintiffs can address each Doe and each medium in turn in their reply. Otherwise, the following will address only those unique aspects of each Doe's testimony.

1. Doe 17.

As an employee of his father's business, Doe 17 installs and maintains video conferencing systems. TT 285:1-287:15. These systems use the internet, they use server space, they operate virtually instantaneously, they transmit voice and computer files, and they use hardware in the form of a CPU or electronic communication device. TT 287:15-291:12. They are also private. TT 292:1-4. Therefore, when Doe 17 performs a diagnostic check on a video conferencing system he installs, he is using a statutory instant messaging system and a chat room. TT 291:16-25. He maintains his Cisco certification through that company's website, which is a statutory social networking website. TT 294:4-295:11. He also uses statutory chat rooms and instant messaging systems for his personal online training business. TT 297:15-299:16.

If Neb. Rev. Stat. § 28-322.05 is applied to Doe 17, his personal business would be shut-down, TT 304:5-21, and he would be relegated to fewer job duties than when on parole because he would be prevented from answering the phone. TT 303:2-10. Because of concerns with complying with this law, he has already self-censured himself online. TT 296:23-297:15; 306:6-307:12. He is frequently interfacing with law enforcement because he is required to update his Internet identifying information regularly. TT 308:18-309:13. His father, Doe F, testified that Doe 17 was integral to his small business. TT 326:2-327:22. The fact that Doe F incorporated the video conferencing business is irrelevant; the testimony of the effect of this law was clear. TT 335:3-15. If Neb. Rev. Stat. § 28-322.05 is applied to Doe 17, his father would have to terminate his employment, TT 330:6-9, and this father could not pass this business on to his son. TT 332:3-16.

2. Doe 35.

Doe 35 regularly texts his wife during the day, and occasionally his mother. Exhibit 211, 14:6-16. He maintains a Facebook account to keep up with old friends. Exhibit 211, 15:16-16:8. As-applied to him, Neb. Rev. Stat. § 28-322.05 would eliminate these mediums of communication with family and friends.

3. Doe 3

Doe 3 uses email and texting to keep up with his wife and children. 369:6-370:7. In addition, he is self-employed, running a business that sells and installs car audio/vide equipment and other vehicle accessories. TT 360:5-15. He has operated the business for almost two years. TT 368:20-21. He purchases inventory from online vendors, usually

through the use of email, and some of these vendors require creation of a profile. TT 310:16-361:6.

He conducts much of his business through car audio forums, including contacting new global clients. TT 362:19-362:9. For example, he uses DIYMA.com, which permits a person to create a profile, search and view another's profile, and permits some form of communication; it also allows more direct messaging functions between users. TT 362:15-363:3. This is a statutory social networking website, instant messaging and chat room. To the best of his knowledge, he signed up for these forums in 2007 or 2008, TT 375:20-23, and there is no age verification employed by these forums. TT 372:22-373:4.

Doe 3 uses these forums at least once per day as his primary source of technical data. TT 364:8-22. If he was banned from these forums, he would not be able to access the full range of technical information needed or consult with the car audio experts on those forums. TT 373:5-17. Basically, for the type of business he runs, the local market is not capable of sustaining his required client base. TT 363:4-13; 373:19-374:7. As he put it, the impact of Neb. Rev. Stat. § 28-322.05 would be fatal if it meant he were banned from the forums: "It would -- it would basically not allow me to -- to continue the business because there isn't [sic] enough, I guess, customers located in our area to support this business." TT 365:24-366:4.

4. 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. TT 379:10-380:4. He has operated his businesses since 2006 and 2008. TT 389:5-9. He uses text messaging and email to keep in touch with tour managers, his partners, his assistant and

to send out bids to potential clients; he also uses these for personal communication. TT 382:7-383:13.

As before, he has self-censured and not utilized social networking because it was "nerve-wracking with all this going on." TT 384:20-21. He is also concerned that the mere use of these mediums is criminal. TT 385:6-386:2. He testified that he needed these because he was losing ground, although these are common mediums in his industry. TT 384:2-385:5. He has abstained from setting up a Twitter account. TT 389:13-15. If Neb. Rev. Stat. § 28-322.05 prohibited email or texting, his business would be sunk because he would lose the necessary communications. TT 386:24-387:9.

5. Doe 18

Doe 18 has significant experience with both computer hardware and computer software. TT 390:20-392:9. He currently operates a computer consulting business, whereby he removes computer viruses, hardware and software upgrades and on-call support. TT 392:10-20. He communicates with clients via cell phone calls, texts or email, although they are translated from one medium to the next. TT 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 or transfer computer files. TT 394:2-395:1. He uses manufacture websites to obtain technical assistance, such as the websites for Lexmark, Dell or IBM. TT 396:25-397:5. All of the manufacturer websites permit some form of chat function, and he used the chat function on the Lexmark website to obtain technical data from a person of unknown age. TT 397:6-398:4.

Similar to Doe 3, he uses online forums, such as Bleeping Computers, to gain assistance with technical problems; it would likely be a statutory social networking website. TT 396:1-17. He too has self censured, and agreed that a computer consultant that is not present online is odd. TT 395:2-18; 402:19-403:20. If Neb. Rev. Stat. § 28-322.05 prohibited Doe 18 from using forums and manufacture websites, it would be difficult if not impossible to combat the virus or other in-depth problems with which he deals. TT 401:25-402:18. If he were unable to use a cell phone or text message, it would "significantly impact" his personal relationships. TT 404:17-405:1.

6. Doe 2

Doe 2 develops Internet-based applications for his employer company. TT 412:16-21. His employer has a company-specific social networking used by employees, presumably including interns under the age of 18 that the company also employs. TT 413:22-415:13; 441:6-15. He collaborates with other employees in New York and Wisconsin using this medium, TT 415:4-10, as well as some Internet-based phone, WebEx and GoToMeeting. TT 416:6-418:23. Doe 2 uses online forums, similar to those testified to by others. 420:11-423:9.

In addition to his employment, Doe 2 also runs a computer programming and consulting business. TT 423:15-20. He designs websites for companies, TT 423:23-425:10. He lives and dies by email and uses text messaging frequently from his consulting work. TT 425:11-22. He uses LogMeIn, Remote Desktop Protocol or a Cisco product to gain remote access to a client's computer. TT 426:16-427:5. If Neb. Rev. Stat. § 28-322.05 prohibited Doe 2 from using social networking, such as his company internal website, 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. TT 427:9-428:3. Finally, he testified at length about his personal use of, and desired personal use of, various forms of electronic communications. 431:21-433:22.

7. Doe 12

Doe 12 operates a specialized software development and computer consulting company for clients around the world. TT 489:10-13. Because he has clients in Europe, Asia and South America, he communicates via chat rooms and instant messaging it would be cost prohibitive otherwise. TT 490:23-491:9. He uses Skype on a daily basis, TT 491:7-9, which permits communication via typed text, voice over IP and video over IP. TT 491:21-6.

Doe 12 has authored technical books in his field, and as a result has an author page on Amazon. TT 496:15-498:6. Amazon allows a person to view his author website, allows him to view a profile page of another Amazon user, and permits some form of communication between these two profiles. TT 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. TT 500:2-501:4.

Doe 12 carried on an enlightening dialogue with the Court. He testified about the difficulty from a user's perspective to know what system or protocol on which that user is communicating. TT 536:14-537:17. He also candidly stated that for all intents and purposes, if Neb. Rev. Stat. § 28-322.05 were to go in to effect, his personal and professional life would end as he now knows it. TT 534:21-535:1.

Each of these Does is faced with banishment from, at the least, common means of electronic communication to, at the most, a complete Internet ban. Even assuming

enforcement of a pared down Neb. Rev. Stat. § 28-322.05, these Does would be detrimentally impacted in their personal and professional lives. It will abridge their freedom of speech, and relegate them to lesser-used and obscure portions of the Internet. Consequently, Neb. Rev. Stat. § 28-322.05 is unconstitutional as it is applied to each of them, and facially under the mitigated test for First Amendment challenges.

V. Neb. Rev. Stat. §§ 29-4006(1)(k) and (s) violate the right to free speech under the United States and Nebraska Constitutions.

The personal Internet information collected under Neb. Rev. Stat. § 29-4006(1)(k) and (s), and the dissemination of that Internet information, constitutes another unconstitutional intrusion on speech. These subsections compel disclosure of a person's online identities, usernames, account passwords, websites that an individual visits, and information identifying the communication devices used by the individual. This personal Internet information, operating in tandem with Neb. Rev. Stat. § 29-4009(1)(e) and 272 NAC 013.01, permits law enforcement to monitor an person's online speech in violation of the right to free speech under the United States and Nebraska Constitutions.

An individual has the right to speak anonymously, particularly with respect to political speech, speech critical of government officials, or speech from a politically unpopular or marginalized group. See McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995). "[A]nonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible….Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." Id. at 341. "Anonymity

thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent." Id. at 342.

Nebraska requires all registrants to disclose information regarding that person's internet identifiers.

> 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;
>
> (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.

Neb. Rev. Stat. § 29-4006(1)(k) and (s). The State concedes that the reporting of both "global unique identifiers" and "Internet protocol addresses" is unconstitutionally overbroad and unduly burdensome. Filing 492, p. 2; TT 6:23-7:13. The following analysis and argument will exclude those terms.

The definitions for some of the information required to be registered are located in Neb. Rev. Stat. § 29-4001.01.

> Chat room identifiers means the username, password, symbol, image, or series of symbols, letters, numbers, or text characters used by a chat room participant to identify himself or herself in a chat room or to identify the source of any content transmitted from a computer or electronic communication device to the web site or server space upon which the chat room is dedicated.

Neb. Rev. Stat. § 29-4001.01(4).

> Email address means the string of letters, numbers, and symbols used to specify the source or destination of an email message that is transmitted over a communication network.

Neb. Rev. Stat. § 29-4001.01(8).

> Instant messaging identifiers means the username, password, symbol, image, or series of symbols, letters, numbers, images, or text characters used by an instant messaging user to identify their presence to other instant messaging users or the source of any content sent from their computer or electronic communication device to another instant messaging user.

Neb. Rev. Stat. § 29-4001.01(11).

> Domain name means a series of text-based symbols, letters, numbers, or text characters used to provide recognizable names to numerically addressed Internet resources that are registered by the Internet Corporation for Assigned Names and Numbers;

Neb. Rev. Stat. § 29-4001.01(6).

> Blog means a web site contained on the Internet that is created, maintained, and updated in a log, journal, diary, or newsletter format by an individual, group of individuals, or corporate entity for the purpose of conveying information or opinions to Internet users who visit their web site.

Neb. Rev. Stat. § 29-4001.01(2).

The State Patrol is then permitted to disclose this personal Internet information to state law enforcement, federal law enforcement and the public.

> Information obtained under the Sex Offender Registration Act shall <u>not</u> be confidential, except that the following information shall only be disclosed to law enforcement agencies, including federal or state probation or parole agencies, if appropriate: A sex offender's email addresses, instant messaging identifiers, chat room identifiers, global unique identifiers, and other Internet communication identifiers.

Neb. Rev. Stat. § 29-4009(1)(e).

> Information shall be disclosed to law enforcement agencies for law enforcement purposes. Registration information disclosed for law enforcement purposes shall be treated as confidential by law enforcement agencies and shall not be considered public record information.

272 NAC 013.01.

> Information obtained under the Sex Offender Registration Act that IS confidential and shall only be released upon written request to law enforcement agencies, including federal or state probation or parole agencies, if appropriate, are a sex offenders social security number, references to arrests of a sex offender not resulting in a conviction, travel or immigration document information, remote communication device identifiers and addresses, e-mail addresses , instant messaging identifiers, and other Internet communication identifiers, telephone numbers, motor vehicle operator's license information or state identification card number, the name of any employer.

272 NAC 013.06.

> The Nebraska State Patrol, any law enforcement agency, and any probation or parole officer may release relevant information that is necessary to protect the public concerning a specific person required to register, except that the identity of a victim shall not be released.

272 NAC 013.04.

In Doe v. Shurtleff, the United States District Court for the District of Utah issued an injunction under the First Amendment prohibiting the collection and dissemination of personal Internet information, similar to the dissemination and collection under Neb. Rev. Stat. §§ 29-4006(1)(k) and (s), and 29-4009(1)(e). In that case, the Utah registry require a person to provide Internet identifiers and the addresses used in Internet communications or postings, associated passwords, and the name and Internet address of all websites to which the person registered using an online identifier, including username and password. Doe v. Shurtleff I, 2008 WL 4427594, p. 1 (D. Utah Sept. 25, 2008) (vacated by Doe v. Shurtleff II, 2009 WL 2601458 (D. Utah Aug. 20, 2009)). This included all email, chat, instant messenger, social networking or similar identifier. Id.

With regard to dissemination and control of that information, the Utah registry contained no restriction that prohibited law enforcement from

> tracking and linking protected anonymous internet speech to a registrant if [law enforcement] decides to do so. Nor does the Registry Statute contain any prohibition on [law enforcement] disseminating registrant's internet information outside the [law enforcement agency], raising the real possibility that the information could become public knowledge. Finally, even if the only time that [law enforcement] provides a registrant's internet information to [other] law enforcement is in response to a request for investigative purposes, there is no limitation on how law enforcement officials may use the information once they have it.

Shurtleff I, 2008 WL 4427594, p. 4 (D. Utah Sept. 25, 2008).

The Shurtleff I Court noted that courts protect anonymous online speech under the First Amendment, and applied "exacting scrutiny" to these statutes. Id. at 5-7. While there was a compelling government interest in protecting children, the statutes were not the least restrictive means to achieve these ends. Id. at 8. Specifically, the Court found that there was no limit on how law enforcement could use or disseminate the plaintiff's Internet information, so the statutes implicated both "protected and criminal activity alike." Id. at 8. Consequently, the Court held that the registry provisions on its face were unconstitutional as applied to the plaintiff. Id. at 9.

Subsequently, the Utah registry was amended to explicitly exempt passwords and to limit the disclosure of a person's Internet information to other assist in the investigation of sex-related crimes. Doe v. Shurtleff II, 2009 WL 2601458, p. 2 (D.Utah 2009). Further, once the Internet information was disclosed, that information was private with the exception that the Internet information could be disclosed to the subject of the record, the designee of the subject, or by court order or legislative subpoena. Id. In other

words, dissemination of the Internet information was strictly controlled for limited purpose and to limited entities.

On rehearing, the District Court for Utah found that the modified registry could not by used to simply monitor a person's Internet usage; rather a person's "anonymity…can only be lifted to investigate an Internet sex crime." Doe v. Shurtleff II, 2009 WL 2601458, p. 4 (D.Utah 2009). Therefore, the information collected and limited dissemination procedure did not implicate core political speech, the chilling effect was necessarily diminished, and the registry complied with constitutional minimums. Id.

In White v. Baker, the United States District Court for the Northern District of Georgia enjoined collection of registration information relating to internet identifiers, akin to the information collected by Nebraska and in Shurtleff I. Georgia required sex offenders to disclose e-mail addresses, usernames, and user passwords. White v. Baker, 696 F.Supp.2d 1289, 1295 (N.D.Ga. March 3, 2010). This information was generally private, but it could be disclosed under any of three scenarios: to law enforcement agencies for law enforcement purposes, to government agencies conducting confidential background checks, or to protect the public concerning sexual offenders. Id. at 1294-95.

The White court, applying strict scrutiny, held the scheme unconstitutional under the First Amendment. White first reviewed the information to be disclosed, and found that there was little connection to the protection of children and the public posting of messages on blogs and the like. Most communication that harms minors "are those that occur privately in direct email transmissions, usually using a pseudonym, and in instant messages. They generally do not occur in communications that are posted publicly on sites dedicated to discussion of public, political, and social issues." White, 696 F.Supp.2d

at 1310. In other words, the reporting of passwords and public identifiers was not "related to the internet communication means used by predators to communicate with children." Id.

In addition, the permitted disclosure of registration information was too broad. Disclosure for "law enforcement purposes" was not clearly defined, and could be used to monitor "targeted internet sites, blogs, or chat rooms to review what registrants are saying in their communications on those internet locations. Using Plaintiff's Internet Identifiers in this way would disclose protected speech he chose to engage in anonymously and thus would chill his right to engage in protected anonymous free speech." White, 696 F.Supp.2d at 1310. Disclosure of internet information to the community to protect the public was not narrowly tailored. The court noted that while the public might identify some communication intended to harm children, it would also necessarily require the unconstitutional monitoring of protected speech. White, 696 F.Supp.2d at 1310-11.

Nebraska collects personally identifiable Internet information just as in White and Shurtleff I. Under Neb. Rev. Stat. § 29-4006, a registrant is required to disclose email addresses, instant messaging identifiers, chat room identifiers and other Internet communication identifiers. This includes the username and passwords used for a chat room or instant messaging service. Neb. Rev. Stat. §§ 29-4006(s) and 29-4001.01. The first elephant in the room is: "Why does law enforcement need a password?" Answer: to log in to a person's account.

But beyond either White or Shurtleff I, Nebraska also requires a person to report all websites to which she has "uploaded any content or posted any messages or

information." Neb. Rev. Stat. § 29-4006(1)(s). This unambiguously includes all websites that a person leaves a comment or displays a message, regardless of the recipients or topic of the message. Prof. Post testified that this would also include websites to which a person consciously uploads photos. TT 108:11-19. But this could also include the transmission of less obvious information. For example, a website may request a "cookie" file, which is a file that indicates other websites that person or computer visits. TT 108:20-110:10. The State acknowledged this phenomenon at the preliminary injunction hearing with the acknowledgment that the State was going to "track and monitor where they go in the virtual world." Filing 346-2, pp. 82-83. The requirement to report websites visited is unique to Nebraska and goes well beyond either White or Shurtleff I.

As in White, the Internet information disclosed under Nebraska law is not narrowly tailored. Nebraska requires a person to disclose the websites where a person posts "publically on sites dedicated to discussion of public, political, and social issues." White, 696 F.Supp.2d at 1310. Nebraska also requires disclosure of usernames and passwords associated with these public forums, as well as those usernames and passwords associated with "personal commercial transactions with retail companies and banking institutions." Id. Under the reasoning of White, information about publically displayed content and everyday transactions is not tailored to that communication Neb. Rev. Stat. § 29-4006(k) and (s) intends to prevent.

This presents the second elephant in the room: "Why does law enforcement need all online identifiers and websites to which comments are posted (at the very least)?" Answer: for "monitoring targeted internet sites, blogs, or chat rooms to review what registrants are saying in their communications on those internet locations." White, 696

F.Supp.2d at 1310. In fact, the State acknowledged that it wants law enforcement to use the registry information to monitor a person's internet usage; it wants law enforcement to know where registrants are posting information in order to monitor them. TT 21:13-23:1; 49:24-52:12.

The disclosure of this Internet information is also similar to White and Shurtleff I. Nebraska does not limit the disclosure of Internet information to law enforcement for the investigation of any sex-related crime as in Shurtleff II, but rather for any "law enforcement purpose" which White found to be too broad. Similarly, the Nebraska State Patrol, law enforcement agencies, and any probation or parole officer can release "relevant information" under 272 NAC 013.04. Presumably, this includes Internet identifying information, similar to the White case. Therefore, the Nebraska disclosure provisions are also not narrowly tailored.

The testimony at trial elicited the Does' parallel concerns raised in White and Shurtleff I. Doe 18 testified that he was concerned about the dissemination of his Internet identifiers to clients. TT 405:2-13. Doe 2 testified that reporting the Internet information was a "huge concern" of his. 433:23-434:1. He was concerned about the dissemination of his identity to potential clients. TT 435:10-436:2. He is also worried about law enforcement using the Internet identifiers to see what he is doing. TT 436:3-12. He experienced this concern first-hand when law enforcement commented on his involvement in the reformation of sex offender laws; he is also concerned about non-law enforcement harassment. TT 439:4-440:20. Doe 12 testified that he did not weigh in on a blog discussion about this very lawsuit because he knew that he would have to report to law enforcement, which may subject him to additional scrutiny. TT 517:8-520:6.

In other words, the fear raised by the White court, that this information would be used by law enforcement to monitor protected speech, is candidly the intended use in Nebraska. This is regardless of the topic of conversation being monitored or the mediums used, so as in White and Shurtleff I, Neb. Rev. Stat. § 29-4006(k) and (s), and the corresponding disclosure statute and regulation, are not narrowly tailored and facially unconstitutional.

VI. Neb. Rev. Stat. § 29-4006(2) violates the Fourth Amendment to the United States Constitution, and the Nebraska counterpart, as applied to Doe 24.

The search and monitoring provision in Neb. Rev. Stat. § 29-4006(2) are unconstitutional as it relates to Doe 24 and those similarly situated. The United States and Nebraska Constitutions guarantee "[t]he right of the people to be secure…against unreasonable searches and seizures." U.S. Const. amend. IV; Neb. Const. art. 1, § 7. 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, 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.

This Court determined that the coerced consent found in Neb. Rev. Stat. § 29-4006(2) was invalid. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Esquivel, 507 F.3d 1154, 1159 (8th Cir. 2007). Therefore, an individual's consent cannot be the basis to uphold this provision as a constitutional warrantless search.

During opening argument, the Court and counsel discussed the case of Samson v. California. In Samson, a California statute stated that a parolee is "subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause." Cal. Penal Code § 3067(3) (emphasis added). Based on that statute alone, the Samson Court found that a warrantless, suspicionless search was reasonable because that term had been "clearly expressed to [the plaintiff]. He signed an order submitting to the condition and thus was 'unambiguously' aware of it. Samson v. California, 547 U.S. 843, 852 (2006).

But Samson is legitimately distinguishable. In United States v. Freeman, a parolee "signed a Conditions of Post Release Supervision agreement, which read: 'I agree to subject [sic] to a search by parole officer(s) of my person, residence, and any other person under my control.'" United States v. Freeman, 479 F.3d 743, 744-45 (10th Cir. 2007) (emphasis added). A non-parole officer discovered contraband during a warrantless, suspicionless search of Freeman's residence without consent and contrary to the terms of parole and Kansas parolee search policy. Id. at 745-46.

The Tenth Circuit discussed two warrant exceptions for parolees: First, under the "special needs" exception, "it is constitutionally reasonable for a parole officer to search parolees in compliance with a parole agreement search provision, but without a warrant. [I]n many cases, the police may ... search a probationer's premises without a warrant at the behest of the parole officer." Freeman, 479 F.3d at 746. Second, "searches performed in compliance with a valid parole agreement search provision may be constitutional even if they were not conducted by a probation officer monitoring whether the probationer is complying with probation restrictions." Id. at 746-47.

Under these exceptions, the Court found this to be an unreasonable search of the parolee's home. First, the search was conducted by ordinary law enforcement agents so the search was not justified under the "special needs" rationale. Freeman, 479 F.3d at 748. Second, the search of the parolee's residence did not comply with the terms of his parole agreement or with the state's parolee search policy. Id. Therefore, when non-parole officers conducted a search contrary to state's parolee search policy, "the search exceeded reasonable expectations in two respects." Id.

Neb. Rev. Stat. § 29-4006(2) does not provide for parole officers to conduct the search or monitoring, so the "special needs" exception does not apply. And just as in Freeman, the terms of Doe 24's parole do not sanction the search or monitoring of computer devices or electronic communication devices by general law enforcement. In fact, the "Search and Seizure" provision on the first page explicitly limits the performance of these searches to Doe 24's "parole officer and/or personnel of Parole Administration." Exhibit 210, p. 1. The "Notification of Registration Responsibilities" does not mandate consent to search and monitoring by parole or other law enforcement. Exhibit 201, pp. 3-4. Only paragraphs 10, 12 and 13 of the NDCS Adult Parole Administration - Special Conditions of Parole for Sex Offenders are marked. Exhibit 201, pp. 5-7. Finally, the House Parole Conditions do not speak to additional searches or monitoring. Exhibit 201, p. 8.

Does 24 confirmed that he was not subject to paragraphs 6, 7 or 8 of the Special Conditions of Parole for Sex Offenders. TT 454:8-14. Specifically, paragraph 8 states that

> You will consent to unannounced examination (search) of any and all computer(s) and/or devices to which you have access to. This consent to

> examine includes access to all data and/or images stored on any storage media (including but not limited to cell phones, iPods, PDA's, removable media, thumb drives, camera cards, game consoles, CDs, DVDs) whether installed within a device or removable and separate from the actual device.

Exhibit 210, p. 6, ¶ 8. Although parole could search Doe 24, that search has not been conducted. TT 486:17-20.

Had paragraph 8 been applicable to Doe 24, his expectation of privacy might be reduced as to non-parole law enforcement officers, as well as reduced for those enumerated computers and electronic devices. However, it is not applicable; consequently, Doe 24's expectation of privacy to be free from searches of his computers and other electronic devices is greater than other persons who are subject to these added restrictions. The holding of Freeman, and not Samson, is on-point, and Neb. Rev. Stat. § 29-4006(2) is unconstitutional as it is applied to Doe 24 and those similarly situated.

VII. Both independently and collectively, Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) were intended to be punitive, and their effects are punitive, facially and as applied, in violation of the United States and Nebraska Constitutions.

Both the intent and effects of Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2), when analyzed both discretely and collectively, are punitive. The United States and Nebraska Constitutions forbid *ex post facto* laws. U.S. Const. Art. I, § 10; Neb. Const. art. 1, § 16. To determine whether a statutory scheme at issue is punitive, courts first determine whether the Legislature intended the statute to be punishment. United States v. May, 535 F.3d 912, 920 (8th Cir. 2005) (citing Smith v. Doe, 538 U.S. 84 (2003)). If the intent was punitive, the statutory scheme violates the *ex post facto* clause and the inquiry ends. Id. at 919. Even if the intent is civil, courts look further to

determine whether, by the clearest proof, the statutory scheme is so punitive that it negates the Legislature's civil intent. Id. Courts examine certain enumerated factors, as more fully discussed below. In this case, the intent of these laws was to punish persons convicted of prior registrable offenses, or, in the alternative, the effect of these laws goes beyond a typical criminal sentence for a registrable offense. Consequently, the Court should hold that these laws constitute unconstitutional *ex post facto* legislation.

A. Both independently and collectively, Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) were intended to be punitive.

The evidence presented at trial established a punitive intent. When examining the legislative intent, courts look at both the (1) express and (2) implied actions of the legislature to determine whether the scheme was intended to constitute punishment. United States v. May, 535 F.3d 912, 920 (8th Cir. 2005) (internal citations omitted). The formal attributes of a legislative enactment, such as the manner of its codification and the enforcement procedures that it establishes, are probative of legislative intent. Smith v. Doe, 538 U.S. 84, 94 (2003).

As part of the Attorney General's 2009 legislative agenda, the AGO brought LB 97 to Sen. Lautenbaugh. Exhibit 156; Exhibit 301, p. 31. The AGO was the principal drafter and editor-in-chief of LB 97. Exhibits 169, 170, 172, 173, 175, 176, 182, 198 and 199; see also Filing 346, p. 12. Mr. O'Brien was the principal architect and consultant. Id. Back in December 2008, he indicated that he "would like to prevent [persons with prior sex offenses] from using the internet altogether, that would be unconstitutional." Exhibit 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." Exhibit 301, p. 2. During the Judiciary Committee session on March 11, 2009, Sen. 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.

Exhibit 301, p. 4-5. And he later re-emphasized his lack of legislative perspective.

> And as I indicated before, I have to confess to a certain revulsion, and I don't think it 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.

Id.

As to Neb. Rev. Stat. § 28-322.05, members of the Committee understood that it would violate the First Amendment to prohibit participation in "interactive chat rooms." When discussing LB 15, Sen. White stated that he "considered the possibility of making it illegal for sex offenders to contact on interactive chat rooms, things like that, but it was my concern that that would violate the First Amendment and threaten the bill." Exhibit 301, p. 6. He also stated that registering computer identifiers "doesn't restrict [a registrant] from going on any site or restrict that they can say or who they can talk to which does at least implicate the constitution." Id. at 17. Although these were about LB 15, the Committee was considering both LB's at the same time. Id. at 18. These comments were openly stated, so clearly the constitutional implications of a ban on social

networking, chat rooms and instant messaging systems were known when this legislation was considered.

As to the search and monitor provision in Neb. Rev. Stat. § 29-4006(2), the question as to its constitutionality was raised at this same Committee meeting by the ACLU. Exhibit 301, p. 14. The Indiana Doe case was specifically identified, although it appears that the person testifying believed it to be still pending in 2009. Id. Even Sen. Lautenbaugh, who is clearly no ally to persons on the registry, acknowledged his belief that the search and monitor provisions were unconstitutional. "I do believe some of the concerns that were raised here regarding the ongoing nature of these restrictions and restrictions from access to computers, I don't believe we have a constitutional right to computer access." Id at 15. Yet, even with the constitutional deficiencies identified, the abridgment of speech and search and monitoring provisions were passed out of Committee unanimously. Id. at 20.

The unsettling comments continued before the Unicameral session on April 22, 2009. Sen. Haar rightly identified that the search and monitoring provision would, and Sen. Lautenbaugh agreed, open up a bank computer to search by a person subject to the grip of Neb. Rev. Stat. § 29-4006(2). Exhibit 301, p. 35. Sen. Lautenbaugh responded by admitting that "some of the provisions in here do seem harsh and restrictive and that's really the point." Id. "[W]e do want to limit and track what they're using the Internet for to avoid a repeat offense." Id. Again, this was the "Big Brother" concern raised by the White court coming true. Telling comments were made that the intent of the law was to strip away the anonymity on the Internet, implicating core political speech as in McIntyre. Exhibit 301, p. 45.

At this session on April 22, 2009, Sen. Lautenbaugh again identified his lack of perspective, this time before the Legislature as a whole.

> 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.

Exhibit 301, p. 47. The harsh provisions and the restrictive provisions referenced by Sen. Lautenbaugh indicate a punitive intent, and they were discussed openly to the entire Legislative body. Therefore, these comments were not "individualized quotes" or "isolated comments plucked from the legislative debate" as this Court has noted in its order for summary judgment. Notwithstanding the knowledge of the unconstitutionality of Neb. Rev. Stat. § 29-4006(2) or the First Amendment deficiencies, LB 97 and its amendments ultimately advanced through the Legislature without a dissenting vote. Exhibit 301, pp. 46-47, 52, 53, 60 and 61.

Even statements related to LB 285, which was purported to bring Nebraska into compliance with AWA and appears to be a more "rote" adoption of the federal miniimums, also show the punitive intent. Sen. Harms stated: "I struggle a little bit with this on the basis that I have no tolerance for it, absolutely none. And if it was up to me, people who commit these kinds of crimes, I'd take the key and throw it away." Exhibit 302, p. 40.

There was just a general lack of objectivity of perspective that should have been present in the Unicameral's process when dealing with the sex offender registration. LB 97 and 285 were two separate bills, but both had vitriolic statements connected to them

because of the focus of the legislation: sexual offenders. Since these bills shared a common topic, the comparable comments show the malicious intent.

Further evidence shows the indicia of punishment. The Legislature went far beyond minimum compliance with SORNA. Federal SORNA requires a person disclose her internet identifiers and addresses, such as email address and instant messaging identifiers. Exhibit 303, p. 29; Neb. Rev. Stat. § 29-4006(1)(k) and (s) go so far beyond that requirement that it offends the First Amendment. Nowhere in Exhibit 303 is there a requirement that a person be prohibited from social networking, instant messaging or chat rooms to such a degree that she would be unable to use the Internet or obtain gainful employment. In fact, federal SORNA logically contemplates the opposite, that usage of instant messaging systems would be allowable, because it explicitly requires disclosure of that identifier. Exhibit 303, p. 29. Finally, nowhere in Exhibit 303 does federal SORNA coerce a person into giving consent to search and monitoring of her computers and electronic communication devices within their homes, places of employment, and schools. That idea was purely a Nebraska animal. If the intent was mere compliance with a civil regulatory scheme, these oppressive provisions would not be included.

Finally, there is evidence that, at the very least, no consideration was given to the constitutionality of Neb. Rev. Stat. § 29-4006(2) by the office charged to uphold the law. As noted above, the AGO was the principal drafter and editor-in-chief of LB 97. Exhibits 169, 170, 172, 173, 175, 176 and 182. Mr. O'Brien of the AGO was the principal architect and consultant for the legislative language and editing. Id. While the Plaintiffs have no doubt that the State lacked actual knowledge that another federal court had held a comparable search and monitoring provision unconstitutional, Filing 346-1, p. 12, he was

present at the Judicial Committee meeting and testified on March 11, 2009. Exhibit 301, p. 7. The Indiana Doe decision was rendered prior to that date, so the AGO had constructive knowledge of that holding prior to or as of March 11, 2009. Setting aside constructive notice, the AGO had actual notice that the search and monitoring provision was likely unconstitutional no later than April 28, 2009. Exhibit 301, p. 31. LB 97 was not passed until May 2009, so either the AGO advised the Legislature of the constitutional defect or intentionally failed to advise the Legislature. Even a State employee, when providing training on the changes to the registry, cast doubt on the constitutionality of this provision and was unsure how it would be applied or operate in practice. Exhibits 154 and 155.

In any event, the AGO continued to promote the search and monitoring after learning of the defect. In May 2009, after actual knowledge of the Indiana Doe case, the AG authored a memorandum and circulated it to Nebraska Law Enforcement and County Attorneys. Exhibit 190 and 191. It states that a person providing computer information "must sign a consent form which authorizes the search of the computers and electronic communication devices…[and] installation of hardware or software to monitor their internet usage." Exhibit 190, p. 6; Exhibit 191, p. 5. This memo fails to mention that this provision is dubious, at best.

It may be that these were too close in time from realization to dissemination to amend. But a later memo dated June 4, 2009, touts the AGO's legislative package including the same language about the search and monitoring. Exhibit 192, p. 6. An even later memo dated October 15, 2009, that that a person registering Internet identifiers "will sign a consent form which authorizes the search of the computers and electronic

communication…[and] authorize the installation of hardware or software to monitor internet usage." Exhibit 193, p. 15.

One more bit on this point: the Court noted at trial that Mr. Cookson appeared at the preliminary injunction hearing and "fell on the sword" by acknowledging the unconstitutionality of the search provision. While this is true, he advocated for this Court to enforce the "monitoring and surveillance" portion of that statute as it related to all registrants, both those still serving a criminal sentence and those not. Filing 346-2, p 19-26. So while the State may claim it innocently backed off enforcement of the search, a punitive intent was shown by its attempt to enforce the monitoring of a person's computer and electronic communication devices. Attempting to knowingly violating the Fourth Amendment rights of all registrants shows a punitive intent.

Taken together, the numerous comments, the additional reporting requirements above-and-beyond the federal requirements, the abrogation of the First Amendment, the intrusive searches and constant monitoring, and the general disregard for the constitution, the evidence shows the Legislature intended to punish sex offenders. Consequently, the Court should strike down these sections as unconstitutional *ex post facto* legislation.

B. Both independently and collectively, the effects of Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) are punitive.

As the Court noted at trial, the legal test is stacked against a plaintiff attempting to show that a legislative body's intent was punitive, but Plaintiffs have presented considerable evidence on this point. Assuming that it is insufficient, "the Court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." Smith v. Doe, 538 U.S. 84, 92 (2003). The caselaw factors to be considered when determining an act's punitive effect are: (1)

whether the sanction has historically been regarded as punishment; (2) whether the sanction imposes an affirmative disability or restraint; (3) whether the sanction promotes the traditional aims of punishment; (4) whether the sanction has a rational connection to a nonpunitive purpose; and (5) whether the sanction appears excessive in relation to that nonpunitive purpose. Id. at 97; Doe v. Miller, 405 F.3d 700, 719 (8th Cir. 2005). The Supreme Court has also looked to (6) whether the sanction comes into play only on a finding of scienter, and (7) whether the behavior to which the sanction applies is already a crime. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Based on these factors, the effects of Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) are punitive in either purpose or effect, both individually and when married together, so as to negate the State's non-punitive, civil intention.

1. Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) are analogous to historical forms of punishment.

These "civil" statutes go far beyond those restrictions that a court could impose in the context of a criminal sentence in the form of supervised release. Persons on supervised release can be subjected to certain terms and restrictions that limit their privacy and freedoms. However, even these terms are not without limitation, and terms less restrictive than those contained in these statutes have been overturned. As a result, this factor weighs toward a punitive effect.

Generally, a district court has

> wide discretion to impose conditions of supervised release so long as they are "reasonably related" to (1) the nature and circumstances of the offense; (2) the defendant's history and characteristics; (3) the deterrence of criminal conduct; (4) the protection of the public from further crimes of the defendant; and (5) the defendant's educational, vocational, medicinal, or other correctional needs. In addition, the conditions must not involve a greater deprivation of liberty than is reasonably necessary to achieve such

> purposes, and must be consistent with the Sentencing Commission's policy statements.

United States v. Muhlenbruch, 682 F.3d 1096, 1102-03 (8th Cir. 2012).

However, "district courts may not impose special conditions categorically on all individuals convicted of certain offenses, but a lack of individualized findings does not require reversal if we can discern from the record the basis for the court's imposition of the condition." Id. at 1103 (emphasis added). That one-size-fits-all, conviction-based model prohibited in the context of supervised release is exactly at issue here.

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

For all numbered Doe Plaintiffs, the loss of the ability to speak anonymously online and mandatory disclosure to permit law enforcement monitoring of online activity are analogous to terms of supervised release. The Plaintiffs adopt, without re-stating, the arguments in Section V above, addressing the consequential abridgment of the freedom of speech under the United States and Nebraska Constitutions.

Law enforcement intends to use the internet identifiers and websites to which content is posted to monitor a person's internet usage; basically, the State wants law enforcement to know where registrants are going online. TT 21:13-23:1; 49:24-52:12. Under a broad but reasonable and unambiguous reading of subsection (s), this includes self-reporting of all websites visits. TT 108:20-110:10 and Filing 346-2, pp. 82-83. Monitoring of Internet usage by law enforcement is an accepted terms of parole or supervised release, for the proper case. See United States v. Deatherage, 682 F.3d 755, 764 (8th Cir. 2012) (upholding term of supervised release providing for installation of monitoring devices); United States v. Quinzon, 643 F.3d 1266, 1272 (9th Cir. 2011) (interpreting supervised release term to target Internet-related computer conduct); United

States v. Stergios, 659 F.3d 127, 134 (1st Cir. 2011) (upholding participation in the Computer and Internet Monitoring Program). Internet monitoring by law enforcement through the disclosure of information, made possible by Neb. Rev. Stat. § 29-4006(1)(k) and (s), is clearly analogous to supervised release.

b. Neb. Rev. Stat. § 28-322.05

For those Does subject to it, Neb. Rev. Stat. § 28-322.05 is analogous to Internet limitations implemented, and routinely overturned, as part of the terms of supervised release. The Plaintiffs adopt, without re-stating, the arguments raised in Section IV above, addressing the broad scope of this prohibition.

In United States v. Crume, the sentencing court imposed a term in his supervised release that barred him from accessing computers and the Internet without first receiving permission from his probation officer. United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005). Id. The Eighth Circuit struck this supervised release term down, stating that it was "not convinced that a broad ban from such an important medium of communication, commerce, and information-gathering is necessary given the absence of evidence demonstrating more serious abuses of computers or the Internet [beyond possessing child pornography]." Id. The term at issue in Crume was significantly narrower than the one here because, unlike Neb. Rev. Stat. § 28-322.05, it did not include instant messaging systems or chat rooms, and it allowed for an exception to the prohibition if a probation officer gave him permission. See also United States v. Mark, 425 F.3d 505 (8th Cir. 2005) (vacating term of supervised release banning use of any online computer programs, and from using or possessing a computer, except in the confines of supervised employment without Internet access); United States v. Wiedower,

634 F.3d 490 (8th Cir. 2011) (Internet ban in terms of supervised release was abuse of discretion when person was only convicted of receiving and possessing child pornography).

Even when Internet bans are upheld, they are not absolute. See United States v. Boston, 494 F.3d 660 (8th Cir. 2007) (Internet use permitted with approval of probation term upheld); United States v. Heckman, 592 F.3d 400 (3rd Cir. 2010) (lifetime Internet ban without exception too broad and not tailored); United States v. Miller, 594 F.3d 172 (3rd Cir. 2010) (lifetime Internet ban, even with probation officer permission, too broad); United States v. Albertson, 645 F.3d 191 (3rd Cir. 2011) (upholding 20-year supervised release term, but overturning 20-year limit on Internet access unless parole approved).

Regardless of whether the term was upheld or not in these cases, the limitation contained in Neb. Rev. Stat. § 28-322.05 to the Internet is not uncommon for supervised release. Limitations on the use of chat rooms and instant messaging systems go beyond these cases and create a new classification of banned mediums. In fact, this statute is effectively banishment from vast portions of the Internet and from the most common mediums of electronic communication. See Smith v. Doe, 538 U.S. 84, 98 (2003) (discussing banishment as a traditional punishment).

The Plaintiffs testified to this. While on parole, Doe 17 was banned from the Internet when he first returned to Nebraska, but that was liberalized over time. TT 302:1-303:16. While under court monitoring, Doe 3 had monitoring software installed on his computer. TT 359:1-24. Doe 19 recalled some form of limitation on his Internet usage, but could not specify the parameters. TT 388:10-23. Finally, Doe 12 was originally banned from the Internet while under supervision, but after appeal the term was changed

to physical searches and monitoring. TT 506:7-507:24. This was for a second registrable conviction. TT 515:16-517:7. Therefore, the first factor weighs in favor of finding a punitive effect.

c. Neb. Rev. Stat. § 29-4006(2).

Further, Neb. Rev. Stat. § 29-4006(2) is analogous to the terms and restrictions that are typically seen for those individuals on supervised release. Exhibit 210 are terms of Doe 24's parole, and he consented to a "Search and Seizure" of his person conducted by his "parole officer and/or personnel of Parole Administration." Exhibit 210, p. 1. In addition, searches of computers and electronic communication devices are typical in the Circuit cases cited above. Therefore, the search and monitoring found in Neb. Rev. Stat. § 29-4006(2) is not just analogous to, but rather identical to, term of supervised release.

In sum, this factor weighs in favor of finding a punitive effect. Examined individually, these are each forms of punishment, so taken collectively, they multiply the punitive effect.

2. Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) constitute affirmative disabilities and restraints on registrants.

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

For all lettered Doe Plaintiffs, the mandatory disclosure and law enforcement monitoring of online activity is analogous to restraints found in terms of supervised release. A person has an affirmative obligation to report any changes to law enforcement "in writing, by the next working day." Neb. Rev. Stat. § 29-4006(13). The Plaintiffs adopt, without re-stating, their other preceding arguments related to these subsections in V above. See Smith v. Doe, 538 U.S. 84, 102 (2003) (finding a close question on whether the requirements are parallel to probation or supervised release, and reserving

ruling on future constitutional objections to a different mandatory reporting requirement). Testimony from the Does discussed in section V above indicates the impact this law would impact their lives.

b. Neb. Rev. Stat. § 28-322.05

For those individuals to whom it applies, Neb. Rev. Stat. § 28-322.05 is an explicit restraint. The staggering breadth and depth of this restraint has been discussed at length in section IV above. Prof. Post testified at length about the disabilities that a person subject to this prohibition faces, the substance of which has been argued previously. However, he specifically testified that this was a restraint. TT 105:18-23. But in sum, this ban effectively prohibits many if not most of the avenues used to perform jobs, purchase goods, and generally communicate with each other, bans text messaging, restricts the use of the common phone systems, and restricts Internet usage for information gathering or discussion. Exhibit 304, pp. 18-20. This makes it difficult for a person to, without limitation, either hold a job, obtain medical information, book travel, participate in their children's lives, participate with friends in social networking, or learn about culture. Id. The inability to use mediums to have a "normal" life is an affirmative disability and restraint. The Does testified how this law would impact their lives, as-applied to them. See IV(C) above.

c. Neb. Rev. Stat. § 29-4006(2)

For Doe 24, the search and monitoring provision constitutes an affirmative restraint. He consented only to a search by his parole officer and/or personnel of Parole Administration. Exhibit 210, p. 1. This statute broadens that requirement and applies generally to all law enforcement, without limitation. It will necessarily require a certain

amount of his time, without limitation, for law enforcement to complete the search. Further, the search itself has no real limitation as to where it can be conducted because this "consent" would, presumably, include the consent to locate a cell phone. A cell phone could be located anywhere. This search is also without minimal suspicion. Since there is no limitation as to the "who", the "why", or the "how" this is an affirmative restraint and disability for Doe 24. The fact that this could be done "upon [a] subject computer at locations other than the registrant's residence" does not mitigate its impact. Filing 318, p. 39.

As before, this factor weighs in favor of finding a punitive effect. Examined individually, these are each affirmative restraints and disabilities; logically, the restraints are multiplied when considered collectively.

3. Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) promote the traditional aims of punishment.

These statutes have the primary effect of furthering at least some of the traditional aims of punishment: retribution, deterrence, incapacitation, and rehabilitation. Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

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

Since the State intends to monitor Internet usage through these reporting requirements, this has the specific aim of deterrence. See section V above.

b. Neb. Rev. Stat. § 28-322.05

The Unlawful use of the Internet crime was intended to restrict and ban portions of the Internet and many common electronic mediums in an attempt to prevent online enticement. TT 49:10-52:12. Of course, this is a worthwhile pursuit, but as argued previously in section IV, its scope is vast. It was also enacted to incapacitate a person's

ability to act on certain websites and through many mediums, and so it has the specific aim of deterrence.

c. Neb. Rev. Stat. § 29-4006(2)

The search and monitoring provision is investigatory, and operates to deter a certain class of Internet crime. As presented in section VI above, this is nothing more (or less) than a term of parole. Therefore, this factor again weighs in favor of finding a punitive effect. Considered separately or collectively, each are have at least one underlying goal or aim of traditional punishment.

4 & 5. Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) are excessive in relation to any nonpunitive purpose, and can therefore be assigned no other purpose than punishment.

While the State can act to protect minors from online harms, the three statutes at issue are wildly excessive in relation to this nonpunitive purpose. Whether a statute has a "rational connection to a nonpunitive purpose is a most significant factor in [a Court's] determination that the statute's effects are not punitive." Smith v. Doe, 538 U.S. 84, 102 (2003). This factor turns on "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." Id. at 105. While Plaintiffs have never argued that the State lacked a legitimate interest in protecting children from online crimes, the mechanisms the State has chosen are not reasonable in light of the nonpunitive objective.

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

As noted above, these subsection operate in tandem to abrogate the First Amendment and Nebraska counterpart because of the type of information disclosed and the dissemination of that information, and because it requires self-reporting of all Internet websites visited. These subsections give law enforcement the ability to monitor all

Internet usage, whether pedestrian or criminal, and it is not reasonable in light of the nonpunitive interest. In fact, there is no interest in monitoring commercial transactions, for example. Neb. Rev. Stat. § 29-4006(1)(k) and (s) are excessive because they collect too much information that would otherwise identify a person online. This chills speech and is unrelated to and unreasonable in light of the purpose of informing the public about an individuals prior conviction for a registrable offense.

b. Neb. Rev. Stat. § 28-322.05

As argued previously, the Unlawful use of the Internet crime broadly proscribes significant portions of the Internet and outlaws common mediums of communication used for innocent purposes every day. This broad prohibition of electronic communication is unreasonable in light of the nonpunitive interest. See section IV.

c. Neb. Rev. Stat. § 29-4006(2)

As it pertains to Doe 24, he was determined by Parole Administration to require those terms that are contained in Exhibit 210. These calibrated terms were tailored to him, and to meet the goals of his parole. Logically, anything above and beyond this is excessive in relation to those parole needs and is excessive in relation to the purported nonpunitive purpose of informing the public about Doe 24's prior conviction.

The nonpunitive goal of Neb. Rev. Stat. § 29-4006(2) can be found in Neb. Rev. Stat. § 29-4001, in which 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. The Legislature further finds 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.

If the nonpunitive purpose is the maintenance of pertinent information and registration, then the need for a coerced search and monitoring provision is excessive and not reasonably related to that end. The State indicates that they intend to use Neb. Rev. Stat. § 29-4006(2) by "the placement of such [monitoring] software upon the subject computer at locations other than the registrant's residence." Filing 318, p. 39. To have law enforcement show up at a place of employment and install a monitoring device is not only embarrassing, but it would surely end the employment relationship.

While the Plaintiffs agree that the State can and should act to protect minors online, Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) are not the way to do it. These each distinctly and collectively exhibit a minimal rational connection to that nonpunitive purpose and are unreasonable in light of said objective. Therefore, these factors weigh in favor of a punitive effect.

6 & 7. Neb. Rev. Stat. §§ 28-322.05, 29-4006(2) and 29-4006(1)(k) and (s) come into play on a finding of scienter, and applies only to behavior that is already a crime.

These statutes come into play only on a previous finding of scienter, and apply only to behavior that is already a crime. In Smith, the Court determined that these two factors, scienter and past criminal behavior, carried little weight in the analysis of the effect of a sex offender registry because the "regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern." Smith, 538 U.S. at 105.

It should be noted here that the Unlawful use of the Internet crime is intended to prevent online crimes, but it duplicates the crimes of criminal child enticement pursuant

to Neb. Rev. Stat. § 28-311, child enticement by means of an electronic communication device pursuant to Neb. Rev. Stat. § 28-320.02, and enticement by electronic communication device pursuant to Neb. Rev. Stat. § 28-833. The targeted criminal activity curtailed by Neb. Rev. Stat. § 28-322.05 applies to behavior that is already a crime. Therefore, these final two factors weigh, albeit minimally, in favor of a finding that these statutes are punitive in its effects.

C. When analyzed as a whole and married together, Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) are punitive.

Taking a step back from an examination of the Mendoza factors and looking at these statutes from afar, it becomes clear that Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) are punishments. You look at the statements emanating from the AGO office, and you look at the statements made by Sen. Lautenbaugh and others in the Legislature. You look at the fact that Neb. Rev. Stat. § 29-4006(2) undermines the right to be free from unreasonable searches and seizures, look at the constructive and actual knowledge of this deficiency on the part of the AGO, and you look at the fact that the AGO still attempted to enforce the monitoring provision to all registrants even at the preliminary injunction hearing. You look at the fact that Neb. Rev. Stat. §§ 28-322.05 undermines the right to free speech, and banishes persons from engaging in most online forums for education, commerce and socializing (or at the very least approaches such a violation and presents a close question). You look at the fact that Neb. Rev. Stat. § 29-4006(1)(k) and (s) undermine the right to free speech, and the fact that it is undisputed that the intent is to facilitate law enforcement's monitoring of a person's Internet usage (or at the very least approaches such a violation and presents a close question).

You take all of these ideas, pile them up, and you are led to the conclusion that these statutes constitute punishment. Consequently, Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) should be struck as unconstitutional *ex post facto* legislation in derogation of the United States and Nebraska Constitutions.

VIII. Neb. Rev. Stat. §§ 28-322.05 and 29-4006(2) are unconstitutionally vague, in violation of the United States and Nebraska due process clauses, both facially and as applied.

Neb. Rev. Stat. §§ 28-322.05 and 29-4006(2) are vague in violation of the right to due process under both the United States and Nebraska Constitutions. No person shall "be deprived of life, liberty, or property, without due process of law" U.S. Const. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "No person shall be deprived of life, liberty, or property, without due process of law." Neb. Const. art. I, § 3. In this case, these statutes are so vague that a registrant of ordinary intelligence cannot know what is prohibited, and law enforcement is given willy-nilly enforcement guidance.

Vagueness may invalidate a criminal law for either of two independent reasons: (1) if the statute fails to define the criminal offense with sufficient definiteness that people of common intelligence can understand what conduct is prohibited, or (2) if the statute fails to provide minimum guidance to law enforcement in a manner to encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983); United States v. Bamberg, 478 F.3d 934, 937 (8th Cir. 2007). The Nebraska Supreme Court recognizes the same standard when examining vagueness of a statute or

ordinance under the Nebraska Constitution. See Maxon v. City of Grand Island, 273 Neb. 647, 652-53 (2007) (utilizing same standard for void-for-vagueness claim).

A. Neb. Rev. Stat. § 28-322.05 is unconstitutionally vague.

The crime of Unlawful use of the internet fails to provide a person of ordinary intelligence which services and forms of communication are prohibited. Prof. Post testified that the text of the criminal statute itself and its incorporated definitions are unclear and open to various interpretations. He testified to the friction between "access" versus "use" by a person under the age of 18. TT 77:11-80:14. He testified to a lack of ascertainable meaning for the phrase "that allows…use" by a person under the age of 18. TT 80:15-83:3. He testified to the unknowable scope of what may constitute a "chat room." TT 83:15-91:15. He testified about the confusing definition of an "instant messaging system." TT 91:16-94:17. Also, he testified about the potential Internet ban flowing from the definition of "social networking website." TT 94:18-99:8. Mr. Nigam generally disagrees. In general, the Plaintiffs incorporate in total the arguments raised in section IV above to show the vagueness of the statute and incorporated definitions.

Taking a step back, the point from a due process perspective is this: Prof. Post is not a man of ordinary intelligence, and Mr. Nigam has years of experience in the technical field. These two disagree on what is allowed and what is prohibited by Neb. Rev. Stat. § 28-322.05. See Exhibits 304 and 305. If these two cannot agree or ascertain the permitted usages, then how in the world will a person of common intelligence, who is subject to this statute, know which social networking websites, instant messaging systems or chat rooms are permissible and which place him or her at peril for criminal prosecution? Simply put, he or she cannot know. See e.g. TT 385:1-386:2 (testimony of

Doe regarding confusion around prohibitions); Exhibit 211, p. 11:9-17 (testimony of Doe regarding no difference between instant messaging and chat room).

This statute also fails the second prong of the test, which requires certainty for law enforcement. Because of the dizzying array of possible interpretations and scenarios discussed at length above, brought on by a complete lack of statutory clarity, this statute is susceptible to "arbitrary and discriminatory enforcement." Kolender, 461 U.S. at 357. Although this statute emanated from the AGO, no guidance was provided, TT 544:24-545:15, leaving it up to law enforcement to interpret. A few examples illustrate the point.

Assume that the terms of use control who is allowed to use or access a particular service. What if the terms are silent? Prof. Post and Mr. Nigam disagree what "allows" means under this scenario, so law enforcement can apply its own interpretation. TT 223:2-11; 270:13-272:2. Assume that the terms of use change, either increasing the age limit above 18 or reducing it to below 18 years old. Again, Prof. Post and Mr. Nigam disagree when a person would be required to check the terms of use for changes, so law enforcement can again apply its own discretion as to whether a person must review the terms of use only when first signing up, or each time the service is used. TT 268:15-270:9; 259:23-25. For the same reason that a person of ordinary intelligence does not have proper notice of the prohibited actions, law enforcement fails to have proper guidance. Therefore, Neb. Rev. Stat. § 28-322.05 is unconstitutionally vague in violation of the due process clauses of the United States and Nebraska Constitutions.

B. The search and monitoring provisions in Neb. Rev. Stat. § 29-4006(2) are unconstitutionally vague.

Neb. Rev. Stat. § 29-4006(2) fails to provide ordinary citizens and law enforcement any, let alone constitutionally adequate, guidance. Therefore, this is

likewise unconstitutional. Whether or not this is a criminal or civil statute is of no consequence. See Giaccio v. State, 382 U.S. 399, 405 (1966) (holding a Pennsylvania civil statute unconstitutionally vague). Whether a person of ordinary intelligence would not know what is authorized by this statute, that part is of nominal importance for this type of statute.

The concern from a constitutional perspective is on the law enforcement side of the analysis. Neb. Rev. Stat. § 29-4006(2) dispenses with the need for any level of suspicion, warrant or directive against an arbitrary or capricious search. Neither it nor the administrative code prescribes any limitation on the time, place or manner of the search. Therefore, any law enforcement officer can enter a person's home, where there is a clear expectation of privacy, to perform these searches at 3:00 a.m. each night for a month straight. Without a limit on the extent of the search, law enforcement can sweep an entire house open every drawer, go through every closet, and open every container to locate a computer or cell phone.

Even a State employee, when providing training on the changes to the registry, cast doubt on the constitutionality of this provision and called it "very iffy right now." Exhibits 154 and Exhibit 155, 2:9-15. She said that the State would "probably" not do anything about it, which infers a broad amount of discretion. Id. It would be appropriate here to raise one point on prosecutorial discretion: the idea that an unconstitutional statute can be salvaged by relying on prosecutorial restraint has been rejected by the Supreme Court. The Constitution "protects against the government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold a constitutional statute merely because the Government promised to use it responsibly." United States v. Stevens, 130 S. Ct.

1577, 1591 (2010). Therefore, Neb. Rev. Stat. § 29-4006(2) is unconstitutionally vague in violation of the due process clauses of the United States and Nebraska Constitutions.

IX. Conclusion

Based on the foregoing, this Court should hold that Neb. Rev. Stat. § 28-322.05, Unlawful Use of the Internet, violates the First Amendment to the United States Constitution Article 1, § 5 of the Nebraska Constitution, both facially and as applied; that Neb. Rev. Stat. §§ 29-4006(1)(k) and (s) violate the right to free speech under the United States and Nebraska Constitutions, both facially and as applied; that Neb. Rev. Stat. § 29-4006(2) violates the Fourth Amendment to the United States Constitution, and Article I, § 7 of the Nebraska Constitution, as applied to Doe 24; that, both independently and collectively, the intent and effects of Neb. Rev. Stat. §§ 28-322.05, 29-4006(1)(k) and (s) and 29-4006(2) were and are punitive, facially and as applied, in violation of the *ex post facto* clauses of the United States and Nebraska Constitutions; and that Neb. Rev. Stat. §§ 28-322.05 and 29-4006(2) are unconstitutionally vague, in violation of the United States and Nebraska due process clauses, both facially and as applied.

DATED September 10, 2012

John Doe and Jane Doe 2-7, 9-14, 16-19, 21, 23-28, 31, 33, 35 and 36;
John Doe and Jane Doe B, D through K,
Doe 12 on behalf of Does H and K, minors, and
Doe G on behalf of Doe I, minor,
Plaintiffs (8:09-cv-456)

John Doe,
Plaintiff (8:10-cv-3005)

John Doe,
Plaintiff (8:09-cv-3266)

BY: s/ Rodney C. Dahlquist, Jr.

RODNEY C. DAHLQUIST, JR., #23912
STUART J. DORNAN, #18553
THOMAS MONAGHAN, #12874 (Of counsel)
JASON E. TROIA, #21793
JOSHUA W. WEIR, #23492
Dornan, Lustgarten & Troia, PC LLO
1403 Farnam Street, Suite 232
Omaha, Nebraska 68102
(402) 884-7044
(402) 884-7045 facsimile
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I electronically filed the foregoing document with the Clerk of the District Court using the CM/ECF system which sent notification to all CM/ECF participants in above captioned matter.

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: none.

BY: s/ Rodney C. Dahlquist, Jr.
RODNEY C. DAHLQUIST, JR., #23912