Court of Appeals Docket No. 13-15263
(Consolidated With Court of Appeals Case Number 13-15267)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JOHN DOE; JACK ROE; CALIFORNIA REFORM SEX OFFENDER LAWS, on behalf of themselves and others similarly situated,

*Plaintiffs-Appellees*,

v.

DAPHNE PHUNG; CHRIS KELLY,
*Intervenors-Appellants*,

v.

KAMALA D. HARRIS, Attorney General of the State of California,

*Defendant.*

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On Appeal from the United States District Court for the Northern District of California, Case No. 3:12-cv-05713-TEH, The Honorable Thelton E. Henderson, Presiding

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# OPENING BRIEF OF INTERVENORS-APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Neither of the intervenors-appellants have any parent corporation, and there is no publicly held corporation that owns 10% or more of their stock.

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## JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28(i) and Ninth Circuit Rule 28-4(i), intervenors join in the Attorney General's Jurisdictional Statement.

## STATEMENT OF ISSUES PRESENTED

1. Does Proposition 35, a facially neutral law that would be applied in a content-neutral manner, implicate the First Amendment because it might have a remote, chilling effect on pseudonymous speech by registered sex offenders whose anonymity is already compromised by registration requirements previously upheld by the Supreme Court?

2. Do registered sex offenders, who indisputably have a right to engage in activities protected by the First Amendment, also have an unlimited and unconditional right to remain "anonymous"?

3. Are Proposition 35's limited registration requirements narrowly tailored to serve California's strong interest in combating online sex crimes and recidivism by convicted sex offenders?

## ADDENDUM TO BRIEF

Intervenors have included pertinent statutes in a separately bound addendum, pursuant to Ninth Circuit Rule 28-2.7.

## STATEMENT OF THE CASE

Pursuant to Federal Rule of Appellate Procedure 28(i) and Ninth Circuit Rule 28-4(i), intervenors join in the Attorney General's Statement of the Case.

## STATEMENT OF THE FACTS

### A. Federal Law

The federal Sex Offender Registration and Notification Act ("SORNA") imposes minimum national standards for state sex offender registration and notification systems. *See* 42 U.S.C. § 16901 et seq. States must, among other things, establish a registry including sex offenders' names, addresses, license plate numbers, physical descriptions, sex offenses for which convicted, and current photographs. 42 U.S.C. § 16914. And states are *required* to obtain registrants' Internet identifiers and addresses. 42 U.S.C. § 16915a. The U.S. Department of Justice explains that doing so:

> . . . may help in investigating crimes committed online by registered sex offenders – such as attempting to lure children or trafficking in child pornography through the Internet – and knowledge by sex offenders that their Internet identifiers are known to the authorities may help to discourage them from engaging in such criminal activities.
>
> The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 30,055 (July 2, 2008).

Without Proposition 35, California is out of compliance with these requirements. States that do not comply with federal requirements lose 10% of their federal law enforcement funding as a consequence. *See* 42 U.S.C. § 16925(a).

### B. California Law And Proposition 35

California has long required post-conviction registration of persons convicted of certain sex crimes. *See* Cal. Pen. Code § 290 et seq. The law, which has been upheld by the California Supreme Court, ensures that registered sex offenders "shall be readily available for police

surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." *In re Alva*, 33 Cal. 4th 254, 264 (2004); *see In re Stier*, 152 Cal. App. 4th 63, 78 (2007). Convicted sex offenders must provide law enforcement such information as their names, aliases, residential addresses, fingerprints, license plate numbers, current photographs, and even DNA samples. Cal. Pen. Code §§ 290.014, 290.015, 296. Yet pre-Proposition 35 registration requirements do not address the explosive growth of the Internet and its use by sexual predators.

Proposition 35's Findings and Declarations explain that "the predatory use" of the Internet by "sex offenders has allowed such exploiters a new means to entice and prey on vulnerable individuals in our state." Proposition 35, Californians Against Sexual Exploitation Act, § 2, ¶ 4. Thus, Proposition 35 is intended "[t]o strengthen laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to track and prevent online sex offenses and human trafficking." *Id*., § 3, ¶ 3. The ballot arguments declare that requiring sex offenders to disclose their Internet identities would help stop the exploitation of children, provide "information to authorities about [sex offenders'] Internet presence, which will help protect our children and prevent human trafficking," and "help prevent human trafficking online." Appellants' Excerpts of Record ("ER")[1] at 251-52.

Proposition 35 amends California Penal Code section 290.015 to add "Internet identifiers" and "Internet service providers" to the list of

[1] Intervenors cite to the Excerpts of Record filed by defendants-appellants in the Consolidated Appeal, Case Number 13-15267.

information convicted sex offenders must already provide to law enforcement agencies. It also expands the scope of Penal Code section 290.014, which requires sex offenders to report a name change, to require sex offenders to send a written notice of changes in their Internet identifiers or Internet service provider within 24 hours.[2] Unlike reporting a name change, which must be done in person within five working days, a sex offender may use the mail to report a change in his Internet identifier or Internet service provider. Cal. Pen. Code § 290.14(b).

Proposition 35 defines "Internet service provider" ("ISP") as:

> a business, organization, or other entity providing a computer and communications facility directly to consumers 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.

*Id*., § 290.024(a).

It defines "Internet identifier" as:

> an 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 communication.

*Id*., § 290.024(b).

[2] Proposition 35 also increases fines and jail time for people convicted of human trafficking and increases training for law enforcement officers. Plaintiffs do not challenge these provisions.

The District Court reasonably construed these provisions to apply only to ISPs with which the registrant has a current account, and to exclude Internet identifiers used "solely to purchase products or read content online." ER at 8-9.

Unlike registration laws in other states, Proposition 35 *does not* prohibit sex offenders from visiting any websites or engaging in any kind of online speech. It *does not* require sex offenders to consent to searches of their computers, nor does it require sex offenders to report the websites they visit, or their online passwords. It *does not* prohibit sex offenders from engaging in either anonymous or pseudonymous online speech.[3] It merely requires sex offenders to register their ISPs and Internet identifiers.

Proposition 35 does not amend the existing law governing public disclosure of registration information. Although state law requires the disclosure of some information about registered sex offenders to the public, such as names, aliases, and criminal history, federal law prohibits states from including registrants' Internet identifiers on their public sex offender websites. Cal. Pen. Code § 290.46; 42 U.S.C. §§ 16918(b), 16915a(c). And, as the Attorney General describes in greater detail, under California law and practice, only those law enforcement officials who acknowledge a "need to know, right to know" may access the sex offender

[3] *Compare with Doe v. Prosecutor, Marion County, Ind.*, 705 F.3d 694, 703 (7th Cir. 2013) (striking down Indiana law prohibiting registrants from accessing social networking sites and chat rooms); *Doe v. Nebraska*, No. 8:09CV456, 2012 WL 4923131, at *27 (D. Neb. Oct. 17, 2012) (striking down Nebraska law requiring registrants to consent to computer searches); *White v. Baker*, 696 F. Supp. 2d 1289, 1309-10 (N.D. Ga. 2010) (striking down Georgia law requiring registrants to provide Internet passwords).

registry to learn which Internet identifiers a particular registrant uses. ER at 324. Furthermore, the public will only receive Internet registry information if law enforcement determines public disclosure is "necessary to ensure the public safety . . ." in connection with investigating or preventing online sex crimes. Cal. Pen. Code § 290.45(a)(1); Prop. 35, § 3, ¶ 3.

Any offender who willfully fails to comply with Proposition 35's registration requirements will be subject to the existing penalties for failure to comply with California's Sex Offender Registration Act. Cal. Pen. Code § 290.018. Penalties include up to three years in prison for willful violations by registrants with the most serious convictions. *Id.*

Finally, any eligible individual registrant who believes he should be exempt from registration requirements can petition the court for a certificate of rehabilitation and pardon. Cal. Pen. Code §§ 4852.01, et seq.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In November 2012, Proposition 35 brought California's sex offender registration law into the modern era (and into compliance with federal law) by requiring registered sex offenders to provide law enforcement with the names they use to engage in online communications with other members of the public. The plaintiffs immediately challenged the new law, arguing that it prohibited them from engaging in anonymous speech. But Proposition 35 prohibits no one from engaging in speech anywhere on the Internet, and it does not demand that the speaker disclose his identity to his audience. In fact, Proposition 35 does not regulate speech at all. It simply demands Internet identification information from convicted sex offenders, applying to the virtual world the same rules currently applied in the physical world. Because it is a content-neutral regulation designed to

enable law enforcement to investigate and prevent online sex crimes, rather than to suppress a particular point of view, Proposition 35 does not implicate the First Amendment.

When pressed below, plaintiffs conceded that what they really meant is that Proposition 35 chills their right to pseudonymous speech because law enforcement agencies might misuse the information or make it public. But even if one were to accept plaintiffs' premise that some registrants may refrain from speaking online because their identities could become public, it would not amount to a violation of their First Amendment rights, because plaintiffs do not have an unconditional right to remain anonymous. Indeed, the plaintiffs have already lost a significant degree of anonymity as a result of their status as convicted sex offenders under laws upheld by the Supreme Court against multiple constitutional challenges. Under existing law they are required to report their name, aliases, address, photograph, and physical description to law enforcement, and all of this information is made available to the public on the state's Megan's Law website. So when a registered sex offender sends a letter to the newspaper editor using an alias, a member of the public could identify him by comparing his alias to the aliases included on the Megan's law website. Proposition 35 merely extends the registration requirement to include online aliases.

The District Court did not address these arguments. Instead, under the guise of applying intermediate scrutiny, the District Court held that Proposition 35 was invalid because it did not implement the "least restrictive" means imaginable to serve its public safety goals. Thus, the District Court found fault in Proposition 35 because it applies to all registered sex offenders, not just those whose scores on risk assessment tests

predict they pose the greatest risk of recidivism. But the State is not required to make an individualized decision about the risk presented by a particular sex offender; the Supreme Court has made clear in upholding Alaska's sex offender registration law that a state may make categorical judgments when they relate to registration requirements.

The District Court also erred in concluding that Proposition 35 reaches too much speech. While it is true that Proposition 35 would require a sex offender to register an alias that he uses to post a comment on CNN.com, in addition to one he uses in a chat room populated by teens, the exponential growth of the Internet and its evolving use by sexual predators make it impossible for the state to predict what types of online forums could be used by predators to lure their victims. Under these circumstances, it is permissible for the State to draw a bright line by requiring that registrants report the aliases they use to engage in any online communications with other members of the public. Intermediate scrutiny requires that a law must be narrowly tailored to serve the government's legitimate interests, not the least restrictive or intrusive means of achieving those interests. Thus, the District Court erred by applying a more exacting test and plaintiffs have no likelihood of succeeding on the merits of their claim.

Intervenors therefore respectfully request that the Court overturn the preliminary injunction issued by the District Court.

## STANDARD OF REVIEW

Pursuant to Federal Rule of Appellate Procedure 28(i) and Ninth Circuit Rule 28-4(i), intervenors join in the Attorney General's Standard of Review.

## ARGUMENT

To obtain a preliminary injunction, plaintiffs must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of the preliminary injunction; (3) the balance of equities tips in their favor; and (4) the issuance of the preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

## I.

## PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

### A. This Is Not A First Amendment Case

#### 1. A mere incidental effect on speech does not implicate the First Amendment

Because Proposition 35 does not ban, restrict, or in any way regulate speech or expressive conduct, the only effect that Proposition 35 could have on activities protected by the First Amendment is an incidental chilling effect. The District Court assumed that this incidental effect was enough to implicate the First Amendment (ER at 4), but the United States Supreme Court has held otherwise.

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the Supreme Court considered the extent to which a law must affect First Amendment rights before First Amendment scrutiny applies. At issue was whether the First Amendment barred a city from closing a business that was used as a place for prostitution because the business was also used to sell adult books. The New York Court of Appeals struck down the closure order as overbroad. It concluded that even though the public health nuisance law that authorized the closure was facially neutral, and even though the order

itself was unrelated to the suppression of speech, the closure's incidental effect on the adult bookstore required the city to find a different way to restrict the prostitution taking place on the premises. *Id*. at 701-02.

The Supreme Court reversed, finding that facially neutral laws do not implicate the First Amendment merely because they have an incidental effect on speech – something more is required. *Id.* at 704-07. For example, the Court had previously found that a facially neutral law implicated the First Amendment when the law had an incidental effect on speech that fell exclusively on those who express "a particular political opinion." *Id.* at 702. Such was the case in *United States v. O'Brien*, 391 U.S. 367 (1968), which considered a statute that outlawed the knowing destruction of draft cards. Although the law "ordinarily" applied to non-expressive conduct, its application to expressive conduct fell on those who expressed a particular political opinion by burning their cards to express their opposition to the draft. *Arcara*, 478 U.S. at 702 (discussing *O'Brien*). Similarly, the Court had previously concluded that a facially neutral law implicated the First Amendment because it applied exclusively to "those engaged in protected First Amendment activities." *Id.* at 704. Such was the case in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983), where the state imposed a facially-neutral tax on ink that had the incidental effect of "singl[ing] out the press for special" burdens that did not fall on any other kind of business.

The *Arcara* Court distinguished these cases from the public health nuisance law before it, which had nothing but an incidental effect on speech. The law had not been invoked to punish partisan expressive conduct like the burning of a draft card; it had been invoked to crack down on prostitution. *Arcara*, 478 U.S. at 707. Nor did the public nuisance law

"inevitably single out" those engaged in First Amendment protected activities; it targeted all nuisances, regardless of their surrounding circumstances. *Id.* at 705.

The same analysis applies here. Proposition 35's registration requirements apply to every registered sex offender who has an ISP and an Internet identifier, regardless of that offender's political views. Likewise, Proposition 35 does not "single out" those engaged in activities protected by the First Amendment. It applies to all sex offenders, regardless of whether they use the Internet for activities like accessing child pornography or commenting on political issues.

Plaintiffs argued below that Proposition 35's application to the Internet, which is tied so closely to speech, triggers First Amendment scrutiny like the tax on ink in *Minneapolis Star*, because the registration requirements "burden[ ] instrumentalities uniquely associated with speech." ER at 173. But plaintiffs misread *Minneapolis Star*. That case does not trigger First Amendment scrutiny every time generally applicable governmental regulations affect First Amendment protected activities. To the contrary, the *Minneapolis Star* Court emphasized that states are free to "burden" newspapers with taxes as long as those taxes fall on other businesses, too. 460 U.S. at 581. The constitutional problem arose when Minnesota singled out newspapers for "differential treatment," because such treatment suggests that "the goal of the regulation is not unrelated to suppression of expression. . . ." *Id.* at 585. Proposition 35 presents literally the opposite situation. Far from "singling out" Internet-related activities for special burdens, Proposition 35 seeks to extend the same registration requirements that apply in the physical world to the virtual world. For example, if a registrant uses an alias to send a letter to the newspaper editor,

he must report that alias to law enforcement. Now, he must also report the aliases he uses on the Internet. Thus, Proposition 35 updates California's sex offender registration law to make it the kind of generally applicable governmental regulation that the Supreme Court has deemed to be free of constitutional problems. *Id.*, 460 U.S. at 581; *Arcara*, 478 U.S. at 705.

The Second Circuit Court of Appeals has applied *Arcara* to conclude that a mere incidental chilling effect on anonymous speech does not implicate the First Amendment. In *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2nd Cir. 2004), New York City sought to prevent members of the Ku Klux Klan from wearing masks while participating in a public demonstration by enforcing a statute that prohibited individuals from disguising themselves when congregating in public. *Id.* at 200-01. The Klan claimed that the anti-mask statute infringed their right to engage in anonymous speech, but the Second Circuit disagreed. The Court first determined that the purpose of the anti-mask law was to "deter[ ] violence and facilitat[e] the apprehension of wrongdoers" rather than "to suppress any particular viewpoint." *Id.* at 205. It then concluded that even if the inability to wear a mask would make some members "less willing to participate in rallies," "a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment." *Id.* at 209 (citing *Arcara*, 478 U.S. at 706). So it is here. Proposition 35 is a content-neutral statute of general application that provides a tool to law enforcement to combat online sex crimes and does not suppress any particular viewpoint.

### 2. A remote chilling effect on speech does not implicate the First Amendment

Although the Supreme Court has found that constitutional violations may arise from the "'chilling[ ]' effect of governmental regulations," some "chilling effect[s]" are too remote to implicate the First Amendment. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). In fact, an individual cannot invoke the First Amendment merely because he knows "that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and addition[a]l action detrimental to that individual." *Id.*

The Tenth Circuit applied that principle in the only appellate decision yet to address the constitutionality of Internet registration requirements for sex offenders. Although the Tenth Circuit acknowledged the possible chilling effect from the public disclosure of online aliases, it was "not persuaded that this possibility imposes a constitutionally improper burden on speech." *Doe v. Shurtleff*, 628 F.3d 1217, 1225 (10th Cir. 2010) (citing *Laird*, 408 U.S. at 11). In so holding, the Court noted that a chilling effect generally occurs "when an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression." *Shurtleff*, 628 F.3d at 1225. In the context of a sex offender registry, however, "such a disclosure would generally occur, if at all, at some time period following [an offender's] speech." *Id.*

The Tenth Circuit explained this distinction by citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999). *Buckley* struck down a law requiring petition circulators to wear a name badge while talking to voters, which it distinguished from a law requiring petition circulators to

print their names and addresses on affidavits they later submitted to the government.[4] As the *Buckley* Court explained:

> [T]he name badge requirement forces circulators to reveal their identities at the same time they deliver their political message; it operates when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned. The affidavit, in contrast, does not expose the circulator to the risk of "heat of the moment" harassment.
>
> *Buckley*, 525 U.S. at 198-99 (internal citations and quotations omitted).

Thus, *Shurtleff* concluded that a registry's alleged "chilling effect" is too tenuous to justify constitutional consequences under *Laird* if it is based on a speculative fear about future government conduct, and is too remote to justify constitutional consequences under *Buckley* if the law provides distance between the speaker and the speech.

The District Court distinguished *Shurtleff* on the grounds that the Utah law would lead to less public disclosure than Proposition 35. ER at 12. But *Buckley* and *Shurtleff* establish that public disclosure is not constitutionally suspect if it is remote in time and in distance from the speech. After all, *Buckley* approved of a law requiring petition circulators to print their names and addresses on affidavits even though the information would eventually become "a public record." *Shurtleff*, 628 F.3d at 1225; *Buckley*, 525 U.S. at 198-99.

[4] Although the affidavit requirement was not before it, the Court concluded it was likely constitutional. *Buckley*, 525 U.S. at 200.

The District Court next distinguished *Shurtleff* on the grounds that Utah placed more distance between sex offenders' online speech and the disclosure of their online aliases than Proposition 35, which requires registrants to mail written disclosure "within 24 hours after speaking and potentially while the speech is ongoing." ER at 13. But the District Court falsely equated registration with an immediate loss of anonymity. The mere registration of an offender's online alias will not enable the government (or public) to connect the speaker with most speech, given that sex offenders do not have to register the websites where they are speaking.[5] For these reasons, *Shurtleff* applies.

### 3. Registered sex offenders do not have a right to anonymity

The District Court framed the legal question as involving "the First Amendment's protection of the right to speak anonymously online" but the Supreme Court has never found a separate, cognizable right to

[5] Thus, Proposition 35 is not designed to facilitate the monitoring of speech, but is designed to facilitate the investigation of crime. Proposition 35 would allow law enforcement, for example, to connect an email address used by a predator to "groom" a young girl with one used by a registered sex offender in order to prevent or investigate a crime.

anonymity, distinct from the First Amendment.[6] ER at 4. Rather, the Court has condemned laws that flatly ban anonymous speech, or force identification in a narrow setting: where the speaker is prohibited from cloaking him or herself in anonymity at the time of speaking, in face-to-face meetings. Thus, the Court struck down a prohibition on anonymous handbills in *Talley v. California*, 362 U.S. 60 (1960), and it struck down a prohibition on all anonymous campaign literature in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). And, as discussed above, the Court struck down a law forcing petition circulators to wear name badges while speaking to voters in *Buckley*, 525 U.S. 182. *See* pp. 13-14. But the Court has never declared a generalized right to speak anonymously at any time, in any setting.

To the contrary, the Supreme Court has upheld a series of laws against First Amendment challenges that compel speakers to disclose their identities, even in the area of core political speech, because those laws are "not a prohibition on speech, but instead a[re] *disclosure* requirement[s]. '[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.'" *Doe No. 1 v. Reed*, __ U.S. __,

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[6] At least two justices have flatly rejected the existence of a separate constitutional right to anonymity. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 373 (1995) ("Evidence that anonymous electioneering was regarded as constitutional right is sparse, and as far as I am aware evidence that it was *generally* regarded as such is nonexistent.") (Scalia, J., dissenting) (emphasis in original); *Doe No. 1 v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2831 n.4 (noting that "*McIntyre* posited no such freewheeling right" as a right to anonymous speech; "The right . . . is the right to speak, not the right . . . to speak anonymously." (Stevens, J., concurring).

130 S. Ct. 2811, 2818 (2010) (emphasis in original) (rejecting facial challenge to law that required public disclosure of the names and addresses of signers of referendum petitions; law did not impermissibly infringe on First Amendments rights) (citation omitted). Likewise, in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876 (2010), the Court upheld disclosure laws that required a person making electioneering communications to disclose information about the communication within 24 hours and identify the person making the communication on the communication itself. Noting that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," the Court had little trouble finding that the disclosure requirements met the exacting scrutiny standard: the governmental interest of providing the electorate with information about who was behind such communications was sufficiently important and reasonably related to the disclosure requirements. *Citizens United*, 130 S. Ct. at 915, 916 (2010).[7]

Under these authorities, then, it is not clear that *anyone* has a cognizable right to anonymity. Yet, even assuming that some individuals have such a right, it cannot be the case that convicted sex offenders have the same anonymity rights as those who not have engaged in criminal conduct. After all, convicted sex offenders have a diminished right to privacy generally. *U.S. v. Kreisel*, 632 F. Supp. 2d 1044, 1046-47 (W.D. Wash. 2009), citing *Green v. Berge*, 354 F.3d 675, 679-80

[7] In both *Doe No. 1* and *Citizens United*, the laws expressly burdened political speech and were not content-neutral. Thus, unlike here, the exacting review standard of First Amendment scrutiny applied. *Doe No. 1 v. Reed*, 130 S. Ct. at 2818; *Citizens United*, 130 S. Ct. at 914.

(7th Cir. 2004) (Easterbrook, J., concurring) and *Johnson v. Quander*, 370 F. Supp. 2d 79, 102-03 (D.D.C. 2005). And that diminished privacy right does not allow them to escape sex offender registration laws. *A.A. ex rel. M.M. v. New Jersey*, 341 F.3d 206, 211 (3d Cir. 2003) (citation omitted) ("[T]his case begins with the understanding and, indeed, the requirement that what might otherwise be private information [i.e., registrants' home addresses] be made public"); *see also United States v. Juvenile Male*, 670 F.3d 999, 1012-13 (9th Cir. 2012) ("sex offenders do not have a fundamental right to avoid publicity.").

Indeed, one of the valid and primary purposes of sex offender registration laws is to de-anonymize known sexual predators. *See*, *e.g.*, *Smith v. Doe*, 538 U.S. 84, 93 (2003) (noting that Alaska Legislature found that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety."); *In re Alva*, 33 Cal. 4th 254, 264 (2004). Thus, in *Bruggeman v. Taft*, 27 F. App'x 456 (6th Cir. 2001), the Sixth Circuit rejected a First Amendment challenge to Ohio's sex offender registration law, concluding that the First Amendment "does not guarantee a citizen the right to move and assemble in society free from being shunned by society" and that "there is no liberty interest in being free from having to register as a sex offender or from public disclosure of registry information." *Id*. at 458, citing *Cutshall v. Sundquist*, 193 F.3d 466, 478-83 (6th Cir. 1999).

Thus, while no one disputes that convicted sex offenders have First Amendment rights, the assertion that they have an unconditional right to remain anonymous has been repeatedly rejected by the courts. Under existing sex offender registration laws, plaintiffs' criminal conduct has already deprived them of the ability to remain anonymous at all times and in

all places. As a consequence, even if Proposition 35 did implicate plaintiffs' First Amendment rights, it does so in a way that imposes no greater burden than existing laws that have been upheld against constitutional challenge. *See*, *e.g.*, *Smith v. Doe*, 538 U.S. 84; *In re Alva*, 33 Cal. 4th 254.

## B. Proposition 35 Is Narrowly Tailored To Serve An Important Government Interest

### 1. The District Court correctly concluded that intermediate scrutiny applies to content-neutral regulations

Although it is far from clear that Proposition 35 implicates the First Amendment, it is clear that its registration requirements are content-neutral given that they "operate[ ] without regard to the message that any registrant's speech conveys." ER at 6. Accordingly, if First Amendment scrutiny applies at all, it is necessarily intermediate scrutiny. *Id*., citing *Doe v. Shurtleff*, 628 F.3d at 1223.

### 2. The District Court applied the wrong standard for intermediate scrutiny

The District Court misapplied the intermediate scrutiny standard. It correctly recited that intermediate scrutiny requires that "a law must 'be narrowly tailored to serve the government's legitimate, content-neutral interests.'" ER at 6 (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1566 (2012) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). But the Court ignored the law which provides that, "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000) (citing *Ward*,

491 U.S. at 798). Thus, the Court failed to consider the many ways in which Proposition 35 would leave registered sex offenders free to communicate online, and struck down Proposition 35 for failing to implement the "least restrictive" means imaginable to serve its public safety goals. This effectively subjects Proposition 35 to strict scrutiny, a clear abuse of discretion.

### 3. Proposition 35 is narrowly tailored to serve the State's strong interest in combating online sex crimes without infringing speech

It is undisputed that the government has a legitimate interest in promoting Proposition 35's purposes of: (1) "deter[ring] predators from using the Internet to facilitate human trafficking and sexual exploitation;" (2) "combat[ing] the crime of human trafficking;" and (3) "strengthen[ing] laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to track and prevent online sex offenses and human trafficking." ER at 8-9; Prop. 35, § 2, ¶ 6, § 3, ¶¶ 1 & 3. The District Court easily concluded that Proposition 35's registration requirements can be expected to advance those interests. ER at 9-10. Thus, the only question is whether Proposition 35 is narrowly tailored to advance the State's public safety goals.

#### a. Proposition 35 leaves open ample channels for online communications

"[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726 (citing *Ward*, 491 U.S. at 798). Thus, a statute that regulates speech-related conduct within 100 feet of health care

facilities satisfies the tailoring requirement by allowing protesters to speak through signs and oral statements, even though it would prevent protesters from delivering some handbills to some patients. *Hill*, 530 U.S. at 726-28.

Here, the District Court did not even consider the breadth of online speech that would remain available to sex offenders, and it grossly exaggerated the chilling effect that Proposition 35 could reasonably be expected to have.

To begin with, Proposition 35 does not ban or prohibit any kind of speech. Plaintiffs' mere assertion otherwise[8] is pure hyperbole. Proposition 35 would leave sex offenders free to access any website they wish and engage in any lawful communication once they get there. Nor, more specifically, does Proposition 35 ban anonymous online communications. A true ban on anonymous speech would prohibit the use of online aliases or prohibit communications that are not accompanied by a sex offender's true identity. Yet Proposition 35 does nothing like that, and so leaves offenders free to engage in all available First Amendment-protected online activities.

The District Court did not disagree, but instead made the unreasonable assumption that the possibility of public disclosure would chill anonymous speech. ER at 5, 11-14.

As an initial matter, the District Court exaggerates the risk of public disclosure. For all the reasons explained by the Attorney General, if the public receives any information about the online aliases of sex offenders, it would be under limited circumstances. Yet even if every single online

[8] *See*, *e.g.*, ER at 569 ("The statute prohibits *all* anonymous speech . . .") (emphasis in original).

alias that is ever registered by a sex offender were made available to the public, such disclosure could not reasonably chill the vast majority of anonymous, or even pseudonymous, online speech.

It is important to note that sex offenders have no justifiable basis for fearing that Proposition 35 would strip the anonymity from their *private* online communications, because Proposition 35 does not require sex offenders to register their online passwords. Thus, Proposition 35 will have no effect on the communications that sex offenders initiate through emails, or any other form of password-protected communication.

Nor would sex offenders have a reasonable basis for fearing that Proposition 35 would strip the anonymity from most public online communications that are *truly* anonymous. Sex offenders could continue to post anonymous online speech by using and registering the Internet identifier "anonymous," or non-distinct identifiers like "JD" or "John2013." Doing so would provide ample safeguards for controversial political opinions because the public, even if it had access to the registrant's Internet identifiers, could do little more than speculate as to whether a registered sex offender who uses the identifier "anonymous" was the same "anonymous" as the individual who posted a comment at CNN.com.

Consequently, if Proposition 35 has any chilling effect, it would be on public online communications that are pseudonymous, *and* which involve an online alias that is so distinct (for example, "Skywalker") that a member of the public could infer that the individual who posted a comment on CNN.com is the sex offender who registered the same alias. But such inferences could not be drawn with any frequency in the real world because Proposition 35 does not require sex offenders to report the names of the websites they visit. That will necessarily prevent law enforcement or the

public from learning where sex offenders speak online unless the postings contain a criminal element that brings them to the attention of law enforcement, or by pure happenstance, such as when someone happens to browse the comments at CNN.com after "Skywalker" posts, and also happens to know that "Skywalker" is the online alias used by a particular sex offender. Of course, the likelihood of such chance discoveries is vanishingly small given the vastness of the Internet and the fact that as many as 73,000 registered sex offenders will each register one or more Internet identifier, assuming they use the Internet to engage in online communications.[9]

Thus, Proposition 35's content-neutral regulations do not "entirely foreclose" online communications by registered sex offenders, and so may satisfy the tailoring requirement even though they are not the least restrictive means of advancing the statutory goal. *Hill*, 530 U.S. at 726.

**b. Proposition 35 does not apply to too many speakers**

No one disputes that registered sex offenders "recidivate." Plaintiffs' own evidence establishes that "'[p]edophiles who molest boys and rapists of adult women have recidivism rates of 52% and 39% respectively,'" and that "the overall average recidivism rate for registrants in all risk categories is between 14% and 20%.'" ER at 15 (quoting ER at 489). Given that "[t]he risk of recidivism posed by sex offenders is 'frightening and high,'" the United States Supreme Court has determined

[9] It is also unlikely because California's sex offender registry would enable very few law enforcement officials to know the identity of "Skywalker." As described above (p. 5), only those law enforcement users who acknowledge a "need to know, right to know" would be able to use the registry to connect an Internet identifier with the name of an offender. ER at 324.

that a state implementing a sex offender registry may "conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Smith*, 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002). In doing so:

> [T]he State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions . . .
>
> *Smith*, 538 U.S. at 104.

The District Court nevertheless found that California may *not* conclude that a conviction for a sex offense provides sufficient evidence of substantial risk of recidivism for purposes of Proposition 35, but must instead use individual predictions of future dangerousness. More specifically, the Court deemed Proposition 35 to be "overbroad" because it does not use the results of the Static-99 risk-assessment tool[10] to exempt those sex offenders whose scores suggest that they pose a "low" or "moderate-low" risk of re-offending. ER at 15-16.

This ruling cannot be squared with *Smith* or relevant First Amendment precedent. Although the question in *Smith* arose in the context of an *Ex Post Facto* Clause challenge, it was resolved through an analogous legal framework. The *Smith* Court considered whether Alaska's sex

[10] Static-99 is an actuarial assessment instrument that considers 10 static (unchanging) factors, such as the nature of the offense that led to the most recent arrest and the offender's age at release, to estimate the recidivism rate of convicted sex offenders. The Static-99 is intended to be used with adult male offenders who have reached the age of 18 prior to release to the community. ER at 375-76.

offender registry law was "narrowly drawn to accomplish" the government's public safety goals given that it applied to all convicted sex offenders "without regard to their future dangerousness. . . ." *Smith*, 538 U.S. at 103. The Court acknowledged that individuals can reform after committing a crime, but affirmed that states may nevertheless make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* Although such categorical judgments must yield when sex offenders face serious governmental restraints like involuntary confinement, "the more minor condition of registration" permits the state to "dispense with individual predictions of future dangerousness. . . ." *Id.* at 104. Because Proposition 35 also imposes mere registration requirements like the law considered in *Smith*,[11] California is free to rely on categorical rather than individualized assessments.

The alleged existence of a First Amendment issue does not change this analysis. The Supreme Court has elsewhere determined that states may make categorical rather than individualized judgments that have the effect of burdening speech if individualized assessments would "often [be] difficult to make accurately." *Hill*, 530 U.S. at 729. Thus, a state may impose a bright-line prohibition on all speech-related conduct within 100 feet of the entrance to a health care facility to protect those entering the facilities from unwelcome speech. The *Hill* Court concluded that it was constitutionally acceptable for the statute to sweep in some speakers whose

[11] The Alaska Sex Offender Registration Act requires any convicted sex offender or child kidnapper to register with local law enforcement agencies and regularly verify certain identifying information relating to the physical (though not virtual) world. *Smith*, 538 U.S. at 90-91.

conduct would ultimately prove "harmless" given the "great difficulty" in drafting a statute that could accurately characterize which speakers would be "harassing or not harassing." *Id.* at 729.

The District Court assumed that Static-99 could be used without difficulty to sort the dangerous offenders from those who are not dangerous, but this is far from true. The Eleventh and Seventh Circuits have noted that even Static-99's advocates concede that it has "only 'moderate predictive accuracy.'" *United States v. Farley*, 607 F.3d 1294, 1322 (11th Cir. 2010) (citing disclaimer in the Static-99 coding manual); *United States v. McIlrath*, 512 F.3d 421, 425 (7th Cir. 2008) (same); *see also Orozco v. Kramer*, CV 08-5504 AHM (CT), 2008 WL 6089860, at *16 (C.D. Cal., May 8, 2009) (citing expert). In fact, it is widely acknowledged that Static-99 is least effective when used in the way that the District Court insists California must use it: as a predictor of an individual's risk of re-offense. As a different district court phrased it:

> It is critical . . . to remember that the recidivism estimates generated [by actuarial risk assessment tools like Static-99] are group estimates based upon re-convictions and thus do not directly correspond to the recidivism risk of an individual offender. An offender's risk may be higher or lower based on other factors not adequately measured (or measured at all) by the actuarial instrument.
>
> *United States v. Wetmore*, 766 F. Supp. 2d 319, 335 (D. Mass. 2011).[12]

[12] *See also Farley*, 607 F.3d at 1322 (citing expert testimony that "Static-99 scores were merely group estimates, not a direct prediction of an individual offender's risk."); *United States v. Shields*, CIV A No. 07-12056-PBS, 2008

(continued . . .)

This is so because Static-99 considers only 10 static factors, such as the nature of the most recent sex offense that led to arrest, age at release, and sexual criminal history. ER at 375. It does not consider other relevant factors, including offenses that did not result in criminal convictions or whether the offender is receiving psychiatric treatment. *Id.* It is therefore also widely acknowledged that Static-99 provides, at best, a good place to start an analysis of an offender's future dangerousness, but not an end to it. *McIlrath*, 512 F.3d at 425; *Huftile v. Hunter*, No. CIV S-05-0174 GEB DAD P., 2009 WL 111721, at *5 (E.D. Cal., Jan. 16, 2009); *Orozco*, 2008 WL 6089860, at *16.

The facts in *Huftile v. Hunter*, 2009 WL 111721, illustrate these limitations. Michael Huftile appealed a jury verdict finding that he was a sexually violent predator who should be civilly committed for two years. *Id.* at *1. Huftile argued in part that the evidence did not support the jury's finding because his Static-99 score "put him at the lowest category of risk possible. . . ." *Id.* at *4. Huftile's Static-99 score of 3 was based on a 1984 conviction of the second degree rape of his seven to nine year old adopted daughter; a 1995 conviction for lewd and lascivious conduct with the seven to nine year old daughter of his girlfriend; and the fact that none of the victims were related to Huftile. *Id.* at *2, *5.

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( . . . continued)
WL 544940, at *1 (D. Mass., Feb. 26, 2008) (Static-99 test re-offense rates "are group estimates; they do not directly correspond to the recidivism risk of an individual offender."); *McGee v. Bartow*, No. 06-C-1151, 2007 WL 1062175, at *1 (E.D. Wis., Apr. 3, 2007) (assessing Static-99 score; "a statistical profile based on other individuals says nothing about whether the specific individual . . . will re-offend . . .").

But the jury also considered other factors, such as the many offenses that Huftile committed which did not result in a conviction. Thus the jury learned that Huftile sexually fondled two girls in a day care center where he volunteered, became sexually involved with young girls he babysat, and molested seven friends of the adopted daughter he raped. *Id.* at *2. The jury learned that he continued these offenses despite suffering severe consequences, including "police questioning, divorce, and incarceration." *Id.* at *6. He did so while involved in adult relationships, "thus showing his strong preference for children." *Id.* He rationalized his behavior "by explaining that the victims derived sexual pleasure from the molestations," and he "never affirmatively sought treatment." *Id.* Based on the entirety of this evidence, the district court affirmed the jury's verdict, even though Huftile's age of 53 and "relatively low score on the Static-99 test suggest his likelihood of reoffending is not high. . . ." *Id.* at *7, *8.

As these authorities establish, the Static-99 test often does not reliably predict the future dangerousness of individuals. Under *Smith* and *Hill*, California may therefore make categorical judgments about convicted sex offenders, even if those judgments would burden speech. *Smith*, 538 U.S. at 103; *Hill*, 530 U.S. at 729.

It is important to note that, according to the District Court, Proposition 35 is overly broad because it would require a person with a low-risk Static-99 score like Michael Huftile to register. ER at 15, 489. Intervenors strenuously disagree that anyone should be exempt from a mere registration requirement based on a score that tells us so little about the true danger posed to our communities.

The Court abused its discretion in concluding otherwise, not only because *Smith* and *Hill* are to the contrary, but because there is literally

no evidence in the record to support such a conclusion.[13] Although some of plaintiffs' witnesses testified that Static-99 should be used to determine where to concentrate scarce law enforcement resources, no one testified that it should be used to flatly exempt anyone from mere registration requirements. ER at 378, 382, 486-87.

The only expert to address Static-99 and registration requirements was Brian Abbott, one of plaintiffs' witnesses, who declared that the California Sex Offender Management Board ("CASOMB") recommends that registration duration "be based on Static-99" scores so that, for example, those with scores of 1-3 be required to register for only 10 years. ER at 486-87 (citing CASOMB: Recommendations Report (Jan. 2010)).[14] But Mr. Abbott is wrong. CASOMB did not recommend that offenders leave the registry based on Static-99 scores alone. It recommended exemptions for "low-risk" offenders who fulfilled other requirements, like committing no new offenses and complying fully with the registry law. *Id*. at 96. But it also recommended that offenders be required to register for at least 20 years if they committed "violent" crimes like rape, even if they receive a "low-risk" score on Static-99. *Id*. at 96-98. Thus, the District Court's ruling extends beyond the evidentiary record to grant sex offenders far more freedom than even plaintiffs' own witnesses advocate.

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[13] To the contrary, plaintiffs' own expert declared that there were serious errors in developing Static-99 and Static-99R, which *underestimate* the recidivism rate in all reference groups. ER at 484, 488.

[14] *See* http://www.casomb.org/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf.

In the final analysis, California must protect vulnerable women and children from the sexual predators in their midst, and it must do so based on the information that is available. That information tells us that convicted sex offenders are a dangerous group, but it cannot tell us which individuals within that group will recidivate. The District Court would require California to tolerate the public safety risk that would flow from allowing the Michael Huftiles of this world to maintain secret, online identities. But California does not wish to accept that risk, and Supreme Court precedent does not permit the District Court to force a different choice upon it, given that Proposition 35 "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (citation omitted); *see also id*. at 797 ("The Court of Appeals erred in sifting through all the available or imagined alternative[s] . . . in order to determine whether the city's solution was 'the least intrusive means' of achieving the desired end.").

**c. Proposition 35 does not apply to too much speech**

According to the District Court, Proposition 35 applies to "too much speech" because it seeks Internet identifiers used on "sites dedicated to discussion of public, political, and social issues" which, in the Court's view, "have not been shown to pose any reasonable risk of leading to an online sex offense or human trafficking." ER at 16-17 (citation omitted).

This was an abuse of discretion because it is not supported by any law, let alone the cases cited by the Court below. While it is true that the *Nebraska* Court concluded that Nebraska's law infringed on First Amendment rights, Nebraska's law went far beyond the requirements of Proposition 35. ER at 16 (quoting *Doe v. Nebraska*, 2012 WL 4923131,

at *27 (D. Neb. Oct. 17, 2012)). The Nebraska statute required a sex offender to "consent to a search of his computers and electronic communication devices" and inform the State about all Internet sites maintained by the person or to which the person has uploaded any content or posted any information. *Id.* Proposition 35, of course, does nothing of the kind.

Likewise, the Court in *White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010), did not conclude that Georgia's law was overbroad because it applied to sites dedicated to public, political, and social issues, but because it required usernames and *passwords* used on sites used "exclusively to conduct personal *commercial transactions with retail companies and banking institutions*." *Id.* at 1310 (emphasis added). Proposition 35, of course, does not require registration of passwords, and the District Court agreed that it cannot reasonably be read to apply to identifiers used "solely to purchase products." ER at 8-9.

The District Court also abused its discretion because there is literally no evidence in the record to support its assumption concerning issue-based sites. *U.S. v. Dixon*, 201 F.3d 1223, 1233 (9th Cir. 2000) (factual finding that lacks evidentiary support is clear error). To the contrary, the record contradicts the Court's conclusion. The Court ignored intervenors' citation to a case involving a conviction for uploading child pornography to an "Internet newsgroup." ER at 280 (citing *United States v. Cervini*, 16 F. App'x 865, 866-67 (10th Cir. 2001)). And it ignored testimony by Sharmin Bock, an Assistant District Attorney in Alameda County, that Internet use by sexual predators "is constantly evolving" in response to law enforcement efforts:

> At first, predators gravitated toward social networking sites to meet, recruit, and sell victims. Children, for example, were routinely sold on Craigslist. As a result of efforts to curtail the exploitation of certain high profile social networking sites, predators have simply moved elsewhere, such as to online gaming sites, chat rooms, and other legitimate, as well as illegitimate, sites. . . . [S]ex offenders have become more creative in their effort to locate victims, further challenging law enforcement in their effort to locate predators.
>
> ER at 257.

Plaintiffs' witness agrees that "the online environment is a rapidly changing one" that requires "careful monitoring of trends . . . to identify emerging risks to young people." ER at 419-20. Thus, the available evidence indicates that it would be dangerous to confine law enforcement efforts based on the past criminal use of the Internet.[15]

Moreover, as discussed above, a state may utilize bright-line rules that have the effect of burdening speech if individualized assessments would "often [be] difficult to make accurately." *Hill*, 530 U.S. at 729. Some sites that are devoted to "public, political, and social issues" draw vulnerable women and children, and it would be exceedingly difficult to

[15] The District Court ignored this evidence to rely on a statement by the *White* Court that online solicitations for sexual exploitation "generally" do not occur on sites dedicated to public, political, and social issues. ER at 16, citing *White*, 696 F. Supp. 2d at 1310. Yet this statement was based solely upon the *White* Court's own experience with the seven cases that had come before it involving online sexual predators between 2005 and 2010. *Id.* at 1304 n.11. Thus, it is precisely the kind of backwards-looking assessment that ignores law enforcement's need to respond to the "evolving" nature of the Internet.

draft a statute that captures such sites while exempting others. For example, a site devoted to the Boy Scouts[16] may provide a forum for discussing social issues, but it could also provide a forum for pedophiles to meet young boys. Even CNN.com could serve as a meeting place for predators and youth given that visitors are as likely to find stories about Justin Bieber[17] and the latest *Twilight* movie[18] as they are to find news stories.

It is constitutionally permissible for California to choose not to exclude such sites, even if it is not "the least intrusive means" for protecting its children, particularly where speakers would not be "entirely foreclose[d]" from any means of communication. *Ward*, 491 U.S. at 799; *Hill*, 530 U.S. at 726. That is the case here, where sex offenders would remain free to say anything legal anywhere on the Internet, with only a remote possibility that law enforcement or concerned members of the public could someday pierce their secret, online identities.

## II.

## THE BALANCE OF HARDSHIPS FAVORS THE STATE

"[W]hen . . . a party has not shown any chance of success on the merits, no further determination of irreparable harm or balancing of hardships is necessary." *Global Horizons, Inc. v. U.S. Dept. of Labor*,

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[16] *See*, *e.g.*, SCOUTER <http://www2.scouter.com>.

[17] Stephanie Goldberg, Justin Bieber: *From tween sensation to adult icon*, CNN (Mar. 29, 2013, 7:37 AM EDT) <http://www.cnn.com/2013/03/28/showbiz/music/justin-bieber-growing-up/index.html?hpt=hp_bn9#cnn-disqus-area>.

[18] *'Breaking Dawn – Part 2' cleans up at Razzies*, CNN (Feb. 25, 2013, 1:52 PM ET) <http://marquee.blogs.cnn.com/2013/02/25/breaking-dawn-part-2-cleans-up-at-razzies/?iref=allsearch>.

510 F.3d 1054, 1058 (9th Cir. 2007). Because plaintiffs cannot ultimately prevail, there is no need to weigh the hardships.

Yet even if hardships are compared, plaintiffs cannot prevail. At most, plaintiffs face the possibility that their pseudonymous identities will be revealed under rare circumstances. If such identities had not been used for criminal purposes, plaintiffs could easily develop new identifiers.

Even if such a fleeting injury were deemed to be irreparable, it does not justify injunctive relief if it is outweighed by a more compelling public interest. *See*, *e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). Here, the public faces the risk that convicted sex offenders will use the Internet to prey on vulnerable women and children with a greatly diminished fear of detection. Clearly, the public's interest in deterring some of the most heinous crimes imaginable outweighs a registered sex offender's desire to cloak his online identity in secrecy.

## CONCLUSION

Proposition 35 leaves registered sex offenders alone to say anything they want to say, anywhere on the Internet, and to do so anonymously. Proposition 35 even allows sex offenders to use an alias while interacting with members of the public online, and it does so under circumstances that ensure the vast majority of such communications will remain pseudonymous. Yet Proposition 35's registration requirement would no longer allow such aliases to be used behind a veil of complete secrecy. If a sex offender uses such an alias to exploit a woman or a child, Proposition 35 ensures that law enforcement could quickly pierce that veil to identify and track down the offender. In short, Proposition 35 could save

lives without ever providing sex offenders with reasonable grounds to curb their legal online communications.

The minimal effect that Proposition 35 might possibly have on speech has legal consequences. First, the effect is too incidental, and the possibility that it will reasonably chill anyone's speech is too remote, to implicate the First Amendment. Second, even if it did, plaintiffs cannot complain that the law will infringe their right to remain anonymous. If there is any such right under the Constitution, plaintiffs' own criminal activity has eliminated their ability to invoke it in the context of a mere registration requirement. Thus, this is not a First Amendment case, and the District Court erred in assuming otherwise.

Furthermore, Proposition 35's minimal effect on speech underscores how narrowly tailored the measure is to meet the State's important interest in protecting its citizens from sexual predators. Although it is possible to imagine registration schemes that would grant some sex offenders more online secrecy, the District Court abused its discretion in faulting this measure for failing to incorporate the least restrictive means of advancing its public safety goals.

For these reasons, intervenors respectfully urge this Court to reverse the order below.

Dated: April 10, 2013

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

By: s/ James C. Harrison
James C. Harrison

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## STATEMENT OF RELATED CASES

Intervenors are not aware of any known related cases pending in this Court.

**CERTIFICATE OF COMPLIANCE TO**
**FED. R. APP. P. 32(a)(7)(C) AND**
**CIRCUIT RULE 32-1 FOR CASE NUMBER 13-15263**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 9,496 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

Dated: April 10, 2013

s/ James C. Harrison

**CERTIFICATE OF SERVICE**

I hereby certify that on April 10, 2013, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ James C. Harrison

(00196146-4)

Court of Appeals Docket No. 13-15263
(Consolidated With Court of Appeals Case Number 13-15267)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JOHN DOE; JACK ROE; CALIFORNIA REFORM SEX OFFENDER LAWS, on behalf of themselves and others similarly situated,

*Plaintiffs-Appellees*,

v.

DAPHNE PHUNG; CHRIS KELLY,
*Intervenors-Appellants*,

v.

KAMALA D. HARRIS, Attorney General of the State of California,

*Defendant.*

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On Appeal from the United States District Court for the Northern District of California, Case No. 3:12-cv-05713-TEH, The Honorable Thelton E. Henderson, Presiding

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# ADDENDUM TO OPENING BRIEF OF INTERVENORS-APPELLANTS

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West's Ann.Cal.Penal Code § 290.014

# § 290.014. Name change by registrant; addition or change of account with Internet service provider or addition or change of Internet identifier

Effective: November 7, 2012
Currentness

(a) If any person who is required to register pursuant to the Act changes his or her name, the person shall inform, in person, the law enforcement agency or agencies with which he or she is currently registered within five working days. The law enforcement agency or agencies shall forward a copy of this information to the Department of Justice within three working days of its receipt.

(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.

**Credits**
(Added by Stats.2007, c. 579 (S.B.172), § 22, eff. Oct. 13, 2007. Amended by Initiative Measure (Prop. 35, § 11, approved Nov. 6, 2012, eff. Nov. 7, 2012).)

**Editors' Notes**

**VALIDITY**

For validity of this section, see Doe v. Harris, 2013 WL 144048.

Notes of Decisions (1)

West's Ann. Cal. Penal Code § 290.014, CA PENAL § 290.014
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West's Annotated California Codes
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West's Ann.Cal.Penal Code § 290.015

# § 290.015. Release from incarceration; registration requirement; information required at registration; failure to register

Effective: January 1, 2013
Currentness

<Section as amended by Stats.2012, c. 867 (S.B.1144), § 17. See, also, section as amended by Initiative Measure (Prop. 35, § 12, approved Nov. 6, 2012, eff. Nov. 7, 2012). >

(a) A person who is subject to the Act shall register, or reregister if he or she has previously registered, upon release from incarceration, placement, commitment, or release on probation pursuant to subdivision (b) of Section 290. This section shall not apply to a person who is incarcerated for less than 30 days if he or she has registered as required by the Act, he or she returns after incarceration to the last registered address, and the annual update of registration that is required to occur within five working days of his or her birthday, pursuant to subdivision (a) of Section 290.012, did not fall within that incarceration period. The registration shall consist of all of the following:

(1) A statement in writing signed by the person, giving information as shall be required by the Department of Justice and giving the name and address of the person's employer, and the address of the person's place of employment if that is different from the employer's main address.

(2) The fingerprints and a current photograph of the person taken by the registering official.

(3) The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person.

(4) Notice to the person that, in addition to the requirements of the Act, he or she may have a duty to register in any other state where he or she may relocate.

(5) Copies of adequate proof of residence, which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable. If the person has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact. Upon presentation of proof of residence to the registering official or a signed statement that the person has no residence, the person shall be allowed to register. If the person claims that he or she has a residence but does not have any proof of residence, he or she shall be allowed to register but shall furnish proof of residence within 30 days of the date he or she is allowed to register.

 

(b) Within three days thereafter, the registering law enforcement agency or agencies shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the Department of Justice.

(c)(1) If a person fails to register in accordance with subdivision (a) after release, the district attorney in the jurisdiction where the person was to be paroled or to be on probation may request that a warrant be issued for the person's arrest and shall have the authority to prosecute that person pursuant to Section 290.018.

(2) If the person was not on parole or probation or on postrelease community supervision or mandatory supervision at the time of release, the district attorney in the following applicable jurisdiction shall have the authority to prosecute that person pursuant to Section 290.018:

(A) If the person was previously registered, in the jurisdiction in which the person last registered.

(B) If there is no prior registration, but the person indicated on the Department of Justice notice of sex offender registration requirement form where he or she expected to reside, in the jurisdiction where he or she expected to reside.

(C) If neither subparagraph (A) nor (B) applies, in the jurisdiction where the offense subjecting the person to registration pursuant to this Act was committed.

**Credits**

(Added by Stats.2007, c. 579 (S.B.172), § 23, eff. Oct. 13, 2007. Amended by Stats.2011, c. 363 (S.B.756), § 1; Stats.2012, c. 867 (S.B.1144), § 17.)

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Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
Title 9. Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals (Refs & Annos)
Chapter 5.5. Sex Offenders (Refs & Annos)

West's Ann.Cal.Penal Code § 290.018

§ 290.018. Penalties for violation

Effective: October 1, 2011
Currentness

(a) Any person who is required to register under the Act based on a misdemeanor conviction or juvenile adjudication who willfully violates any requirement of the act is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year.

(b) Except as provided in subdivisions (f), (h), and (j), any person who is required to register under the act based on a felony conviction or juvenile adjudication who willfully violates any requirement of the act or who has a prior conviction or juvenile adjudication for the offense of failing to register under the act and who subsequently and willfully violates any requirement of the act is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

(c) If probation is granted or if the imposition or execution of sentence is suspended, it shall be a condition of the probation or suspension that the person serve at least 90 days in a county jail. The penalty described in subdivision (b) or this subdivision shall apply whether or not the person has been released on parole or has been discharged from parole.

(d) Any person determined to be a mentally disordered sex offender or who has been found guilty in the guilt phase of trial for an offense for which registration is required under the act, but who has been found not guilty by reason of insanity in the sanity phase of the trial, or who has had a petition sustained in a juvenile adjudication for an offense for which registration is required pursuant to Section 290.008, but who has been found not guilty by reason of insanity, who willfully violates any requirement of the act is guilty of a misdemeanor and shall be punished by imprisonment in a county jail not exceeding one year. For any second or subsequent willful violation of any requirement of the act, the person is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

(e) If, after discharge from parole, the person is convicted of a felony or suffers a juvenile adjudication as specified in this act, he or she shall be required to complete parole of at least one year, in addition to any other punishment imposed under this section. A person convicted of a felony as specified in this section may be granted probation only in the unusual case where the interests of justice would best be served. When probation is granted under this act, the court shall specify on the record and shall enter into the minutes the circumstances indicating that the interests of justice would best be served by the disposition.

(f) Any person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, and who fails to verify his or her registration every 90 days as required pursuant to subdivision (b) of Section 290.012, shall be punished by imprisonment in the state prison or in a county jail not exceeding one year.

 

(g) Except as otherwise provided in subdivision (f), any person who is required to register or reregister pursuant to Section 290.011 and willfully fails to comply with the requirement that he or she reregister no less than every 30 days is guilty of a misdemeanor and shall be punished by imprisonment in a county jail for at least 30 days, but not exceeding six months. A person who willfully fails to comply with the requirement that he or she reregister no less than every 30 days shall not be charged with this violation more often than once for a failure to register in any period of 90 days. Any person who willfully commits a third or subsequent violation of the requirements of Section 290.011 that he or she reregister no less than every 30 days shall be punished in accordance with either subdivision (a) or (b).

(h) Any person who fails to provide proof of residence as required by paragraph (5) of subdivision (a) of Section 290.015, regardless of the offense upon which the duty to register is based, is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding six months.

(i) Any person who is required to register under the act who willfully violates any requirement of the act is guilty of a continuing offense as to each requirement he or she violated.

(j) In addition to any other penalty imposed under this section, the failure to provide information required on registration and reregistration forms of the Department of Justice, or the provision of false information, is a crime punishable by imprisonment in a county jail for a period not exceeding one year. Nothing in this subdivision shall be construed to limit or prevent prosecution under any applicable provision of law.

(k) Whenever any person is released on parole or probation and is required to register under the act but fails to do so within the time prescribed, the parole authority or the court, as the case may be, shall order the parole or probation of the person revoked. For purposes of this subdivision, "parole authority" has the same meaning as described in Section 3000.

**Credits**

(Added by Stats.2007, c. 579 (S.B.172), § 26, eff. Oct. 13, 2007. Amended by Stats.2009, c. 60 (S.B.668), § 1; Stats.2011, c. 15 (A.B.109), § 318, eff. April 4, 2011, operative Oct. 1, 2011; Stats.2011, c. 39 (A.B.117), § 13, eff. June 30, 2011, operative Oct. 1, 2011.)

Notes of Decisions (10)

West's Ann. Cal. Penal Code § 290.018, CA PENAL § 290.018
Current with all 2012 Reg.Sess. laws, Gov.Reorg.Plan No. 2 of 2011-2012, and all propositions on 2012 ballots.

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
Title 9. Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals (Refs & Annos)
Chapter 5.5. Sex Offenders (Refs & Annos)

West's Ann.Cal.Penal Code § 290.45

# § 290.45. Information to be provided to enumerated persons, agencies or organizations by law enforcement agency that a registered sex offender is likely to encounter in order to protect the public; information to be disclosed; releasing information with respect to high-risk sex offenders; immunity from liability; illegal use of information

Effective: October 1, 2011
Currentness

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), any designated law enforcement entity may provide information to the public about a person required to register as a sex offender pursuant to Section 290, by whatever means the entity deems appropriate, when necessary to ensure the public safety based upon information available to the entity concerning that specific person.

(2) The law enforcement entity shall include, with the disclosure, a statement that the purpose of the release of information is to allow members of the public to protect themselves and their children from sex offenders.

(3) Community notification by way of an Internet Web site shall be governed by Section 290.46, and a designated law enforcement entity may not post on an Internet Web site any information identifying an individual as a person required to register as a sex offender except as provided in that section unless there is a warrant outstanding for that person's arrest.

(b) Information that may be provided pursuant to subdivision (a) may include, but is not limited to, the offender's name, known aliases, gender, race, physical description, photograph, date of birth, address, which shall be verified prior to publication, description and license plate number of the offender's vehicles or vehicles the offender is known to drive, type of victim targeted by the offender, relevant parole or probation conditions, crimes resulting in classification under this section, and date of release from confinement, but excluding information that would identify the victim.

(c)(1) The designated law enforcement entity may authorize persons and entities who receive the information pursuant to this section to disclose information to additional persons only if the entity determines that disclosure to the additional persons will enhance the public safety and identifies the appropriate scope of further disclosure. A law enforcement entity may not authorize any disclosure of this information by its placement on an Internet Web site.

(2) A person who receives information from a law enforcement entity pursuant to paragraph (1) may disclose that information only in the manner and to the extent authorized by the law enforcement entity.

(d)(1) A designated law enforcement entity and its employees shall be immune from liability for good faith conduct under this section.

(2) Any public or private educational institution, day care facility, or any child care custodian described in Section 11165.7, or any employee of a public or private educational institution or day care facility which in good faith disseminates information as authorized pursuant to subdivision (c) shall be immune from civil liability.

(e)(1) Any person who uses information disclosed pursuant to this section to commit a felony shall be punished, in addition and consecutive to any other punishment, by a five-year term of imprisonment pursuant to subdivision (h) of Section 1170.

(2) Any person who uses information disclosed pursuant to this section to commit a misdemeanor shall be subject to, in addition to any other penalty or fine imposed, a fine of not less than five hundred dollars ($500) and not more than one thousand dollars ($1,000).

(f) For purposes of this section, "designated law enforcement entity" means the Department of Justice, every district attorney, the Department of Corrections, the Department of the Youth Authority, and every state or local agency expressly authorized by statute to investigate or prosecute law violators.

(g) The public notification provisions of this section are applicable to every person required to register pursuant to Section 290, without regard to when his or her crimes were committed or his or her duty to register pursuant to Section 290 arose, and to every offense described in Section 290, regardless of when it was committed.

**Credits**

(Added by Stats.2003, c. 634 (A.B.1313), § 4.1, eff. Sept. 30, 2003. Amended by Stats.2005, c. 722 (A.B.1323), § 6, eff. Oct. 7, 2005; Stats.2011, c. 15 (A.B.109), § 320, eff. April 4, 2011, operative Oct. 1, 2011.)

Notes of Decisions (3)

West's Ann. Cal. Penal Code § 290.45, CA PENAL § 290.45
Current with all 2012 Reg.Sess. laws, Gov.Reorg.Plan No. 2 of 2011-2012, and all propositions on 2012 ballots.

End of Document

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
Title 9. Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals (Refs & Annos)
Chapter 5.5. Sex Offenders (Refs & Annos)

West's Ann.Cal.Penal Code § 290.46

# § 290.46. Sex offender information made available to public via Internet Web site; ongoing updates; information included and restricted; offenses and offenders included; notification; misuse of information

Effective: June 27, 2012
Currentness

(a)(1) On or before the dates specified in this section, the Department of Justice shall make available information concerning persons who are required to register pursuant to Section 290 to the public via an Internet Web site as specified in this section. The department shall update the Internet Web site on an ongoing basis. All information identifying the victim by name, birth date, address, or relationship to the registrant shall be excluded from the Internet Web site. The name or address of the person's employer and the listed person's criminal history other than the specific crimes for which the person is required to register shall not be included on the Internet Web site. The Internet Web site shall be translated into languages other than English as determined by the department.

(2)(A) On or before July 1, 2010, the Department of Justice shall make available to the public, via an Internet Web site as specified in this section, as to any person described in subdivision (b), (c), or (d), the following information:

(i) The year of conviction of his or her most recent offense requiring registration pursuant to Section 290.

(ii) The year he or she was released from incarceration for that offense.

(iii) Whether he or she was subsequently incarcerated for any other felony, if that fact is reported to the department. If the department has no information about a subsequent incarceration for any felony, that fact shall be noted on the Internet Web site.

However, no year of conviction shall be made available to the public unless the department also is able to make available the corresponding year of release of incarceration for that offense, and the required notation regarding any subsequent felony.

(B)(i) Any state facility that releases from incarceration a person who was incarcerated because of a crime for which he or she is required to register as a sex offender pursuant to Section 290 shall, within 30 days of release, provide the year of release for his or her most recent offense requiring registration to the Department of Justice in a manner and format approved by the department.

(ii) Any state facility that releases a person who is required to register pursuant to Section 290 from incarceration whose incarceration was for a felony committed subsequently to the offense for which he or she is required to register shall, within 30 days of release, advise the Department of Justice of that fact.

(iii) Any state facility that, prior to January 1, 2007, released from incarceration a person who was incarcerated because of a crime for which he or she is required to register as a sex offender pursuant to Section 290 shall provide the year of release for his or her most recent offense requiring registration to the Department of Justice in a manner and format approved by the department. The information provided by the Department of Corrections and Rehabilitation shall be limited to information that is currently maintained in an electronic format.

(iv) Any state facility that, prior to January 1, 2007, released a person who is required to register pursuant to Section 290 from incarceration whose incarceration was for a felony committed subsequently to the offense for which he or she is required to register shall advise the Department of Justice of that fact in a manner and format approved by the department. The information provided by the Department of Corrections and Rehabilitation shall be limited to information that is currently maintained in an electronic format.

(3) The State Department of State Hospitals shall provide to the Department of Justice Sex Offender Tracking Program the names of all persons committed to its custody pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, within 30 days of commitment, and shall provide the names of all of those persons released from its custody within five working days of release.

(b)(1) On or before July 1, 2005, with respect to a person who has been convicted of the commission or the attempted commission of any of the offenses listed in, or who is described in, paragraph (2), the Department of Justice shall make available to the public via the Internet Web site his or her name and known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, prior adjudication as a sexually violent predator, the address at which the person resides, and any other information that the Department of Justice deems relevant, but not the information excluded pursuant to subdivision (a). On or before January 1, 2013, the department shall make available to the public via the Internet Web site his or her static SARATSO score and information on an elevated risk level based on the SARATSO future violence tool.

(2) This subdivision shall apply to the following offenses and offenders:

(A) Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289.

(B) Section 207 committed with intent to violate Section 261, 286, 288, 288a, or 289.

(C) Section 209 committed with intent to violate Section 261, 286, 288, 288a, or 289.

(D) Paragraph (2) or (6) of subdivision (a) of Section 261.

(E) Section 264.1.

(F) Section 269.

(G) Subdivision (c) or (d) of Section 286.

(H) Subdivision (a), (b), or (c) of Section 288, provided that the offense is a felony.

(I) Subdivision (c) or (d) of Section 288a.

(J) Section 288.3, provided that the offense is a felony.

(K) Section 288.4, provided that the offense is a felony.

(L) Section 288.5.

(M) Subdivision (a) or (j) of Section 289.

(N) Section 288.7.

(O) Any person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code.

(P) A felony violation of Section 311.1.

(Q) A felony violation of subdivision (b), (c), or (d) of Section 311.2.

(R) A felony violation of Section 311.3.

(S) A felony violation of subdivision (a), (b), or (c) of Section 311.4.

(T) Section 311.10.

(U) A felony violation of Section 311.11.

(c)(1) On or before July 1, 2005, with respect to a person who has been convicted of the commission or the attempted commission of any of the offenses listed in paragraph (2), the Department of Justice shall make available to the public via the Internet Web site his or her name and known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, the community of residence and ZIP Code in which the person resides or the county in which the person is registered as a transient, and any other information that the Department of Justice deems relevant, but not the information excluded pursuant to subdivision (a). On or before July 1, 2006, the Department of Justice shall determine whether any person convicted of an offense listed in paragraph (2) also has one or more prior or subsequent convictions of an offense listed in subdivision (c) of Section 290, and, for those persons, the Department of Justice shall make available to the public via the Internet Web site the

address at which the person resides. However, the address at which the person resides shall not be disclosed until a determination is made that the person is, by virtue of his or her additional prior or subsequent conviction of an offense listed in subdivision (c) of Section 290, subject to this subdivision.

(2) This subdivision shall apply to the following offenses:

(A) Section 220, except assault to commit mayhem.

(B) Paragraph (1), (3), or (4) of subdivision (a) of Section 261.

(C) Paragraph (2) of subdivision (b), or subdivision (f), (g), or (i), of Section 286.

(D) Paragraph (2) of subdivision (b), or subdivision (f), (g), or (i), of Section 288a.

(E) Subdivision (b), (d), (e), or (i) of Section 289.

(d)(1) On or before July 1, 2005, with respect to a person who has been convicted of the commission or the attempted commission of any of the offenses listed in, or who is described in, this subdivision, the Department of Justice shall make available to the public via the Internet Web site his or her name and known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, the community of residence and ZIP Code in which the person resides or the county in which the person is registered as a transient, and any other information that the Department of Justice deems relevant, but not the information excluded pursuant to subdivision (a) or the address at which the person resides.

(2) This subdivision shall apply to the following offenses and offenders:

(A) Subdivision (a) of Section 243.4, provided that the offense is a felony.

(B) Section 266, provided that the offense is a felony.

(C) Section 266c, provided that the offense is a felony.

(D) Section 266j.

(E) Section 267.

(F) Subdivision (c) of Section 288, provided that the offense is a misdemeanor.

(G) Section 288.3, provided that the offense is a misdemeanor.

(H) Section 288.4, provided that the offense is a misdemeanor.

(I) Section 626.81.

(J) Section 647.6.

(K) Section 653c.

(L) Any person required to register pursuant to Section 290 based upon an out-of-state conviction, unless that person is excluded from the Internet Web site pursuant to subdivision (e). However, if the Department of Justice has determined that the out-of-state crime, if committed or attempted in this state, would have been punishable in this state as a crime described in subdivision (c) of Section 290, the person shall be placed on the Internet Web site as provided in subdivision (b) or (c), as applicable to the crime.

(e)(1) If a person has been convicted of the commission or the attempted commission of any of the offenses listed in this subdivision, and he or she has been convicted of no other offense listed in subdivision (b), (c), or (d) other than those listed in this subdivision, that person may file an application with the Department of Justice, on a form approved by the department, for exclusion from the Internet Web site. If the department determines that the person meets the requirements of this subdivision, the department shall grant the exclusion and no information concerning the person shall be made available via the Internet Web site described in this section. He or she bears the burden of proving the facts that make him or her eligible for exclusion from the Internet Web site. However, a person who has filed for or been granted an exclusion from the Internet Web site is not relieved of his or her duty to register as a sex offender pursuant to Section 290 nor from any otherwise applicable provision of law.

(2) This subdivision shall apply to the following offenses:

(A) A felony violation of subdivision (a) of Section 243.4.

(B) Section 647.6, if the offense is a misdemeanor.

(C) A felony violation of Section 311.1, subdivision (b), (c), or (d) of Section 311.2, or Section 311.3, 311.4, 311.10, or 311.11 if the person submits to the department a certified copy of a probation report filed in court that clearly states that all victims involved in the commission of the offense were at least 16 years of age or older at the time of the commission of the offense.

(D)(i) An offense for which the offender successfully completed probation, provided that the offender submits to the department a certified copy of a probation report, presentencing report, report prepared pursuant to Section 288.1, or other official court document that clearly demonstrates that the offender was the victim's parent, stepparent, sibling, or grandparent and that the crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object.

(ii) An offense for which the offender is on probation at the time of his or her application, provided that the offender submits to the department a certified copy of a probation report, presentencing report, report prepared pursuant to Section 288.1, or other

official court document that clearly demonstrates that the offender was the victim's parent, stepparent, sibling, or grandparent and that the crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object.

(iii) If, subsequent to his or her application, the offender commits a violation of probation resulting in his or her incarceration in county jail or state prison, his or her exclusion, or application for exclusion, from the Internet Web site shall be terminated.

(iv) For the purposes of this subparagraph, "successfully completed probation" means that during the period of probation the offender neither received additional county jail or state prison time for a violation of probation nor was convicted of another offense resulting in a sentence to county jail or state prison.

(3) If the department determines that a person who was granted an exclusion under a former version of this subdivision would not qualify for an exclusion under the current version of this subdivision, the department shall rescind the exclusion, make a reasonable effort to provide notification to the person that the exclusion has been rescinded, and, no sooner than 30 days after notification is attempted, make information about the offender available to the public on the Internet Web site as provided in this section.

(4) Effective January 1, 2012, no person shall be excluded pursuant to this subdivision unless the offender has submitted to the department documentation sufficient for the department to determine that he or she has a SARATSO risk level of low or moderate-low.

(f) The Department of Justice shall make a reasonable effort to provide notification to persons who have been convicted of the commission or attempted commission of an offense specified in subdivision (b), (c), or (d), that on or before July 1, 2005, the department is required to make information about specified sex offenders available to the public via an Internet Web site as specified in this section. The Department of Justice shall also make a reasonable effort to provide notice that some offenders are eligible to apply for exclusion from the Internet Web site.

(g)(1) A designated law enforcement entity, as defined in subdivision (f) of Section 290.45, may make available information concerning persons who are required to register pursuant to Section 290 to the public via an Internet Web site as specified in paragraph (2).

(2) The law enforcement entity may make available by way of an Internet Web site the information described in subdivision (c) if it determines that the public disclosure of the information about a specific offender by way of the entity's Internet Web site is necessary to ensure the public safety based upon information available to the entity concerning that specific offender.

(3) The information that may be provided pursuant to this subdivision may include the information specified in subdivision (b) of Section 290.45. However, that offender's address may not be disclosed unless he or she is a person whose address is on the Department of Justice's Internet Web site pursuant to subdivision (b) or (c).

(h) For purposes of this section, "offense" includes the statutory predecessors of that offense, or any offense committed in another jurisdiction that, if committed or attempted to be committed in this state, would have been punishable in this state as an offense listed in subdivision (c) of Section 290.

(i) Notwithstanding Section 6254.5 of the Government Code, disclosure of information pursuant to this section is not a waiver of exemptions under Chapter 3.5 (commencing with Section 6250) of Title 1 of Division 7 of the Government Code and does not affect other statutory restrictions on disclosure in other situations.

(j)(1) Any person who uses information disclosed pursuant to this section to commit a misdemeanor shall be subject to, in addition to any other penalty or fine imposed, a fine of not less than ten thousand dollars ($10,000) and not more than fifty thousand dollars ($50,000).

(2) Any person who uses information disclosed pursuant to this section to commit a felony shall be punished, in addition and consecutive to any other punishment, by a five-year term of imprisonment pursuant to subdivision (h) of Section 1170.

(k) Any person who is required to register pursuant to Section 290 who enters an Internet Web site established pursuant to this section shall be punished by a fine not exceeding one thousand dollars ($1,000), imprisonment in a county jail for a period not to exceed six months, or by both that fine and imprisonment.

(*l*)(1) A person is authorized to use information disclosed pursuant to this section only to protect a person at risk.

(2) Except as authorized under paragraph (1) or any other provision of law, use of any information that is disclosed pursuant to this section for purposes relating to any of the following is prohibited:

(A) Health insurance.

(B) Insurance.

(C) Loans.

(D) Credit.

(E) Employment.

(F) Education, scholarships, or fellowships.

(G) Housing or accommodations.

(H) Benefits, privileges, or services provided by any business establishment.

(3) This section shall not affect authorized access to, or use of, information pursuant to, among other provisions, Sections 11105 and 11105.3, Section 8808 of the Family Code, Sections 777.5 and 14409.2 of the Financial Code, Sections 1522.01 and 1596.871 of the Health and Safety Code, and Section 432.7 of the Labor Code.

(4)(A) Any use of information disclosed pursuant to this section for purposes other than those provided by paragraph (1) or in violation of paragraph (2) shall make the user liable for the actual damages, and any amount that may be determined by a jury or a court sitting without a jury, not exceeding three times the amount of actual damage, and not less than two hundred fifty dollars ($250), and attorney's fees, exemplary damages, or a civil penalty not exceeding twenty-five thousand dollars ($25,000).

(B) Whenever there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of misuse of the information available via an Internet Web site established pursuant to this section in violation of paragraph (2), the Attorney General, any district attorney, or city attorney, or any person aggrieved by the misuse is authorized to bring a civil action in the appropriate court requesting preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or group of persons responsible for the pattern or practice of misuse. The foregoing remedies shall be independent of any other remedies or procedures that may be available to an aggrieved party under other provisions of law, including Part 2 (commencing with Section 43) of Division 1 of the Civil Code.

(m) The public notification provisions of this section are applicable to every person described in this section, without regard to when his or her crimes were committed or his or her duty to register pursuant to Section 290 arose, and to every offense described in this section, regardless of when it was committed.

(n) A designated law enforcement entity and its employees shall be immune from liability for good faith conduct under this section.

(o) The Attorney General, in collaboration with local law enforcement and others knowledgeable about sex offenders, shall develop strategies to assist members of the public in understanding and using publicly available information about registered sex offenders to further public safety. These strategies may include, but are not limited to, a hotline for community inquiries, neighborhood and business guidelines for how to respond to information posted on this Internet Web site, and any other resource that promotes public education about these offenders.

**Credits**

(Added by Stats.2004, c. 745 (A.B.488), § 1, eff. Sept. 24, 2004. Amended by Stats.2005, c. 721 (A.B.437), § 1; Stats.2005, c. 722 (A.B.1323), § 7, eff. Oct. 7, 2005; Stats.2006, c. 337 (S.B.1128), § 19, eff. Sept. 20, 2006; Stats.2006, c. 886 (A.B.1849), § 4.2, eff. Sept. 30, 2006; Stats.2007, c. 579 (S.B.172), § 36, eff. Oct. 13, 2007; Stats.2008, c. 599 (S.B.1302), § 1; Stats.2008, c. 598 (S.B.1187), § 1, operative Jan. 1, 2010; Stats.2008, c. 599 (S.B.1302), § 1.5, operative Jan. 1, 2010; Stats.2009, c. 35 (S.B.174), § 8; Stats.2010, c. 219 (A.B.1844), § 14, eff. Sept. 9, 2010; Stats.2011, c. 15 (A.B.109), § 321, eff. April 4, 2011, operative Oct. 1, 2011; Stats.2012, c. 867 (S.B.1144), § 18; Stats.2012, c. 24 (A.B.1470), § 18, eff. June 27, 2012.)

Notes of Decisions (17)

West's Ann. Cal. Penal Code § 290.46, CA PENAL § 290.46
Current with all 2012 Reg.Sess. laws, Gov.Reorg.Plan No. 2 of 2011-2012, and all propositions on 2012 ballots.

West's Annotated California Codes
Penal Code (Refs & Annos)
Part 1. Of Crimes and Punishments
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Chapter 6. DNA and Forensic Identification Data Base and Data Bank Act of 1998 (Refs & Annos)
Article 2. Offenders Subject to Sample Collection (Refs & Annos)

West's Ann.Cal.Penal Code § 296

# § 296. Offenders subject to collection of specimens, samples and print impressions

Effective: November 3, 2004
Currentness

(a) The following persons shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis:

(1) Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense.

(2) Any adult person who is arrested for or charged with any of the following felony offenses:

(A) Any felony offense specified in Section 290 or attempt to commit any felony offense described in Section 290, or any felony offense that imposes upon a person the duty to register in California as a sex offender under Section 290.

(B) Murder or voluntary manslaughter or any attempt to commit murder or voluntary manslaughter.

(C) Commencing on January 1 of the fifth year following enactment of the act that added this subparagraph, as amended, any adult person arrested or charged with any felony offense.

(3) Any person, including any juvenile, who is required to register under Section 290 or 457.1 because of the commission of, or the attempt to commit, a felony or misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense.

(4) The term "felony" as used in this subdivision includes an attempt to commit the offense.

(5) Nothing in this chapter shall be construed as prohibiting collection and analysis of specimens, samples, or print impressions as a condition of a plea for a non-qualifying offense.

(b) The provisions of this chapter and its requirements for submission of specimens, samples and print impressions as soon as administratively practicable shall apply to all qualifying persons regardless of sentence imposed, including any sentence of death, life without the possibility of parole, or any life or indeterminate term, or any other disposition rendered in the case of an adult or juvenile tried as an adult, or whether the person is diverted, fined, or referred for evaluation, and regardless of disposition rendered or placement made in the case of juvenile who is found to have committed any felony offense or is adjudicated under Section 602 of the Welfare and Institutions Code.

(c) The provisions of this chapter and its requirements for submission of specimens, samples, and print impressions as soon as administratively practicable by qualified persons as described in subdivision (a) shall apply regardless of placement or confinement in any mental hospital or other public or private treatment facility, and shall include, but not be limited to, the following persons, including juveniles:

(1) Any person committed to a state hospital or other treatment facility as a mentally disordered sex offender under Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(2) Any person who has a severe mental disorder as set forth within the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.

(3) Any person found to be a sexually violent predator pursuant to Article 4 (commencing with Section 6600) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code.

(d) The provisions of this chapter are mandatory and apply whether or not the court advises a person, including any juvenile, that he or she must provide the data bank and database specimens, samples, and print impressions as a condition of probation, parole, or any plea of guilty, no contest, or not guilty by reason of insanity, or any admission to any of the offenses described in subdivision (a).

(e) If at any stage of court proceedings the prosecuting attorney determines that specimens, samples, and print impressions required by this chapter have not already been taken from any person, as defined under subdivision (a) of Section 296, the prosecuting attorney shall notify the court orally on the record, or in writing, and request that the court order collection of the specimens, samples, and print impressions required by law. However, a failure by the prosecuting attorney or any other law enforcement agency to notify the court shall not relieve a person of the obligation to provide specimens, samples, and print impressions pursuant to this chapter.

(f) Prior to final disposition or sentencing in the case the court shall inquire and verify that the specimens, samples, and print impressions required by this chapter have been obtained and that this fact is included in the abstract of judgment or dispositional order in the case of a juvenile. The abstract of judgment issued by the court shall indicate that the court has ordered the person to comply with the requirements of this chapter and that the person shall be included in the state's DNA and Forensic Identification Data Base and Data Bank program and be subject to this chapter.

However, failure by the court to verify specimen, sample, and print impression collection or enter these facts in the abstract of judgment or dispositional order in the case of a juvenile shall not invalidate an arrest, plea, conviction, or disposition, or otherwise relieve a person from the requirements of this chapter.

 

**Credits**

(Added by Stats.1998, c. 696 (A.B.1332), § 2. Amended by Stats.1999, c. 475 (S.B.654), § 3; Stats.2000, c. 823 (A.B.2814), § 1; Stats.2001, c. 906 (A.B.673), § 1; Stats.2002, c. 160 (A.B.2105), § 1, eff. July 12, 2002; Initiative Measure (Prop. 69, § III.3, approved Nov. 2, 2004, eff. Nov. 3, 2004).)

**Editors' Notes**

**VALIDITY**

*For validity of this section, see People v. Buza (App. 1 Dist. 2011), 129 Cal.Rptr.3d 753, 2011 WL 3338855, review granted and opinion superseded, 132 Cal.Rptr.3d 616, 262 P.3d 854.*

Notes of Decisions (22)

West's Ann. Cal. Penal Code § 296, CA PENAL § 296
Current with all 2012 Reg.Sess. laws, Gov.Reorg.Plan No. 2 of 2011-2012, and all propositions on 2012 ballots.

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**PENAL CODE - PEN**

**PART 3. OF IMPRISONMENT AND THE DEATH PENALTY [2000. - 10007.]** *( Part 3 repealed and added by Stats. 1941, Ch. 106. )*

**TITLE 6. REPRIEVES, PARDONS AND COMMUTATIONS [4800. - 4906.]** *( Title 6 added by Stats. 1941, Ch. 106. )*

**CHAPTER 3.5. Procedure for Restoration of Rights and Application for Pardon [4852.01. - 4852.21.]** *( Chapter 3.5 added by Stats. 1943, Ch. 400. )*

**4852.01.** (a) Any person convicted of a felony who has been released from a state prison or other state penal institution or agency in California, whether discharged on completion of the term for which he or she was sentenced or released on parole prior to May 13, 1943, who has not been incarcerated in a state prison or other state penal institution or agency since his or her release and who presents satisfactory evidence of a three-year residence in this state immediately prior to the filing of the petition for a certificate of rehabilitation and pardon provided for by this chapter, may file the petition pursuant to the provisions of this chapter.

(b) Any person convicted of a felony who, on May 13, 1943, was confined in a state prison or other institution or agency to which he or she was committed and any person convicted of a felony after that date who is committed to a state prison or other institution or agency may file a petition for a certificate of rehabilitation and pardon pursuant to the provisions of this chapter.

(c) Any person convicted of a felony or any person who is convicted of a misdemeanor violation of any sex offense specified in Section 290, the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter if the petitioner has not been incarcerated in any prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading and is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years residence in this state prior to the filing of the petition.

(d) This chapter shall not apply to persons serving a mandatory life parole, persons committed under death sentences, persons convicted of a violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, or persons in the military service.

(e) Notwithstanding the above provisions or any other provision of law, the Governor shall have the right to pardon a person convicted of a violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, if there are extraordinary circumstances.

*(Amended by Stats. 1997, Ch. 61, Sec. 2. Effective January 1, 1998.)*

**4852.03.** (a) The period of rehabilitation shall begin to run upon the discharge of the petitioner from custody due to his or her completion of the term to which he or she was sentenced or upon his or her release on parole or probation, whichever is sooner. For purposes of this chapter, the period of rehabilitation shall constitute five years' residence in this state, plus a period of time determined by the following rules:

(1) To the five years there shall be added four years in the case of any person convicted of violating Section 187, 209, 219, 4500, or 18755 of this code, or subdivision (a) of Section 1672 of the Military and Veterans Code, or of committing any other offense which carries a life sentence.

(2) To the five years there shall be added five years in the case of any person convicted of committing any offense or attempted offense for which sex offender registration is required pursuant to Section 290, except for convictions for violations of subdivision (b), (c), or (d) of Section 311.2, or of Section 311.3, 311.10, or 314. For those convictions, two years shall be added to the five years imposed by this section.

(3) To the five years there shall be added two years in the case of any person convicted of committing any offense that is not listed in paragraph (1) or paragraph (2) and that does not carry a life sentence.

(4) The trial court hearing the application for the certificate of rehabilitation may, if the defendant was ordered to serve consecutive sentences, order that his or her statutory period of rehabilitation be extended for an additional period of time which when combined with the time already served will not exceed the period prescribed by statute for the sum of the maximum penalties for all the crimes.

(5) Any person who was discharged after completion of his or her term or was released on parole before May 13, 1943, is not subject to the periods of rehabilitation set forth in these rules.

(b) Unless and until the period of rehabilitation, as stipulated in this section, has passed, the petitioner shall be ineligible to file his or her petition for a certificate of rehabilitation with the court. Any certificate of rehabilitation that is issued and under which the petitioner has not fulfilled the requirements of this chapter shall be void.

(c) A change of residence within this state does not interrupt the period of rehabilitation prescribed by this section.

*(Amended (as amended by Stats. 2010, Ch. 178, Sec. 84) by Stats. 2011, Ch. 296, Sec. 217. Effective January 1, 2012.)*

**4852.04.** Each person who may initiate the proceedings provided for in this chapter shall be entitled to receive counsel and assistance from all rehabilitative agencies, including the adult probation officer of the county and all state parole officers, and, in the case of persons under the age of 30 years, from the Youth Authority.

*(Amended by Stats. 1957, Ch. 2256.)*

**4852.05.** The person shall live an honest and upright life, shall conduct himself or herself with sobriety and industry, shall exhibit a good moral character, and shall conform to and obey the laws of the land.

*(Amended by Stats. 1996, Ch. 981, Sec. 4. Effective January 1, 1997.)*

**4852.06.** Except as provided in subdivision (a) of Section 4852.01, after the expiration of the minimum period of rehabilitation applicable to him or her (and, in the case of persons released upon parole or probation, after the termination of parole or probation), each person who has complied with the requirements of Section 4852.05 may file in the superior court of the county in which he or she then resides a petition for ascertainment and declaration of the fact of his or her rehabilitation and of matters incident thereto, and for a certificate of rehabilitation under this chapter. No petition shall be filed until and unless the petitioner has continuously resided in this state, after leaving prison, for a period of not less than five years immediately preceding the date of filing the petition.

*(Amended by Stats. 1996, Ch. 981, Sec. 5. Effective January 1, 1997.)*

**4852.07.** The petitioner shall give notice of the filing of the petition to the district attorney of the county in which the petition is filed, to the district attorney of each county in which the petitioner was convicted of a felony or of a crime the accusatory pleading of which was dismissed pursuant to Section 1203.4, and to the office of the Governor, together with notice of the time of the hearing of the petition, at least 30 days prior to the date set for such hearing.

*(Amended by Stats. 1976, Ch. 434.)*

**4852.08.** During the proceedings upon the petition, the petitioner may be represented by counsel of his own selection; if he has no such counsel he shall be represented by the public defender, if there is one in the county, and if there is none, by the adult probation officer of the county or if in the opinion of the court the petitioner needs counsel, the court shall assign counsel to represent him.

*(Added by Stats. 1943, Ch. 400.)*

**4852.09.** No filing fee nor court fees of any kind shall be required of a petitioner in proceedings under this chapter.

*(Added by Stats. 1943, Ch. 400.)*

**4852.1.** The court in which the petition is filed may require such testimony as it deems necessary, and the production, for the use of the court and without expense of any kind to the petitioner, of all records and reports relating to the petitioner and the crime of which he was convicted, including the record of the trial, the report of the probation officer, if any, the records of the prison, jail, detention facility or other penal institution from which the petitioner has been released showing his conduct during the time he was there, the records of the penal institution or agency doctor and psychiatrist, the records of the parole officer concerning him if he was released on parole, the records of the Youth Authority concerning him if he has been committed to the authority, and written reports or records of any other law enforcement agency concerning the conduct of the petitioner since his release

on probation or parole or discharge from custody. All persons having custody of any such records shall make them available for the use of the court in the proceeding.

*(Amended by Stats. 1976, Ch. 434.)*

**4852.11.** Any peace officer shall report to the court, upon receiving a request as provided in Section 4852.1, all violations of law committed by said petitioner which may come to his knowledge. Upon receiving satisfactory proof of such violation the court may deny the petition and determine a new period of rehabilitation not to exceed the original period of rehabilitation for the same crime. In that event, before granting the petition, the court may thereafter require the petitioner to fulfill all the requirements provided to be fulfilled before the granting of the certificate under the original petition.

*(Amended by Stats. 1974, Ch. 1365.)*

**4852.12.** (a) In any proceeding for the ascertainment and declaration of the fact of rehabilitation under this chapter, the court, upon the filing of the application for petition of rehabilitation, may request from the district attorney an investigation of the residence of the petitioner, the criminal record of the petitioner as shown by the records of the Department of Justice, any representation made to the court by the applicant, the conduct of the petitioner during his period of rehabilitation, including all matters mentioned in Section 4852.11, and any other information the court may deem necessary in making its determination. If so requested, the district attorney shall provide the court with a full and complete report of such investigations.

(b) In any proceeding for the ascertainment and declaration of the fact of rehabilitation under this chapter of a person convicted of a crime the accusatory pleading of which has been dismissed pursuant to Section 1203.4, the district attorney, upon request of the court, shall deliver to the court the criminal record of petitioner as shown by the records of the Department of Justice. The district attorney may investigate any representation made to the court by petitioner and may file with the court a report of the investigation including all matters known to the district attorney relating to the conduct and place and duration of residence of the petitioner during the period of rehabilitation and all known violations of law committed by petitioner.

*(Amended by Stats. 1976, Ch. 434.)*

**4852.13.** (a) Except as otherwise provided in subdivision (b), if after hearing, the court finds that the petitioner has demonstrated by his or her course of conduct his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship, the court may make an order declaring that the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner. This order shall be filed with the clerk of the court, and shall be known as a certificate of rehabilitation.

(b) No certificate of rehabilitation shall be granted to a person convicted of any offense specified in Section 290 if the court determines that the petitioner presents a continuing threat to minors of committing any of the offenses specified in Section 290.

(c) A district attorney in either the county where the conviction was obtained or the county of residence of the recipient of the certificate of rehabilitation may petition the superior court to rescind a certificate if it was granted for any offense specified in Section 290. The petition shall be filed in either the county in which the person who has received the certificate of rehabilitation resides or the county in which the conviction was obtained. If the superior court finds that petitioner has demonstrated by a preponderance of the evidence that the person who has received the certificate presents a continuing threat to minors of committing any of the offenses specified in Section 290, the court shall rescind the certificate.

*(Amended by Stats. 1996, Ch. 981, Sec. 6. Effective January 1, 1997.)*

**4852.14.** The clerk of the court shall immediately transmit certified copies of the certificate of rehabilitation to the Governor, to the Board of Prison Terms and the Department of Justice, and, in the case of persons twice convicted of a felony, to the Supreme Court.

*(Amended by Stats. 1979, Ch. 255.)*

**4852.15.** Nothing in this chapter shall be construed to abridge or impair the power or authority conferred by law on any officer, board, or tribunal to revoke or suspend any right, privilege, or franchise for any act or omission not involved in his or her conviction, or to require the reinstatement of the right or privilege to practice or carry on any profession or occupation the practice or conduct of which requires the possession or obtaining of a license, permit, or certificate. Nothing in this chapter shall affect any provision of Chapter 5 (commencing with Section

2000) of Division 2 of the Business and Professions Code or the power or authority conferred by law on the Board of Medical Examiners therein, or the power or authority conferred by law upon any board that issues a certificate permitting any person to practice or apply his or her art or profession on the person of another. Nothing in this chapter shall affect any provision of Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code or the power or authority in relation to attorneys at law and the practice of the law in the State of California conferred by law upon or otherwise possessed by the courts, or the power or authority conferred by law upon the State Bar of California or any board or committee thereof.

*(Amended by Stats. 1987, Ch. 828, Sec. 141.)*

**4852.16.** The certified copy of a certificate of rehabilitation transmitted to the Governor shall constitute an application for a full pardon upon receipt of which the Governor may, without any further investigation, issue a pardon to the person named therein, except that, pursuant to Section 8 of Article V of the Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court.

*(Amended by Stats. 1980, Ch. 1117, Sec. 20.)*

**4852.17.** Whenever a person is issued a certificate of rehabilitation or granted a pardon from the Governor under this chapter, the fact shall be immediately reported to the Department of Justice by the court, Governor, officer, or governmental agency by whose official action the certificate is issued or the pardon granted. The Department of Justice shall immediately record the facts so reported on the former criminal record of the person, and transmit those facts to the Federal Bureau of Investigation at Washington, D.C. When the criminal record is thereafter reported by the department, it shall also report the fact that the person has received a certificate of rehabilitation, or pardon, or both.

Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including, but not limited to: (1) the right to vote; (2) the right to own, possess, and keep any type of firearm that may lawfully be owned and possessed by other citizens; except that this right shall not be restored, and Sections 17800 and 23510 and Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6 shall apply, if the person was ever convicted of a felony involving the use of a dangerous weapon.

*(Amended (as amended by Stats. 2010, Ch. 178, Sec. 85) by Stats. 2011, Ch. 296, Sec. 218. Effective January 1, 2012.)*

**4852.18.** The Board of Prison Terms shall furnish to the clerk of the superior court of each county a set of sample forms for a petition for certificate of rehabilitation and pardon, a notice of filing of petition for certificate of rehabilitation and pardon, and a certificate of rehabilitation. The clerk of the court shall have a sufficient number of these forms printed to meet the needs of the people of the county, and shall make these forms available at no charge to persons requesting them.

*(Amended by Stats. 2002, Ch. 784, Sec. 572. Effective January 1, 2003.)*

**4852.19.** This chapter shall be construed as providing an additional, but not an exclusive, procedure for the restoration of rights and application for pardon. Nothing in this chapter shall be construed as repealing any other provision of law providing for restoration of rights or application for pardon.

*(Added by Stats. 1943, Ch. 400.)*

**4852.2.** Every person, other than an individual who is licensed to practice law in the State of California, pursuant to Article 4 (commencing with Section 6060) of Chapter 4 of Division 3 of the Business and Professions Code and who is acting in that capacity, who solicits or accepts any fee, money, or anything of value for his or her services, or his or her purported services, in representing a petitioner in any proceeding under this chapter, or in any application to the Governor for a pardon under this chapter, is guilty of a misdemeanor.

*(Amended by Stats. 1990, Ch. 632, Sec. 5.)*

**4852.21.** (a) Any person to whom this chapter applies shall, prior to his discharge or release on parole from a state prison or other state penal institution or agency, be informed in writing by the official in charge of the place of confinement of his right to petition for, and of the procedure for filing the petition for, and obtaining, a certificate of rehabilitation and pardon pursuant to this chapter.

(b) Prior to dismissal of the accusatory pleading pursuant to Section 1203.4, the defendant shall be informed in writing by the clerk of the court dismissing the accusatory pleading of the defendant's right, if any, to petition for, and of the procedure for filing a petition for, and obtaining, a certificate of rehabilitation and pardon pursuant to this chapter.

*(Amended by Stats. 1976, Ch. 434.)*

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16914

§ 16914. Information required in registration

Effective: July 27, 2006
Currentness

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

**(1)** The name of the sex offender (including any alias used by the individual).

**(2)** The Social Security number of the sex offender.

**(3)** The address of each residence at which the sex offender resides or will reside.

**(4)** The name and address of any place where the sex offender is an employee or will be an employee.

**(5)** The name and address of any place where the sex offender is a student or will be a student.

**(6)** The license plate number and a description of any vehicle owned or operated by the sex offender.

**(7)** Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

**(1)** A physical description of the sex offender.

**(2)** The text of the provision of law defining the criminal offense for which the sex offender is registered.

**(3)** The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

**(4)** A current photograph of the sex offender.

**(5)** A set of fingerprints and palm prints of the sex offender.

**(6)** A DNA sample of the sex offender.

**(7)** A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

**(8)** Any other information required by the Attorney General.

**Credits**

(Pub.L. 109-248, Title I, § 114, July 27, 2006, 120 Stat. 594.)

Notes of Decisions (2)

42 U.S.C.A. § 16914, 42 USCA § 16914
Current through P.L. 112-283 approved 1-15-13

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16915a

§ 16915a. Direction to the Attorney General

Effective: October 13, 2008
Currentness

(a) Requirement that sex offenders provide certain Internet related information to sex offender registries

The Attorney General, using the authority provided in section 114(a)(7) of the Sex Offender Registration and Notification Act [42 U.S.C.A. § 16914(a)(7)], shall require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act [42 U.S.C.A. § 16901 et seq.]. These records of Internet identifiers shall be subject to the Privacy Act (5 U.S.C. 552a) to the same extent as the other records in the National Sex Offender Registry.

(b) Timeliness of reporting of information

The Attorney General, using the authority provided in section 112(b) of the Sex Offender Registration and Notification Act [42 U.S.C.A. § 16912(b)], shall specify the time and manner for keeping current information required to be provided under this section.

(c) Nondisclosure to general public

The Attorney General, using the authority provided in section 118(b)(4) of the Sex Offender Registration and Notification Act [42 U.S.C.A. § 16918(b)(4)], shall exempt from disclosure all information provided by a sex offender under subsection (a).

(d) Notice to sex offenders of new requirements

The Attorney General shall ensure that procedures are in place to notify each sex offender of changes in requirements that apply to that sex offender as a result of the implementation of this section.

(e) Definitions

(1) Of "social networking website"

As used in this Act, the term " social networking website"--

(A) means an Internet website--

**(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 online social interactions; and

**(B)** includes any contractors or agents used by the website to act on behalf of the website in carrying out the purposes of this Act.

(2) Of "Internet identifiers"

As used in this Act, the term " Internet identifiers" means electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting.

(3) Other terms

A term defined for the purposes of the Sex Offender Registration and Notification Act [42 U.S.C.A. § 16901 et seq.] has the same meaning in this Act.

**Credits**
(Pub.L. 110-400, § 2, Oct. 13, 2008, 122 Stat. 4224.)

42 U.S.C.A. § 16915a, 42 USCA § 16915a
Current through P.L. 112-283 approved 1-15-13

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16918

# § 16918. Public access to sex offender information through the Internet

Effective: July 27, 2006
Currentness

(a) In general

Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user. The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.

(b) Mandatory exemptions

A jurisdiction shall exempt from disclosure--

**(1)** the identity of any victim of a sex offense;

**(2)** the Social Security number of the sex offender;

**(3)** any reference to arrests of the sex offender that did not result in conviction; and

**(4)** any other information exempted from disclosure by the Attorney General.

(c) Optional exemptions

A jurisdiction may exempt from disclosure--

**(1)** any information about a tier I sex offender convicted of an offense other than a specified offense against a minor;

**(2)** the name of an employer of the sex offender;

 

**(3)** the name of an educational institution where the sex offender is a student; and

**(4)** any other information exempted from disclosure by the Attorney General.

(d) Links

The site shall include, to the extent practicable, links to sex offender safety and education resources.

(e) Correction of errors

The site shall include instructions on how to seek correction of information that an individual contends is erroneous.

(f) Warning

The site shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties.

**Credits**
(Pub.L. 109-248, Title I, § 118, July 27, 2006, 120 Stat. 596.)

Notes of Decisions (1)

42 U.S.C.A. § 16918, 42 USCA § 16918
Current through P.L. 112-283 approved 1-15-13

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification

42 U.S.C.A. § 16925

# § 16925. Failure of jurisdiction to comply

Effective: July 27, 2006
Currentness

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under part A of subchapter V of chapter 46 of this title [42 U.S.C. 3750 et seq.].

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

 

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding reduction as specified in subsection (a) of this section.

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

**Credits**

(Pub.L. 109-248, Title I, § 125, July 27, 2006, 120 Stat. 598.)

Notes of Decisions (1)

42 U.S.C.A. § 16925, 42 USCA § 16925
Current through P.L. 112-283 approved 1-15-13

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CALIFORNIANS AGAINST SEXUAL EXPLOITATION ACT ("CASE ACT")

SECTION 1. Title.

This measure shall be known and may be cited as the "Californians Against Sexual Exploitation Act" ("CASE Act").

SEC. 2. Findings and Declarations.

The people of the State of California find and declare:

1. Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance.
2. Human trafficking is a crime against human dignity and a grievous violation of basic human and civil rights. Human trafficking is modern slavery, manifested through the exploitation of another's vulnerabilities.
3. Upwards of 300,000 American children are at risk of commercial sexual exploitation, according to a United States Department of Justice study. Most are enticed into the sex trade at the age of 12 to 14 years old, but some are trafficked as young as four years old. Because minors are legally incapable of consenting to sexual activity, these minors are victims of human trafficking whether or not force is used.
4. While the rise of the Internet has delivered great benefits to California, the predatory use of this technology by human traffickers and sex offenders has allowed such exploiters a new means to entice and prey on vulnerable individuals in our state.
5. We need stronger laws to combat the threats posed by human traffickers and online predators seeking to exploit women and children for sexual purposes.
6. We need to strengthen sex offender registration requirements to deter predators from using the Internet to facilitate human trafficking and sexual exploitation.

SEC. 3. Purpose and Intent.

The people of the State of California declare their purpose and intent in enacting the CASE Act to be as follows:

1. To combat the crime of human trafficking and ensure just and effective punishment of people who promote or engage in the crime of human trafficking.
2. To recognize trafficked individuals as victims and not criminals, and to protect the rights of trafficked victims.
3. To strengthen laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to track and prevent online sex offenses and human trafficking.

* * *

SEC. 9. Section 290 of the Penal Code is amended to read:

290. (a) Sections 290 to ~~290.023~~ *290.024*, inclusive, shall be known and may be cited as the Sex Offender Registration Act. All references to "the Act" in those sections are to the Sex Offender Registration Act.

(b) Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.

(c) The following persons shall be required to register:

Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, *subdivision (b) and (c) of Section 236.1*, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.

SEC. 10. Section 290.012 of the Penal Code is amended to read:

290.012. (a) Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subdivision (b) of Section 290. At the annual update, the person shall provide current information as required on the Department of Justice annual update form, including the information described in paragraphs (1) to ~~(3)~~ *(5)*, inclusive of subdivision (a) of Section 290.015. The registering agency shall give the registrant a copy of the registration requirements from the Department of Justice form.

(b) In addition, every person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, shall, after his or her release from custody, verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer, in a manner established by the Department of Justice. Every person who, as a sexually violent predator, is required to verify his or her registration every 90 days, shall be notified wherever he or she next registers of his or her

increased registration obligations. This notice shall be provided in writing by the registering agency or agencies. Failure to receive this notice shall be a defense to the penalties prescribed in subdivision (f) of Section 290.018.

(c) In addition, every person subject to the Act, while living as a transient in California, shall update his or her registration at least every 30 days, in accordance with Section 290.011.

(d) No entity shall require a person to pay a fee to register or update his or her registration pursuant to this section. The registering agency shall submit registrations, including annual updates or changes of address, directly into the Department of Justice Violent Crime Information Network (VCIN).

SEC. 11. Section 290.014 of the Penal Code is amended to read:

290.014. (a) If any person who is required to register pursuant to the Act changes his or her name, the person shall inform, in person, the law enforcement agency or agencies with which he or she is currently registered within five working days. The law enforcement agency or agencies shall forward a copy of this information to the Department of Justice within three working days of its receipt.

*(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.*

SEC. 12. Section 290.015 of the Penal Code is amended to read:

290.015. (a) A person who is subject to the Act shall register, or reregister if he or she has previously registered, upon release from incarceration, placement, commitment, or release on probation pursuant to subdivision (b) of Section 290. This section shall not apply to a person who is incarcerated for less than 30 days if he or she has registered as required by the Act, he or she returns after incarceration to the last registered address, and the annual update of registration that is required to occur within five working days of his or her birthday, pursuant to subdivision (a) of Section 290.012, did not fall within that incarceration period. The registration shall consist of all of the following:

(1) A statement in writing signed by the person, giving information as shall be required by the Department of Justice and giving the name and address of the person's employer, and the address of the person's place of employment if that is different from the employer's main address.

(2) The fingerprints and a current photograph of the person taken by the registering official.

(3) The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person.

*(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.*

~~(4)~~ *(7)* Notice to the person that, in addition to the requirements of the Act, he or she may have a duty to register in any other state where he or she may relocate.

~~(5)~~ *(8)* Copies of adequate proof of residence, which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable. If the person has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact. Upon presentation of proof of residence to the registering official or a signed statement that the person has no residence, the person shall be allowed to register. If the person claims that he or she has a residence but does not have any proof of residence, he or she shall be allowed to register but shall furnish proof of residence within 30 days of the date he or she is allowed to register.

(b) Within three days thereafter, the registering law enforcement agency or agencies shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the Department of Justice.

(c)(1) If a person fails to register in accordance with subdivision (a) after release, the district attorney in the jurisdiction where the person was to be paroled or to be on probation may request that a warrant be issued for the person's arrest and shall have the authority to prosecute that person pursuant to Section 290.018.

(2) If the person was not on parole or probation at the time of release, the district attorney in the following applicable jurisdiction shall have the authority to prosecute that person pursuant to Section 290.018:

(A) If the person was previously registered, in the jurisdiction in which the person last registered.

(B) If there is no prior registration, but the person indicated on the Department of Justice notice of sex offender registration requirement form where he or she expected to reside, in the jurisdiction where he or she expected to reside.

(C) If neither subparagraph (A) nor (B) applies, in the jurisdiction where the offense subjecting the person to registration pursuant to this Act was committed.

SEC. 13. Section 290.024 is added to the Penal Code, to read:

*290.024. For purposes of this chapter, the following terms apply:*

*(a) "Internet service provider" means a business, organization, or other entity providing a computer and communications facility directly to consumers 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.*

*(b) "Internet identifier" means an 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 communication.*