

1 KAMALA D. HARRIS  
 Attorney General of California  
 2 PETER K. SOUTHWORTH  
 Supervising Deputy Attorney General  
 3 ROBERT D. WILSON  
 Deputy Attorney General  
 4 State Bar No. 136736  
 1300 I Street, Suite 125  
 5 P.O. Box 944255  
 Sacramento, CA 94244-2550  
 6 Telephone: (916) 327-7870  
 Fax: (916) 324-8835  
 7 E-mail: Robert.Wilson@doj.ca.gov  
 Attorneys for Kamala D. Harris,  
 8 Attorney General of California

9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11  
 12  
 13 **JOHN DOE, JACK ROE, AND**  
 14 **CALIFORNIA REFORM SEX OFFENDER**  
 15 **LAWS, ON BEHALF OF THEMSELVES AND**  
 16 **OTHERS SIMILARLY SITUATED,**

Plaintiffs,

v.

17  
 18 **KAMALA D. HARRIS, ATTORNEY**  
 19 **GENERAL OF CALIFORNIA, AND CITY OF**  
 20 **ALAMEDA,**

Defendants.

Case No. 3:12-cv-05713-TEH

**OBJECTIONS OF DEFENDANT**  
**KAMALA D. HARRIS TO**  
**DECLARATION OF DAVID G. POST IN**  
**SUPPORT OF PLAINTIFFS' MOTION**  
**FOR PRELIMINARY INJUNCTION**

Date: December 17, 2012  
 Time: 10:00 a.m.  
 Courtroom: 12  
 Judge: The Honorable Thelton E.  
 Henderson  
 Trial Date: Not Set  
 Action Filed: November 6, 2012

21  
 22  
 23 Defendant Kamala D. Harris (Defendant) objects to the Declaration of David G. Post filed  
 24 in support of Plaintiffs' Motion for Preliminary Injunction. The Post Declaration is objectionable  
 25 for several reasons and should be disregarded in its entirety.

26 Evidence submitted to the Court on motion practice must meet all requirements for  
 27 admissibility of evidence if offered at the time of trial. *Beyene v. Coleman Sec. Services, Inc.*,  
 28 854 F.2d 1179, 1181-82 (9th Cir. 1988); *Travelers Cas. & Sur. Co. of Am. v. Telstar Const. Co.*,

1 *Inc.*, 252 F. Supp. 2d 917, 923 (D. Ariz. 2003). *See also* Fed. R. Evid. 101 (Rules of Evidence  
 2 apply to all proceedings in the courts of the United States); Fed. R. Evid. 1101 (listing exceptions  
 3 to Rule 101). Such evidence must be relevant to the claims and defenses of the case. Fed. R.  
 4 Evid. 401. Testimonial evidence must be based on facts or data a purported expert has been made  
 5 aware of or personally observed. Fed. R. Evid. 703. Testimony requiring scientific, technical, or  
 6 other specialized knowledge may be given only by an expert witness with the requisite  
 7 knowledge, skill, experience, training, or education, and opinion testimony is not permitted of a  
 8 lay person. Fed. R. Evid. 701, 702; *see also U.S. Aviation Underwriters, Inc. v. Yellow Freight*  
 9 *Sys., Inc.*, 296 F. Supp. 2d 1322, 1331 (S.D. Ala. 2003) (unqualified expert opinions inadmissible  
 10 at summary judgment). The Post Declaration fails to meet one or more of these criteria, as set  
 11 forth below.

	<b>Proffered Evidence</b>	<b>Objection</b>
1. 14 15 16 17	Post Declaration, ¶ 3a: The CASE Act’s definitions of the terms “Internet service provider” and “Internet identifier” reporting requirements are ambiguous and would cause uncertainty for officials and registrants.	The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
2. 18 19 20 21 22 23	Post Declaration, ¶ 3b: Under reasonable and plausible readings of the statutory language, the CASE Act’s “Internet service provider” and “Internet identifier” definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller and seemingly capriciously-chosen subset of those communications.	The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
3. 24 25 26 27 28	Post Declaration, ¶ 3c: Under any reading of the statutory text, the CASE Act will substantially curtail registrants’ ability to engage in anonymous communication, and will require considerable and burdensome reporting even for ordinary, non-anonymous communication.	The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.

	<b>Proffered Evidence</b>	<b>Objection</b>
4.	Post Declaration, ¶¶ 4-5 (Background and experience)	<p>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist and has no declared awareness of the California Department of Justice's policies, practices or procedures.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999).</p>
5.	Post Declaration, ¶¶ 6-17 (Background: Size and Use of the Internet)	The witness' opinions are irrelevant. Fed. R. Evid. 402.
6.	<p>Post Declaration, ¶ 20: The phrase "any electronic mail address, user name, screen name, or similar identifier" could include almost any information a person uses to refer to himself or herself on the Internet, including:</p> <p>a. A person's real name, when used as a user name, screen name, or similar identifier;</p> <p>b. The word "Anonymous," when used as a user name, screen name, or similar identifier;</p> <p>c. Any temporary or permanent forwarding address, such as one created on behalf of a person posting an article for sale on craigslist. (Any such address could be an "Internet identifier" regardless of whether the registrant were actually aware of its creation or existence.)</p>	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
7.	Post Declaration, ¶ 21: The phrase "any electronic mail address, user name, screen name, or similar identifier" could also include information about other people. The natural reading of the phrase "used by the person" is "used to identify the	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11 12	<p>person,” but there is also a possible unintended reading: “employed for any purpose by the person.” Because people “use” other people’s Internet identifiers when communicating with or referring to those people, an “identifier used for [the specified purposes]” could be read to include every identifier a registrant uses to communicate or even refer to another Internet user.</p>	<p>person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p>8. Post Declaration, ¶ 23: Without the names of the associated websites, blogs, or social networking sites, however, the information being reported often may be of no practical value to law enforcement. It is difficult to imagine any practical value in merely knowing that <i>e.g.</i>, a registrant used the identifier “Angry_User” as an Internet identifier <i>somewhere</i> on the Internet on November 7, 2012, because there may well be thousands, or hundreds of thousands, of postings across the Internet on that day with that “identifier,” posted by thousands or hundreds of thousands of different people.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice’s policies, practices or procedures.</p> <p>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5		<i>See also, Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i> , 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	9. Post Declaration, ¶ 24: The disutility of this information, standing alone, may well lead law enforcement officials to demand that registrants additionally report the particular website/blog/social networking site associated with each reported username.	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.</p> <p>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
25 26 27 28	10. Post Declaration, ¶ 25: Similarly, it is unclear how the requirement to report "any and all Internet identifiers . . . used by the person" applies to a person who uses the same username (e.g. "davidgpost") for several different newspaper websites,	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	political blogs or other services.	<p>witness has no declared awareness of the California Department of Justice’s policies, practices or procedures.</p> <p>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
20 21 22 23 24 25 26 27 28	11. Post Declaration, ¶ 26: On many sites or services, distinct additional identifiers, such as an account number or email forwarding address may be automatically “established” for the person and used internally or externally to enable forms of communication encompassed by the definition of Internet identifier in the Act. It is unclear whether each identifier for a given service must be reported.	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
		<p>is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
12.	<p>Post Declaration, ¶ 27: The ordinary meanings of the terms used in the phrase “used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communications” appears to encompass a vast array of Internet communications on a wide range of subjects.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
13.	<p>Post Declaration, ¶ 28: I would describe an “Internet forum discussion” as an online site where individuals can participate in a discussion by means of posting messages or comments. As such, any site that permits comments by visitors would appear to be an “Internet forum discussion,” or at the very least “similar” to an “Internet forum discussion.” This would include:</p> <p>a. Many, if not most, news-oriented websites, which often permit comments on at least some of the articles or other content on the site.</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	<p>b. Many, if not most, political, legal, and current affairs sites. For example, the “Volokh Conspiracy” blog, where I am a regular contributor, permits site visitors to leave comments and to participate in a discussion about individual blog postings, using a username of the visitor’s choosing.</p> <p>c. Many sites promoting discussions of sensitive topics such as sexuality, alcoholism, etc. In particular, the website for California Reform Sex Offender Laws (<a href="http://californiarsol.org/">http://californiarsol.org/</a>), a group advocating on behalf of convicted sex offenders, includes a discussion forum.</p> <p>d. Many commercial sites, such as Amazon.com or eBay.com, which allow users to post feedback on recent purchases or otherwise participate in group discussions.</p> <p>e. Many entertainment sites, such as HBO.com or YouTube.com, which allow users to start, or to participate in, online discussions of the content posted at the site or other matters.</p> <p>f. Many blogs, which increasingly use platforms such as WordPress or Tumblr and allow visitors to comment or otherwise contribute.</p> <p>g. Most sites offering social networking functionality as described in ¶¶35-36 below.</p>	<p>create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
21 22 23 24	<p>14. Post Declaration, ¶ 29: I estimate that the number of sites falling into one or more of these categories is in the millions, if not the hundreds of millions.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p>
25 26 27 28	<p>15. Post Declaration, ¶ 30: The term “Internet chat room discussions” is undefined and broad. The term “chat,” in cyberspace jargon, generally refers to any form of online “synchronous conferencing”– applications that allow users to exchange</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p>



	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10	messages (usually text, but increasingly, these days, including video content as well) with at least one other known user, in real time.	<p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
11 12 13 14 15 16 17 18 19 20 21	16. Post Declaration, ¶ 31: "Instant messaging" is another name for functionality that permits users to exchange messages (text or video) to one or more other known users in real-time. As such, it is largely overlapping with "Internet chat room discussion."	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
22 23 24 25 26 27 28	17. Post Declaration, ¶ 32: The Facebook "chat" function is a typical web-based chat application; when a user logs on to her Facebook account, she is presented with a list of her "friends" – other users who have accepted, or extended, a "friend request" to her in the past – who are currently logged on to their Facebook accounts, and she can choose any one of them with whom to "chat," i.e., to exchange messages one-to-one in real-time.	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
		<p>is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
18.	<p>Post Declaration, ¶ 33: Hundreds of thousands of ordinary commercial websites allow users to “chat” with a service representative if they have questions about the merchandise being offered for sale, a prior order, etc.</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
19.	<p>Post Declaration, ¶ 34: A number of politicians and political candidates have participated in “online town halls” where constituents can ask questions for the politician or candidate to answer in real time. Although these events may be moderated, they are otherwise functionally equivalent to any other “chat.”</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire</i></p>

	<b>Proffered Evidence</b>	<b>Objection</b>
		<i>Co. v. Carmichael</i> , 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i> , 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).
20.	<p>Post Declaration, ¶ 35: The term “social networking” is also extremely broad. In the Internet context, “social networking” has become a widely used catchphrase to define a class of online functions, spurred largely by the phenomenal popularity of such sites as Myspace, LinkedIn, Twitter, and Facebook. There is no consensus definition of the term, although it generally describes websites that allow users to create searchable profiles, and that contains mechanisms for communicating with, and linking to, other users.</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
21.	<p>Post Declaration, ¶ 36: An increasing number of web pages incorporate some form of social networking functionality in this sense. Examples include:</p> <p>a. Online commerce sites such as Amazon.com and eBay.com, b. Product and business review sites such as Yelp, c. Blogging sites and services, especially those using platforms such as WordPress and Tumblr, and</p> <p>d. User-generated or user-created content sites or services such as YouTube or Pinterest.</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
22.	Post Declaration, ¶ 37: I estimate that the number of websites incorporating such functionality – without even considering sites that are “similar” in some unspecified manner to these sites – is in the millions, if not hundreds of millions.	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
23.	Post Declaration, ¶ 38: In addition, Internet sites and services are not static; instead, they are constantly adding new functionality. Thus, even a site that does not presently fall within the scope of the Act could change its functionality so that it qualified in the future. A user of the site may or may not be aware of such changes.	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
24.	Post Declaration, ¶ 39: Finally, while the Internet identifier definition sweeps	The witness’ opinions are based on speculation, conjecture, or other improper

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11 12	broadly in many respects, it also contains one significant exception. By restricting itself to “Internet” identifiers and communications, the definition appears to exclude identifiers used for communications over non-Internet networks – most importantly, the proprietary cellphone networks.	<p>matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
13 14 15 16 17 18 19 20 21 22 23 24	25. Post Declaration, ¶ 40: A substantial proportion of the billions of “instant messages” transmitted each day do not travel over “the Internet” but, instead, over one of many proprietary cellphone networks. Identifiers used for that purpose would appear to be outside the scope of the statutory reporting requirements. On the other hand, many instant messaging services do, in fact, use the Internet to handle all, or some portion, of the relevant communication. Identifiers used for those purposes would appear to be within the scope of the statute. Users of the different systems, however, may have no knowledge – and no practical way of obtaining the knowledge – about which kind of instant messaging system they are using; this information is, generally speaking, invisible to the users involved.	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
25 26 27 28	26. Post Declaration, ¶ 41: In summary, the definition for “Internet identifier” can be construed as requiring reporting of every identifier used for a vast amount of online communications. However, the exact boundaries are extremely difficult to determine, owing in part to the imprecise	The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11	language used to define the sites and services covered by the definition. Finally, although registrants are not required to report the actual site or service where they use the reported identifiers, law enforcement may nevertheless require that registrants provide such site or service association information.	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
12 13 14 15 16 17 18 19 20 21	27. Post Declaration, ¶ 45: There are three significant differences, however, between the two statutes. First, the federal definition includes only persons "engaged in the business of" providing Internet access, while the CASE Act includes "any business . . . or other entity." Second, the federal definition applies only to those providing a facility through which a "customer" can access the Internet; the CASE Act applies to those providing a facility through which "a person" may access the Internet. Finally, the FCA definition excludes a "common carrier," but only "to the extent that it provides only telecommunications services"; the CASE Act excludes any entity that "provides only" such services.	The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
22 23 24 25 26 27 28	28. Post Declaration, ¶ 46: There are a wide range of methods by which a person (or his or her device) may obtain access to the Internet: <p style="margin-left: 40px;">a. Many people access the Internet via their iPhones or other "smart" mobile devices using their wireless carrier.</p> <p style="margin-left: 40px;">b. Many people access the Internet from "cyber cafés" or "Internet cafés," which typically provide computer</p>	<p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v.</i></p>

	<b>Proffered Evidence</b>	<b>Objection</b>
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p>	<p>terminals and Internet access for a fee.</p> <p>c. Many people access the Internet from coffee shops, airport ‘hot spots,’ and hotels that provide wireless or wired Internet access for a fee or at no charge.</p> <p>d. Many people access the Internet using “open” wireless systems. Residential and business users may leave their wireless networks “open” so that anyone within range of the network, whether guest or stranger, can use their wireless connection to freely access the Internet. Devices that are configured to connect to “open” wireless systems may do so without notifying or requiring any activity on the part of the user.</p> <p>e. Many people access the Internet from their workplaces, using their employers’ systems.</p> <p>f. Many people access the Internet from libraries and educational institutions; in the latter case, access may be limited to students, faculty and staff, but not necessarily.</p>	<p><i>Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
<p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>29. Post Declaration, ¶ 47: However, if the statute covers all entities that provide a “computer and communications facility” that allows users to access the Internet, it would reach entities that most people would not ordinarily think of as ISPs, potentially including:</p> <p>a. A company that sells or rents computers, smartphones, or other devices with networking capabilities. Many businesses, such as Best Buy, Amazon.com and other electronics stores, sell devices that can access the Internet.</p> <p>b. A business or home Internet user that leaves a wireless network “open” for others to use for Internet access.</p> <p>c. A company that sells or rents cars with Internet-enabled mapping or other services.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person of ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice,</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
		<p>confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
30.	<p>Post Declaration, ¶ 48: In many circumstances, it may be difficult if not impossible for a user to know the identity of the entity or entities “used” when communicating over the Internet.</p> <p>a. An employee may use the employer’s Internet access service, but that service may in turn be provided by another entity.</p> <p>b. A mobile device user may not realize that her device is “roaming” on a different provider’s cellular network or has connected to an open wireless network.</p> <p>c. A wireless user at a coffee shop or a hotel may be using Internet access service cooperatively provided by (a) the coffee shop or hotel, (b) a traditional ISP such as AT&amp;T, and possibly (c) an intermediary who assists the coffee shop or hotel in setting up its network and/or provides the hardware or software used to connect users to the Internet.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
31.	<p>Post Declaration, ¶ 49: In addition, any form of online communication, including simply accessing a website, could be said to “use” the target computer’s Internet service provider and the providers of any intermediary networks as well as the initiator’s Internet service provider.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p>



	<b>Proffered Evidence</b>	<b>Objection</b>
		<p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
32.	<p>Post Declaration, ¶ 50: Furthermore, the Act does not limit Internet service providers to those entities which provide Internet access <i>to the registrant</i>. Thus, any registrant who "uses" any business which qualifies as an Internet service provider as to <i>any</i> person appears to be required to report this use. For example, a registrant who purchases a DVD at Best Buy plausibly is required to report that "use."</p>	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
33.	<p>Post Declaration, ¶ 51: The CASE Act's reporting requirement refers to a registrant's "account with an Internet service provider," Cal. Penal Code § 290.014(b). This can reasonably be read to imply that only entities with whom a registrant has an account must be reported, and conversely that entities with which the registrant has no account are <i>not</i> ISPs under the CASE Act.</p>	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
34.	<p>Post Declaration, ¶ 52: If so, then cyber cafés (for which one usually pays an hourly fee), coffee shops, hotels, roommates, and open wireless home or business networks (for which no account is needed) would not be ISPs under the CASE Act, insofar as consumers can readily use these facilities to obtain Internet access without setting up an account.</p>	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
35.	<p>Post Declaration, ¶ 53: However, by the same reasoning, libraries (for which one does not need an account) would not fall within the basic definition of ISP and thus would not need to be explicitly excluded.</p>	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
36.	<p>Post Declaration, ¶ 54: In addition, this reading appears to be in tension with Penal</p>	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4	Code Section 290.015(a)(5), which requires reporting of “[a] list of any and all Internet service providers used by the person” and does not imply any account requirement.	of law for the Court to decide.
5 6	37. Post Declaration, ¶ 55: It thus is unclear whether a user must report on the use of “Internet service providers” that do not provide or require an account.	The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
7 8 9 10 11	38. Post Declaration, ¶ 56: Under the plain text of this statute, only businesses that provide <i>exclusively</i> “telecommunications services, cable services, or video services” are excluded. If a company provides Internet service at all, even if the registrant does not purchase or use such service, it is encompassed by the definition.	The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
12 13 14 15 16 17	39. Post Declaration, ¶ 57: The Act’s departure from the definition of Internet access provider in federal law seems to reinforce this interpretation. See ¶¶44-45. The federal definition excludes entities that would otherwise qualify “to the extent that they provide only telecommunications services,” 47 U.S.C. § 151 (note), while the CASE Act exclusion is instead limited to entities that “ <i>provide only</i> telecommunications . . . services.” Cal. Penal Code § 290.024(b) (emphasis added).	The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
18 19 20 21 22 23 24 25 26 27 28	40. Post Declaration, ¶ 59: But extremely few companies would fall within the definition so construed, as the vast majority of telecommunications and cable television providers also offer some form of Internet access.	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5	41. Post Declaration, ¶ 60: A more reasonable reading would be that businesses that provide only telecommunications, cable, or video services to the registrant are excluded from the definition of Internet service provider—but this reading is in tension with the plain language of the bill.	The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	42. Post Declaration, ¶ 61: Thus, while a court might determine that a registrant is not required to report on his telecommunications, cable, or video services that do not involve Internet access, a cautious registrant is likely to err on the side of caution and report more than is required.	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person of ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
22 23 24 25 26 27 28	43. Post Declaration, ¶ 62: In summary, the "Internet service provider" reporting requirements appear to encompass a wide range of entities outside of the common understanding of that term, potentially including entities which a registrant has no way of identifying.	<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5		<i>See also, Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i> , 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).
6 7 8 9 10 11 12 13 14 15 16 17	44. Post Declaration, ¶ 63: The reporting provisions of the CASE Act appear to place a significant and substantial burden on the ordinary Internet user to document and submit his or her Internet usage, both because the requirements are difficult to interpret, and because they potentially encompass many, and possibly most, of the avenues through which most people in this country communicate with one another online, whether to perform their jobs, purchase goods and services, or educate or entertain themselves.	The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.  The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.  The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.  <i>See also, Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i> , 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).
18 19 20 21 22 23 24 25 26 27 28	45. Post Declaration, ¶ 64: To comply with the reporting requirements for Internet identifiers, a registrant plausibly must document and submit each distinct identifier she uses, potentially including:  a. A transient screen name in a customer support chat,  b. A newly-chosen screen name used for expressive purposes in the context of a specific political or current events discussion,  c. A temporary forwarding email alias automatically assigned by a classified ad service, and even  d. Identifiers associated with other persons that he "uses" in order to	The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.  The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.  The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.  The probative value of the witness' opinions is substantially outweighed by the prejudice,

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6	communicate with or refer to those persons.	confusion, and misleading impressions they create. Fed. R. Evid. 403.  <i>See also, Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i> , 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	46. Post Declaration, ¶ 65: To comply with the reporting requirements for Internet service providers, she plausibly must document and submit each distinct provider he uses, potentially including:  a. Each wireless network he uses at a café, hotel, or other location, including every entity involved in providing Internet access through that network;  b. Each purchase of any device that can connect to the Internet; and even  c. Each “use” he makes of any entity that provides Internet access to any person.	The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.  The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.  The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.  The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.  <i>See also, Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i> , 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).
23 24 25 26 27 28	47. Post Declaration, ¶ 66: It is also plausible that the actual reporting requirements could be construed much more narrowly. However, because of the significant ambiguities in the law, a registrant wishing to “play it safe” would attempt to report far more than the narrowest possible construction, particularly if there are criminal penalties for noncompliance.	The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness’ opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11		<p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	48. Post Declaration, ¶ 67: While the statute on its face only requires a registrant to document and submit Internet identifiers, but not the sites or services for which she creates or uses identifiers, law enforcement may nevertheless demand that registrants provide such site or service association information. Similarly, it is unclear whether she is required to report the reuse of a previously reported user name on a new service.	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.</p> <p>The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person of ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice,</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6		<p>confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
7 8 9 10 11 12 13 14 15 16 17 18	<p>49. Post Declaration, ¶ 68: Taken as a whole, the CASE Act’s reporting requirement for “Internet identifiers” and “Internet service providers” may encompass all of the forms of online speech and mechanisms of accessing the Internet discussed above, or some vaguely-defined and apparently arbitrary subset thereof.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness’ opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
19 20 21 22 23	<p>50. Post Declaration, ¶ 69: In addition, the CASE Act may require reporting not only of Internet identifiers and Internet service providers that the registrant currently uses or uses in the future, but also identifiers and providers that the registrant has used in the past. There is no guidance in the statute as to whether or not it extends to past information.</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
24 25 26 27 28	<p>51. Post Declaration, ¶ 70: Exhaustively documenting all such information may be difficult if not impossible for many persons, and as a result may deter residents from participating in online communications so as to avoid the burden of reporting on such activities or the accompanying risk of criminal penalties if</p>	<p>The witness’ opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness’ opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice’s policies,</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11 12 13 14	she fails to do so.	<p>practices or procedures.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
15 16 17 18 19 20 21 22 23 24 25 26 27 28	52. Post Declaration, ¶ 71: In addition, the reporting requirements of the CASE Act will prohibit or chill many forms of anonymous online speech and online association.	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice,</p>



	<b>Proffered Evidence</b>	<b>Objection</b>
		<p>confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
53.	<p>Post Declaration, ¶ 72: Anonymous political speech has long contributed to important public discourse in this country. This includes both anonymous speech in the strict sense of speech having no indication of authorship at all (e.g., Thomas Jefferson’s publication of Notes on the State of Virginia, published anonymously because of the radical views on a number of sensitive political matters that were expressed in the book) and pseudonymous speech (e.g., the John Jay-James Madison-Alexander Hamilton collaboration published “The Federalist” under an assumed name (“Publius”).</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p>
54.	<p>Post Declaration, ¶ 73: In the modern era, the U.S. Supreme Court has recognized the importance of anonymity to political speech and association. “Under our constitution, anonymous [speech] ... is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” <i>McIntyre v. Ohio Elections Comm.</i>, 514 U.S. 334, 357 (1995). Courts routinely protect the identities of online speakers against discovery in litigation. <i>See, e.g., In re Anonymous Online Speakers</i>, 611 F.3d 653 (9th Cir. 2010); <i>Highfields Capital Mgmt., LP v. Doe</i>, 385 F.Supp.2d 969 (N.D. Cal. 2005); <i>Columbia Insurance Co. v. Seescandy.com</i>, 185 F.R.D. 573 (N.D. Cal. 1999).</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402.</p> <p>The witness’ opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p>
55.	<p>Post Declaration, ¶ 74: In addition, individuals enjoy the “right to be protected from compelled disclosure by the State” of their associations and affiliations, and thus the freedom of association. <i>NAACP v. Alabama</i>, 357 U.S. 449, 458 (1958); <i>see also Brown v. Socialist Workers</i>, 459 U.S. 87, 91 (1982); <i>Shelton v. Tucker</i>, 364 U.S.</p>	<p>The witness’ opinions are irrelevant. Fed. R. Evid. 402.</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3	479, 488 (1960); <i>Perry v. Schwarzenegger</i> , 591 F.3d 1147, 1159-60 (9th Cir. 2010).	
4 5 6 7 8	56. Post Declaration, ¶ 75: Many if not most of the online communications covered by the CASE Act allow users to participate under a pseudonym. Examples exist in all categories, from social networks (Twitter, Google+) to forums on news sites (New York Times) to user-generated content services (Flickr) to product and business review sites (Yelp).	The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
9 10 11 12 13	57. Post Declaration, ¶ 76: Some sites and services permit users to create a screen name without even divulging their name or other identifier to the site itself. This appears to be particularly common for sites focused on sensitive topics where contributors are particularly concerned about protecting their identity.	The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness' opinions are irrelevant. Fed. R. Evid. 402. Due Process requires only that a person ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.
14 15 16	58. Post Declaration, ¶ 77: Under the CASE Act, however, any registrant wishing to use an online pseudonym for any reason will be required to disclose his/her real identity to the government.	The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.
17 18 19 20 21 22 23 24 25 26 27 28	59. Post Declaration, ¶ 78: In addition, while the Act does not appear to require registrants to disclose the actual sites which they use, it is possible that registration agencies will nonetheless request or demand such information. See ¶¶22-24.	The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.  The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.  The witness is not qualified as an expert on the particular subject to which his opinion relates. Fed. R. Evid. 702. He is not a declared criminalist.  The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.  The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7		<p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
8 9 10 11 12 13 14 15 16 17	<p>60. Post Declaration, ¶ 79: This is of particular concern for individuals, such as members of California Reform Sex Offender Laws, who rely on online anonymous speech to discuss political issues related to their status as a sex offender, or who exercise their right to speak anonymously in order to criticize public officials – activities for which they have a reasonable fear of retribution were their true identities to be disclosed.</p>	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
18 19 20 21 22	<p>61. Post Declaration, ¶ 80: In addition, the CASE Act does not restrict law enforcement's broad discretion to further disseminate any information it collects, creating the further possibility of retribution from private parties.</p>	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
23 24 25 26 27 28	<p>62. Post Declaration, ¶ 81: As a result, the CASE Act is likely to substantially chill speech by an already-vulnerable population and make it more difficult for registrants to self-organize and advocate for change in their own interest.</p>	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are not based on reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice's policies, practices or procedures.</p> <p>The witness' opinions are irrelevant. Fed. R.</p>

	<b>Proffered Evidence</b>	<b>Objection</b>
1 2 3 4 5 6 7 8 9 10 11 12 13 14		<p>Evid. 402. Due Process requires only that a person of ordinary intelligence receive fair notice. Expert testimony on what a person of ordinary intelligence understands is, by definition, irrelevant.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p> <p>The witness' opinions are not likely to help the Court or any other trier of fact. Fed. R. Evid. 702.</p> <p>The probative value of the witness' opinions is substantially outweighed by the prejudice, confusion, and misleading impressions they create. Fed. R. Evid. 403.</p> <p><i>See also, Daubert v. Merrell Dow Pharms., Inc.</i>, 509 U.S. 579, 591 (1993); <i>Kumho Tire Co. v. Carmichael</i>, 526 U.S. 137, 147-148 (1999); <i>Washington State Grange v. Washington State Republican Party</i>, 522 U.S. 442, 450-451 (2008) (Claims of facial invalidity often rest on speculation.).</p>
15 16 17 18	63. Post Declaration, ¶ 82: The CASE Act's definitions of the terms "Internet service provider" and "Internet identifier" reporting requirements are ambiguous and would cause uncertainty for officials and registrants.	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
19 20 21 22 23 24 25	64. Post Declaration, ¶ 83: Under reasonable and plausible readings of the statutory language, the CASE Act's "Internet service provider" and "Internet identifier" definitions and reporting requirements would sweep in many, if not most, of the ways that people communicate over the global network; under other reasonable and plausible readings of the statutory language, they would cover a much smaller seemingly capriciously chosen subset of those communications.	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.</p>
26 27 28	65. Post Declaration, ¶ 84: Under <i>any</i> reading of the statutory text, the CASE Act will substantially curtail registrants' ability to engage in anonymous communication, and will require considerable and burdensome	<p>The witness' opinions are based on speculation, conjecture, or other improper matter. Fed. R. Evid. 703.</p> <p>The witness' opinions are not based on</p>

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<b>Proffered Evidence</b>	<b>Objection</b>
	reporting even for ordinary, non-anonymous communication.	reliable facts or data. Fed. R. Evid. 703. The witness has no declared awareness of the California Department of Justice’s policies, practices or procedures.  The witness’ opinions are irrelevant. Fed. R. Evid. 402. Statutory construction is a matter of law for the Court to decide.

Dated: November 26, 2012

Respectfully submitted,

KAMALA D. HARRIS  
 Attorney General of California  
 PETER K. SOUTHWORTH  
 Supervising Deputy Attorney General

/s/ ROBERT D. WILSON

ROBERT D. WILSON  
 Deputy Attorney General  
*Attorneys for Defendant  
 Kamala D. Harris,  
 California Attorney General*

SA2012108623  
 10997779.doc