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14 situated

15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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18 JOHN DOE, *et al.*, on behalf of themselves and)
19 others similarly situated,)

20 Plaintiffs,)

21 v.)

22 KAMALA D. HARRIS, *et al.*,)

23 Defendants.)
24)
25)
26)
27)
28)

Civil Case No. 12 5713

**EX PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

1 Plaintiffs hereby request, pursuant to FRCP 65 and Civil Local Rules 7-10 and 65-1, that
 2 the Court issue a temporary restraining order and an order to show cause why a preliminary
 3 injunction should not issue. Counsel provided detailed notice to the Attorney General one week
 4 ago; we have since discussed the case with her office and have served her office electronically with
 5 all papers before filing them with this Court, as we agreed to do. See Declaration of Michael
 6 Risher ¶¶ 9-13 & Ex. 3 (service list); *see also id.* ¶¶ 3-8 & Ex. 2 (October 31, 2012 letter).
 7 Plaintiffs do *not* seek a TRO or preliminary injunction against Defendant City of Alameda,
 8 although they have also provided notice to that Defendant, as well as the documents filed today.
 9 *See id.* ¶ 7. They do seek class provisional certification, as discussed in their motion for class
 10 certification, and request that the Court also consider that motion in conjunction with Plaintiffs'
 11 request for a TRO.

12 **NEED FOR TEMPORARY RESTRAINING ORDER**

13 Plaintiffs seek a TRO to prohibit the state from enforcing a new statute that criminalizes
 14 constitutionally protected online anonymous speech and imposes burdensome reporting
 15 requirements on the online speech, whether anonymous or not, of every person convicted after
 16 1944 of any sex-related offense that requires registration, including misdemeanors such as indecent
 17 exposure ("registrants"). The law, the Californians Against Sexual Exploitation Act ("CASE Act"
 18 or "Act"), was enacted by voter initiative yesterday and is effective today.¹ A copy of the initiative
 19 is attached as Exhibit 1 to the Risher Declaration, with the parts most relevant to this case
 20 highlighted. The Act expressly requires all of the 73,900 current California registrants currently
 21 living in the community to "*immediately*" provide the police with information about their access to
 22 and use of the Internet for expressive purposes, including comments on newspaper websites and
 23 online political discussion groups, and then update that information within 24 hours of creating
 24

25 _____
 26 ¹ "The California Constitution expressly provides that an initiative measure approved by the voters
 27 takes effect the day after the election." *People v. Superior Court (Clark)*, 22 Cal.App.4th 1541,
 28 1546 (1994) (citing Cal. Const., art. II, § 10(a)). This provision means what it says. *See id.*
 ("Proposition 115 was approved by the voters June 5, 1990, and therefore it became effective on
 June 6, 1990.").

1 new accounts or using new service providers.² A failure to comply with any of these new
 2 requirements is a crime, often a felony.³ Tens of thousands of Californians, many of whom may
 3 not have been in trouble with the law for years or decades, thus face arrest and prosecution if they
 4 fail to take the affirmative steps necessary to comply with this unconstitutional new law.

5 Immediate relief is necessary because this new law violates the First Amendment, in part
 6 because it criminalizes constitutionally protected anonymous speech. As a matter of law, “[t]he
 7 loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes
 8 irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *Sammortano v. First Jud. Dist.*
 9 *Court*, 303 F.3d 959, 973 (9th Cir. 2002). This case presents an extreme example of why this is
 10 so: if registrants turn over information about their Internet use to the government, they will have
 11 been irreparably stripped of their anonymity. If they fail to do so, they risk immediate arrest and
 12 prosecution. And the new requirement that registrants report new Internet identifiers or service
 13 providers to the police within 24 hours is a burden that will chill speech.

14 Three federal courts have invalidated or enjoined the enforcement of laws that similarly
 15 required sex offenders to provide the government with identifying information about their online
 16 speech. *See White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010) (issuing preliminary injunction
 17 against similar law); *Doe v. Nebraska*, _ F.Supp.2d _, 2012 WL 4923131 (D. Neb. 2012) (order
 18 and opinion after trial); *Doe v. Shurtleff*, 2008 WL 4427594 (D. Utah Sept. 25, 2008) (summary
 19 judgment), order vacated after law amended, 2009 WL 2601458 (D. Utah Aug 20, 2009), *aff'd*,
 20 628 F.3d 1217 (10th Cir. 2010). For the reasons discussed in those cases, in Plaintiffs’
 21 Memorandum of Points and Authorities in Support of Preliminary Injunction, and below, this
 22 Court should do the same.

23 GROUND FOR APPLICATION

24 “The standard for issuing a TRO is the same as that for issuing a preliminary injunction.”
 25 *Walker v. County of Santa Clara*, 2011 WL 4344212 at *2 (N.D. Cal. 2011) (citations omitted).

26 _____
 27 ² CASE Act §§ 11-13, codified at Cal. Penal Code §§ 290.014(b), 290.015(a)4-6, 290.024(a), (b).
 California’s registration law categorically applies retroactively. *See id.* § 290.03.

28 ³ *See id.* § 290.018(a)-(c).

1 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the
2 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
3 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
4 *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). If plaintiffs show a “likelihood of irreparable
5 injury and that the injunction is in the public interest,” a “preliminary injunction is appropriate
6 when a plaintiff demonstrates that serious questions going to the merits were raised and the balance
7 of hardships tips sharply in the plaintiff's favor.” *Alliance for the Wild Rockies v. Cottrell*, 632
8 F.3d 1127, 1134-35 (9th Cir. 2011).

9 As discussed above, Plaintiffs face serious, imminent, and irreparable harm. A TRO is in
10 the public interest because “it is *always* in the public interest to prevent the violation of a party's
11 constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted,
12 emphasis added). The balance of equities tips in Plaintiffs favor for this same reason, because a
13 TRO will simply maintain the status quo and because it does not appear that the state is even in a
14 position to collect and use the information that the new law requires it to collect. And Plaintiffs are
15 likely to succeed on the merits for the following four reasons:

16 **First**, the Act is overbroad because it criminalizes constitutionally protected anonymous
17 speech but is not narrowly tailored because it restricts far too much anonymous speech by too
18 many speakers, and allows the information to be used for too many purposes. “Under our
19 constitution, anonymous [speech] ... is not a pernicious, fraudulent practice, but an honorable
20 tradition of advocacy and of dissent.” *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357
21 (1995); see *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). The statute
22 prohibits all anonymous speech, even if it pertains to news, politics, and professional activity and
23 could not possibly be used to commit a crime (such as commenting on a newspaper website). The
24 statute also applies to all registrants, regardless of the severity, type, or age of the underlying
25 offense and whether it had any connection whatsoever to the Internet or to children. Only 1% of
26 sex crimes against children involve any sort of technology, and even fewer involve the use of the
27 Internet. Registered sex offenders make up only two to four percent of persons arrested for
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1 technology-facilitated sex crimes against youth. And after a number of years in the community
2 without a new arrest, sex offenders are less likely to re-offend than a non-sex offender is likely to
3 commit an “out of the blue” sexual offense. Thus, the Act criminalizes many types of anonymous
4 speech, and the speech of many people, that do not pose the dangers with which the statute is
5 concerned. Because the law “burden[s] substantially more speech than is necessary to further” the
6 government’s interests, it is facially invalid under the First Amendment under any level of scrutiny.
7 *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir.
8 2011); see *Simon and Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 118, 122
9 & n.* (1991).

10 **Second**, the Act is unconstitutional because it imposes burdensome registration
11 requirements on a great deal of non-anonymous online speech by registrants, but is not narrowly
12 tailored to its stated goals, for the reasons set forth above.

13 **Third**, the Act violates due process because it is impossibly vague. A law is void for
14 vagueness if it “fails to give a person of ordinary intelligence a reasonable opportunity to know
15 what is prohibited.... or abuts upon sensitive areas of basic First Amendment freedoms.” *Hunt v.*
16 *City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011) (citations and numbering omitted). This
17 new law requires registrants immediately to report all “Internet service providers” and “Internet
18 identifiers,” but the definitions of these terms leave it entirely unclear whether they trigger
19 reporting obligations for connecting to a wireless network at a coffee shop or hotel, creating an
20 account on a new service with the same user name as that used on a different service, or buying
21 something from an online retailer, such as Amazon.com, that requires the creation of an account
22 and allows for customer reviews. The statute is also unclear as to whether a registrant must report
23 all “Internet service providers” and “Internet identifiers” she has ever used or only those currently
24 in active use. The vague definitions do not give registrants sufficient notice of what they need to
25 report to comply with the law, a vagueness that is particularly intolerable given the free speech
26 rights implicated and the severe criminal penalties for failure to comply. See *id.* at 712-13.

27 **Fourth**, the Act is unconstitutional because it violates registrants’ associational rights by
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1 potentially compelling disclosure of their participation in online forums organized by political and
2 other groups and by compelling disclosure of the identity of other registrants with whom they
3 discuss political issues. See *NAACP v. Alabama*, 357 U.S. 449, 458 (1958); *Perry v.*
4 *Schwarzenegger*, 591 F.3d 1147, 1159-60 (9th Cir. 2010).

5 The law “clearly favors granting preliminary injunctions to a plaintiff ... who is likely to
6 succeed on the merits of his First Amendment claim.” *Klein v. City of San Clemente*, 584 F.3d
7 1196, 1208 (9th Cir. 2009). That is the case here, particularly because the harm that Plaintiffs face
8 is serious and irreparable, and because it does not appear that the government is even in a position
9 to use this information, particularly if all 73,900 registrants living in the community were suddenly
10 to show up at local police departments with lists of their online identifiers and ISPs.

11 RELIEF SOUGHT

12 Plaintiffs respectfully request that the Court grant this *ex parte* motion as follows:

- 13 1. First, Plaintiffs request that the Court issue an immediate temporary restraining order, pending
14 a hearing on the request for a preliminary injunction, that enjoins Defendant HARRIS,
15 including her officers, agents, servants, employees, and attorneys, and upon those persons in
16 active concert or participation with, from implementing and enforcing Cal. Penal Code
17 §§ 290.014(b) and 290.015(4)-(6), as enacted by Proposition 35, or from otherwise requiring
18 registrants to provide identifying information about their online speech to the government.
19 Because Defendant HARRIS is the chief law-enforcement officer of the state, this order will
20 bind all California state and local law-enforcement officers. See *American Civil Liberties*
21 *Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); see also Ca. Const. art. V § 13; Ca.
22 Gov’t Code §§ 12511, 12512. Plaintiffs have filed herewith a motion for class certification,
23 asking that the Court provisionally certify a class so that all 73,900 registrants will be covered
24 by this Court’s order. The proposed class is defined as “all persons who are required to register
25 under California Penal Code § 290, including those whose duty to register arises after the class
26 has been certified.”
- 27 2. Second, Plaintiffs ask the Court to issue an order to show cause why a preliminary injunction
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1 should not issue to enjoin Defendant from implementing and enforcing these same laws, and
2 set a hearing on the motion for a preliminary injunction.

3 This motion is based on this *Ex Parte* Application and the following documents that are
4 being filed herewith:

- 5 1. Class Action Complaint for Declaratory and Injunctive Relief
- 6 2. Memorandum of Points and Authorities In Support of Temporary Restraining Order
7 and Preliminary Injunction
- 8 3. [Proposed] Temporary Restraining Order and Order to Show Cause
- 9 4. Declaration of John Doe (filed under partial seal)
- 10 5. Declaration of Jack Roe (filed under partial seal)
- 11 6. Supplemental Declaration of Jack Roe
- 12 7. Declaration of Janice Bellucci
- 13 8. Declaration of David G. Post
- 14 9. Declaration of Brian Abbott
- 15 10. Declaration of David Finkelhor
- 16 11. Declaration of R. Karl Hanson
- 17 12. Declaration on Charlene Sheen
- 18 13. Declaration of Michael T. Risher re: Notice and In Support of Administrative
19 Motion for Leave to Proceed Anonymously and to File Portions of Declaration
20 Under Seal
- 21 14. Notice of Motion and Motion; Points and Authorities In Support of Class
22 Certification
- 23 15. Declaration of Linda Lye ISO Class certification
- 24 16. Declaration of Lee Tien ISO Class certification
- 25 17. [Proposed] Order Certifying Class
- 26 18. Administrative Motion For Leave to Proceed Anonymously and to File Portions of
27 Declarations Under Seal

- 1 19. [Proposed] Order Granting Motion For Leave to Proceed Anonymously and to File
2 Portions of Declarations Under Seal
3 20. Declination to Proceed Before Magistrate Judge
4 21. Certification of Interested Parties

5 and the complete files and records of this action; and such other and further matters as the Court
6 may properly consider.

7 DATED: November 7, 2012

Respectfully submitted,

8
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