UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT
NO: 3:15-cv-00014-GFVT

JOHN DOE PLAINTIFF

v.

COMMONWEALTH OF KENTUCKY, DEFENDANTS
ex rel., et al.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL MOTION FOR INJUNCTIVE AND DECLARATORY RELIEF

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INTRODUCTION

This is an action seeking to have KRS 17.546(2) and KRS 17.510(10) (c) and (13) struck down as an unconstitutional and, therefore, illegal abridgement of the Free Speech rights of the Plaintiff – who, per Kentucky statutory law, is legally obliged to be listed on the state Sex Offender Registry[1] for twenty years as well as submit to a myriad of other restrictions over and above the typical restrictions of a felon convicted in a Kentucky court.

The issue[2] facing *sub judice* is straightforward:

> Do the restrictions placed upon the use of digital/electronic social media by a person on the sex offender registry ("Registrant") violate his rights secured by the First and Fourteenth Amendments?

[1] Sex Offender Registry will be abbreviated as "SOR" throughout this Memorandum of Law.

[2] In our Complaint, one of the theories advanced is the statutes are illegal *ex post facto* enactments. Upon further research and analysis following the filings of the Defendants, we have concluded that there is no ex post facto violation, and so this is an affirmative and express statement that this theory is abandoned and will not be briefed. *Complaint, Fifth Claim for Relief [DE 1].*

The applicable law and affidavits[3] demonstrate that the answer to that question is "yes," these statutes are unconstitutional.

Kentucky's statutory scheme is similar but typically even more restrictive and onerous than statutory schemes which have already been struck down by both sister state and federal courts as anathema to the federal constitution. The Plaintiff respectfully requests that this Court enjoin the Defendants from enforcing the provisions of KRS 17.546(2), KRS 17.510(10)(c) and (13) and declare these statutes unconstitutional.

BRIEF FACTUAL SUMMARY

The Plaintiff is a near life-long Kentucky resident who is on the Kentucky Sex Offender Registry due to his conviction in 2007 for a single count of possession of material portraying a sexual performance by a minor. *Complaint, ¶3 [DE 1]*. He received no custodial sentence, was probated, and was discharged from probation. He is not under any form of court supervision, aside from his continued duty to register. *Id.* He has no other criminal history.

In its 2009 General Session, the Kentucky General Assembly enacted what became codified as KRS 17.546 and 17.510(10) & (13). This statutory scheme uses the mechanism of the Sex Offender Registry to prevent any use for any purpose of any social networking site (as defined by the statute) as well as instant messaging and chat programs – public and private – by people on the registry. *Id., ¶8 [DE 1]*.

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[3] The following Affidavits are in the Record in support of Plaintiff's claim:
- David Finklehor, Professor of Sociology, University of New Hampshire, *[DE 15-1]*
- David Post, Professor of Law, Temple University (retired 2014), *[DE 15-2]*
- Susan Smith, Ph.D., a family therapist and certified by the Commonwealth to treat sex offenders since 2002, practices in Lexington, KY since 1996 (and Plaintiff's primary therapist from arrest in 2007 until he was released by her), attached as *Exhibit 1* to this Memorandum of Law.

The statutes also require a person on the registry to provide to their local probation office their e-mail and "internet communication name identities." Any person who violates the registration requirements is guilty of a Class D felony; and, if he uses any social networking site (public and private platforms) he is guilty of a Class A misdemeanor. *KRS 17.546(2)* and *KRS 17.510(10) (c) and (13).*

The use of social networking platforms is a common, routine and integral mode of communication whether in the context of personal, business, private, commercial, or political. *Complaint, ¶11-13 [DE 1]*. Indeed, courts, including this one, frequently communicate via electronic/digital, and federal, state and local government agencies of all types employ social media platforms like Facebook to communicate. It is hard to envision any political campaign[4] for any office in any town, city, county, state, or the country that does not use Facebook, Twitter, Reddit, Youtube, Viber, Instagram or any of the myriad of social networking sites that are within the scope of these Kentucky statutes that are the subject of Plaintiff's challenge. *Id.*

ARGUMENT

This issue has been heavily litigated in recent years, as we noted in the Memorandum in Support of Motion for a Preliminary Injunction. *[DE# 15-3, Page 126-127]*. The clear trend has been that these sorts of statutes, while well-intentioned, are overreaching and unconstitutional. Indeed, even since the filing of the Plaintiff's Motion, Illinois' statutory scheme requiring

[4] For example, *see,* Jack Conway, Democrat candidate for Governor: *https://www.facebook.com/conwayforky ; https://twitter.com/conwayforky ;* and, Matt Bevin, Republican candidate for Governor: *https://www.facebook.com/mattbevinforkentucky ; https://twitter.com/mattbevin* .

registration of internet identifiers by people on the registry was struck down as unconstitutional by a state trial court in *Illinois v. Minnis*, 14-CF-1076 (July 7, 2015).[5]

The Kentucky statutes ban all social media use SOR Registrants, as well as the use of any software which allows folks to communicate in real time, and to register all of their "internet communication name identities." This restriction on communication violates the civil rights of SOR registrants who have completed their criminal sentences and parole and/or probation conditions. In short, all that remains is their status as a felon and placement on the SOR for the applicable period of time.[6] These laws ban an entire medium of communication, place significant burdens on *all* online communication by people required to register, are vague in specifying what must be registered, and what web sites and programs must be avoided all in the context of a serious threat of a very serious criminal sanction (in most cases it would actually expose the individual to Persistent Felony Offender Status penalties, *see,* KRS 532.080).

Simply put, these types of restrictions on digital communication like KRS 17.546(2), KRS 17.510(10)(c) and (13), were drafted out of fear without evidentiary support as to either their efficacy or whether SOR Registrants were swarming *en masse* to social media sites to solicit minors. Yet despite these good legislative intentions seeking to prevent sexual exploitation and violence of our children and teens, the statutory scheme is wholly ineffective at redressing the evil sought to be prevented. The science does not bear this approach out.

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5 Order attached as *Exhibit 2*.

6 Kentucky, like most states, has different SOR periods for different crimes. *KRS 17.520.*

The occurrence of SOR Registrants soliciting minors for sexual purposes via social media is nearly non-existent throughout the nation.[7]

For those individuals determined to employ social media to contact victims for sexual purposes[8], the notion that making social media use a misdemeanor is an effective deterrent for blinks reality. In other words, the consequence of these laws is to only burden SOR Registrants who have served out criminal sentences and wish to lead law-abiding lives. In order to do so, these individuals, like Plaintiff, must comply with a regulatory system which is ever-growing in breadth, complexity, and severity.

A. THE KENTUCKY STATUTORY SCHEME IS UNCONSTITUTIONAL IN THAT IT PLACES SIGNIFICANT BURDENS ON PROTECTED SPEECH WHICH ARE NOT NARROWLY TAILORED AND DOES NOT LEAVE OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION

In order for Kentucky's scheme[9] to survive constitutional scrutiny, "it must be 'narrowly tailored to serve a significant governmental interest' and 'leave open ample alternative channels of communication.'" *Doe v. Prosecutor, Marion County*, 705 F.3d 694, 698 (7th Cir. 2013) citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Narrow tailoring can only be accomplished within the context of Kentucky's statutory ban here "only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 698, citing *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). It is important to note that, where (as here) the State seeks to restrict

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[7] Dr. Finkelhor's declaration and research indicates that 96% of all technologically-facilitated crimes against minors were perpetrated by people who were not on the sex offender registry. *[DE 15-1, Page 96-97]*.

[8] This conduct is discretely criminalized and punished via KRS 510.155, as a Class D felony.

[9] And specifically KRS 17.546(2).

speech, the burden rests with it to establish the constitutionality of the statutory approach. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000).

Kentucky's social media ban does not target inappropriate online communication between Registrants and minors.[10] Rather, these laws ban *all* communication via social media sites and burden *all* internet communication generally, sweeping within its ambit a great deal of protected personal, social, business, political, religious, and other communication through a medium which – for better or worse – is how the bulk of the world communicates in the modern era. It is a reality for which the Kentucky approach does not account. [See *Post Decl.*, *DE# 15-2*, Page 105.]

The Plaintiff does not dispute that Kentucky has a significant interest in preventing the sexual exploitation and abuse of minors and others, online and otherwise. However, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, *and that the regulation will in fact alleviate those harms in a direct and material way***.**" *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (emphasis added).

So, while the Plaintiff does not contend that sexual solicitation and exploitation of minors is an imaginary harm, the Plaintiff *does* contend that banning SOR Registrants from social media and coercing registration of internet identifiers via an obstacle strewn process accomplishes little to nothing aside from denying an unpopular group, of which the Plaintiff is a member, of constitutionally protected freedoms.

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[10] As noted, *supra*, Kentucky law already criminalizes this conduct in KRS 510.155.

As detailed in the scientific, anthropological, and statistical research identified in the affidavits of Dr. Finkelhor, Professor Post, and Dr. Smith[11], the recidivism rate of sex offenders is much lower than anecdotally believed and erroneously reported. Recidivism rates of around five percent (5%) are common in the scientific literature. [*Smith Decl. at* ¶¶ 6-8]. Indeed, dozens of studies have been conducted on the topic of sex offender recidivism:

- 2010 study of 7,011 California sex offenders found a recidivism rate of 5% after three years;[12]

- 2005 study of 4,091 sex offenders in Washington found a recidivism rate of 2.7% after five years;[13]

- 2003 Department of Justice study tracked 9,961 sex offenders released from prison in 1994 and found a re-arrest rate of 5.3% for a new sex offense within three years of release;[14]

- 2001 study tracked 879 Ohio sex offenders and found 8% recidivism rate for ten years after release;[15]

- 2007 study of 19,827 New York sex offenders found 8% recidivism rate eight years after registration date;[16]

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[11] Affidavit of Susan Smith, Ph.D, attached as Exhibit 1.

[12] California Department of Corrections and Rehabilitation, 2010 Adult Institutions Outcome Evaluation Report (2010). Found at: *http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY0506_Outcome_Evaluation_Report.pdf)*

[13] Washington State Institute for Public Policy, Sex Offender Sentencing in Washington State: Recidivism Rates (2005), available at: http://www.wsipp.wa.gov/ReportFile/908

[14] Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994 (2003) available at: http://www.bjs.gov/content/pub/pdf/rsorp94.pdf

[15] Ohio Department of Rehabilitation and Correction, Ten-Year Recidivism Follow-Up of 1989 Sex Offender Releases (2001) available at: http://www.drc.state.oh.us/web/Reports/Ten_Year_Recidivism.pdf

[16] New York State Division of Probation and Correctional Alternatives, Research Bulletin: Sex Offender Populations, Recidivism, and Actuarial Assessment.

In line with the research that has been done on recidivism, research also indicates that approximately ninety-five percent (95%) of sex crime is perpetrated by someone who is *not* on the SOR. [*Smith Decl., Exhibit 1,* ¶¶ 6-8.]. The vast majority of all sexual crime is committed by people that have *no* prior record of sexual offending. Perhaps unsurprisingly, then, the existence of people on the SOR who use social media to solicit minors for sexual purposes is vanishingly small (4% of all such crimes). *[DE 15-1*, Page 96-97*]*.

It is essential to critically address the issue of sex offender recidivism in this context, as the government will likely contend that these laws are necessary because of the "frightening and high" recidivism risk that people on the SOR pose to minors as discussed in US Supreme Court precedent. *Smith v. Doe*, 538 U.S. 84, 103 (2003), citing *McKune v. Lile*, 536 U.S. 24, 34 (2002).

Indeed, the wisdom, received, and believed efficacy of the statutes at issue here, and sex offender legislation generally, is expressly predicated on the belief that sex offenders are possessed of this "frightening and high" chance to reoffend. In both Defendant Larson's and Defendant Brown's Response to the Plaintiff's Motion for a Preliminary Injunction, the government did not provide any substantive evidence of a "frightening and high" rate of re-offense outside of citing to *Smith* and *McKune*. [*Response, DE 17-1*, Page 144*; Response, DE 19,* Page 183].

To state it plainly, the Supreme Court was incorrect in stating in *McKune v. Lile*—and then later in *Smith*—the recidivism rates of sex offenders. This mistake is thoroughly explored in a forthcoming law review article[17], authored by Arizona State University law professor Ira

[17] Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CON. CMNTRY. (forthcoming Fall 2015), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616429, and attached hereto as Exhibit 3, *infra.*

Ellman that examined the court's phrase "frightening and high" recidivism risk. This has become a phrase of art, if you will, by legislators, courts, prosecutors and pundits, and has been repeated ever since (according to Professor Ellman, this phrase alone has been cited in 91 judicial opinions and 101 case briefs).[18]

Unfortunately, in neither of the cases from which these opinions arose was the Court supported by facts regarding the recidivism risk of sex offenders:

> *McKune* provides a single citation to support its statement "that the recidivism rate of untreated offenders has been estimated to be as high as 80%": the U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988). Justice Kennedy likely found that reference in the amicus brief supporting Kansas filed by the Solicitor General, then Ted Olson, as the SG's brief also cites it for the claim that sex offenders have this astonishingly high recidivism rate. This Practitioner's Guide itself provides but one source for the claim, an article published in 1986 in Psychology Today, a mass market magazine aimed at a lay audience. That article has this sentence: "Most untreated sex offenders released from prison go on to commit more offenses– indeed, as many as 80% do." But the sentence is a bare assertion: the article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism. He is a counselor, not a scholar of sex crimes or re-offense rates, and the cited article is not about recidivism statistics. It's about a counseling program for sex offenders he then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported assertion about the lower recidivism rate for those who complete his program.
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> So the evidence for *McKune*'s claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons…[19]

It is difficult to overstate the impact that the Court's language in *Smith* and *McKune* has had on subsequent litigation surrounding SORs, SOR Registrants, and the passage of additional restrictions like KRS 17.546(2) and KRS 17.510(10) (c) and (13). Reliance by States, like

[18] *Id.* at 3.
[19] *Id*. at 4-5.

Kentucky, and courts on *Smith* and *McKune* for the proposition that SOR Registrants bear a "relatively high rate" of re-offense is simply unwarranted. There are neither facts nor science in *Smith, McKune*, or elsewhere to support the claim that sex offenders as a class have a high rate of re-offense. To the contrary, the published research conclusively supports the opposite conclusion: that SOR Registrants generally have a low rate of re-offense *that continues to decrease the longer that a person has remained in the community offense-free*. [*Smith Decl., Exhibit 1,* ¶ 11.] Therefore, a ban preventing SOR Registrants from using social media has a *de minimis* impact on sexual violence and solicitation of minors, and very well may only serve to further cripple the re-integration of sex offenders back into a society that depends upon social-media and other digital formats to communicate. The net effect is that all that occurs is a mighty burdening of the rights of sex offenders who have served out their sentence. To put a finer point on it: the Commonwealth is ignoring the fact that sex offenders and SOR Registrants do not pose a high risk of re-offense based on the fifteen plus (15+) years of research on the subject.

To be clear, we agree that even a single instance of solicitation or abuse is a serious crime, and the Plaintiff does not suggest otherwise. Understandably, the impetus behind this statutory scheme in singling out SOR Registrants was to be proactive, as opposed to reactive in responding to the demonstrable threat of sexual victimization we see almost daily in the media.

As Defendant Brown says "[t]he Commonwealth should not have to wait until a child is solicited by a sex offender on a social networking website. Instead, it can bar sex offender registrants from visiting social networking websites which permit minors in the first place." [*Response*, *DE# 19*, Page 183.]. Respectfully, this is flawed logic, premised on flawed presumptions, which provides no real abatement of the threat and serves only to violate the

constitutional rights of SOR Registrants. That may be an emotive plea, but it also happens to be wrong.

The Seventh Circuit eloquently dealt with this same reasoning in striking down the ban imposed by our neighbor to the north, Indiana, on social media use by SOR Registrants. In *Doe v. Prosecutor, Marion County,* the circuit court said:

> The district court also suggested the law was narrowly tailored to serve purposes different from the existing solicitation and communication laws. It stated the existing laws "aim[ ] to *punish* those who have *already committed* the crime of solicitation," while the "challenged statute, by contrast, aims to *prevent and deter* the sexual exploitation of minors by barring certain sexual offenders from entering a virtual world where they have access to minors" (emphases in original). The state continues this argument on appeal. The immediate problem with this suggestion is that all criminal laws generally "punish" those who have "already committed" a crime. The punishment is what "prevent[s] and deter[s]" undesirable behavior. Thus, characterizing the new statute as preventative and the existing statutes as reactive is questionable. The legislature attached criminal penalties to solicitations in order to prevent conduct in the same way decade-long sentences are promulgated to deter repeat drug offenses. Perhaps the state suggests that prohibiting social networking deprives would-be solicitors the opportunity to send the solicitation in the first place. But if they are willing to break the existing anti-solicitation law, why would the social networking law provide any more deterrence? By breaking two laws, the sex offender will face increased sentences; however, the state can avoid First Amendment pitfalls by just increasing the sentences for solicitation — indeed, those laws already have enhanced penalties if the defendant uses a computer network.
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> The state also makes the conclusory assertion that "the State need not wait until a child is solicited by a sex offender on Facebook." Of course this statement is correct, but the goal of deterrence does not license the state to restrict far more speech than necessary to target the prospective harm. Moreover, the state never explains how the social network law allows them to avoid "waiting."

705 F.3d 694 at 700-701 (2013). (citations omitted).

As noted above, Kentucky already criminalizes the use of an electronic medium to solicit a minor for sexual purposes (and it is a Class D felony, as opposed to the misdemeanor social networking offense as provided here). Repeat offenders face even harsher penalties in the form

of Persistent Felony Offender sentencing and, in the case of a 20-year registrant, a lifetime registration requirement. KRS 532.080, and 17.520.

If the Commonwealth believes that the law does not do enough to deter this behavior by SOR Registrants then, as the Seventh Circuit noted, it can enhance the penalties for solicitation and completely avoid the First Amendment implications that are raised here. Putting the Seventh Circuit's point in concrete terms, the striking down of these unconstitutional restrictions on First Amendment protections does not hamper, hinder, or straight-jacket the correctional and public safety policies of the Commonwealth in any manner given the existing deterrence and enhanced punishment for repeat offenders.

Similarly, the requirement of having SOR Registrants provide with their internet communication identifiers fails as a remedial measure for the same reasons the social media ban fails to address the harms the government seeks to protect against since Registrants have very low rates of re-offense (and are not responsible for 96% of all solicitation cases involving minors).[20] Even more problematic, the internet identifier aspect of the Kentucky scheme requires, by its terms, *all* internet communication to be reported. The law does not require that Registrants tell anyone the internet sites visited or services used via a particular identifier. Not only does this burden *all* online communication, but nullifies the so-called purpose of the registration requirement as an effective law enforcement tool . . . *even granting the underlying wrong-headed assumptions about recidivism on which the law is based*. [*Post Decl.*, *DE# 15-2*, Page 109.]

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[20] Janis Wolak, David Finkelhor, Kimberly Mitchell, *Trends in Arrests of "Online Predators"*, Crimes Against Children Research Center (2009) *available at* http://www.unh.edu/ccrc/pdf/CV194.pdf.

Kentucky's scheme also does not leave open "ample alternative channels" for communication. As Dr. Post's declaration indicates, the Kentucky scheme fences off large swaths of the internet from use by SOR Registrants. [*Post Decl.* ¶ 35-36, *DE# 15-2*, Page 114] (noting that web sites and services which are prohibited under Kentucky's law easily number in the millions, if not hundreds of millions).

An enormous amount of modern communication takes place via social networking sites. Sixty-six percent (66%) of respondents to a Pew Center for Internet & Society survey indicated they used the internet for social networking. [*Id.* ¶ 10, *DE#* 15-2, Page 105]. Services like Facebook, Instagram, Viber, Twitter and seemingly a new one everyday have become ubiquitous in social, cultural, commercial, and political discourse. This digital communication is everywhere and used by seemingly everyone.

It is no consolation for the State to say that SOR Registrants can still use internet messaging programs or social networking sites that do not allow minors to access or use those programs or sites. Frankly, these sites simply do not exist. Anyone, for example, can *access* a web site if only to read the site's terms and conditions. *See Doe v. Nebraska*, 898 F.Supp.2d 1086, 1099 (D. Nebraska 2012). Under a literal reading of the statute, even websites that bar minors from *using* the website or program per its terms and conditions are still off limits under Kentucky's scheme, as minors can nevertheless *access* the site or program, if only to read that site's terms and conditions. And, this further depends on the maturity of a minor to obey the site's instruction to "KEEP OUT". Kentucky's scheme, then, bars SOR Registrants from *all* use of *all* social networking services and instant messaging services as broadly defined in KRS 17.546.

This leaves Registrants with precious few opportunities to engage in *any* kind of online communication. Even the communication in which they could participate, such as posting a comment on a news article on the Herald-Leader, Courier Journal, New York Times, or Wall Street Journal sites would create a nightmare of potential criminal liability. The Registrant would need to undergo a same-day trek to the probation/parole office to register an identifier, or else choose not to engage in the communication at all.

These digital services are integral to the how and why of modern communication and the manner in which society interacts. Social movements such as the protests in Ferguson and Charleston, or the Arab Spring and Occupy Wall Street, or the populous movements in the EU like Podemos and Syrizia were not fueled by comments on news articles and e-mails. Rather, these were coordinated and organized via the use of social media networks such as Twitter and Facebook.

While the State will contend that, since the *entire* internet has not been fenced off, there are ample alternative channels open for communication. As the district court noted when striking down Nebraska's social media ban as *inter alia*, neither being narrowly tailored nor leaving open alternative channels of communication in *Doe v. Nebraska*: "[f]rankly, this is a little like banning the use of the telephone and then arguing that First Amendment values are preserved because the user can (perhaps) resort to a walkie-talkie." 898 F.Supp.2d 1086 at 1117 (2012).

Kentucky's ban is neither narrowly tailored nor leaves open alternative channels of communication. Thus, it fails constitutional scrutiny and must be struck down . . . now.

B. THE KENTUCKY STATUTORY SCHEME PROVIDES INADEQUATE NOTICE OF WHAT CONDUCT IS ILLEGAL AND WHAT INFORMATION MUST BE REPORTED TO AUTHORITIES

The Kentucky scheme is unconstitutionally vague. It does not provide adequate notice of what conduct is illegal *viz-a-viz* what websites an SOR Registrant can and cannot lawfully use, and what information must be provided to authorities to avoid committing what is likely another felony.

To avoid being deemed unconstitutionally vague, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) This inquiry is especially sensitive within the context of First Amendment freedoms, as "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'" *Id.* at 109 (citations omitted).

Neither KRS 17.510 nor 17.546 provides this constitutionally required adequate notice. This statutory scheme provides no definition for what constitutes an "internet communication name identifier." [*Post Decl.*, DE# 15-2, Page 108.] The phrase "internet communication name identifier" could include things such as bank account logins, the person's actual name when used as a username, temporary forwarding addresses that web sites or services automatically assigned to the person using them, transient screen names assigned to a person using a technical support chat function, or an already registered username that a person on the registry wants to use on a different site (though the statute does not allow domain names to be registered). *Id.*

Doe v. Harris is instructive here. In *Harris*, a group California SOR Registrants brought a 42 USC § 1983 action seeking a preliminary injunction against the enforcement of a voter-passed initiative called the CASE Act. 772 F.3d 563, 568 (9th Cir. 2014). The CASE Act required the Registrants to provide authorities with "internet identifiers established or used by the person" and:

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

Id. (emphasis in original). Notably, the CASE Act, unlike the Kentucky statutes *sub judice* did not ban Registrants from using any service or program. The district court in *Harris* sustained their motion for an injunction, finding that the CASE Act was constitutionally infirm, as "the challenged provisions, when combined with the lack of protections on the information's disclosure and the serious penalty registrants face if they fail to comply with the reporting requirements, create too great a chilling effect to pass constitutional muster." *Id.* at 569.

California then appealed the district court's order enjoining enforcement of the CASE Act. The Ninth Circuit affirmed finding that the CASE Act's requirement to report internet identifiers was unconstitutional in that it "may lead registered sex offenders to over report their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report. 'This uncertainty undermines the likelihood that the [Act] has been carefully tailored to the [State's] goal of protecting minors' and other victims." *Id.* at 579 citing *Reno v. ACLU*, 521 U.S. 844, 871 (1997) (alterations in original).

The definition of "social networking" website found in KRS 17.546 is nearly identical to the definition struck down by other courts as unconstitutionally vague. The North Carolina Court of Appeals in *State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App. 2013) is strikingly similar (if not more well defined) than Kentucky's statute:

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

> (b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:
>
> > (1) Is operated by a person revenue from membership fees, or other sources related to the Web site.
> >
> > (2) Facilitates the social between two or more persons for of friendship, meeting other information exchanges.
> >
> > (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user….
> >
> > (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.
>
> (c) A commercial social networking Web site does not include an Internet Web site that either:
>
> > (1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or
> >
> > (2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

Id. at 149. North Carolina's scheme was much narrower than Kentucky's as it was limited to commercial sites and did not ban Registrants from using instant messaging or chat room services.

The court in *Packingham* struck down North Carolina's statute as infirm on overbreadth and vagueness grounds given its application:

> The construction of N.C. Gen.Stat. § 14-202.5(b) lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited. We assume that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream social networking sites such as *Facebook.com* and *Myspace.com.* However, the ban is much more expansive. For example, while *Foodnetwork.com* contains recipes and restaurant suggestions, it is also a commercial social networking Web site because it derives revenue from advertising, facilitates the social introduction between two or more persons, allows users to create user profiles, and has message boards and photo sharing features. Additionally, the statute could be interpreted to ban registered sex

> offenders from accessing sites such as *Google.com* and *Amazon.com* because these sites contain subsidiary social networking pages: they derive revenue from advertising; their functions facilitate the social introduction of two or more people; and they allow users to create personal profiles, e-mail accounts, or post information on message boards. Thus, registered sex offenders may be prohibited from conducting a "Google" search, purchasing items on *Amazon.com,* or accessing a plethora of Web sites unrelated to online communication with minors. In its overall application, the statute prohibits a registered sex offender whose conviction is unrelated to sexual activity involving a minor from accessing a multitude of Web sites that, in all likelihood, are not frequented by minors.

Id. at 153.

Other courts have reached similar conclusions. In *Doe v. Jindal*, 853 F.Supp 2d. 596, (M.D. La. 2012), the court was confronted with people on the registry who were banned from social networking websites defined as follows:

> (4) "Social networking website" means an Internet website that has any of the following capabilities:
>
> > (a) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users.
> >
> > (b) Offers a mechanism for communication among users, such as a forum, chat room, electronic mail, or instant messaging.

Id. at 600. The court in *Jindal* held that these provisions were too ill-defined to pass constitutional muster:

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

Id. at 606. See also *Doe v. Nebraska*, 898 F.Supp 2d. at 1112-1115.

Another distinguishing feature between Kentucky and other State restrictions struck down is that places like Indiana provided statutory defenses to a person charged with violating these SOR requirements.

A close reading of Kentucky's statutory scheme indicates that those defenses available to individuals in *Doe v. Prosecutor, Marion County, supra*,[21] and others, are unavailable under the Kentucky statutes. While such statutory defenses might otherwise help to ameliorate vagueness concerns (though not in *Prosecutor, Marion County*), Kentucky has chosen to exacerbate the problem. The phrase "knowingly or intentionally" in KRS 17.546 modifies the use of the website or service, not whether or not the individual *knows* that website or service allows minors to access it. So long as the use of the site or the service is knowing and intentional, it matters not whether or not the person knows the site or service allows minors to use it.

The vagueness and overbreadth as applied in the Kentucky scheme *far* outpaces those that have been struck down in other courts on vagueness grounds. The provisions of KRS 17.510 and 17.564 are unconstitutionally vague.

C. KENTUCKY'S STATUTORY SCHEME IS FACIALLY OVERBROAD

Kentucky's scheme is also facially overbroad. The overbreadth doctrine "enables litigants 'to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Hill v. Colorado*, 530 U.S. 703 (2000) citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The overbreadth must be real and substantial "judged in relation to the statute's plainly legitimate sweep." *Broadrick*,

[21] The Indiana statute provided an express defense to individuals if they were unaware that minors could access or use the program. *Prosecutor*, 705 F.3d at 695 n.1.

413 U.S. at 615. There is a special concern within the overbreadth context that a statute deters protected speech where, as here, it imposes criminal sanctions. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

As noted above, Kentucky clearly has a legitimate interest in protecting minors from sexual victimization and exploitation from SOR Registrants and others. However, KRS 17.546 and 17.510 relating to internet identifiers clearly exceed the bounds of those legitimate interests. By their very terms, the statutes sweep *all* of a Registrant's internet communication under government monitoring – not just that communication which is improper or illegal. More so, and as has been the case in the numerous other cases construing these sorts of statutes, "no one can truly know 'what the statute covers.'" *Nebraska*, 898 F.Supp.2d. at 1119 citing *United States v. Williams*, 553 U.S. 285 (2008).

There can be no doubt that the Kentucky scheme criminalizes a substantial amount of protected speech activity, including using services like Skype to communicate with family, friends, or business associates over long distances. These are programs which, undoubtedly, minors use as well, and so their use by a Registrant would—by the terms of the statutes—likely be illegal whether or not the Registrant used the software to communicate with a minor or even had a minor in their contact list. [*See Post Decl.*, *DE# 15-2*.]

This overbreadth problem was recently addressed in Louisiana in *Doe v. Jindal*, 853 F.Supp2d. 596 (M.D. La. 2012). There, the court found a similar statutory ban overbroad, *even despite* a provision allowing for SOR Registrants to be able to petition their probation or parole officer for an exemption. *Id.* at 603-605.

And, the Ninth Circuit in *Harris* found overbroad the CASE Act's requirement of people on the registry turning over all their online identifiers within 24 hours. 772 F.3d at 578. And, in

Doe v. Nebraska which involved a nearly identical statutory scheme as Kentucky's which too was struck down as overbroad:

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

898 F.Supp.2d at 1119. (citations omitted).

Because Kentucky's statutory scheme encompasses all internet communication within its ambit and prohibits a substantial amount of communication that is otherwise protected and permissible, it is *facially overbroad* and fails scrutiny under the First and Fourteenth Amendments.

D. THE KENTUCKY STATUTORY SCHEME DEPRIVES PEOPLE ON THE REGISTRY OF THEIR CONSTITUTIONALLY-PROTECTED RIGHT TO ANONYMOUS SPEECH, AND IS THEREFORE UNCONSTITUTIONAL

The Kentucky scheme makes available for public access all the internet communication name identities that an SOR Registrant provides to authorities, and therefore deprives the Plaintiff and others of the right to speak anonymously. KRS 17.580(3). "Under our Constitution, anonymous [speech] is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

KRS 17.580 makes public information provided by Registrants, including the creation on a State website a search function for internet identifiers of SOR Registrants.[22] KRS § 17.580(3).

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22 http://kspsor.state.ky.us/sor/html/SORSearch.htm

The same statute also provides for civil immunity for law enforcement that disseminates the same identifiers "in good faith." Id.

These provisions destroy the ability of Registrants to engage in anonymous online communication. Not only are the identifiers of people on the registry available for public consumption, but Kentucky law provides no safeguard or restriction on the active dissemination and disclosure of those identifiers by Kentucky officials to other government officials or the public, and shielding law enforcement from civil liability for disclosure.

This type of "dissemination" provision has already been found to be constitutionally problematic in *Harris* where, in California's CASE Act, there were at least *some* safeguards in place to protect against disclosure of a registrant's information, *and* those identifiers were not open to public inspection. The Ninth Circuit struck down these "safeguards" as inadequate. 772 F.3d at 579-580. *See also Doe v. Shurtleff*, 2008 WL 4427504 (D. Utah, 2008) (striking down Utah's requirement that identifiers registered by people on the registry be disclosed to the public as violative of the First and Fourteenth Amendments). If a scheme that included some *de minimus* dissemination safeguards is deemed unconstitutional, then a scheme like the one in Kentucky that has no safeguards compounded by an immunity for disclosure *and* discloses them to the public by way of a search function cannot survive.

White v. Baker, 696 F.Supp.2d. 1289 (N.D. Georgia 2010) is also instructive on this point. In *White*, the court was confronted with a Georgia statutory scheme that required people on the registry to disclose online identifiers and, though the statute did not provide for public disclosure, was still constitutionally problematic:

> Subsection (*o*) allows the Internet Identifiers to be disclosed to law enforcement agencies for "law enforcement purposes." This permitted use is undefined and extensive. "Law enforcement purposes" can have many meanings. To some, it is the investigation of suspected or identified criminal conduct. To others, "law

> enforcement purposes" encompasses the development of investigative leads. To still others, it is the prevention of crime. It may mean any purpose determined appropriate by law enforcement personnel to prevent criminal conduct. The free speech implication is obvious. A law enforcement agency could deem it necessary to begin monitoring internet sites, blogs, or chat rooms it believes may or could be used by predators to induce minors into sexual encounters because the monitoring may provide investigative leads. An agency could decide to create a list of registrant user names for use in monitoring 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. This section, like the original statute at issue in *Shurtleff,* is not sufficiently narrowly-tailored to meet the government's compelling interest to protect children.

Id. at 1310.

Even leaving aside Kentucky's public disclosure of the Plaintiff's identifiers and the identifiers of Registrants, not only is there a complete absence of any safeguards concerning how this information may be shared, but the statutes actively scheme actively encourages dissemination under a "good faith" standard by creating an immunity shield that attempts to protect law enforcement from civil liability. Taken together, Kentucky's statutory scheme deprives the Plaintiff and others on the registry of their constitutional right to anonymous speech, and is therefore unconstitutional.

E. THE KENTUCKY STATUTORY SCHEME IS UNCONSTITUTIONAL BECAUSE IT FUNCTIONS AS A *DE FACTO* PRIOR RESTRAINT ON SPEECH AND OTHERWISE HAS AN IMPERMISSIBLE CHILLING EFFECT ON PROTECTED SPEECH

Kentucky's requirement that an SOR Registrant must, on the same day of communicating via a new or changed "internet communication name identity," travel to their local probation and parole office and register the identifier functions as a *de facto* prior restraint on speech. Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Analogous to the case at bar are the facts that confronted the Eleventh Circuit in *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004). *Bourgeois* dealt with a group of protestors who annually protested at the School of the Americas, housed at Fort Benning, Georgia. *Id.* at 1306. A week before the planned protest for 2002, a policy was implemented by the City of Columbus, requiring individuals who wished to take part in the protest to submit to a magnetometer search before they could protest. *Id.* at 1307.

The Eleventh Circuit found that requiring protestors to submit to a magnetometer search *prior to protesting* constituted a prior restraint on speech, and thus unconstitutional. *Id.* at 1319. Similarly, Kentucky requires a Registrant to *personally appear* at the probation and parole office on the *same day* that the proposed communication is to take place that uses a new or changed identifier (e.g., leaving a comment on a news article).[23] If a person on the registry has the good fortune of being employed, or, as may be the case, lacks reliable transportation, this may present an impossibility and therefore a complete prior restraint to the speech.

If the local probation and parole office is closed (such as after 5:00P.M., on the weekend, or a holiday), the situation is virtually indistinguishable from the prior restraint in *Bourgeois*. The statute does not provide for communicating and then registering as soon as is practicable or the next business day. So, the individual faces a difficult choice: either engage in the protected communication and commit a new Class D felony (as well as a likely PFO hit), or not speak at all. To suggest that forcing such a choice onto people bears any semblance of comporting with the protections afforded by the First Amendment or serves to protect anyone is farcical.

Even *if* the stars align and the Registrant desiring to engage in this speech did not have a job or other commitment that prevented him or her from appearing in person, had reliable

[23] The statute also provides for registration of new identifiers prior to the date of use or creation. Is this even epistemologically possible?

transportation, and the local probation/parole office was open, the requirement *still* poses constitutional problems. As noted, *supra,* in *Harris*, the Ninth Circuit also had a problem with the CASE Act requirement that Registrants had to send written notice to authorities within 24 hours of creating or changing an internet identifier. *Harris*, 772 F.3d 563 at 581-582. As the court explained:

> . . . any time registrants want to communicate with a new identifier, they must assess whether the message they intend to communicate is worth the hassle of filling out a form, purchasing stamps, and locating a post office or mailbox. The mail-in requirement is not only psychologically chilling, but physically inconvenient, since whenever a registered sex offender obtains a new ISP or Internet identifier, he must go somewhere else within 24 hours to mail that information to the State. *Cf. Lamont,* 381 U.S. at 307, 85 S.Ct. 1493 (holding that a law requiring addressees of "communist political propaganda" to request in writing that the mailing be delivered "[wa]s almost certain to have a deterrent effect").
>
> The Act's 24-hour reporting requirement thus undoubtedly chills First Amendment Activity. Of course, that chilling effect is only exacerbated by the possibility that criminal sanctions may follow for failing to update information about Internet identifiers or ISP accounts.

772 F.3d 563 at 582.

Given this holding, it is hard to divine a constitutionally safe harbor for the far more onerous Kentucky scheme. If a mail in requirement is "psychologically chilling" and "physically inconvenient" to the point of unconstitutionality, the same can logically be said for a requirement that a person appear that same day at a probation/parole office, and wait however long it takes to see a probation officer in order to register an internet communication identifier . . . all, again, assuming it is a weekday, she has no job or can get off work (remember, she is a felon on an SOR), the office is open, an officer is available, and the Registrant can physically get herself there before closing time.

This scenario, we suggest, conjures a lot of unconstitutional "ifs".

The provisions of the Kentucky approach function as a *de facto* prior restraint on speech that are either indistinguishable from the prior restraint in *Bourgeois* (if the local probation and parole office is closed or the person is unable to personally appear there on the same day), or is otherwise a difference without distinction. In *Bourgeois*, the government is essentially told the School of America protesters "if you want to speak, you are going to have to jump through these hurdles that we've put in your way." Here, the Commonwealth is essentially telling the Plaintiff and others in his position the same thing – that on the same day that you engage in that communication, you are going to need to personally appear at the probation/parole office to register that identifier, or else be guilty of a new Class D felony.

The effect in both cases is the same: chilling of protected speech to the point of freezing it in silence in the speaker's mouth.

CONCLUSION

For the foregoing reasons, the provisions of KRS 17.546 and KRS 17.510 relating to internet identifiers and prohibited internet use by people on the registry in the Commonwealth are unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The Plaintiff therefore respectfully requests that the Court issue a permanent injunction enjoining the Commonwealth and Fayette County from enforcing the law, and to declare those same provisions unconstitutional.

Further, if the Defendants agree, the Plaintiff respectfully suggests that this matter can be resolved on the Record and briefing without the cost and time of a Bench Trial, and that oral argument in a hearing context would be ample . . . though Plaintiff is satisfied to submit the case on the briefs with no hearing unless the Court deems it useful in this matter.

This the 28th day of August, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed via CM/ECF to all counsel of Record on August 28, 2015.

/s/ *Scott White*