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 REPLY BRIEF

Craig E. Stewart (129530)
Skye D.Y. Langs (287908)
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 739-3939
Facsimile: (650) 739-3900
E-mail: slangs@jonesday.com

Attorneys for Plaintiff-Appellant
DAVID LITMON, JR.

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INTRODUCTION

Mr. Litmon alleges that a lifetime, 90-day, in-person registration requirement applicable only to individuals civilly committed as sexual violent predators is unconstitutional and violates state law. In particular, the registration requirement violates substantive due process, the *Ex Post Facto* Clause, and equal protection; it is unconstitutionally vague; and it is void for failing to comply with the California Administrative Procedure Act. While the Attorney General attempts to dismiss these allegations, she distorts Mr. Litmon's claims and inaccurately describes the law.

This case is about where to draw the line separating acceptable sex offender registration and reporting requirements from unconstitutional infringements on individual liberty. Unlike other forms of registration, a lifetime, 90-day, in-person registration requirement rises to the level of custody, infringing on Mr. Litmon's fundamental right to be free from physical restraint and inhibiting his ability to work in a wide variety of professions. In addition, the registration requirement imposes an impermissible retroactive punishment in violation of the *Ex Post Facto* Clause. In opposing Mr. Litmon's substantive due process and *ex post facto* claims, the Attorney General errs by treating all registration requirements the same. Because the registration requirement at issue in this case is significantly more

demanding than other forms of registration, this Court should find that it infringes on Mr. Litmon's liberty.

This Court should ensure that society's fear of those deemed sexually violent predators does not become an excuse for subjecting them to unconstitutional restrictions. Because there are no meaningful differences between civilly committed sex offenders, and the differences that do exist have no bearing on the safety risks they pose or the efficacy of more frequent registration, there is no rational reason to require sexually violent predators to register more often than other types of sex offenders. In opposing Mr. Litmon's equal protection claim, the Attorney General erroneously concludes that it is rational to require that some sex offenders who have been found dangerous and likely to reoffend register annually, while other similarly dangerous offenders must register every 90 days.

At a minimum, this Court should require the State to enact clear and specific laws that do not encourage arbitrary enforcement. Because Section 290.012(b) places too much discretion in the hands of law enforcement, the law is unconstitutionally vague in all its applications. In opposing Mr. Litmon's void-for-vagueness claim, the Attorney General fails to recognize that a law can be unconstitutionally vague even when it has not been violated. In addition, the Attorney General fails to address the substance of Mr. Litmon's state law claim.

Because lifetime, 90-day, in-person registration implicates fundamental rights, this Court should remand Mr. Litmon's claims for review under strict scrutiny. However, even if this Court finds that the registration requirement does not implicate fundamental rights, this Court should reverse because Mr. Litmon has adequately alleged that the law's requirements are not rational. Finally, to the extent that this Court accepts the Attorney General's contention that a liberal reading of Mr. Litmon's complaint does not encompass all the arguments presented in his appeal, Mr. Litmon should be granted leave to amend. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248-49 (9th Cir. 1995) ("Unless it is absolutely clear that no amendment can cure the defect . . . a pro se litigant is entitled to . . . an opportunity to amend prior to dismissal of the action.").

ARGUMENT

I. LIFETIME, NINETY-DAY, IN-PERSON REGISTRATION INFRINGES ON FUNDAMENTAL RIGHTS AND SHOULD BE REVIEWED UNDER STRICT SCRUTINY.

A. Lifetime, Ninety-Day, In-Person Registration Is a Form of Custody Infringing on the Fundamental Right To Be Free from Physical Restraint.

The Attorney General argues that the fundamental right to be free from physical restraint extends only to literal imprisonment and not to broader forms of custody such as lifetime, in-person registration every 90 days. *See* Appellee's Br. 18. This argument distorts Justice O'Connor's concurrence in *Reno v. Flores*, 507

U.S. 292 (1993). In *Flores*, Justice O'Connor does not restrict the scope of the right, but instead states that "'[f]reedom from bodily restraint' means *more* than freedom from handcuffs, straightjackets, or detention cells" and extends to any act by the State that "restrain[s] the individual's freedom to act on his own behalf." *Id.* at 315-16 (J. O'Connor, concurring) (emphasis added). Here, in-person registration restrains Mr. Litmon's freedom to act on his own behalf by limiting his ability to make decisions about his movements. Because the registration requirement compels Mr. Litmon to appear at particular places, at particular times, for the remainder of his life, his fundamental right to be free from physical restraint has been infringed.

The Attorney General further ignores the practical realities of 90-day, in-person registration in arguing that it is "not in any sense custodial." *See* Appellee's Br. 14, 18. *Habeas* cases have held that a frequent appearance requirement restricts an individual's freedom of movement and amounts to custody. *See, e.g.*, *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993). While the Attorney General asserts that *Henry v. Lungren* forecloses this argument, *Henry* is distinguishable because it concerns annual, as opposed to quarterly, registration. 164 F.3d 1240, 1242 (9th Cir. 1999). Fourth Amendment cases have also held that registration procedures, such as fingerprinting and photographing, can amount to an unlawful seizure of the person. *See, e.g.*, *Hayes v. Florida*, 470

U.S. 811, 814-15 (1985). The fact that these cases arise outside of the substantive due process context does not make the rights they protect any less fundamental, and the Attorney General has failed to explain why this Court should not look to them for guidance. The right to be free from physical restraint is so deeply ingrained in our nation's concept of freedom that it crosses the boundaries dividing legal constructions. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects."); *Smith v. Texas*, 233 U.S. 630, 636 (1914) ("Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three."). As a result, this Court can and should look beyond the context of due process sex offender registration cases to determine whether a lifetime, 90-day appearance requirement infringes on an individual's fundamental right to be free from physical restraint.

The Attorney General also incorrectly applies *Flores* when arguing that this Court should more carefully describe the fundamental right at issue. *See* Appellee's Br. 15. As an initial matter, *Flores* should be followed with care so that overly narrow descriptions of the fundamental rights at stake do not distort the analysis. *See Flores*, 507 U.S. at 318-19 (J. O'Connor, concurring) (finding that

the majority mischaracterized the fundamental right at issue); *id.* at 341 (J. Stevens, dissenting) ("In my view, the only 'novelty' in this case is the Court's analysis."). Here, even if this Court more carefully describes the right at issue, the right to be free from a lifetime, in-person, 90-day appearance requirement is just one specific example of our fundamental right to freedom of movement. *See Kent v. Dulles*, 357 U.S. 116, 126 (1958) (finding that freedom of movement is "basic in our scheme of values," and has been "engrained in our history" since the Magna Carta).

Even while arguing that this Court should more carefully describe the fundamental right at issue, the Attorney General erroneously treats all registration requirements as equivalent. The Attorney General grossly mischaracterizes the burden of registration by equating it with "the time it takes to fill out tax forms or wait in line at the Department of Motor Vehicles." Appellee's Br. 18. Unlike registration, filing taxes does not mandate a full day, in-person appearance, four times a year. Similarly, most individuals only have to appear in person at the DMV once every few years. Despite the attempt to characterize registration as an ordinary inconvenience, it is notable that the Attorney General can point to no other civil regulation that places as great a burden on otherwise free citizens.

In fact, the Attorney General cannot cite to any cases holding that lifetime, 90-day, in-person registration does not infringe an individual's fundamental right to be free from physical restraint because the question has not properly been before

this Court until now. The Attorney General relies heavily on *United States v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012). However, *Juvenile Male* concerns a less burdensome registration period of 25 years to life, as opposed to the guaranteed lifetime requirement at issue in this case. *Id.* at 1005. In addition, the *Juvenile Male* Court indicated that the substantive due process issue had not been properly raised or briefed; the defendants did not attempt to identify any fundamental rights, and their argument focused instead on whether registration was punitive. *Id*. at 1012. While this Court held that 90-day, in-person registration for 25 years to life did not implicate any fundamental rights such as the right to marry or have children, it did not address the impact of registration on the fundamental right to be free from physical restraint. *Id*. at 1012-13.

The other cases cited by the Attorney General fare no better. Because the precise nature of the registration requirement determines whether it rises to the level of custody, cases concerning requirements less burdensome than lifetime, 90-day, in-person registration are inapposite. *See Smith v. Doe*, 538 U.S. 84, 90 (2003) (lifetime, 90-day registration with no appearance requirement); *Doe v. Tandeske*, 361 F.3d 594, 596 (9th Cir. 2004) (lifetime, 90-day registration with no appearance requirement); *Henry*, 164 F.3d at 1242 (lifetime, *annual*, in-person registration); s*ee also Doe v. Moore*, 410 F.3d 1337, 1340-41 (11th Cir. 2005) (one

initial registration, followed by a lifetime duty to notify the state upon a change of address).

Because no court has directly addressed whether a lifetime, 90-day, in-person registration requirement rises to the level of custody, infringing on the fundamental right to be free from restraint, this Court should remand so that the District Court can review Mr. Litmon's claims under strict scrutiny.

B. Lifetime, Ninety-Day, In-Person Registration Implicates the Fundamental Right to Work Because It Restricts Employment in a Wide Variety of Professions.

In addition to erroneously maintaining that there is no fundamental right to be free from a frequent lifetime appearance requirement, the Attorney General mischaracterizes Mr. Litmon's right-to-work claim. *See* Appellee's Br. 20-21. Mr. Litmon is not just alleging that the registration requirement inhibits his ability to work as a truck driver; he is alleging that the burdens of registration prevent him from finding and keeping a job in virtually *any* profession.[1] A regulation that forecloses a "wide range of employments" infringes on the fundamental right to

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[1] Mr. Litmon's local police station only allows him to register on weekdays during normal business hours. Because registration can take up to ten hours, Mr. Litmon must take a full day off work at least four times a year. ER 42-43. There are very few entry level jobs that will give Mr. Litmon enough flexibility in his time off to enable him to comply with his registration requirement without developing attendance problems at work. *See* Appellant's Br. 20.

"work for a living in the common occupations of the community." *See Truax v. Raich*, 239 U.S. 33, 41 (1915); *see also Smith*, 233 U.S. at 636 ("In so far as a man is deprived of the right to labor, his liberty is restricted . . . . [T]he constitutional guarantee [of liberty] is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.")

Despite asserting that the right to work is not fundamental, the Attorney General cannot cite to any case upholding a regulation that forecloses as wide a variety of employment opportunities as the one at issue here. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-13 (1976) (requiring police officers to retire at age 50); *In re Crawford*, 194 F.3d 954, 961 (9th Cir. 1999) (requiring bankruptcy petition preparers to disclose their social security numbers); *Dittman v. California*, 191 F.3d 1020, 1032-33 (9th Cir. 1999) (requiring acupuncturists to disclose their social security numbers); *Madarang v. Bermudes*, 889 F.2d 251, 252, 253 (9th Cir. 1989) (restricting the creation of new dental clinics in the Commonwealth of the Northern Mariana Islands); *see also Conn v. Gabbert*, 526 U.S. 286, 287-88 (1999) (state action preventing attorney from being present while his client testified before a grand jury).

Here, because the frequent and time consuming registration requirement inhibits the ability of sex offenders to find and keep gainful employment in a wide range of fields, this Court should remand so that the District Court can review Mr.

Litmon's claim under a higher level of scrutiny. *See Truax*, 239 U.S. at 43 (applying strict scrutiny to strike down a regulation restricting employment because it "relate[d] to every sort" of business); *see also Mass. Bd. of Ret.*, 427 U.S. at 321-23 (J. Marshall, dissenting) (advocating for a higher level of scrutiny for regulations infringing on the right to work because of the "importance of the interest involved").

II. LIFETIME, NINETY-DAY, IN-PERSON REGISTRATION IS PUNITIVE.

As with Mr. Litmon's substantive due process claim, the Attorney General's *ex post facto* analysis ignores the fact that lifetime, 90-day, in-person registration differs materially from less burdensome registration requirements.[2] *See* Appellee's Br. 25-26.

The Attorney General overstates the law in concluding that "well-established precedent confirms that in-person . . . registration is not punitive, even if it must be done four times a year." *See* Appellee's Br. 26. First, the Attorney General

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[2] Though Mr. Litmon originally alleged that the registration requirement violates double jeopardy, an *ex post facto* challenge more accurately captures his claim. *See* ER 144, 159. In the case of *pro se* litigants, the Court may overlook technical pleading errors and construe complaints according to the party's intention. *Woods v. Carey*, 525 F.3d 886, 889-90 (9th Cir. 2008). Because the legal analysis is the same, no prejudice results from recasting Mr. Litmon's claim as an *ex post facto* challenge.

supports this point with inapplicable cases concerning less onerous registration requirements. *See Smith v. Doe,* 538 U.S. at 90 (upholding lifetime, 90-day registration, with no appearance requirement); *Hatton v. Bonner*, 356 F.3d 955, 963-64 (9th Cir. 2003) (upholding *annual* in-person registration).

Furthermore, the cases upholding lifetime, 90-day, in-person registration requirements are distinguishable, and this Court should decline to follow them. *See Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001) (explaining that courts may decline to follow factually distinguishable precedent). In both *Elkins* and *Elk Shoulder*, the plaintiffs challenged criminal penalties resulting from failure to register, rather than the registration requirements themselves. *United States v. Elkins*, 683 F.3d 1039, 1040-41, 1045 (9th Cir. 2012); *United States v. Elk Shoulder*, 738 F.3d 948, 950, 958 (9th Cir. 2013). In *W.B.H.*, the plaintiff challenged whether a drug offense conviction could trigger a federal duty to register based on a prior sex offense. *United States v. W.B.H.*, 664 F.3d 848, 851 (11th Cir. 2011). Finally, *Masto*, like *Elkins*, *Elk Shoulder*, and *W.B.H.*, arose under the federal Sex Offender Registration and Notification Act ("SORNA"). *Am. Civil Liberties Union of Nev. v. Masto*, 670 F.3d 1046, 1051 (9th Cir. 2012). While SORNA, like Section 290.012(b), requires some offenders to register in-person, every 90 days, for life, California has not fully implemented the federal requirements, and its registration scheme should be evaluated on its own merits.

See http://ojp.gov/smart/sorna.htm (indicating that California has not substantially implemented SORNA).

Because this Court has not evaluated the punitive impact of California's lifetime, 90-day, in-person registration requirement, this Court should remand so that Mr. Litmon can pursue his claim before the District Court.

III. THE SEX OFFENDER REGISTRATION ACT VIOLATES EQUAL PROTECTION BY REQUIRING SOME CIVILLY COMMITTED SEX OFFENDERS TO REGISTER MORE FREQUENTLY THAN OTHERS.

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); *see also Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) ("Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made."). Only sexually violent predators are required to register quarterly; all other civilly committed sex offenders are required to register only annually. *See* Cal. Penal Code § 290.012. Because the differences in the types of civil commitment for sex offenders are unrelated to the goals of registration, there is no rational reason to require some civilly committed sex offenders to register more often than others.

A. Because All Civilly Committed Sex Offenders Are Sexually Dangerous, They Are Similarly Situated For Purposes of Evaluating the Registration Requirement.

The Attorney General argues that sexually violent predators are differently situated because only they are found by a jury to be sexually dangerous beyond a reasonable doubt. Appellee's Br. 28-29. That is incorrect. There is no appreciable difference in the procedures or standards used to civilly commit sex offenders.

Regardless of whether a sex offender is civilly committed as a sexually violent predator, a mentally disordered offender, or a mentally disordered sex offender, the standards and procedures used to commit them are the same. All three forms of civil commitment require unanimous jury verdicts finding beyond a reasonable doubt that the offenders are dangerous. Cal. Welf. & Inst. Code §§ 6603(f), 6604 (sexually violent predators); Cal. Penal Code § 2972(a) (mentally disordered offenders); *People v. Kirk*, 122 Cal. Rptr. 653, 654 (Cal. Ct. App. 1975) (mentally disordered sex offenders). In addition, all three forms of civil commitment require that the sex offenders be evaluated by at least two mental health professionals prior to the initiation of commitment proceedings to determine if they are a danger to others. Cal. Welf. & Inst. Code § 6601(d); Cal Penal Code § 2962(d); *People v. Henderson*, 166 Cal. Rptr. 20, 26-27 (Cal. Ct. App. 1980).

The only difference between the standards and procedures governing these three forms of civil commitment is the way in which the sex offender's

dangerousness is described. The Attorney General does not dwell on this distinction, perhaps because the different statutory formulations are merely different ways of describing the same perceived threat to society.

First, the description of the danger presented by a sexually violent predator is virtually identical to that of a mentally disordered sex offender. While sexually violent predators must be found to be a "danger to the health and safety of others in that it is likely that [they] will engage in sexually violent criminal behavior," mentally disordered sex offenders must be found "dangerous to the health and safety of others" because they are "predisposed to the commission of sexual offenses." Cal. Welf. & Inst. Code § 6600; *id.* § 6300 (repealed 1981). In both cases, the jury must believe that the sex offender poses a danger to society because it is likely he will commit future sex offenses.

The description of the danger presented by a sex offender who is civilly committed as a mentally disordered offender is also similar to that of a sexually violent predator. While sexually violent predators must be deemed a "danger to the health and safety of others in that it is likely that [they] will engage in sexually violent criminal behavior," a jury must find that a mentally disordered offender "represents a substantial danger of physical harm to others" because he "suffer[s] from a seriously and substantially impaired capacity to control his behavior." Cal. Welf. & Inst. Code § 6600; Cal. Penal Code § 2972(c); *People v. Putnam*, 9 Cal.

Rptr. 3d 392, 396 (Cal. Ct. App. 2004). Where the mentally disordered offender has committed prior sex offenses, the implication is that he, like a sexually violent predator, is dangerous because he is likely to commit future sex offenses. *See, e.g.*, *People v. Simmons*, No. H039198, 2013 Cal. App. Unpub. LEXIS 7991, at *15 (Cal. Ct. App. Nov. 4, 2013) (finding that a mentally disordered offender "posed a substantial danger of physical harm to others because of his pedophilia"); *People v. George Guinn*, No. B192386, 2007 Cal. App. Unpub. LEXIS 5138, at *3 (Cal. Ct. App. June 26, 2007) (finding that a mentally disordered offender "represented a substantial danger of physical harm to others in the form of sexual violence"). Where a mentally disordered offender has not committed a sex offense, he or she does not have to register as a sex offender and is not relevant to this analysis.

The Attorney General attempts to distinguish between the different forms of civil committees by asserting that a prosecutor could rationally decide to pursue commitment under one statute rather than another based on the ease of securing commitment and the strength of the evidence against the offender.[3] Appellee's Br.

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[3] The Attorney General is incorrect that the decision regarding which statute to commit an offender under originates with the prosecutor. Appellee's Br. 29-30; *see* Cal. Welf. & Inst. Code § 6601(a)(1) (delegating the authority to recommend commitment to the Secretary of the Department of Corrections and Rehabilitation); Cal. Penal Code § 2970 (delegating the authority to recommend commitment to the

29-30. Because there are no appreciable differences in the procedures or standards for the commitment of sex offenders, this "rational" choice is actually arbitrary. *See Humphry v. Cady*, 405 U.S. 504, 512 (1972) (finding that 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"). Even if this were a rational choice, neither the strength of the evidence nor the ease of securing commitment has any bearing on the dangerousness of the offender. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

Because the Attorney General is unable to point to any meaningful way in which sexually violent predators differ from other civilly committed sex offenders, this Court should find that they are similarly situated for purposes of evaluating their registration requirements.

(continued…)

medical professional treating the offender, or to the Secretary of the Department of Corrections and Rehabilitation).

B. Section 290.012(b) Violates Equal Protection Because Only Sexually Violent Predators Adjudicated In-State Are Required To Register Every Ninety Days.

In addition to being similarly situated to other types of civilly committed sex offenders, the Attorney General concedes that sexually violent predators adjudicated in California courts are similarly situated to those adjudicated out-of-state. *See* Appellee's Br. 31-32. However, the Attorney General incorrectly contends that out-of-state sexually violent predators are treated the same as in-state offenders. *See id.* In fact, the Sex Offender Registration Act and the Sexually Violent Predator Act, when read as a whole, require only sexually violent predators adjudicated by California courts to register every 90 days; all other offenders are required to register only annually. *See* Cal. Welf. & Inst. Code § 6600 *et. seq.*; Cal. Penal Code § 290 *et. seq.*

The Attorney General errs by reading Section 6600 in isolation and concluding that every individual who meets the definition of a sexually violent predator must register every 90 days. *See* Cal. Welf. & Inst. Code § 6600 (defining sexually violent predator). Contrary to the Attorney General's reading of the statute, Section 6600 does not determine whether an individual has been *adjudicated* a sexually violent predator and must therefore register in accordance with Section 290.012. *See* Cal. Penal Code § 290.012(b) (establishing that "every person who has ever been adjudicated a sexually violent predator, as defined in

Section 6600 of the Welfare and Institutions Code" shall register every 90 days). To determine whether an individual has been adjudicated a sexually violent predator, this Court must look to the procedures described in the rest of the Sexually Violent Predator Act. *See* Cal. Welf. & Inst. Code § 6600(a)(3) (including the jury determination and accompanying procedures as a necessary part of the definition of a sexually violent predator).

Those procedures do not encompass out-of-state state adjudications because they refer exclusively to California entities. For example, the Department of Corrections and Rehabilitation and the State Department of Mental Health must evaluate inmates and recommend their commitment as sexually violent predators. Cal. Welf. & Inst. Code § 6601; *see also id.* § 6604 (requiring commitment in an institution under the jurisdiction of the Department of Corrections and Rehabilitation). While these agencies are not clearly defined as Californian entities, this Court presumes that the California legislature is referring to agencies within its own jurisdiction. *See Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."). Once a California agency recommends commitment, "county's designated counsel" must file a petition for commitment in the "superior court of the county in which the person was convicted . . . ." Cal. Welf. & Inst. Code § 6601(i). These adjudicatory procedures follow convictions

under California law that occur in California courts. Because Section 6600 requires the participation of California entities, any individual who has been adjudicated outside of California courts has not in fact been "adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code." Cal. Penal Code § 290.012(b).

The Attorney General argues that if the California legislature intended Section 290.012(b) to refer only to sexually violent predators adjudicated in California courts, it would have said so. *See* Appellee's Br. 32. However, elsewhere in the statutory scheme, the Legislature took the opposite approach, specifically describing when out-of-state offenders were included. *See, e.g.*, Cal. Penal Code §§ 290(c), 290.002, 290.005 (requiring out-of-state offenders to register annually). As a result, this Court should not read the omission of out-of-state adjudications to imply their inclusion. *See Webb v. Smart Document Solutions*, 499 F.3d 1078, 1084 (9th Cir. 2007) (when a statute "designates certain . . . manners of operation, all omissions should be understood as exclusions").

Because the Sex Offender Registration Act and the Sexually Violent Predator Act, when read as a whole, require only sexually violent predators adjudicated in-state to register every 90 days, while similarly situated offenders have to register only annually, Mr. Litmon has stated a valid equal protection claim.

C. There Is No Rational Reason To Subject Similarly Situated Civilly Committed Sex Offenders to Different Registration Requirements.

Because Section 290.012(b) implicates fundamental rights, *see supra* Part I, this Court should remand Mr. Litmon's equal protection claims for review under strict scrutiny. However, even if this Court applies rational basis review, Mr. Litmon has stated viable equal protection claims.

The Attorney General advocates for a form of rational basis review so superficial that it amounts to giving the Legislature a blank check. *See* Appellee's Br. 33-35. However, rational basis review must still involve some scrutiny, and a total mismatch between a law and its ultimate objective is unacceptable. *See City of Cleburne*, 473 U.S. at 448-50 (rejecting the city's reasons for requiring a special zoning permit for group housing for the mentally retarded after finding that the characteristics of the residents were irrelevant to the city's proffered interests); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973). In *Moreno*, the Supreme Court considered an equal protection challenge to a regulation denying food stamp benefits to households including unrelated individuals, while providing them to households made up solely of related individuals. *Id.* at 530. Even though the Court accepted the Government's argument that it was trying to prevent fraud, it struck down the law because there was no rational connection between the composition of households and the occurrence of fraud. *Id.* at 535-36, 538.

Similarly, a law requiring more frequent registration by one particular subset of civilly committed sex offenders cannot survive rational basis review. Even if this Court accepts that sex offender registration helps keep the public safe,[4] that does not end the analysis. *See id.* Because the different types of civil commitment for sex offenders are unrelated to any differences in the safety risks they pose or to the efficacy of closer monitoring, there is no rational reason to require one type of civilly committed sex offender to register more frequently than another.

In addition, the Attorney General has not put forth any plausible reasons for requiring sexually violent predators adjudicated in-state to register more frequently than those adjudicated out-of-state. *See* Appellee's Br. 34-35. The Attorney General's argument that it is too difficult to track out-of-state offenders is unpersuasive because the State already does so, though it only requires them to register annually. *See* Cal. Penal Code §§ 290(c), 290.002, 290.005. Similarly, while the Attorney General claims it is too difficult to track out-of-state offenses

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[4] Contrary to the Attorney General's assertion, Mr. Litmon does not concede that registration protects public safety. *See* Appellee's Br. 33. While the *goal* of registration is to protect public safety, Mr. Litmon argues that more frequent registration is not an effective means of achieving that goal. *See* Appellant's Br. 34; *see also* Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* 25-30, 60-61 (Sept. 2007), *available at* http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf (demonstrating that registration does not reduce sex crimes or prevent recidivism).

because the definitions and procedures could change at any time, this has not prevented the State from requiring registration for out-of-state offenses. *See* Cal. Penal Code § 290.005.

Despite the Attorney General's assertions to the contrary, there is no rational reason for requiring sexually violent predators adjudicated in-state to register every 90 days while all other sex offenders are only required to register annually. Because Mr. Litmon's claim survives rational basis review, this Court should find that he has stated viable equal protection claims and remand so that he can prove his case.

IV. SECTION 290.012(b) IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT PROVIDE ADEQUATE GUIDANCE TO LAW ENFORCEMENT.

The Attorney General's opposition to Mr. Litmon's vagueness challenge rests solely on the fact that Mr. Litmon has complied with his registration obligations since 2008. *See* Appellee's Br. 37. However, Mr. Litmon does not allege that Section 290.012(b) is unconstitutionally vague because he is unable to comply with the law. Rather, he argues that the law is unconstitutional because it affords law enforcement too much discretion and because the vagueness of the law obstructs meaningful judicial review. *See* Appellant's Br. 42-47; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) ("The requirement that government articulate its aims with a reasonable degree of clarity . . . reduces the danger of caprice and

discrimination in the administration of the laws . . . and permits meaningful judicial review."); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345 (9th Cir. 1984) ("A statute is void for vagueness . . . if it invites arbitrary and discriminatory enforcement."). The Attorney General has not addressed these concerns.

In this case, the Department of Justice's contradictory guidance regarding the registration process invites local police to unfairly enforce the law. In addition, the lack of specificity in the law makes it difficult for reviewing courts to determine what registration actually entails. As a result, this Court should remand and allow Mr. Litmon the opportunity to pursue his vagueness claims.

A. Section 290.012(b) Is Unconstitutionally Vague as Applied to Mr. Litmon.

Mr. Litmon alleges that Section 290.012(b) is unconstitutionally vague because neither the statute nor the Department of Justice's registration form provides sufficient guidance to law enforcement. To succeed on an as-applied challenge, Mr. Litmon need not demonstrate that any of his constitutional rights have been infringed. *See United States v. Powell*, 423 U.S. 87, 92 (1975) ("Vagueness challenges to statutes which do not involve [Constitutional] freedoms must be examined in the light of the facts of the case at hand."); *Cunney v. Bd. of Trs. of Grand View, N.Y.*, 660 F.3d 612, 615 (2nd Cir. 2011) (holding a zoning ordinance unconstitutionally vague without finding infringement of any constitutional rights). Rather, Mr. Litmon need only demonstrate that Section

290.012(b) is "impermissibly vague in all of its applications" because it does not describe a "reasonably ascertainable standard of conduct" to guide local police stations in their enforcement of the law. *See Powell*, 423 U.S. at 92; *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003). Here, because of the contradictions and ambiguity created by the Department of Justice's registration form, law enforcement has not been provided with reasonably ascertainable standards describing what registrants must do to fully comply with their registration obligations. *See* Cal. Penal Code § 290.012(b); ER 29-30. As a result, Section 290.012(b) is impermissibly vague in all its applications.

The Attorney General incorrectly argues that Section 290.012(b) is "unambiguous" because the sex offender registration form describes exactly how to comply with the registration requirement. *See* Appellee's Br. 36-37; ER 29-30. This is not true. First, the form is ambiguous because it is used for both annual and 90-day registration and does not distinguish between the two, despite the fact that Section 290.012 requires more detailed information from annual registrants. *See* ER 29-30; Cal. Penal Code §§ 290.012(a), 290.015 (requiring annual registrants to provide their address, employer, and license plate number and have their fingerprints and photograph taken); *id.* § 290.012(b) (requiring 90-day registrants to update their address and employer). In addition, even though Section 290.012(b) requires 90-day registrants to update only their address and employer, the multi-

purpose registration form inexplicably asks all registrants for their drivers license number, license plate number, descriptions of scars and tattoos, next of kin, email addresses, screen names, fingerprints, and photographs. *See* ER 29; Cal. Penal Code § 290.012(b). Because the registration form does not provide any guidance about what information to collect from which offenders, local law enforcement has too much discretion to pick and choose how to enforce the law.

The ambiguity of the registration form is further emphasized by the Attorney General's own confusion about what information registrants must provide. *Compare* Appellee's Br. 38 (stating that all registrants must provide all the information on the form), *with* ER 43 (representing that 90-day registration is "just the verification" and not a "full-fledged registration"). Because the registration form is ambiguous and contradicts the statute, it does not provide "reasonably ascertainable standard[s] of conduct" and is "impermissibly vague in all its applications." *See Powell*, 423 U.S. at 92; *Hotel & Motel Ass'n*, 344 F.3d at 971. Local law enforcement has too much freedom to decide what information to collect, and the differing interpretations of what the law requires "serve only to reinforce our view that the ordinance's vagueness authorizes arbitrary enforcement." *Cunney*, 660 F.3d at 622.

Here, the fact that Mr. Litmon has complied with Section 290.012(b) does not prove that the law's requirements are clear. Mr. Litmon has remained in

compliance because he appears in person at his local police station and follows the instructions of the registering agent. He provides whatever information is asked for on that day and does not leave until he is told that his registration is complete. The fact that Mr. Litmon has not been found criminally liable for failing to register according to instructions does not mean the law provides enough guidance to local police stations regarding what instructions to give. *See City of Chicago v. Morales*, 527 U.S. 41, 62 (1999) (J. Stevens, writing for the majority) ("[T]hat the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue.").

In Mr. Litmon's case, he has directly experienced the consequences of the law's vagueness. Rather than just briefly updating his address and employer, Mr. Litmon has endured lengthy registration visits lasting up to 10 hours. ER 42. He has been kept waiting while unnecessary background and warrant checks were run, provided redundant fingerprints and photographs, and been required to complete two full-fledged registrations within weeks of each other. *See* ER 42-43, 146-47. These experiences are more than merely inconvenient; they demonstrate that local law enforcement has been given too much discretion in how they enforce a law, the violation of which results in criminal penalties.

B. Section 290.012(b) Is Unconstitutionally Vague on Its Face.

In addition to being unconstitutionally vague as applied to Mr. Litmon, Section 290.012(b) is unconstitutionally vague on its face.

The Attorney General dismisses the applicability of *Morales* to facial vagueness challenges by arguing that the "no set of circumstances" test "survived" *Morales*. *See* Appellee's Br. 36. However, while this Court has declined to follow the three-justice plurality opinion in *Morales* (*Hotel & Motel Ass'n*, 344 F.3d at 972), the majority opinion in the case is still binding. In *Morales*, the six-justice majority facially invalidated a loitering ordinance without applying the "no set of circumstances" test because the regulation "violate[d] the requirement that a legislature establish minimal guidelines to govern law enforcement." *Morales*, 527 U.S. at 60 (internal quotation marks and citation omitted). Similarly, in *Kolender v. Lawson* the Supreme Court facially invalidated a law requiring suspects to provide "credible and reliable" identification because it "encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." 461 U.S. 352, 361 (1983). Both *Morales* and *Kolender* establish that laws entrusting law enforcement with too much discretion can be facially invalidated for vagueness, even if sometimes they are enforced permissibly. *See Morales*, 527 U.S. at 71 (J. Breyer, concurring) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or

poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case.").

Furthermore, while the Attorney General attempts to distinguish *Morales* based on the number of people regulated, *Morales* is not as factually distinguishable as the Attorney General would like this Court to believe. *See* Appellee's Br. 18-19, 40. Like the laws at issue in *Morales* and *Kolender*, Section 290.012(b) involves criminal penalties for non-compliance and restricts an individual's freedom of movement without providing adequate guidance to law enforcement. Cal. Penal Code § 290.018(f); *Morales*, 527 U.S. at 55, 60; *Kolender*, 461 U.S. at 358. While the Attorney General argues that Section 290.012(b) is not vague because it "specifies exactly who must comply," it is still unclear *how* they must comply. Appellee's Br. 40; *see Kolender*, 461 U.S. at 361 (finding a law applying only to individuals identified as suspects unconstitutionally vague because it did not "establish standards by which the officers may determine whether the suspect has complied").

Here, in every circumstance, the lack of specificity in Section 290.012(b), and the contradictory guidance regarding the law's requirements, gives local law enforcement too much discretion to decide how to enforce the law.

C. Section 290.012(b) Is Unconstitutionally Vague Because the Face of the Law Does Not Require In-Person Registration.

Finally, this Court should recognize that neither the text of Section 290.012(b) nor any regulation having the force of law requires in-person registration for quarterly registrants. *See* Cal. Penal Code § 290.012(b); Cal. Code Regs. tit. 15, § 3652(b). The in-person requirement appears *only* in uncodified Department of Justice publications such as the sex offender registration form. *See* ER 29-30.

The fact that Section 290.012(b) does not, on its face, require in-person registration may obstruct meaningful judicial review. The Attorney General argues that judicial review was not obstructed in this case because Mr. Litmon brought the in-person requirement before the Court. *See* Appellee's Br. 42. Not every litigant will do so. When litigants do not raise the in-person requirement, the Court will likely make decisions about the overall burden of the registration scheme without full information about what the law entails. As a result, this Court should find Section 290.012(b) unconstitutionally vague because its lack of specificity obstructs meaningful judicial review. *See Roberts*, 468 U.S. at 629 (finding that a lack of clarity in a law can interfere with judicial review).

V. THE DEPARTMENT OF JUSTICE'S REGISTRATION POLICIES ARE VOID AS A MATTER OF LAW FOR FAILING TO COMPLY WITH THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT.

The Attorney General fails to address the substance of Mr. Litmon's California Administrative Procedure Act claim. *See* Appellee's Br. 42-44. As a result, the Attorney General has waived any arguments it could have raised. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (finding that an argument not addressed in an answering brief is waived). Because Mr. Litmon's state law claim raises purely legal questions, this Court should find as a matter of law that the Department of Justice's policies governing the manner of registration under section 290.012(b) are void for failing to comply with the California Administrative Procedure Act. *See Tidewater Marine W., Inc. v. Bradshaw*, 927 P.2d 296, 308 (Cal. 1996).

In the alternative, to the extent that this Court finds that Mr. Litmon has stated valid federal claims, it should advise the District Court to reconsider its dismissal of Mr. Litmon's state law claim on remand. *See San Pedro Hotel Co. v. City of L.A.*, 159 F.3d 470 (9th Cir. 1998).

CONCLUSION

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

Dated: March 14, 2014

Respectfully submitted,

Jones Day

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

Attorney for Plaintiff-Appellant
DAVID LITMON, JR.

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 6939 words.

Dated: March 14, 2014

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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