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JOHN DOE, et al.  
on behalf of themselves and others similarly  
situated

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**TEH**

**C 12 5713**

JOHN DOE, et al., on behalf of themselves and  
others similarly situated,

Civil Case No. \_\_\_\_\_

Plaintiffs,

**DECLARATION OF DAVID G. POST**

vs.

KAMALA D. HARRIS, et al.,

Defendants.

I, David G. Post, declare as follows:

1. I am a professor of law at Beasley School of Law, Temple University, specializing in copyright, trademark, other intellectual property law, and cyberlaw. In this declaration, I set forth my conclusions about the scope of the CASE Act's "Internet service provider" and "Internet identifier" reporting requirements for registered sex offenders, focusing on the meaning of the law's definitions and the breadth and range of activities they will affect. The information in this declaration is based upon my personal knowledge and experience and sources of the type that researchers in my field would rely upon in their work. If called upon to testify, I could and would competently testify thereto.
  
2. In relevant part, the CASE Act amends California law to provide:

Cal. Penal Code § 290.014(b): If any person who is required to register pursuant to the Act adds or changes his or her account with an Internet service provider or adds or changes an Internet identifier, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within 24 hours. The law enforcement agency or agencies shall make this information available to the Department of Justice. Each person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.

Cal. Penal Code § 290.015(a): A person who is subject to the Act shall register. . .  
(4) A list of any and all Internet identifiers established or used by the person.  
(5) A list of any and all Internet service providers used by the person.  
(6) A statement in writing signed by the person acknowledging that the person is required to register and update the information in paragraphs (4) and (5), as required by this chapter.

Cal. Penal Code § 290.024(a): "Internet service provider" means any business, organization, or other entity providing directly to consumers a computer and communications facility through which a person may obtain access to the Internet. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.

Cal. Penal Code § 290.024(b): "Internet identifier" means any electronic mail address, user name, screen name, or similar identifier used for the purpose of

Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications.

### **Summary of Declaration**

3. Based on my personal knowledge, experience, and research, I conclude that:
  - a. The CASE Act's definitions of the terms "Internet service provider" and "Internet identifier" reporting requirements are ambiguous and would cause uncertainty for officials and registrants.
  - b. Under reasonable and plausible readings of the statutory language, the CASE Act's "Internet service provider" and "Internet identifier" definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller and seemingly capriciously-chosen subset of those communications.
  - c. Under *any* reading of the statutory text, the CASE Act will substantially curtail registrants' ability to engage in anonymous communication, and will require considerable and burdensome reporting even for ordinary, non-anonymous communication.

### **Background and Experience**

4. I am a professor of law at Beasley School of Law, Temple University, in Philadelphia, Pennsylvania, specializing in copyright, trademark, other intellectual property law, and cyberlaw. I received a Ph.D. in biological anthropology (1978), specializing in computer analysis of primate behavioral data, and taught in the Anthropology Department at Columbia University for five years (1976 – 81), including courses on mathematical statistics and computer techniques in the social sciences. After graduating from Georgetown Law Center in 1986, I served as a law clerk to the Honorable Ruth Bader Ginsburg for one year, at the United States Court of Appeals for the District of Columbia Circuit (1986-87 term), and then practiced computer and intellectual property law for six

years (1987 – 93) as an associate at the Washington, D.C. law firm of Wilmer, Cutler & Pickering. After clerking again for then-Justice Ginsburg at the Supreme Court of the United States (1993-94 term), I began writing and teaching in the area of Internet law, first at Georgetown University Law Center (1994 – 97) and then Temple University (1997 – present). During this period I have published several dozen scholarly articles, and participated as presenter and/or commentator at numerous scholarly conferences and Continuing Legal Education seminars, relating to Internet law. I have recently published two books on the subject: *In Search of Jefferson’s Moose: Notes on the State of Cyberspace* (Oxford, 2009), and *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age* (West, 4th ed. 2010), (co-authored with Paul Berman, Patricia Bellia, and Brett Frischmann), currently the most widely-used casebook in the field.

5. I have previously served as an expert in the case *John Doe and Jane Doe 1 through 36 et al. v. State of Nebraska et al.*, Docket No. 8:09-cv-456 (D. Neb.), involving a challenge to Internet-related reporting requirements for registered sex offenders, for which I prepared an expert report and testified at trial.

#### **Background: Size and Use of Internet**

6. The Internet is a network of networks that communicate with each other using a common protocol (Internet Protocol, or IP).<sup>1</sup> It does not have a central control point or directory that will be aware of any newly-created web page. In addition, web pages are constantly created and deleted, many by automated processes. Thus, it is impossible to determine the precise “size” of the Internet at any given time.

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<sup>1</sup> The most common definition of “the Internet” is probably that found in the federal Telecommunications Act, 47 U.S.C. § 230(f)(1) (“[T]he international computer network of both Federal and non-Federal interoperable packet switched data networks.”). Roughly speaking, federal law treats Internet communications services as a type of “information service” and not “telecommunications service.” 47 U.S.C. § 153(24) (defining “information service” to mean “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”)

7. Various properties of the Internet can be measured, however. For example:
  - a. A domain name (e.g., “google.com”) must be publicly registered with an established registrar in order to be available to a generic Internet-connected computer. These registrars report that there are over 200 million active domain names at this time.
  - b. A Uniform Resource Locator (URL) can be used to identify a specific web page or other form of online content hosted on a given domain. Although not all URLs are known or recorded, see ¶6, Google reported in 2009 that it had found and indexed over 1 trillion URLs as of July 2008, a number that has undoubtedly increased since then. While some of these URLs are duplicates (they point to the same content) or possibly no longer extant, this gives a rough lower bound as to the number of web pages in existence.
8. The Internet is an increasingly common platform for individuals to communicate about a wide range of subjects. Today most Americans use the Internet, and the typical user spends more than an hour per day online on average.
9. The most popular Internet sites generate a tremendous amount of traffic. For example, there are now over 1 billion registered accounts on Facebook, and Twitter users generate hundreds of millions of “Tweets” per day.
10. Internet users also tend to visit and engage with a large number of different sites. A typical user visits well over 100 distinct websites per month. A prolific user may visit even more sites.
11. Americans use the Internet for a wide range of expressive activities. For example, a recent study by the Pew Center for Internet & Society found that significant numbers of adult Internet users use the Internet for the following activities:
  - Email (91 percent of adult Internet users),
  - Social networking (66 percent),

- Using an online classified ads site (53 percent),
- Uploading photos (46 percent),
- Sending instant messages (46 percent),
- Rating a product or service (37 percent),
- Playing online games (36 percent),
- Commenting on a site or blog (32 percent),
- Uploading user-generated content (30 percent),
- Participating in an online forum concerning health or personal issues (22 percent),
- Creating collaborative web pages or blogs (15 percent), and
- Maintaining a personal web page or blog (14 percent).<sup>2</sup>

12. A growing number of Americans rely on the Internet as a source of news, increasingly preferring it to traditional sources such as newspapers. Roughly half of all Americans regularly obtain at least some news online, and an increasing minority obtains news via social networking sites.

13. Many Americans go online to learn about or even engage in political activities. According to recent research, 39 percent of Americans have engaged in some form of online civic or political activity.<sup>3</sup>

14. Businesses increasingly view the Internet as an important channel for reaching out to consumers. Companies, ranging from startups to Fortune 500 stalwarts, increasingly use

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<sup>2</sup> See Pew Internet & American Life Project, *Trend Data (Adults)*, <http://pewinternet.org/Trend-Data-%28Adults%29/Online-Activites-Total.aspx>.

<sup>3</sup> See Pew Internet & American Life Project, *Social Media and Political Engagement*, <http://www.pewinternet.org/Reports/2012/Political-engagement.aspx>.

Facebook, Twitter, blogs, and other methods of reaching out to current and potential customers online.

15. Many people use the Internet to find employment or employees. Employers and jobseekers use both specialized sites such as Monster.com and general-purpose Internet sites and services. The professional social network LinkedIn, which describes itself as the world's largest online professional network, has more than 187 million members in over 200 countries and territories.

16. The Internet is increasingly used for educational purposes, even beyond academic research. Many academic institutions offer formal or informal courses online, and millions of Americans participate in these courses. These offerings frequently include online forums, chat rooms, or similar sites where class participants can meet to interact with the instructors and each other. In addition, user-generated content sites frequently include "how-to" videos and similar educational materials.<sup>4</sup>

17. The Internet is also an outlet for personal creative expression. As noted above, see ¶11, 30 percent of Internet users upload content they have created themselves to share with others, and 14 percent maintain their own website or blog. The video hosting site YouTube, which allows both user-generated and commercial videos, is the third most visited website in the world.

### **Statutory Language**

#### *Internet identifier reporting requirements*

18. The CASE Act requires a registrant to annually report "[a] list of any and all Internet identifiers established or used by the person." Cal. Penal Code § 290.015(a)(4). In addition, a registrant must "send written notice" within 24 hours if she "adds or changes

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<sup>4</sup> For example, Harvard, MIT, and Stanford are all exploring ways to open up their classes to the general public via the Internet. See Gregory Ferenstein, *Move over Harvard and MIT, Stanford Has the Real "Revolution in Education,"* TECHCRUNCH, May 9, 2012, <http://techcrunch.com/2012/05/09/move-over-harvard-and-mit-stanford-has-the-real-revolution-in-education/>.

an Internet identifier.” Cal. Penal Code § 290.014(b) In addition, “[e]ach person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.. *Id.*

19. The Act defines “Internet identifier” to mean “any electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications.” California Penal Code 290.024(b). The Act does not provide additional definitions for any of the terms used.

20. The phrase “any electronic mail address, user name, screen name, or similar identifier” could include almost any information a person uses to refer to himself or herself on the Internet, including:

- a. A person’s real name, when used as a user name, screen name, or similar identifier;
- b. The word “Anonymous,” when used as a user name, screen name, or similar identifier;
- c. Any temporary or permanent forwarding address, such as one created on behalf of a person posting an article for sale on craigslist. (Any such address could be an “Internet identifier” regardless of whether the registrant were actually aware of its creation or existence.)

21. The phrase “any electronic mail address, user name, screen name, or similar identifier” could also include information about other people. The natural reading of the phrase “used by the person” is “used to identify the person,” but there is also a possible unintended reading: “employed for any purpose by the person.” Because people “use” other people’s Internet identifiers when communicating with or referring to those people, an “identifier used for [the specified purposes]” could be read to include every identifier a registrant uses to communicate or even refer to another Internet user.



22. The phrase “any electronic mail address, user name, screen name, or similar identifier” does *not*, however, by its plain terms, include the identity of the site or service on which the Internet identifier was used, nor does the CASE Act elsewhere require registrants to submit a reporting of the websites, blogs, social networks, etc. associated with these identifiers.
23. Without the names of the associated websites, blogs, or social networking sites, however, the information being reported often may be of no practical value to law enforcement. It is difficult to imagine any practical value in merely knowing that *e.g.*, a registrant used the identifier “Angry\_User” as an Internet identifier *somewhere* on the Internet on November 7, 2012, because there may well be thousands, or hundreds of thousands, of postings across the Internet on that day with that “identifier,” posted by thousands or hundreds of thousands of different people.
24. The disutility of this information, standing alone, may well lead law enforcement officials to demand that registrants additionally report the particular website/blog/social networking site associated with each reported username.
25. Similarly, it is unclear how the requirement to report “any and all Internet identifiers . . . used by the person” applies to a person who uses the same username (*e.g.* “davidgpost”) for several different newspaper websites, political blogs or other services.
26. On many sites or services, distinct additional identifiers, such as an account number or email forwarding address may be automatically “established” for the person and used internally or externally to enable forms of communication encompassed by the definition of Internet identifier in the Act. It is unclear whether each identifier for a given service must be reported.
27. The ordinary meanings of the terms used in the phrase “used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications” appears to encompass a vast array of Internet communications on a wide range of subjects.

28. I would describe an “Internet forum discussion” as an online site where individuals can participate in a discussion by means of posting messages or comments. As such, any site that permits comments by visitors would appear to be an “Internet forum discussion,” or at the very least “similar” to an “Internet forum discussion.” This would include:

- a. Many, if not most, news-oriented websites, which often permit comments on at least some of the articles or other content on the site.
- b. Many, if not most, political, legal, and current affairs sites. For example, the “Volokh Conspiracy” blog, where I am a regular contributor, permits site visitors to leave comments and to participate in a discussion about individual blog postings, using a username of the visitor’s choosing.
- c. Many sites promoting discussions of sensitive topics such as sexuality, alcoholism, etc. In particular, the website for California Reform Sex Offender Laws (<http://californiarsol.org/>), a group advocating on behalf of convicted sex offenders, includes a discussion forum.
- d. Many commercial sites, such as Amazon.com or eBay.com, which allow users to post feedback on recent purchases or otherwise participate in group discussions.
- e. Many entertainment sites, such as HBO.com or YouTube.com, which allow users to start, or to participate in, online discussions of the content posted at the site or other matters.
- f. Many blogs, which increasingly use platforms such as WordPress or Tumblr and allow visitors to comment or otherwise contribute.
- g. Most sites offering social networking functionality as described in ¶¶35-36 below.

29. I estimate that the number of sites falling into one or more of these categories is in the millions, if not the hundreds of millions.

30. The term “Internet chat room discussions” is undefined and broad. The term “chat,” in cyberspace jargon, generally refers to any form of online “synchronous conferencing”– applications that allow users to exchange messages (usually text, but increasingly, these days, including video content as well) with at least one other known user, in real time.
31. “Instant messaging” is another name for functionality that permits users to exchange messages (text or video) to one or more other known users in real-time. As such, it is largely overlapping with “Internet chat room discussion.”
32. The Facebook “chat” function is a typical web-based chat application; when a user logs on to her Facebook account, she is presented with a list of her “friends” – other users who have accepted, or extended, a “friend request” to her in the past – who are currently logged on to their Facebook accounts, and she can choose any one of them with whom to “chat,” i.e., to exchange messages one-to-one in real-time.
33. Hundreds of thousands of ordinary commercial websites allow users to “chat” with a service representative if they have questions about the merchandise being offered for sale, a prior order, etc.
34. A number of politicians and political candidates have participated in “online town halls” where constituents can ask questions for the politician or candidate to answer in real time. Although these events may be moderated, they are otherwise functionally equivalent to any other “chat.”
35. The term “social networking” is also extremely broad. In the Internet context, “social networking” has become a widely used catchphrase to define a class of online functions, spurred largely by the phenomenal popularity of such sites as Myspace, LinkedIn, Twitter, and Facebook. There is no consensus definition of the term, although it generally describes websites that allow users to create searchable profiles, and that contains mechanisms for communicating with, and linking to, other users.<sup>5</sup>

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<sup>5</sup> Existing definitions are often conflicting. For example, the federal Keeping the Internet Devoid of Sexual Predators Act defines a “social networking website” as an Internet website

36. An increasing number of web pages incorporate some form of social networking functionality in this sense. Examples include:

- a. Online commerce sites such as Amazon.com and eBay.com,
- b. Product and business review sites such as Yelp,
- c. Blogging sites and services, especially those using platforms such as WordPress and Tumblr, and
- d. User-generated or user-curated content sites or services such as YouTube or Pinterest.

37. I estimate that the number of websites incorporating such functionality – without even considering sites that are “similar” in some unspecified manner to these sites – is in the millions, if not hundreds of millions.

38. In addition, Internet sites and services are not static; instead, they are constantly adding new functionality. Thus, even a site that does not presently fall within the scope of the Act could change its functionality so that it qualified in the future. A user of the site may or may not be aware of such changes.

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- (i) that allows users, through the creation of web pages or profiles or by other means, to provide information about themselves that is available to the public or to other users; and
  - (ii) that offers a mechanism for communication with other users where such users are likely to include a substantial number of minors; and
  - (iii) whose primary purpose is to facilitate social interactions . . . .

42 U.S.C. § 16915a(e)(1)(A). In contrast, an oft-cited academic article defines “social network sites” as

web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.

danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMP.-MEDIATED COMM. 11 (2007). The difference between these two definitions is considerable; a simple blog or forum that might appeal to minors would qualify as a “social networking website” under the federal definition but would likely fail prongs (2) and (3) of the boyd/Ellison definition, whereas a professional network such as LinkedIn would qualify as a “social network site” under the boyd/Ellison definition but might fail both prongs (ii) and (iii) of the federal definition.

39. Finally, while the Internet identifier definition sweeps broadly in many respects, it also contains one significant exception. By restricting itself to “Internet” identifiers and communications, the definition appears to exclude identifiers used for communications over non-Internet networks – most importantly, the proprietary cellphone networks.
40. A substantial proportion of the billions of “instant messages” transmitted each day do not travel over “the Internet” but, instead, over one of many proprietary cellphone networks. Identifiers used for that purpose would appear to be outside the scope of the statutory reporting requirements. On the other hand, many instant messaging services do, in fact, use the Internet to handle all, or some portion, of the relevant communication. Identifiers used for those purposes would appear to be within the scope of the statute. Users of the different systems, however, may have no knowledge – and no practical way of obtaining the knowledge – about which kind of instant messaging system they are using; this information is, generally speaking, invisible to the users involved.
41. In summary, the definition for “Internet identifier” can be construed as requiring reporting of every identifier used for a vast amount of online communications. However, the exact boundaries are extremely difficult to determine, owing in part to the imprecise language used to define the sites and services covered by the definition. Finally, although registrants are not required to report the actual site or service where they use the reported identifiers, law enforcement may nevertheless require that registrants provide such site or service association information.

*Internet service provider reporting requirements*

42. The CASE Act requires a registrant to annually submit “[a] list of any and all Internet service providers used by the person.” Cal. Penal Code § 290.015(a)(5). In addition, a registrant must “send written notice . . . within 24 hours” if she “adds or changes [her] account with an Internet service provider.” Cal. Penal Code § 290.014(b). Finally, “[e]ach person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.” *Id.*

43. The Act defines “Internet service provider” to mean “any business, organization, or other entity providing directly to consumers a computer and communications facility through which a person may obtain access to the Internet. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.” Cal. Penal Code § 290.024 (a).

44. This definition appears to be derived from the definition of an Internet access provider found in the federal Communications Act:

The term ‘Internet access provider’ means a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services.

47 U.S.C. § 151 (note).

45. There are three significant differences, however, between the two statutes. First, the federal definition includes only persons “engaged in the business of” providing Internet access, while the CASE Act includes “any business . . . or other entity.” Second, the federal definition applies only to those providing a facility through which a “customer” can access the Internet; the CASE Act applies to those providing a facility through which “a person” may access the Internet. Finally, the FCA definition excludes a “common carrier,” but only “to the extent that it provides only telecommunications services”; the CASE Act excludes any entity that “provides only” such services.

46. There are a wide range of methods by which a person (or his or her device) may obtain access to the Internet:

- a. Many people access the Internet via their iPhones or other “smart” mobile devices using their wireless carrier.
- b. Many people access the Internet from “cyber cafés” or “Internet cafés,” which typically provide computer terminals and Internet access for a fee.

- c. Many people access the Internet from coffee shops, airport ‘hot spots,’ and hotels that provide wireless or wired Internet access for a fee or at no charge.
  - d. Many people access the Internet using “open” wireless systems. Residential and business users may leave their wireless networks “open” so that anyone within range of the network, whether guest or stranger, can use their wireless connection to freely access the Internet. Devices that are configured to connect to “open” wireless systems may do so without notifying or requiring any activity on the part of the user.
  - e. Many people access the Internet from their workplaces, using their employers’ systems.
  - f. Many people access the Internet from libraries and educational institutions; in the latter case, access may be limited to students, faculty and staff, but not necessarily.
47. However, if the statute covers all entities that provide a “computer and communications facility” that allows users to access the Internet, it would reach entities that most people would not ordinarily think of as ISPs, potentially including:
- a. A company that sells or rents computers, smartphones, or other devices with networking capabilities. Many businesses, such as Best Buy, Amazon.com and other electronics stores, sell devices that can access the Internet.
  - b. A business or home Internet user that leaves a wireless network “open” for others to use for Internet access.
  - c. A company that sells or rents cars with Internet-enabled mapping or other services.
48. In many circumstances, it may be difficult if not impossible for a user to know the identity of the entity or entities “used” when communicating over the Internet.

- a. An employee may use the employer's Internet access service, but that service may in turn be provided by another entity.
  - b. A mobile device user may not realize that her device is "roaming" on a different provider's cellular network or has connected to an open wireless network.
  - c. A wireless user at a coffee shop or a hotel may be using Internet access service cooperatively provided by (a) the coffee shop or hotel, (b) a traditional ISP such as AT&T, and possibly (c) an intermediary who assists the coffee shop or hotel in setting up its network and/or provides the hardware or software used to connect users to the Internet.
49. In addition, any form of online communication, including simply accessing a website, could be said to "use" the target computer's Internet service provider and the providers of any intermediary networks as well as the initiator's Internet service provider. See ¶21.
50. Furthermore, the Act does not limit Internet service providers to those entities which provide Internet access *to the registrant*. Thus, any registrant who "uses" any business which qualifies as an Internet service provider as *any* person appears to be required to report this use. For example, a registrant who purchases a DVD at Best Buy plausibly is required to report that "use."
51. The CASE Act's reporting requirement refers to a registrant's "account with an Internet service provider," Cal. Penal Code § 290.014(b). This can reasonably be read to imply that only entities with whom a registrant has an account must be reported, and conversely that entities with which the registrant has no account are *not* ISPs under the CASE Act.
52. If so, then cyber cafés (for which one usually pays an hourly fee), coffee shops, hotels, roommates, and open wireless home or business networks (for which no account is needed) would not be ISPs under the CASE Act, insofar as consumers can readily use these facilities to obtain Internet access without setting up an account.



53. However, by the same reasoning, libraries (for which one does not need an account) would not fall within the basic definition of ISP and thus would not need to be explicitly excluded.
54. In addition, this reading appears to be in tension with Penal Code Section 290.015(a)(5), which requires reporting of “[a] list of any and all Internet service providers used by the person” and does not imply any account requirement.
55. It thus is unclear whether a user must report on the use of “Internet service providers” that do not provide or require an account.
56. The statute excludes “a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution” from the definition of “Internet service provider.”
57. Under the plain text of this statute, only businesses that provide *exclusively* “telecommunications services, cable services, or video services” are excluded. If a company provides Internet service at all, even if the registrant does not purchase or use such service, it is encompassed by the definition.
58. The Act’s departure from the definition of Internet access provider in federal law seems to reinforce this interpretation. See ¶¶44-45. The federal definition excludes entities that would otherwise qualify “to the extent that they provide only telecommunications services,” 47 U.S.C. § 151 (note), while the CASE Act exclusion is instead limited to entities that “*provide only* telecommunications . . . services.” Cal. Penal Code § 290.024(b) (emphasis added).
59. But extremely few companies would fall within the definition so construed, as the vast majority of telecommunications and cable television providers also offer some form of Internet access.

60. A more reasonable reading would be that businesses that provide only telecommunications, cable, or video services *to the registrant* are excluded from the definition of Internet service provider—but this reading is in tension with the plain language of the bill.
61. Thus, while a court might determine that a registrant is not required to report on his telecommunications, cable, or video services that do not involve Internet access, a cautious registrant is likely to err on the side of caution and report more than is required.
62. In summary, the “Internet service provider” reporting requirements appear to encompass a wide range of entities outside of the common understanding of that term, potentially including entities which a registrant has no way of identifying.

### **Burdens and Restrictions Imposed**

#### *Recording and reporting Internet identifiers and Internet service providers*

63. The reporting provisions of the CASE Act appear to place a significant and substantial burden on the ordinary Internet user to document and submit his or her Internet usage, both because the requirements are difficult to interpret, and because they potentially encompass many, and possibly most, of the avenues through which most people in this country communicate with one another online, whether to perform their jobs, purchase goods and services, or educate or entertain themselves.
64. To comply with the reporting requirements for Internet identifiers, a registrant plausibly must document and submit each distinct identifier she uses, potentially including:
- a. A transient screen name in a customer support chat,
  - b. A newly-chosen screen name used for expressive purposes in the context of a specific political or current events discussion,
  - c. A temporary forwarding email alias automatically assigned by a classified ad service, and even

- d. Identifiers associated with other persons that he “uses” in order to communicate with or refer to those persons.
65. To comply with the reporting requirements for Internet service providers, she plausibly must document and submit each distinct provider he uses, potentially including:
  - a. Each wireless network he uses at a café, hotel, or other location, including every entity involved in providing Internet access through that network;
  - b. Each purchase of any device that can connect to the Internet; and even
  - c. Each “use” he makes of any entity that provides Internet access to any person.
66. It is also plausible that the actual reporting requirements could be construed much more narrowly. However, because of the significant ambiguities in the law, a registrant wishing to “play it safe” would attempt to report far more than the narrowest possible construction, particularly if there are criminal penalties for noncompliance.
67. While the statute on its face only requires a registrant to document and submit Internet identifiers, but not the sites or services for which she creates or uses identifiers, law enforcement may nevertheless demand that registrants provide such site or service association information. Similarly, it is unclear whether she is required to report the reuse of a previously reported user name on a new service.
68. Taken as a whole, the CASE Act’s reporting requirement for “Internet identifiers” and “Internet service providers” may encompass all of the forms of online speech and mechanisms of accessing the Internet discussed above, or some vaguely-defined and apparently arbitrary subset thereof.
69. In addition, the CASE Act may require reporting not only of Internet identifiers and Internet service providers that the registrant currently uses or uses in the future, but also identifiers and providers that the registrant has used in the past. There is no guidance in the statute as to whether or not it extends to past information.

70. Exhaustively documenting all such information may be difficult if not impossible for many persons, and as a result may deter residents from participating in online communications so as to avoid the burden of reporting on such activities or the accompanying risk of criminal penalties if she fails to do so.

*Anonymous speech and association*

71. In addition, the reporting requirements of the CASE Act will prohibit or chill many forms of anonymous online speech and online association.

72. Anonymous political speech has long contributed to important public discourse in this country. This includes both anonymous speech in the strict sense of speech having no indication of authorship at all (*e.g.*, Thomas Jefferson's publication of Notes on the State of Virginia, published anonymously because of the radical views on a number of sensitive political matters that were expressed in the book) and pseudonymous speech (*e.g.*, the John Jay-James Madison-Alexander Hamilton collaboration published "The Federalist" under an assumed name ("Publius")).

73. In the modern era, the U.S. Supreme Court has recognized the importance of anonymity to political speech and association. "Under our constitution, anonymous [speech] ... is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995). Courts routinely protect the identities of online speakers against discovery in litigation. *See, e.g.*, *In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010); *Highfields Capital Mgmt., LP v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

74. In addition, individuals enjoy the "right to be protected from compelled disclosure by the State" of their associations and affiliations, and thus the freedom of association. *NAACP v. Alabama*, 357 U.S. 449, 458 (1958); *see also Brown v. Socialist Workers*, 459 U.S. 87, 91 (1982); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159-60 (9th Cir. 2010).

75. Many if not most of the online communications covered by the CASE Act allow users to participate under a pseudonym. Examples exist in all categories, from social networks (Twitter, Google+) to forums on news sites (New York Times) to user-generated content services (Flickr) to product and business review sites (Yelp).
76. Some sites and services permit users to create a screen name without even divulging their name or other identifier to the site itself. This appears to be particularly common for sites focused on sensitive topics where contributors are particularly concerned about protecting their identity.
77. Under the CASE Act, however, any registrant wishing to use an online pseudonym for *any* reason will be required to disclose his/her real identity to the government.
78. In addition, while the Act does not appear to require registrants to disclose the actual sites which they use, it is possible that registration agencies will nonetheless request or demand such information. See ¶¶22-24.
79. This is of particular concern for individuals, such as members of California Reform Sex Offender Laws, who rely on online anonymous speech to discuss political issues related to their status as a sex offender, or who exercise their right to speak anonymously in order to criticize public officials – activities for which they have a reasonable fear of retribution were their true identities to be disclosed.
80. In addition, the CASE Act does not restrict law enforcement’s broad discretion to further disseminate any information it collects, creating the further possibility of retribution from private parties.<sup>6</sup>

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<sup>6</sup> The potential for additional consequences is not limited to anonymous speech or speakers. For example, if social networks such as Facebook were provided with the Internet identifiers of all registered sex offenders and decided to exclude such individuals, registrants would effectively be barred not only from e.g. Facebook itself but also from any news site, blog, or other online discussion that requires a Facebook login in order to participate, a requirement that is becoming increasingly common.

81. As a result, the CASE Act is likely to substantially chill speech by an already-vulnerable population and make it more difficult for registrants to self-organize and advocate for change in their own interest.

### Conclusion

82. The CASE Act's definitions of the terms "Internet service provider" and "Internet identifier" reporting requirements are ambiguous and would cause uncertainty for officials and registrants.

83. Under reasonable and plausible readings of the statutory language, the CASE Act's "Internet service provider" and "Internet identifier" definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller seemingly capriciously chosen subset of those communications.

84. Under *any* reading of the statutory text, the CASE Act will substantially curtail registrants' ability to engage in anonymous communication, and will require considerable and burdensome reporting even for ordinary, non-anonymous communication.

I declare, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6<sup>th</sup> day of Nov., 2012 at Philadelphia, Pennsylvania.



David G. Post