No. 12-15261

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LITMON, JR.,

Plaintiff-Appellant,

v.

KAMALA D. HARRIS, ATTORNEY GENERAL OF CALIFORNIA

Defendant-Appellee.

On Appeal From the United States District Court
for the Northern District of California
Honorable Edward M. Chen, Judge
Case No. 10-03894 EMC

APPELLANT'S REPLACEMENT OPENING BRIEF

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INTRODUCTION

In this 42 U.S.C. § 1983 action, Plaintiff-Appellant David Litmon, Jr. alleges that California's lifetime, 90-day, in-person registration requirement applicable only to sexually violent predators violates his Fourteenth Amendment rights to due process and equal protection. In addition, Mr. Litmon alleges that the requirement violates the *Ex Post Facto* Clause, and that it was not issued in compliance with the California Administrative Procedure Act.

The district court dismissed Mr. Litmon's *pro se* complaint. The court first found, as a matter of law, that the registration requirement does not encroach on Mr. Litmon's liberty. Second, the court found that the requirement is not punitive, and therefore does not violate the *Ex Post Facto* Clause. Third, the court found a rational basis for placing more burdensome registration requirements on only one class of offender. Finally, the court found that the Department of Justice was acting within its scope of authority when it required in-person registration.

The district court erred in dismissing Mr. Litmon's complaint without hearing any evidence, and without giving him the opportunity to prove his allegations. No other civil registration requirement places such an extreme burden on otherwise free citizens. A lifetime, 90-day, in-person registration requirement violates Mr. Litmon's fundamental rights. It encroaches on his freedom, impedes his ability to find meaningful employment, and permanently punishes him for his

crimes. In addition, the State subjects those deemed sexually violent predators to more onerous registration requirements, without a sound reason for doing so. Because the registration requirement goes far beyond the bounds of a permissible civil regulation and arbitrarily subjects Mr. Litmon to unnecessary burdens, the Department of Justice should be enjoined from enforcing the requirement.

Not only does the 90-day in-person registration requirement unduly interfere with Mr. Litmon's liberty, but the Department of Justice has not developed written guidelines for what the law actually requires. Local police stations have been given no guidance, creating an unacceptable risk that the law will be arbitrarily enforced. This lack of concern for the rule of law violates both substantive due process and the California Administrative Procedure Act. Therefore, the Department of Justice should be enjoined from enforcing the law until it has established written guidelines specifying the requirements of quarterly registration.

ISSUES PRESENTED

1. Does in-person registration every 90 days encroach upon Mr. Litmon's fundamental rights?
2. Is a lifetime duty to register in person every 90 days punitive?
3. Do the Department of Justice's registration requirements arbitrarily treat similarly situated sex offenders differently?
4. Does the lack of specificity in the registration requirements for sexually violent predators violate substantive due process?
5. Are the Department of Justice's informal policies regarding sex offender registration void for failing to comply with the California Administrative Procedure Act?

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a) for Mr. Litmon's claims arising under 42 U.S.C. § 1983. The district court had supplemental jurisdiction over Mr. Litmon's state law claim under 28 U.S.C. § 1367(a). This Court has jurisdiction under 28 U.S.C. § 1291. *See Hall v. City of L.A.*, 697 F.3d 1059, 1070-71 (9th Cir. 2012). The district court entered final judgment as to all claims on January 25, 2012. ER 22. Mr. Litmon timely filed his notice of appeal on February 7, 2012. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE FACTS

A. Relevant Statutory Law

California's Sex Offender Registration Act requires all sex offenders to register with local law enforcement. Cal. Penal Code §§ 290-290.024. The Legislature intended registration to reduce the risk of recidivism and enable law enforcement to monitor offenders. *Id.* § 290.03. As part of the registration process, offenders must be fingerprinted and photographed, and they must provide proof of residence, descriptions of the vehicles they drive, and information about where they work. *Id.* § 290.015. The Department of Justice makes some of this information available to the public in the form of a searchable, on-line database. *Id.* § 290.03; *see also* http://www.meganslaw.ca.gov/.

Individuals convicted of a sex offense in any state, federal, or military court must register annually. *See* Cal. Penal Code §§ 290, 290.005, 290.023. Sex offenders must also register annually if they have been found not guilty by reason of insanity, or if they have been civilly committed as mentally disordered sex offenders or sexually violent predators. *Id.* §§ 290.001, 290.004. In most cases, unless they are granted a full pardon, offenders must register for life. *Id.* §§ 290.012, 290.5(b)(1). Failure to register results in criminal penalties. *Id.* §§ 290.015(c), 290.018(f).

In addition to the annual duty to register, individuals found to be sexually violent predators must also register every 90 days. *Id.* § 290.012(b). A sexually violent predator for purposes of this registration requirement is any person who has been convicted of a sexually violent offense and found to have a mental disorder making him or her likely to commit future sexually violent crimes. Cal. Welf. & Inst. Code § 6600.

The definition of "sexually violent predator" originates from California's Sexually Violent Predator Act, a statute providing for the civil commitment and treatment of sex offenders after the expiration of their criminal sentences. Cal. Welf. & Inst. Code §§ 6600-6609.3; *People v. Superior Court*, 81 Cal. Rptr. 2d 189, 193 (Cal. Ct. App. 1999). To civilly commit an individual as a sexually violent predator, the State must first identify the offender prior to his release from prison, evaluate his or her mental health, and then file a petition for commitment with the court. Cal. Welf. & Inst. Code § 6601. The State must then prove beyond a reasonable doubt that the offender has a mental disorder making him or her a danger to others and a high risk for re-offense. *Id.* § 6604. Early versions of the law provided for two-year terms of commitment, and required a new petition, evaluation, and trial for each subsequent term. ER 127. Under the current laws governing such civil commitments, offenders are held for an indeterminate term, and released only when a court or jury determines that they are no longer sexually

violent predators. Cal. Welf. & Inst. Code § 6605. Upon release from commitment, these offenders must register every 90 days for the remainder of their lives. Cal. Penal Code § 290.012(b).

To register, a sexually violent predator must "verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer, in a manner established by the Department of Justice." *Id.* However, neither the Sex Offender Registration Act, nor any other law or regulation, requires that these quarterly updates be in person. *See id.*; Cal. Code Regs. tit. 15, § 3652(b)(1) ("Every person who has been adjudicated a sexually violent predator . . . shall, after his or her release from custody, verify his or her residence and employment address at least once every 90 days, including the name of the employer and the place of employment."). Furthermore, neither the Sex Offender Registration Act nor the Department of Justice regulation requires fingerprints, photographs, or additional information from quarterly registrants. *Compare* Cal. Penal Code § 290.012(b), *and* Cal. Code Regs. tit. 15, § 3652(b), *with* Cal. Penal Code §§ 290.012(a), 290.015 (requiring annual registrants to appear in person for fingerprinting and photographing).

The Department of Justice requires offenders to fill out a form during their registration. Entitled "Sex Registration / Change of Address / Annual or Other Update," this multi-purpose form is used for all types of sex offender registration.

ER 29-30. While the form states that all registration must be completed in person, no statute or regulation supports an in-person requirement for quarterly registrants. *See* ER 30; Cal. Penal Code § 290.012(b); Cal. Code Regs. tit. 15, § 3652(b). In addition, the multi-use form appears to require all registrants to fill out *all* the requested information, despite the fact that the Sex Offender Registration Act only requires quarterly updates of the offender's addresses and employer. *See* ER 30; Cal. Penal Code § 290.012(b); Cal. Code Regs. tit. 15, § 3652(b). This registration process can take anywhere from four to ten hours. ER 42-43.

B. Mr. Litmon's Registration Requirement

In the 1970s, Mr. Litmon was civilly committed as a mentally disordered sex offender after committing multiple violent sexual offenses. ER 107. He reoffended following release, and the court sentenced him to 34 years in prison. ER 107, 157. Prior to his release from prison, the Department of Corrections and Rehabilitations began proceedings to civilly commit him as a sexually violent predator. *See* Cal. Welf. & Inst. Code § 6601. On May 2, 2000, a jury found Mr. Litmon to be a sexually violent predator, and he was civilly committed for a two-year term spanning from 2000 to 2002. ER 74:11-14, 157.

Before the expiration of Mr. Litmon's first two-year term, the State filed a petition to extend his commitment for another two years. ER 125. However, due to limited judicial resources, the trial on that petition did not occur until 2005, with

Mr. Litmon remaining in custody pending that trial. ER 125, 132. In 2005, after a belated jury trial, Mr. Litmon was retroactively civilly committed for the two-year period spanning from 2002 until 2004. ER 74, 125.

From 2005 until his release in 2008, Mr. Litmon was once again held in custody without a valid commitment order. ER 157. During that time, the State attempted to consolidate his backlogged petitions and commit him for the period of time spanning from 2004 until 2008. ER 126. However, the jury trial on the consolidated petition resulted in a deadlock, and the court declared a mistrial. ER 126. While Mr. Litmon was awaiting re-trial on the consolidated petition, the California Legislature amended the Sexually Violent Predator Act to permit indeterminate commitments. ER 127. In response, the court ordered that Mr. Litmon's civil commitment be converted to an indeterminate term, retroactive to his original commitment in 2000. ER 127-28.

Mr. Litmon appealed, and the California Court of Appeal reversed the retroactive indeterminate commitment because it violated procedural due process. ER 74. In addition, the court dismissed the consolidated recommitment petitions due to excessive pretrial delay. ER 134. Thus, after being held in custody for five years without a valid commitment order, Mr. Litmon was released on September 4, 2008. ER 157.

As a result of Mr. Litmon's four-year civil commitment as a sexually violent predator, he must now, for the remainder of his life, register in person with his local police station at least once every 90 days. ER 159; *see also* Cal. Penal Code § 290.012(b).

STATEMENT OF THE CASE

Acting *pro se*, Mr. Litmon filed this action against defendant Edmund G. Brown, Attorney General for the State of California,[1] seeking injunctive relief under 42 U.S.C. § 1983. ER 156-58. Mr. Litmon alleged that the Department of Justice's policy requiring sexually violent predators to register in person every 90 days violates his Fourteenth Amendment due process and equal protection rights. ER 55-56, 158-59. In support of those claims, Mr. Litmon alleged, among other things, that the 90-day in-person registration requirement so severely restricts his liberty and freedom of movement that he has been unable to work as a truck driver. ER 158. Mr. Litmon also alleged that the registration requirement violates the *Ex Post Facto* Clause of the constitution. ER 159. Finally, he alleged that section 290.012(b), as written, does not require detailed, in-person registration. ER 158-59.

The district court dismissed Mr. Litmon's complaint with prejudice. ER 85. The court held that the registration requirement does not violate Mr. Litmon's

[1] When Kamala D. Harris was sworn in as the new Attorney General, she automatically became the defendant. Fed. R. Civ. P. 25(d).

liberty interests because it is flexible enough to allow him to work as a truck driver. ER 78-79. In addition, the court found that the several hours Mr. Litmon must spend at his local law enforcement agency every 90 days does not deprive him of his liberty. ER 21. The court further held that the registration requirement does not violate the *Ex Post Facto* Clause of the Constitution because it is regulatory, not punitive. ER 84. Finally, the court held that because section 290.012(b) gives the Department of Justice the authority to determine the "manner" of registration, the agency's policy requiring in-person registration is not *ultra vires*. ER 77.

After being granted leave to amend his complaint, Mr. Litmon alleged that the registration requirement violates the Equal Protection Clause because similarly situated sex offenders are not required to register every 90 days. ER 55-56, 62. The district court dismissed this amended complaint with prejudice, finding it reasonable that the State monitors those deemed sexually violent predators more rigorously than other type of sex offenders. ER 17-18. The court entered final judgment against Mr. Litmon on January 25, 2012. ER 22.

STANDARDS OF REVIEW

The dismissal of Mr. Litmon's section 1983 claim is reviewed *de novo*. *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (motion to dismiss); *United States v. Perelman*, 695 F.3d 866, 869 (9th Cir. 2012) (constitutionality of a statute); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001) (section 1983 claim of

individuals not in custody). A complaint should be dismissed only when it fails to allege a cognizable legal claim, or when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (quotation marks and citation omitted); *Hinds Invs., LP v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011). A *pro se* complaint must be construed liberally, particularly in a civil rights case, in order to give the petitioner the benefit of the doubt. *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010).

SUMMARY OF ARGUMENT

Mr. Litmon, having previously been civilly committed as a sexually violent predator, must now, for the remainder of his life, register in person with his local police station every 90 days.

Lifetime, quarterly, in-person registration places limits on Mr. Litmon's freedom that are unmatched by any other civil registration requirement. The duty to appear in person at least four times a year is a form of physical restraint that prevents Mr. Litmon from engaging in the normal occupations of the community. Furthermore, the cumulative burden of the registration requirement pushes it across the line separating permissible civil regulations from unconstitutionally retroactive penalties. As a result, the registration requirement violates substantive due process and the *Ex Post Facto* Clause of the Constitution.

Additionally, the 90-day registration requirement violates equal protection because it applies only to individuals adjudicated as sexually violent predators by the State of California. Other similarly situated offenders, such as mentally disordered offenders, mentally disordered sex offenders, and individuals who were adjudicated as sexually violent predators outside of California courts, are required to register only annually.

Finally, the Department of Justice has not given police stations any guidance regarding enforcement of the law. As a result, local law enforcement may make the registration process even more burdensome and time consuming than the face of the law suggests. Furthermore, the law's lack of clarity and specificity interferes with meaningful judicial review. While the Department of Justice has the authority to determine the "manner" of registration, its failure to do so violates both substantive due process and the California Administrative Procedure Act.

Despite the factual issues raised by Mr. Litmon's allegations, the district court erroneously dismissed his claims, finding that the 90-day in-person registration requirement would survive rational basis review. However, because the requirement implicates fundamental rights, strict scrutiny applies. This Court should remand so that Mr. Litmon can develop a record showing that the registration requirement is invalid under that standard. Furthermore, even if this

Court finds that no fundamental rights are implicated, Mr. Litmon has nonetheless raised valid claims sufficient to survive a motion to dismiss.

ARGUMENT

I. A LIFETIME, QUARTERLY, IN-PERSON REGISTRATION REQUIREMENT VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT IS NOT NARROWLY TAILORED TO PROTECT PUBLIC SAFETY.

The Due Process Clause of the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Substantive due process protects individuals against government action that interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Among the fundamental rights protected are the rights to be free from physical restraint and to "work for a living in the common occupations of the community." *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *Truax v. Raich*, 239 U.S. 33, 41 (1915). Laws infringing on these liberty interests should be upheld only if they are narrowly tailored to achieve a compelling purpose. *Washington*, 521 U.S. at 721 ("[T]he Fourteenth Amendment forbids the government to infringe . . . 'fundamental' liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest.") (internal quotations and citations omitted).

Section 290.012(b), as implemented by the Department of Justice, requires that Mr. Litmon register in person, every 90 days, for the rest of his life. This subjects him to bodily restraint and interferes with his right to work. As a result, this Court should remand and allow Mr. Litmon the opportunity to prove that the registration requirement is not narrowly tailored to protect society from the risk that he, and others like him, will re-offend.

A. A Lifetime, Quarterly, In-Person Registration Requirement Unconstitutionally Infringes on Mr. Litmon's Fundamental Right To Be Free from Restraint.

Substantive due process protects an individual's fundamental right to be free from physical restraint. *See Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . ."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Liberty "denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men"). By requiring registrants to physically appear at their local police station on a regular basis, the Department of Justice has infringed this fundamental right.

Restrictions on an individual's freedom of movement run afoul of the fundamental right to be free from physical restraint. For example, the Supreme Court in *City of Chicago v. Morales* struck down a law prohibiting gang members

from loitering in public after finding they had a liberty interest in freedom of movement. 527 U.S. 41, 45-46, 53-54 (1999). The Court recognized that the "right to remove from one place to another according to inclination" is "part of our heritage." *Id.* at 53-54 (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Kent v. Dulles*, 357 U.S. 116, 126 (1958)). Similarly, even a brief, involuntary detention for purposes of fingerprinting and photographing interferes with an individual's freedom of movement and amounts to a seizure under the Fourth Amendment. *Hayes v. Florida*, 470 U.S. 811, 814-15 (1985); *Rowe v. Burton*, 884 F. Supp. 1372, 1381-82 (D. Alaska 1994) (noting that "involuntary surrender" to the state for sex offender registration could be a Fourth Amendment seizure).

In addition, cases arising in the *habeas corpus* context have consistently held that requiring an individual to appear in person, at a particular time or place, creates a form of physical restraint. *See Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998) ("The precedents that have found a restraint on liberty rely heavily on the notion of a physical sense of liberty – that is, whether the legal disability in question somehow limits the . . . petitioner's movement.").[2] In

[2] *Habeas corpus*, unlike substantive due process, requires as a threshold matter that an individual be "in custody." While *habeas* cases do not govern here, they do provide guidance regarding when an individual's freedom of movement has been restrained. *See Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (noting that habeas corpus is a remedy for "severe restraints on individual liberty").

Williamson v. Gregoire, this Court upheld Washington's annual registration requirement for sex offenders, finding it dispositive that the State did not require Williamson to appear in person, and "[t]hus the law neither targets Williamson's movement in order to impose special requirements, nor does it demand his physical presence at any time or place." *Id.* at 1184. In contrast, where an individual is required to appear in person to attend fourteen hours of classes over a three to five day period, this "significantly restrains appellant's liberty to do those thing which free persons in the United States are entitled to do . . . [because] Appellant 'cannot come and go as he pleases.'" *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (citing *Hensley*, 411 U.S. at 351); *see also Barry v. Bergen Cnty. Prob. Dep't*, 128 F.3d 152, 161-62 (3rd Cir. 1997) (holding that 500 hours of community service over three years is a "restraint[] on . . . liberty not shared by the public generally"). Similarly, the Supreme Court in *Hensley v. Municipal Court* found that a defendant's liberty was restrained, despite the fact

(continued…)

Additionally, while this Court in *Williamson v. Gregoire*, 151 F.3d at 1183-84, found that annual registration by mail did not amount to custody, this Court has not yet been presented with a *habeas* challenge to a 90-day in-person registration requirement such as the one at issue here. The frequent appearance requirement restrains an individual's freedom of movement and fundamentally changes the burden created by registration. As a result, this civil registration requirement could satisfy the threshold "in custody" requirement for *habeas*. However, even though Mr. Litmon could bring a *habeas* claim, that is not his exclusive remedy, nor is it the question before the Court.

that he was released on his own recognizance, because he was required to "appear at all times and places as ordered by the court." 411 U.S. at 348, 351. Even though he was free to travel, and not subject to any supervisory limitations, his duty to appear when ordered was sufficient to curtail his freedom of movement. *Id.* at 351, 354.

No other civil registration requirement imposes as great a burden on otherwise free individuals. For example, while individuals convicted of arson, gang-related offenses, and narcotics offenses must register in California, none are required to register every 90 days, in person, for life. *See* Cal. Penal Code § 457.1 (arsonists); *id.* §§ 186.30, 186.32 (gang members); Cal. Health & Safety Code §§ 11590, 11594 (narcotics offenders). Even individuals who receive benefits from the government, such as unemployment checks, food stamps, or drivers licenses, rarely have to appear in person. *See* http://www.edd.ca.gov/Unemployment/Eligibility.htm; http://www.calfresh.ca.gov/PG841.htm; http://www.dmv.org/ca-california/renew-license.php#When-to-Renew-Your-CA-Drivers-License.

The district court, in finding that the registration requirement does not infringe on any fundamental rights, failed to adequately consider the cumulative effect of life-long in-person registration every 90 days, where each appearance consumes several hours. Registrants are limited in their fundamental right to come and go as they please because they must continually reappear, in person, for

periodic reporting, for the remainder of their lives. This burden, not shared by the general public and unmatched by any other civil registration requirement, limits a registrant's ability to engage in the full range of pursuits generally available to those who are truly free.

Mr. Litmon has raised a cognizable due process claim by alleging that life-long, in-person, 90-day registration infringes on his fundamental right to be free from physical restraint. For that reason, this Court should remand so that Mr. Litmon's claims can be factually developed and reviewed under strict scrutiny.

B. The Ninety-Day In-Person Registration Requirement Unconstitutionally Infringes on Mr. Litmon's Fundamental Right To Work.

In addition to alleging that quarterly in-person registration infringes on his fundamental right to be free from restraint, Mr. Litmon alleges that the registration requirement infringes on his fundamental right to work. ER 158. The Due Process Clause of the Fourteenth Amendment protects an individual's "right to work for a living in the common occupations of the community." *Truax*, 239 U.S. at 41; *see also Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (finding a "generalized" due process right to "choose one's field of private employment"); *Green v. McElroy*, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause).

1. In-person registration every ninety days interferes with Mr. Litmon's ability to work in a wide range of professions.

The district court dismissed Mr. Litmon's claim after finding it implausible that the 90-day in-person registration requirement interferes with his ability to find or keep a job.[3] However, this conclusion is in error for several reasons.

First, the burden created by registration and the degree it interferes with Mr. Litmon's employment are factual questions not suitable for adjudication on a motion to dismiss. *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1078 (9th Cir. 2012) (noting that the plaintiff's "failure to prove the case on the pleadings does not warrant dismissal"). Mr. Litmon is entitled to an opportunity to prove as a factual matter that the registration requirement has impaired his ability to work. It was improper for the district court to decide that factual issue against him on a motion to dismiss.

Second, the district court underestimated the impact the 90-day in-person registration requirement has on Mr. Litmon's ability to find work in his chosen profession. Mr. Litmon holds a commercial license and would like to work as a

[3] Mr. Litmon alleges that he has been "unable to obtain employment as a truck driver, since such employment could likely cause him to miss the 90-day appearance at the police station." ER 158:16-18. This complaint should be liberally construed to encompass the details described here. *See Hebbe*, 627 F.3d at 341-42. To the extent that a liberal reading of his claim does not encompass these allegations, he should be granted leave to amend. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).

long-haul truck driver. ER 144-45. However, the demands of this line of work are incompatible with his registration schedule. ER 145, 158. Truck drivers often have very little control over their routes and schedules, and little notice of where their next delivery will take them. Long haul truck drivers can be away from home for months at a time. Because of the realities of this profession, Mr. Litmon cannot both work as a truck driver and register in person every 90 days.

Finally, the district court failed to consider the additional barriers to employment that Mr. Litmon must overcome. Having spent a significant portion of his life in custody, Mr. Litmon faces a lifetime struggle to find and keep a good job. This challenge is further complicated by the fact that he must appear in person, every 90 days, to complete a registration process that can take a full day. ER 42-43. In addition, Mr. Litmon's local police stations have only permitted him to register on weekdays during normal business hours.[4] As a result, he can only work at jobs where he can take time off when he needs it, where he gets paid well enough that he can afford to miss work, and where he gets enough days off that he can sacrifice at least four a year to registration. Entry level jobs that fit these requirements are few and far between.

[4] Mr. Litmon did not include this detail in his complaint. To the extent his complaint cannot be read to encompass this allegation, he should be should be granted leave to amend. *Lucas*, 66 F.3d at 248.

2. The registration requirement should be reviewed under strict scrutiny.

The district court further found that even if the 90-day in-person registration requirement interferes with Mr. Litmon's ability to find work, it would survive rational basis review. ER 77-79. However, because the registration requirement inhibits Mr. Litmon's ability to work in a wide range of occupations, as opposed to just one particular field, his allegations should be reviewed under a higher level of scrutiny.

Every case cited by the district court in support of rational basis review is inapplicable to the facts at issue here. ER 77-78. While government regulations creating barriers to employment in a particular profession are permissible if they are rationally related to an individual's fitness or capacity for that job, in this case, the registration requirement is not related to Mr. Litmon's abilities, and it bears no resemblance to the type of requirements generally upheld under rational basis review. *See, e.g.*, *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957); *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1999).

Because the registration requirement has a far-reaching impact on the ability of sex offenders to find gainful employment in a wide variety of fields, it should be scrutinized more carefully. *See Williams*, 179 U.S. at 274 (finding that an individual has a fundamental right to "live and work where he will; to earn his livelihood in any lawful calling; to pursue any livelihood or avocation"); *Truax*,

239 U.S. at 40, 41 (holding that regulations "cover[ing] the entire field of industry" and impacting "a wide range of employments" infringe on an individual's fundamental right to work).

Mr. Litmon has raised valid allegations that the 90-day in-person registration requirement infringes on his fundamental right to work. Because the requirement is not related to his fitness or capacity for a particular occupation, these allegations merit factual development and review under strict scrutiny.

C. The Enhanced Registration Requirement for Sexually Violent Predators Is Not Narrowly Tailored To Protect Public Safety.

Because the 90-day in-person registration requirement implicates fundamental rights to be free from restraint and to engage in the common occupations of the community, the district court, on remand, should review Mr. Litmon's claims under strict scrutiny. The district court should enjoin enforcement of the law unless it is narrowly tailored to protect a compelling government interest. *Washington*, 521 U.S. at 721.

In this case, while the State has a compelling interest in protecting the public from dangerous sex offenders, Mr. Litmon has validly alleged that a quarterly in-person registration is not narrowly tailored to promote this interest. ER 158. To the extent that quarterly registration is effective at all, its effectiveness does not depend on it being in person. Section 290.012(b) requires registrants only to provide information about their residence and employer; there is no reason this

information cannot be collected as effectively by mail or the internet. Even if photographing and fingerprinting is necessary, this information is already collected annually, and there is no reason to believe that more frequent updates would accomplish any valid purpose. *See* Cal. Penal Code §§ 290.012(a); 290.015; *see also Rowe*, 884 F. Supp. at 1383 (noting that in-person appearances for fingerprinting and photographing is unnecessary when such information was acquired during the initial arrest).

Because the registration requirement encroaches on fundamental rights to be free from restraint and to work, and is not narrowly tailored, this Court should remand and allow Mr. Litmon the opportunity to prove that the law violates his substantive due process rights under the Fourteenth Amendment.

II. LIFETIME IN-PERSON REGISTRATION EVERY NINETY DAYS VIOLATES THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION.

Not only does lifetime in-person registration every 90 days infringe on Mr. Litmon's fundamental rights, but the cumulative burden of the requirement also makes it an unconstitutionally retroactive punishment. The district court dismissed Mr. Litmon's *ex post facto* challenge after finding that the registration requirement does not impose an "affirmative disability or restraint," and is therefore not punitive. ER 82:16-25. However, the court failed to consider that the frequency and duration of the registration requirement at issue here differs from other

registration statutes, and that this difference makes the requirement unconstitutional.

The *Ex Post Facto* Clause of the Constitution prohibits a state from retroactively increasing the punishment for a prior conviction. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). In the absence of clear legislative intent to impose a new punishment, this Court looks to the seven *Mendoza-Martinez* factors to determine whether the effect of a law is punitive:

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

Hatton v. Bonner, 356 F.3d 955, 963 (9th Cir. 2004) (citing *Kennedy v. Mendoza-Martinez* 372 U.S. 144, 168-69 (1963)).

While all seven factors are relevant, the affirmative disability or restraint created by lifetime, quarterly, in-person registration tips the balance towards a finding that the registration requirement is punitive. For example, in *Doe I v. Otte*, this Court found that Alaska's lifetime, quarterly, in-person registration requirement was "onerous," and imposed "substantial disabilities on the plaintiffs." 259 F.3d 979, 987, 989 (9th Cir. 2001) *rev'd, Smith v. Doe*, 538 U.S. 84 (2003).

As a result, this Court held that its retroactive application violated the *Ex Post Facto* Clause. *Id.* at 993. However, after Alaska conceded that the statute did not in fact require in-person registration, the Supreme Court determined that the registration requirement was not punitive. *Smith*, 538 U.S. at 101-02. In that case, the difference between registering every 90 days and registering *in person* every 90 days was enough to alter the constitutionality of the requirement.

Here, in addition to the affirmative disability or restraint created by a lifetime legal duty to appear in person every 90 days, the cumulative burden of the registration requirement impacts several other *Mendoza-Martinez* factors. The frequency and duration of the in-person registration requirement weighs in favor of finding that it is "inherently retributive." *See Otte*, 259 F.3d at 990, 991-92. In addition, the requirement is arguably excessive in relation to its purpose of protecting public safety, further suggesting that the statute is punitive. *See id*. at 991-92. Finally, the registration requirement only applies to persons who have committed crimes. *Id.*

The cumulative impact of lifetime in-person registration every 90 days makes the requirement punitive and its retroactive application unconstitutional. Because the district court failed to consider the burdens created by the specific registration requirement at issue here, this Court should remand so that Mr. Litmon can present evidence in support of this claim.

III. REQUIRING SEXUALLY VIOLENT PREDATORS TO REGISTER EVERY NINETY DAYS VIOLATES EQUAL PROTECTION BECAUSE SIMILARLY SITUATED OFFENDERS HAVE LESS ONEROUS REGISTRATION REQUIREMENTS.

In addition to the undue burden created by the cumulative impact of quarterly in-person registration for life, the 90-day requirement by itself raises constitutional concerns. While those deemed sexually violent predators must register every 90 days, all other types of sex offenders register annually. *See* Cal. Penal Code § 290.012. This difference in treatment violates the Fourteenth Amendment's guarantee of equal protection. U.S. Const. amend. XIV, § 1; *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (requiring that similarly situated individuals be treated alike).

Because quarterly registration implicates the fundamental rights to be free from restraint and to work, this Court should remand so that the district court can review Mr. Litmon's claim under strict scrutiny. *See supra* Part I. However, even if this Court finds that Mr. Litmon's claims do not implicate fundamental rights, Mr. Litmon has stated a viable equal protection claim under rational basis review, and he should be given the opportunity to present evidence in support of his allegations.

A. There Is No Valid Reason To Require Sexually Violent Predators To Register More Frequently than Other Civilly Committed Sex Offenders.

Mr. Litmon alleges that section 290.012(b) violates equal protection because similarly situated sex offenders, such as those civilly committed as mentally disordered offenders and mentally disordered sex offenders, are subject to less stringent registration requirements. ER 55-56. The Equal Protection Clause prohibits states from affording different treatment to "persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). To raise a valid equal protection claim, Mr. Litmon need not allege that *all* civil committees are similarly situated for *all* purposes, but rather that civilly committed sex offenders are similarly situated for purposes of evaluating the registration requirement. *See Reed*, 404 U.S. at 76 (finding that classifications must have a "a fair and substantial relation to the object of the legislation"). Where there is overlap between state statutes governing civil commitment, as is the case here, an "equal protection claim would seem to be especially persuasive if . . . petitioner was deprived of [more favorable treatment] merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." *Humphrey v. Cady*, 405 U.S. 504, 512 (1972).

In California, there is significant overlap between the various civil commitment schemes for sex offenders, both in terms of how individuals are classified, and why they are committed. *See* Cal. Welf. & Inst. Code §§ 6600, 6300 (repealed 1981); Cal. Penal Code § 2962. However, once released, civilly committed sex offenders are subject to different registration requirements based on which statute they were committed under. *See, e.g.*, Cal. Penal Code § 290.012. Because there is no valid reason to treat these similarly situated offenders differently, this Court should permit Mr. Litmon's claim to proceed.

1. Sexually violent predators are similarly situated to mentally disordered offenders.

Sex offenders civilly committed as sexually violent predators are similarly situated to those civilly committed as mentally disordered offenders. Both types of sex offenders have committed serious or violent sex offenses, suffer from mental disorders that make them dangerous to others, and were civilly committed for treatment. *See People v. McKee*, 223 P.3d 566, 583-85 (Cal. 2010); *In re Calhoun*, 18 Cal. Rptr. 3d 315, 341-42 (Cal. Ct. App. 2003); *People v. Buffington*, 88 Cal. Rptr. 2d 696, 701 (Cal. Ct. App. 1999).

Sex offenders who commit serious or violent sex offenses can be civilly committed as mentally disordered offenders or as sexually violent predators. *Compare* Cal. Welf. & Inst. Code § 6600(b), *with* Cal. Penal Code § 2962(e). Predicate offenses for both forms of civil commitment include rape, sodomy, oral

copulation, and sexual penetration achieved through force, violence, duress, menace, or fear. Cal. Welf. & Inst. Code § 6600(b); Cal. Penal Code § 2962(e)(2)(F), (G), (H), (K). In addition, an individual can be civilly committed as a mentally disordered offender based on the commission of sex offenses not specifically enumerated, but which were perpetrated with force, violence, or threat. Cal. Penal Code § 2962(e)(2)(P), (Q). As a result of this "catch all" category, every predicate offense for commitment as a sexually violent predator could also lead to commitment as a mentally disordered offender.

Not only do both forms of civil commitment require the commission of a violent offense, but both types of sex offenders suffer from mental disorders that make them dangerous to others. *Compare* Cal. Welf. & Inst. Code § 6600(a)(1), *with* Cal. Penal Code § 2962(e). A sexually violent predator has a "diagnosed mental disorder that makes the person a danger to the health and safety of others" and a mentally disordered offender has a "severe mental disorder" that "was an aggravating factor in the commission of a crime." Cal. Welf. & Inst. Code § 6600(a)(1); Cal. Penal Code § 2962(b). While the language is not identical, the result is the same; both types of civilly committed sex offenders have mental disorders that contribute to their commission of harmful, violent crimes.

Finally, both forms of civil commitment are designed to protect the public and treat the sex offender. Because sexually violent predators are likely to engage

in future sexually violent criminal behavior, they are committed to treat the mental disorder underlying their criminal conduct. Cal. Welf. & Inst. Code §§ 6600(a)(1), 6606. Similarly, mentally disordered offenders must be treated in order to prevent further acts of violence. Cal. Penal Code § 2962(a).

Here, because of the significant overlap between the two commitment statutes, any sex offender committed as a sexually violent predator could have instead been committed as a mentally disordered offender. The form of civil commitment used depends on how the Department of Corrections and Rehabilitation characterizes the sex offender's mental disorder. Cal. Welf. & Inst. Code § 6600(a)(1); Cal. Penal Code § 2970. While a sexually violent predator has a "diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior," the same individual could be described as a mentally disordered offender with a "severe mental disorder that . . . cannot be kept in remission without treatment" and was an aggravating factor in their commission of a sex offense. Cal. Welf. & Inst. Code § 6600(a)(1); Cal. Penal Code § 2962 (a)(1). Regardless of how the mental disorder is characterized, both types of sex offenders are held in custody until they are no longer a threat to society – either because they no longer have a mental disorder making them a danger to others or because they

are able to keep their mental disorder in remission with treatment. Cal. Penal Code § 2968; Cal. Welf. & Inst. Code § 6605.

Despite these similarities, the State is likely to argue that mentally disordered offenders and sexually violent predators are not similarly situated because of the differences between the two forms of civil commitment. However, the issue here is not whether *all* sexually violent predators are similarly situated to *all* mentally disordered offenders in *all* circumstances. Instead, the issue is whether sex offenders who have been civilly committed as sexually violent predators are similarly situated to those civilly committed as mentally disordered offenders, for purposes of evaluating their registration requirements. *See Reed*, 404 U.S. at 76. Here, despite the similarities between these two types of civilly committed sex offenders, they are subject to different registration requirements upon release from commitment. As a result, sexually violent predators are similarly situated to mentally disordered offenders for purposes of evaluating their registration requirements.

2. Sexually violent predators are similarly situated to mentally disordered sex offenders.

As with mentally disordered offenders, sexually violent predators are similarly situated to mentally disordered sex offenders for purposes of evaluating their registration requirements. Both types of offenders have mental disorders, are likely to commit sex offenses, and pose a danger to others. *Compare* Cal. Welf. &

Inst. Code § 6600(a)(1) (defining "sexually violent predator" as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior"), *with id.* § 6300 (repealed 1981) (defining a "mentally disordered sex offender" as "any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others"). However, despite the significant overlap between these two forms of civil commitment, sexually violent predators are required to register every 90 days while mentally disordered sex offenders are only required to register annually. *See* Cal. Penal Code §§ 290.004, 290.012.

The Legislature repealed the statute providing for the civil commitment of mentally disordered sex offenders in 1981. Cal. Welf. & Inst. Code § 6300 (repealed 1981). For this reason, the district court found it likely that mentally disordered sex offenders currently pose a reduced risk for re-offense, and thus annual registration instead of quarterly registration is reasonable. ER 18. This conclusion is in error for two reasons. First, if the passage of time is relevant to the risk of re-offense, sexually violent predators should not be required to register for the rest of their lives. *See* Cal. Penal Code § 290.012(b). For example, even

though Mr. Litmon's last offense occurred in 1981, more than 30 years ago, his commitment as a sexually violent predator means he must register every 90 days for the rest of his life. ER 107. In addition, the date a mentally disordered sex offender is initially committed has virtually no bearing on his or her current level of risk, since it says nothing about the date of release. *See People v. Oglesby*, 135 Cal. Rptr. 640, 642 (Cal. Ct. App. 1977) (finding that mentally disordered sex offenders should be held as long as they pose a danger).

3. More frequent registration by sexually violent predators does not increase public safety.

Because the registration statute implicates fundamental rights, *see supra* Part I, the State bears the burden of proving that the different sex offender classifications are narrowly tailored to achieve a compelling government purpose. *See Washington*, 521 U.S. at 721 (requiring strict scrutiny of laws that infringe fundamental liberty interests); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (holding that the state bears the burden of proof under strict scrutiny). However, even if this Court determines that no fundamental rights are at stake, Mr. Litmon has raised valid allegations that section 290.012(b) is unconstitutional because more frequent registration by sexually violent predators is not rationally related to protecting public safety. *See Reed*, 404 U.S. at 75-76. Under rational basis review, "[t]he State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be

precise, it, at the least, must have some objective basis." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., writing separately).

Here, regardless of whether the registrant was civilly committed as a sexually violent predator, a mentally disordered offender, or a mentally disordered sex offender, the goal of registration is the same: to protect public safety, prevent offenders from re-offending, and enable law enforcement to quickly locate individuals who may have re-offended. *See, e.g.*, *People v. Hofsheier*, 129 P.3d 29, 34, 39 n.6 (Cal. 2006) (finding that the purpose of the registration requirement is to "protect the public against repeat offenders" and make offenders "readily available for police surveillance at all times") (internal quotation marks and citations omitted).

Because civilly committed sex offenders are similarly situated for purposes of the registration requirement, there is no valid reason to subject those civilly committed as sexually violent predators to more frequent registration. The different types of civilly committed sex offenders are not distinguishable from each other based on their danger to society. While the State may argue that sexually violent predators pose a greater risk of recidivism than other civilly committed sex offenders, or are more likely to try to evade law enforcement, there is no basis for these allegations. Because individuals civilly committed as sexually violent predators could have instead been committed under a different statute, this

classification has no bearing on their risk of recidivism or their danger to others. Furthermore, more frequent registration does not prevent sex offenders from re-offending, changing their appearance, and attempting to evade law enforcement at any time.

Because Mr. Litmon has stated a valid equal protection claim impacting fundamental rights, *see supra* Part I, this Court should remand and require the State to present compelling evidence supporting more frequent registration for those civilly committed as sexually violent predators. However, even if this Court finds that registration does not implicate fundamental rights, Mr. Litmon has nonetheless alleged a viable equal protection claim because requiring sexually violent predators to register more frequently than other civilly committed sex offenders serves no valid purpose.

B. The Registration Requirement Violates Equal Protection Because There Is No Rational Reason To Treat Out-of-State Sexually Violent Predators Differently than Those Adjudicated In-State.

In addition to alleging that those civilly committed as sexually violent predators are treated less favorably than mentally disordered offenders and mentally disordered sex offenders, Mr. Litmon's claim, when liberally construed, extends to all offenders who have been "convicted of the same kinds of sex offenses" and "receiv[ed] the same mental health treatment." ER 55-56. In particular, Mr. Litmon's claim should be read to encompass the allegation that

those adjudicated as sexually violent predators within the State of California are treated less favorably than those similarly adjudicated outside of the state.

While this claim should be reviewed under strict scrutiny, even under rational basis review, section 290.012(b) violates equal protection. There is no rational reason to require individuals adjudicated as sexually violent predators in California courts to register more frequently than those adjudicated in other jurisdictions.

1. Only sexually violent predators adjudicated in California courts are required to register every ninety days.

Section 290.012(b) requires individuals "adjudicated as sexually violent predators, *as defined in Section 6600 of the Welfare and Institutions Code*" to register every 90 days. Cal. Penal Code § 290.012(b) (emphasis added). California Welfare and Institutions Code section 6600 ("section 6600") defines a "sexually violent predator" as an individual who has been (1) convicted of a sexually violent offense and (2) found by a jury to have a mental disorder that makes him or her dangerous and likely to engage in sexually violent criminal behavior. Cal. Welf. & Inst. Code § 6600. Under the first prong, the conviction of a sexually violent offense, the definition accounts for convictions occurring in other jurisdictions. *See id.* § 6600(a)(2)(C)-(D). However, under the second prong, the definition does not account for adjudications occurring outside of California courts. *See id.* §§ 6600(a)(3); 6603, 6604. Instead, section 6600 describes the

process solely through California statutes and procedures. *See* Cal. Welf. & Inst. Code §§ 6600-6609.3. As a result, section 290.012(b) only requires those adjudicated as sexually violent predators in California to register every 90 days; those adjudicated under equivalent statutes in other jurisdictions are only required to register annually. *See* Cal. Penal Code § 290.012.

While numerous other provisions of California's Sex Offender Registration Act require out-of-state sex offenders to register *annually* in accordance with the act,[5] no analogous provisions require out-of-state offenders to register every 90 days. In addition, while several other states account for sexually violent predator hearings held in other jurisdictions, California does not. *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 9799.12 (defining "sexually violent predator" to include determinations occurring "in another jurisdiction, a foreign country or by court martial following a judicial or administrative determination"). Nowhere does California's Sex Offender Registration Act account for individuals adjudicated as sexually violent predators outside of California or individuals required to register as sexually violent predators in their home state.

[5] *See* Cal Penal Code § 290(c) (individuals convicted of California sex offenses in any federal or military court); *id.* § 290.002 (temporary residents of California who are required to register in their home state); *id.* § 290.005 (individuals convicted in another state, federal, or military court of crimes equivalent to California sex offenses; individuals ordered to register by any other court; individuals required to register in the state where they were convicted).

As a result, under section 290.012(b), only those offenders adjudicated as sexually violent predators, *as defined in Section 6600 of the Welfare and Institutions Code*, are required to register every 90 days. *See* Cal. Penal Code § 290.012(b). All other offenders described by the act, including those adjudicated as sexually violent predators outside of California, must register annually under section 290.012(a). *See id.* § 290.012(a).

2. Out-of-state sexually violent predators are similarly situated to those adjudicated in California courts.

Individuals adjudicated as sexually violent predators outside of California are similarly situated to those adjudicated in California courts. The federal government, as well as numerous states, similarly define the term "sexually violent predator" and have similar procedures for civilly committing such individuals.[6] For example, the neighboring State of Arizona's definition of "sexually violent predator" mirrors California's. *Compare* Ariz. Rev. Stat. § 36-3701, *with* Cal. Welf. & Inst. Code § 6600. Under Arizona law, a sexually violent predator has been (1) convicted of a sexually violent offense and (2) found by a jury to have a

[6] *See, e.g.*, 18 U.S.C. §§ 4247, 4248 (federal); Ariz. Rev. Stat. §§ 36-3701, 36-3706 (Arizona); Fla. Stat. §§ 394.912, 394.917 (Florida); Kan. Stat. Ann. §§ 59-29a02, 59-29a07 (Kansas); Minn. Stat. §§ 253B.02, 253B.185 (Minnesota); N.J. Stat. Ann. §§ 30:4-27.26, 30:4-27.32 (New Jersey); N.C. Gen. Stat. §§ 14-208.6, 14-208.20 (North Carolina); 42 Pa. Cons. Stat. Ann. §§ 9799.12, 9799.24 (Pennsylvania); Tex. Health & Safety Code Ann. §§ 841.003, 841.062 (Texas); Wash. Rev. Code §§ 71.09.020, 71.09.060 (Washington).

"mental disorder that makes the person likely to engage in acts of sexual violence." Ariz. Rev. Stat. § 36-3701; *compare id.*, *with* Cal. Welf. & Inst. Code § 6600 (defining "sexually violent predator" to be an individual convicted of a sexually violent crime and who has a mental disorder making him or her likely to engage in sexually violent criminal behavior). Arizona and California adjudication procedures both involve an initial assessment, the filing of a petition for commitment with the court, a probable cause hearing, and a jury trial requiring a finding "beyond a reasonable doubt."[7] Because of the similarities in definitions and procedures, an individual found to be a sexually violent predator by the State of Arizona shares a criminal and mental health profile with California offenders. However, when the Arizona offender crosses the border or moves to California, that individual is treated more favorably.

Whether adjudicated in-state or out-of-state, all individuals found to be sexually violent predators are similarly situated because they have been convicted of sexually violent offenses, have mental disorders, and are likely to engage in sexually violent behavior. *Compare, e.g.*, Cal. Welf. & Inst. Code §§ 6600-6609.3 *with* Ariz. Rev. Stat. §§ 36-3701-36-3717. However, while a sexually violent

[7] *Compare* Ariz. Rev. Stat. §§ 36-3702, 36-3703, *with* Cal. Welf. & Inst. Code § 6601 (initial assessment); Ariz. Rev. Stat. § 36-3704, *with* Cal. Welf. & Inst. Code § 6601.5 (filing of petition); Ariz. Rev. Stat. § 36-3705, *with* Cal. Welf. & Inst. Code § 6602 (probable cause hearing); Ariz. Rev. Stat. § 36-3707, *with* Cal. Welf. & Inst. Code § 6603 (jury trial).

predator adjudicated in a California court must register every 90 days, an out-of-state sexually violent predator who moves to California is only required to register annually. *See* Cal. Penal Code §§ 290.005, 290.012; Cal. Welf. & Inst. Code §§ 6600-6609.3. Unless there is a sound reason for this difference, it violates equal protection to require more frequent registration by California's sexually violent predators.

3. There is no rational reason to treat sexually violent predators adjudicated in-state differently than those adjudicated out-of-state.

Because the 90-day in-person registration requirement infringes on fundamental rights, it must survive strict scrutiny. *See supra* Part I. However, even under less searching review, section 290.012(b) violates equal protection because there is no rational reason to treat sexually violent predators adjudicated in California courts less favorably than those adjudicated in other jurisdictions. *See Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (finding that a law must, at the very least, be "rationally related to legitimate governmental objectives").

While the State may attempt to justify the less favorable treatment of sexually violent predators adjudicated in-state based on the definitions and procedures used in California, this justification cannot survive rational basis review. California recognizes the equivalence of sex offense convictions occurring in different states, under different statutes, with different definitions, and different

procedures. *See, e.g.*, Cal. Penal Code § 290.005. Because California recognizes the equivalence of proceedings in other states, there is no reason to subject sexually violent predators adjudicated in-state to harsher registration requirements.

The State may also attempt to justify its different treatment of out-of-state offenders based on the difficulty of tracking adjudications in other jurisdictions. However, this justification cannot survive rational basis review because the State has proven willing and able to track other types of out-of-state sex offenders. *See, e.g.*, Cal. Penal Code §§ 290(c), 290.002, 290.005 (requiring offenders convicted out-of-state to register in accordance with California law); *see also id.* § 11180 (declaring State's intent to track the movement of offenders). Because the State could track out-of-state sexually violent predators and require them to register every 90 days, but has chosen not to, there is no reason that those adjudicated in-state should have to register more than once a year.

There is no rational reason to require quarterly registration for sexually violent predators, as defined by section 6600, while only requiring annual registration for sexually violent predators adjudicated outside of California courts. For this reason, this Court should find that Mr. Litmon has stated a valid equal protection claim and remand so that he can present evidence in support of his allegations.

IV. SECTION 290.012(b) VIOLATES DUE PROCESS BECAUSE IT IS UNCONSTITUTIONALLY VAGUE.

In addition to his allegations that section 290.012(b) violates substantive due process and equal protection, Mr. Litmon states a valid void-for-vagueness claim by alleging that "section 290.012(b) does not contain a requirement that one appear physically at the local police station, but this requirement has been created and implemented by Defendant Brown." ER 158:8-10. Furthermore, while section 290.012(b) only requires registrants to update their address and employer, Mr. Litmon alleges that his local law enforcement requires a "full-blown registration" which can take up to ten hours. ER 42-43, 146.

The void-for-vagueness doctrine requires that laws be specific, clear, and unambiguous in order to protect an individual's due process rights. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). While it is important that individuals know how to conform their conduct to the law, the "more important aspect of [the] vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). "The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables

individuals to conform their conduct to the requirements of law, and permits meaningful judicial review." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984).

The more important the rights at stake, the more specific a law must be. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Where the regulation is economic, impacts only sophisticated businesses, or has only minor consequences, the law will be void if it essentially creates no standards at all. *Vill. of Hoffman*, 455 U.S. at 497; *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Laws that threaten constitutionally protected rights or result in criminal penalties can be facially invalidated when "vagueness permeates the text." *Morales*, 527 U.S. at 55.

Here, section 290.012(b) is unconstitutionally vague because its requirements are unclear and it creates no standards to guide the conduct of those enforcing or interpreting the law. *See Vill. of Hoffman*, 455 U.S. at 497; *Roberts*, 468 U.S. at 629.

A. Section 290.012(b) Is Unconstitutionally Vague Because It Contains No Standards To Guide Its Application.

Even under the least stringent form of review, section 290.012(b) is void because it contains no standards describing the manner of registration required by the law, and is thus "impermissibly vague in all of its applications." Cal. Penal Code § 290.012(b); *Vill. of Hoffman*, 455 U.S. at 497. For example, in *Bradley v. State ex rel. White*, a statute governing the removal of the mayor from office was

unconstitutionally vague where it conflicted with other statutes. 990 S.W.2d 245, 252-53 (Tex. 1999) (J. Abbott, concurring). Because the statute provided no guidance regarding which rules to apply, those running the removal proceedings could pick and choose how to enforce the law. *Id.*; *see also James P. v. Lemahieu*, 84 F. Supp. 2d 1113, 1121 (D. Haw. 2000) (finding a rule impermissibly vague where its overly broad interpretation made it essentially standardless).

Here, section 290.012(b) is unconstitutionally vague because it provides no guidance regarding the registration procedures. Existing laws and regulations merely state that "every person who has ever been adjudicated a sexually violent predator . . . shall . . . verify his or her address . . . and place of employment . . . in a manner established by the Department of Justice." Cal. Penal Code § 290.012(b); *see also* Cal. Code Regs. tit. 15, § 3652. While the Department of Justice has the authority to specify the "manner" of registration under section 290.012(b), it has not clearly articulated the law's requirements or the procedures to be used by local law enforcement. *See* Cal. Penal Code § 290.012(b); Cal. Code Regs. tit. 15, § 3652; ER 43-44.

The only guidance the Department of Justice has given to local law enforcement is its registration form entitled "Sex Registration / Change of Address / Annual or Other Update." ER 29-30. This multi-purpose form is used for annual and 90-day registration, as well as changes of address and "other" purposes. ER

29. While the form does state that registrants must appear in person, it does not specify what information needs to be collected from each type of offender. ER 29-30. In fact, the Department of Justice admits that it has not provided guidance to police stations regarding use of the form, and it has no idea what information is being collected. *See* ER 38:19-20 ("[H]ow local law enforcement fills out the form, that's up to them."). As a result, law enforcement has virtually no guidance regarding what information to collect, how to collect it, or how to verify its accuracy. This lack of clarity makes it likely that the law will be arbitrarily or discriminatorily enforced.

B. Section 290.012(b) Encourages Arbitrary Enforcement that Deprives Registrants of Their Liberty.

Because section 290.012(b) contains no standards governing the manner of registration, it is unconstitutionally vague. *Vill. of Hoffman*, 455 U.S. at 497. In addition, even under more stringent review, section 290.012(b) is facially invalid because it "fail[s] to establish standards . . . that are sufficient to guard against the arbitrary deprivation of liberty interests." *Morales*, 527 U.S. at 50, 52.

For example, the *Morales* Court applied the void-for-vagueness doctrine to invalidate an ordinance making it a criminal offense for gang members to "loiter" without an "apparent purpose." *Id.* at 47. The Court first found that the "freedom to loiter for innocent purposes" is part of the liberty protected by the Due Process Clause. *Id.* at 53-54. The Court then found that the law did not provide sufficient

guidelines for law enforcement because the determination of whether an individual was "loitering" without an "apparent purpose" depended entirely on the subjective judgment of police officers. *Id.* at 60-61, 65-66. Because the law implicated constitutionally protected rights, and its vagueness "authorize[d] and even encourage[d] arbitrary and discriminatory enforcement," it was facially invalid. *Id.* at 55-56, 64.

Here, as in *Morales*, the registration requirement implicates a protected liberty interest because in-person registration every 90 days requires registrants to appear at a particular place, on a regular basis, thereby infringing their freedom of movement. *See id.* at 54; *see also Creekmore v. Att'y Gen.*, 341 F. Supp. 2d 648, 665 (E.D. Tex. 2004) (finding that the sex offender registration requirements and attendant legal duties "are sufficient in and of themselves to implicate a liberty interest"); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) (finding the "tangible burden[s]" created by lifetime registration "obviously encroach on the liberty of convicted sex offenders"); *W.P. v. Poritz*, 931 F. Supp. 1199, 1219 (D.N.J. 1996) (finding a protectable liberty interest in "the continuing legal status as a registrant and the duties imposed as a result"), *rev'd on other grounds*, *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

The Department of Justice has not given local law enforcement minimum guidelines to protect against the arbitrary deprivation of a registrant's liberty. *See*

Morales, 527 U.S. at 50, 52. Because the only guidance law enforcement has is the multi-purpose form, the "manner" of registration for sexually violent predators is left up to the discretion of the officer collecting the information. For example, because the form does not specify what information to collect from quarterly registrants, local law enforcement will likely require them to fill out the form completely, get fingerprinted, and take a new photograph every 90 days, unnecessarily subjecting them to a time consuming registration that infringes on their freedom of movement. *See* ER 146. Furthermore, because the Department of Justice has not issued any guidance about the registration process, there is a real risk that registration will become a tool to harass and annoy an unpopular class of offenders. Law enforcement may intentionally keep registrants waiting for hours on end, and then require them to return another day to complete the process. *See* ER 146-47. And because offenders must register or risk incarceration, they are at the mercy of local law enforcement, regardless of how officers interpret the open-ended law. *See* Cal. Penal Code § 290.018(f).

C. The Lack of Specificity in Section 290.012(b) Obstructs Meaningful Judicial Review.

Not only does the vagueness of section 290.012(b) encourage arbitrary and discriminatory enforcement, its lack of specificity and clarity interferes with meaningful judicial review. *See Roberts*, 468 U.S. at 629; *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994) (finding that the lack of

clarity in an assault weapons ban made the law "fundamentally irrational and impossible to apply consistently by . . . the prosecutor or the judge"); *see also Bradley*, 990 S.W.2d at 253 (J. Abbott, concurring) (finding a law impermissibly vague when it required "guesswork" by reviewing courts, and "resolution on an *ad hoc* and subjective basis") (quoting *Grayned*, 408 U.S. at 109).

In this case, the lack of clarity regarding the registration requirements has obstructed meaningful judicial review. Mr. Litmon alleges that every 90 days, local law enforcement is subjecting him to a full-blown registration process that can take up to ten hours. ER 42-43. However, because the text of the law does not require this, and because the Department of Justice has not issued any guidance, the court had no evidence about how the law is actually being enforced. As a result, the court dismissed Mr. Litmon's claims, finding nothing to indicate his liberty was infringed. ER 20-21. This is exactly the type of result the void-for-vagueness doctrine is designed to prevent. The vagueness of section 290.012(b) and the lack of guidance provided to local law enforcement should not work to infringe Mr. Litmon's rights while also obscuring the actual severity of the infringement.

In addition, the plain language of section 290.012(b) does not require in-person registration, but the Department of Justice nonetheless requires this. *See* Cal. Penal Code § 290.012(b). Because the in-person requirement is not included

in the text of the statute, meaningful judicial review of this policy has been obstructed. For example, Alaska, like California, required registrants to appear in person, despite the fact that the statute, on its face, did not contain such a requirement. *See Smith*, 538 U.S. at 101-02. When the Supreme Court upheld the law, it never passed judgment on the in-person requirement, noting that "[w]hether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved, are concerns beyond the scope of this opinion." *Id*. at 102. Similarly, in *Henry v. Lungren*, this Court declined to address petitioner's allegations regarding the in-person requirement because it was "not spelled out in the statute." 164 F.3d 1240, 1242 (9th Cir. 1999). In the case of section 290.012(b), the in-person requirement might fall through the cracks during judicial review because it is not described in the statute. Here in particular, the difference between the plain language of the statute and how it is being enforced makes it difficult to determine how burdensome the law truly is, especially on a motion to dismiss. This lack of clarity in the law should not work to the government's advantage by allowing it to evade challenges to how the law is being applied.

Because the requirements of section 290.012(b) are not expressly defined, and Mr. Litmon's claims were dismissed prior to discovery, it is unclear exactly how the law is being interpreted, and what types of inconsistent, arbitrary, or

discriminatory enforcement results from the Department of Justice's lack of guidance. However, because Mr. Litmon has validly alleged that the regulation is unconstitutionally vague, this Court should permit his claims to proceed.

V. THE DEPARTMENT OF JUSTICE'S POLICIES REGARDING SEXUALLY VIOLENT PREDATOR REGISTRATION ARE VOID FOR FAILING TO COMPLY WITH THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT.

In addition to infringing numerous Constitutional protections, the Department of Justice's failure to issue formal regulations or policy statements governing the manner of registration under section 290.012(b) violates the California Administrative Procedure Act ("APA"). *See* Cal. Gov't Code § 11340 *et seq*. When liberally construed, Mr. Litmon stated a valid APA claim when he alleged that "section 290.012(b) does not contain a requirement that one appear physically at the local police station, but this requirement has been created and implemented by Defendant Brown." ER 158:8-10. This Court has discretion to exercise supplemental jurisdiction over this state law claim because it involves the same facts giving rise to Mr. Litmon's other claims. 28 U.S.C. § 1367(a).

The APA requires all state agencies to follow specified procedures when adopting policies or regulations. *See* Cal. Gov't Code § 11340.5(a). Unless a state agency or category of regulation is specifically exempted, the APA applies. Cal. Gov't Code § 11346(a) ("[T]he provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or

hereafter enacted."); *Morning Star Co. v. State Bd. of Equalization*, 132 P.3d 249, 256 (Cal. 2006) ("[A]bsent an express exception, the APA applies to all generally applicable administrative interpretations of a statute.").

Here, the Department of Justice has failed to comply with the APA because it has not issued formal regulations requiring thorough, in-person registration under section 290.012(b). As a result, the Department of Justice's policy should be declared void. Because Mr. Litmon has stated a valid claim for a violation of the APA, this Court should remand so that he can try this claim.

A. The Department of Justice's Policies Requiring In-Person Registration and Additional Information from Offenders Must Be Issued in Accordance with the California APA.

The district court ruled that the Department of Justice's policy is within the scope of authority granted by section 290.012(b). *See* ER 76-77. But even when an agency is acting within the scope of its authority, any policy or interpretation of a statute must be issued in accordance with the formal rulemaking requirements of the APA. *See* Cal. Gov't Code § 11340.5(a); *see also Cnty. of San Diego v. Bowen*, 82 Cal. Rptr. 3d 818, 830, 834 (Cal. Ct. App. 2008) (holding that while the Secretary of State had the statutory authority to issue requirements regarding the manual tallying of votes, such a regulation must be adopted in accordance with the APA).

All agency rules of general application that "implement, interpret, or make specific a law enforced or administered by [the agency]" must be issued in accordance with the APA. *Tidewater Marine W., Inc. v. Bradshaw*, 927 P.2d 296, 304 (Cal. 1996); Cal. Gov't Code § 11340.5(a) ("No state agency shall issue, utilize, enforce, or attempt to enforce" any regulation unless it "has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter"); *id.* § 11342.600 ("'Regulation' means every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.").

Because of the broad scope of the APA, any agency policy or interpretive statement must be formally enacted. *See id.* § 11342.600. For example, in *Morning Star Co. v. State Board of Equalization*, the California Supreme Court held that an agency interpretation of a Health and Safety Code provision was a regulation under the California APA. 132 P.3d at 251. In that case, the agency concluded that all corporations with 50 or more employees fit the statutory definition of "the types of corporations that use, generate, store, or conduct activities . . . related to hazardous materials." *Id.* at 251-52 (quotation marks and citation omitted). While this was reasonable, the agency still needed to comply with the APA because its interpretation of the statute was generally applicable to all corporations with 50 or more employees. *Id.* at 255.

Here, the Department of Justice has interpreted the "manner" of registration under section 290.012(b) to require that registrants appear in person and provide information in addition to their address and their employer. Because this interpretation is generally applicable to all registrants, it is a regulation that must be promulgated in accordance with the APA.

B. The Department of Justice's Policies Are Not Exempt from the Rulemaking Requirement Because They Do Not Fall Within Any Statutory Exceptions.

An agency may adopt a policy without enacting enabling regulations only when the policy falls within a statutory exception. *See* Cal. Gov't Code § 11340.9. For example, an agency does not have to conform with the APA when enacting regulations that embody the only legally tenable interpretation of the law, or when issuing a form supported by existing laws and regulations. *Id.* § 11340.9(f), (c). Here, the Department of Justice's policy requiring detailed in-person registration every 90 days does not fall within any statutory exceptions.

1. The Department of Justice's policies do not represent the only legally tenable interpretation of the law.

The APA does not apply to "[a] regulation that embodies the only legally tenable interpretation of a provision of law." *Id.* § 11340.9(f). This exception is narrow, and applies only where the agency's application of the law is "rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language." *See Morning Star*, 132 P.3d at 257. If the agency is "depart[ing] from,

or embellish[ing] upon, express statutory authorization and language, the agency will need to promulgate regulations." *Id*. at 256-57 (internal punctuation omitted).

In this case, the Department of Justice's registration policies do not encompass the only legally tenable interpretation of the law. Section 290.012(b) requires only that an offender "verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer." Cal. Penal Code § 290.012(b). By requiring in-person registration and information from registrants in addition to their address and employer, the Department of Justice is adding requirements not present in the statute's plain language. *Id.* As a result, the Department of Justice's interpretation of the statute is not "compelled by, or repetitive of, the statute's plain language," and is therefore not exempt from the APA's requirements. *Morning Star*, 132 P.3d at 257.

Furthermore, the Legislature's inclusion of specific requirements for annual registration, but not quarterly registration, demonstrates that quarterly registration was intended to be a brief update distinguishable from annual registration. *See Webb v. Smart Document Solutions*, 499 F.3d 1078, 1084 (9th Cir. 2007) (citing the canon of statutory construction *expressio unius est exclusio alterius*, which "creates a presumption that when a statute designates certain . . . manners of operation, all omissions should be understood as exclusions") (internal quotation marks and citations omitted). While annual registrants must appear in person for

fingerprinting and photographing, and provide information such as proof of residency and details about the cars they drive, section 290.012(b) contains no similar requirements for quarterly registration. *Compare* Cal. Penal Code §§ 290.012(a), 290.015, *with id.* § 290.012(b). While the Legislature could have specified these additional registration requirements under section 290.012(b), it did not. As a result, it is more reasonable to conclude that section 290.012(b) does *not* require in-person registration and additional information from registrants, because if it did, the Legislature would have included these requirements.

Because the policy requiring detailed, in-person registration every 90 days is not the only legally tenable interpretation of section 290.012(b), it is not exempt from the requirements of the APA, and the Department of Justice must issue formal regulations enacting this policy.

2. The Department of Justice's registration form does not obviate the need to pass enabling regulations.

While agencies are free to create forms and instructions without following the procedural requirements of the APA, any interpretation or expansion of a law contained in a form has no effect unless it is supported by a valid regulation. *See* Cal. Gov't Code § 11340.9(c) (the APA's form exception does not apply when a regulation "is needed to implement the law under which the form is issued"); 41 *California Forms of Pleading and Practice – Annotated* § 472.21(1)(c) ("[E]mbedding rules or interpretations within a form does not insulate the rules

from APA requirements, and . . . the use of a form resulting in a regulatory effect does not insulate the regulation from APA requirements."); *see also Stoneham v. Rushen*, 188 Cal. Rptr. 130, 135-36 (Cal. Ct. App. 1982) (holding that a Department of Corrections inmate classification form did not fall within the APA's exception because it "brings about a wholly new and different scheme affecting the placement and transfer of prisoners").

Here, the Department of Justice's use of a registration form to implement section 290.012(b) does not exempt the agency from enacting regulations that support the form's requirements. The form asks for information such as the registrant's appearance, vehicle information, and thumbprint, and states that registrants must appear in person; however, these requirements are unsupported by existing laws or regulations governing quarterly registration. *See* Cal. Penal Code § 290.012(b); Cal. Code Regs. tit. 15, § 3652(b); ER 29-30. Before the Department of Justice can require in-person quarterly registration and ask for all the information described on the form, it must pass regulations supporting these requirements. Cal Gov't Code § 11340.9(c).

The Department of Justice cannot create new laws by merely creating new forms. As a result, the Department of Justice's registration form does not satisfy the requirements of the APA.

C. The Department of Justice's Policies Requiring Detailed In-Person Registration Every Ninety Days Are Void for Failing To Comply with the APA.

To comply with the APA, agency rules, policies, and interpretations must be adopted in accordance with formal rulemaking procedures. Cal. Gov't Code § 11340.5. The agency must give public notice of the proposed regulatory action, provide the text of the proposed regulation and the reasons for it, give interested parties an opportunity to comment, respond in writing to public comments, and forward the materials to the Office of Administrative law, where the regulation will be reviewed for clarity and consistency with existing laws. Cal. Gov't Code § 11340.5; *Tidewater Marine*, 927 P.2d at 303. Any agency regulation that does not comply with the California APA is void. *Id.* at 308.

The APA's rulemaking procedures are necessary to preserve the rule of law. Rulemaking protects democracy by promoting transparency, avoiding conflicts between laws, encouraging public participation in rulemaking, and ensuring that agencies are responsive to the individuals they regulate. *Id.* at 303. As noted by the California Supreme Court, formal rulemaking procedures

> ensure that those persons or entities whom a regulation will affect have a voice in its creation, as well as notice of the law's requirements so that they conform their conduct accordingly. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.

Id. To uphold the Department of Justice's policy despite its failure to follow rulemaking procedures would "give weight to an improperly adopted regulation in a controversy that pits the agency against an individual member of exactly that class the APA sought to protect [and] would permit an agency to flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received neither." *Id.* at 308 (internal citations and punctuation omitted).

Here, where civil liberties are threatened by burdensome registration requirements, the Department of Justice has a special obligation to ensure that its regulations are justly enacted. However, the Department of Justice has not taken any of the required steps to formalize its policies regarding the manner in which sexually violent predators must register. As a result, the Department of Justice's informal policies requiring detailed, in-person registration every 90 days should be declared void. The Department of Justice should not be permitted to require in-person registration every 90 days, or to collect information from registrants other than their address and employer. Because Mr. Litmon has stated a valid APA claim, this Court should remand so that Mr. Litmon can seek to enjoin the Department of Justice's enforcement of section 290.012(b).

CONCLUSION

For the foregoing reasons, the district court's judgment dismissing Mr. Litmon's complaint should be reversed.

Dated: November 27, 2013

Respectfully submitted,

Jones Day

By: /s/ Skye D.Y. Langs
Skye D.Y. Langs

Attorney for Plaintiff-Appellant
DAVID LITMON, JR.

STATEMENT OF RELATED CASES

Attorneys for Mr. Litmon are aware of no related cases pending before the Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Red. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,638 words.

Dated: November 27, 2013

By: /s/ Skye D.Y. Langs
Skye D.Y. Langs

Attorney for Plaintiff-Appellant
DAVID LITMON, JR.

9th Circuit Case Number(s) 12-15261

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