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' REPLY TO DEFENDANT'S POST-TRIAL BRIEF**
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 hereby submit this Reply to Defendants' Post-Trial Brief. The Reply will address sections of the Defendants' Brief as needed. For clarity, the numbering in this Reply correlates to the numbering in Defendants' Post-Trial Brief. For those sections that are not specifically addressed, Plaintiffs stand on the arguments raised in their Closing Argument.

FACTUAL BACKGROUND

II. The Investigator

Investigator Scott Haugaard testified about registration information and how a person's online identifiers would be utilized by law enforcement. He indicated that this information would be used to "monitor remotely not -- not content" but rather "monitor the activities of those specific email addresses and specifically to identify it to a person in --in the need that an investigation started." TT 576:13-21. He also testified law enforcement's use of this information to "monitor from afar" which used to be done by searching a person's computer. TT 577:15-578:1. He testified that law enforcement uses the reported websites and blogs to know whose site it is and to ascertain the nature of the website. TT 578:8-17.

This testimony directly raises the monitoring concerns addressed in White v. Baker, 696 F.Supp.2d 1289 (N.D.Ga., March 3, 2010). We can dance on the head of a pin if we want and say we are not reading the content of messages, but one cannot ascertain the nature of a blog or website without reading the content of the messages or other information posted on the website or blog. See Section V of Plaintiffs' brief, Filing 521.

ARGUMENT

II. The statutes are unconstitutionally vague.

A. Any real world analogy falls short of the scope of the statutory prohibition, weighs in favor of the Plaintiffs, and is irrelevant to the ultimate question of constitutionality of the specific statutes at issue.

Mr. Nigam made real world comparisons of a chat room to a party or room where people congregate, instant messaging to a private conversation between two people, and

social networking to a book club or other social gathering. Filing 522, p. 17. Clearly, the State does not have the authority to abridge speech at a private party in someone's home, regulate the private conversations between two people, or dictate who can and cannot join a book club. Logically then, the State cannot ban speech through the online equivalents to these real world settings.

B. Neb. Rev. Stat. § 28-322.05 is unique.

Out of fifty States, only Nebraska and four others have passed statutes that ban communication of persons on the registry. Filing 522, p. 17. Taking into consideration that Louisiana struck down their ban, less than ten percent of the States have bans on internet usage. That is unique. In addition, the Nebraska ban is much broader than the North Carolina statute referenced, which exempts dedicated instant messaging systems, chat rooms, message boards, and all commercial websites. Nebraska provides for no such limitation.

C. Neb. Rev. Stat. § 28-322.05 is not susceptible to a limiting construction.

1 & 2. The phrase "collection of websites" and incorporation of the terms of use are not 'readily susceptible' to a narrowing construction.

The Defendants' content that "collection of websites" should be construed to mean "common domain names, of whatever level," Filing 522, p. 21, and that a social networking website, chat room or instant messaging system "allows" a person under 18 to use or access its service if the terms of use explicitly state that a person under 18 can use or access it service, Filing 522, p. 22. If that is the intent of the Legislature, then it could have defined and clarified these phrases more precisely.

The language of the challenged statute requires significant tweaking, striking, broadening, narrowing, and a general overhauling, as argued in Section IV(A)(5), Filing

521. As far as a limiting construction in this case, "federal courts lack jurisdiction authoritatively to construe state legislation. Limiting constructions of state and local legislation are more appropriately done by a state court or an enforcement agency." Ways v. City of Lincoln, 274 F.3d 514, 519 (8th Cir. 2001).

3. Even applying the significant limiting constructions, the statute is still not narrowly tailored.

The State contends that the statute gets to the "obvious goal of preventing registered sex offenders from committing offenses against minors" and "that the Nebraska Legislature's intent was to prevent communication between registered sex offenders and minors." Filing 522, pp. 25-26.

Then why didn't they just say that? If the goal is to prevent communication between a registered sex offender and a minor online, then pass a statute that bans that communication between the specific sender and recipient. That law could be unconstitutional as well, but it would be more surgical and targeted. Even a pared-down Neb. Rev. Stat. § 28-322.05 goes way too far into protected speech.

D. If email does not fall within the definition of chat room or instant messaging, then that would tend to indicate that the statute is under-inclusive.

Plaintiffs stand by the argument that email falls within the definition of either instant messaging system, chat room, or both. Filing 521, Section IV(A)(3)(b) and (c).

But if, as Defendants contend, email does not fall under the prohibitions, then that creates a gaping hole in the statute and "leave[s] significant influences bearing on the interest unregulated." Republican Party of Minnesota v. White, 416 F.3d 738, 751 (8th Cir. 2005) (internal citations omitted). In other words, if the State's obvious goal

discussed above is "to prevent communication between registered sex offenders and minors," then leaving email out tends to show that the statute is not narrowly tailored.

IV. The statutes at issue violate the right to free speech.

B. Neb. Rev. Stat. § 28-322.05 prohibits the use of SMS texting.

Mr. Nigam testified about the various protocols or platforms that different functions use. Filing 522, p. 37-38. While that piece of trivia may be true, that distinction is irrelevant when a prosecutor is determining whether text messaging falls within the statutory definition. A text is a "direct, dedicated, and private communication" "accessed with an electronic communication device" "that enables a user of the service to send and receive virtually instantaneous text transmissions" "to other selected users of the service" "through the Internet or a computer communications network," so text messaging can be a statutory instant messaging system. It is utilizes "a communication network" "primarily designated for the virtually instantaneous exchange of text transmissions" "amongst two or more electronic communication device users," so text messaging can also be a statutory chat room.

Basically, the Defendants argue here that we should disregard the statute because everyone knows what these terms mean, and we can rely on prosecutorial discretion and logic to yield a constitutional outcome each time. But Mr. Haugaard's testimony belies this assertion, and it exemplifies the confusion surrounding enforcement of these statutes. Plaintiffs have no doubt that Mr. Haugaard does his duty with the utmost professionalism, and that is not in dispute. It appears that he personally believes "access" and "use" to mean different things, but he would construe them both as "use" when acting in good faith as a law enforcement officer. TT 579:16-581:13.

Taking that idea and applying it, he might look to the intent of a person's use of Facebook. TT 582:4-583:3. He would make a referral to the prosecution if a person merely maintained an account on a social networking website that falls under the statutory definition, without any indication of abuse. TT 583:4-23. As he rightly put it: "if you signed up for the account, you're already wrong." TT 584:6.

And that is the proper thing for an investigator to do in that situation. The problem is not with law enforcement's performance; rather, the problem lies with the statute itself and its complete lack of guidance and clarity that it must provide to law enforcement officers that vigilantly protect us every day. The Constitution demands more.

V. Given the facts of this case, *Samson v. California* is not controlling.

Plaintiffs stand on their argument raised in Section IV, Filing 521, but want to quickly re-emphasize a couple points about the search and monitoring provision. In the Samson case, there was a California statute that stated that a parolee is subject to search or seizure by basically any law enforcement at any time with or without a search warrant or cause. The Supreme Court upheld such a search because the parolee had "signed an order submitting to the condition and thus was 'unambiguously' aware of it. Samson v. California, 547 U.S. 843, 852 (2006). In other words, that requirement was specifically expressed to the parolee at the time of his parole. Doe 24 did not sign such an order or submit to similar search and monitoring. Exhibit 210. Instead, Doe 24 signed terms of parole more akin to those in Freeman that limited the search to a parole officer or employees of parole administration. United States v. Freeman, 479 F.3d 743, 744-45 (10th Cir. 2007).

DATED September 11, 2012

John Doe and Jane Doe 2-7, 9-14, 16-19, 21, 23-28, 31, 33, 35 and 36;
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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)

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 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.

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