13-15263, 13-15267

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE, et al.,

Plaintiffs - Appellees,

v.

DAPHNE PHUNG, et al.,

Intervenors - Appellants,

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

Defendant - Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant-appellant Attorney General joins in the Intervenors' reply brief, which argues that the Californians Against Sexual Exploitation Act ("CASE Act" or "Act") does not trigger First Amendment scrutiny and does not improperly impinge on anonymous speech. The Act, enacted as Proposition 35 by an overwhelming number of California voters, is narrowly tailored and gives registrants fair notice of its requirements. The significance of the state's interest in protecting its children and other vulnerable citizens from particularly harmful crimes has never been disputed. On balance, the hardships implicated by the district court's injunction clearly favor the State of California. We again write separately to address plaintiff-appellees' arguments concerning law enforcement's access to, and use of, Internet information under the CASE Act.

INTRODUCTION

The district court's decision to grant a preliminary injunction halting law enforcement's practice of collecting Internet information from sex offender registrants, based on passage of the CASE Act, was based in a large part on its conclusion that the Attorney General's assurances against improper use were no more reliable than the assurances of non-enforcement of an ordinance by a city in *Comite de Jornalereos de Redondo Beach* v. *City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011). But the Attorney General's arguments were based on the express language of the Act, pre-existing limitations on the disclosure of a registered sex offender's information, and the reality that California had been collecting virtually identical information for more than one year without any of the negative consequences posited by plaintiff-appellees. There has not been, nor will

there be, a chilling effect sufficient to conclude that the challenged provisions are unconstitutional, or to enjoin the use of this vital information.

I. THE ATTORNEY GENERAL'S CONTENTIONS HOW THE CASE ACT WILL BE USED BY LAW ENFORCEMENT ARE BASED ON THE EXPRESS LANGUAGE OF THE ACT, EXISTING LAW, AND CALIFORNIA'S EXPERIENCE IN COLLECTING THIS DATA PRIOR TO PASSAGE OF THE ACT.

A key factor in the district court's decision to grant the requested injunction was the possibility that, without sufficient statutory restraints, law enforcement might misuse the information. In *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), the challenged statutory requirement that sex offender registrants provide Internet information evolved from one that expressed only a general purpose to one which explained more clearly that the purpose was to "assist in investigating kidnapping and sex-related crimes, and in apprehending offenders." *Id*. at 1221, 1225. The district court here did not construe the CASE Act's parallel statement of purpose "to allow law enforcement to track and prevent online sex offenses" (Prop. 35, § 3, ¶ 3; ER 0009) as similarly defining and limiting the purpose for which California law enforcement would use this information.

Instead, the district court cited *Comite de Jornalereos de Redondo Beach v. City of Redondo Beach* and refused to presume that the Attorney General and local law enforcement would act in good faith. ER 0013. But that decision, along with additional authorities cited by plaintiff-appellees on page 44 of their brief, are inapposite. In *United States v. Stevens*, 559 U.S. 460 (2010) the reach of 18 U.S.C. § 48, a prohibition against the depiction of animal cruelty, was called into constitutional question under the First

Amendment. Section 48 was enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty, in particular "crush videos," which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish. *Id.* at 442 ("Crush videos often depict women slowly crushing animals to death with their bare feet or while wearing high heeled shoes, sometimes while talking to the animals in a kind of dominatrix patter . . . " (internal quotation marks omitted)). The statute criminalized the depiction only if the conduct violated federal or state law where the creation, sale, or possession took place. *Id.* at 448 - 449. Accordingly, it would have permitted some persons to lawfully create a depiction (a hunting video, for example, filmed in a state where hunting is lawful) but would subject a person to prosecution if that same depiction were sold in a jurisdiction where hunting is unlawful. *Id.*

But Stevens was convicted for selling videos depicting dog fighting, not producing crush videos. In an attempt to avoid an overbreadth problem, the government assured the courts that that law would apply only to those engaged in filming "crush videos" and other more limited situations. *United States v. Stevens*, 559 U.S. at 452. Inasmuch as there was no such limitation anywhere in the statute, the Supreme Court held that the statute was substantially overbroad, and therefore invalid under the First Amendment. *Id.*

As explained fully in the Attorney' General's opening brief, the decision in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* involved the same scenario: a public entity assuring the courts that it will act in good faith when enforcing the challenged statute, even though on

its face the statute does not contain the restrictions the agency promises to follow.

This case is different. The Attorney General showed that the CASE Act was not devoid of guidance on how its provisions were to be used by law enforcement and that hornbook principles of law required there must be some nexus between the prevention or resolution of a sexual exploitation crime to justify law enforcement access to, and use of, the Internet information the Act requires. What distinguishes this case from *Stevens* and *Comite* is that the Attorney General's representations of how the Case Act would be applied do not rest only on a promise of good faith.

A. The CASE Act requires that law enforcement access to, and use of, the required Internet information be predicated on the prevention or investigation of online sex offenses and human trafficking.

The Act's Findings and Declarations explain that "the predatory use" of the Internet by "sex offenders have allowed such exploiters a new means to entice and prey on vulnerable individuals in our state." Act, § 2, ¶ 4; ER-0009-10. Thus, the Act is intended to "strengthen the 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; ER-0009-10. This plain language -- "to allow law enforcement to track and prevent online sex offenses and human trafficking" – defines the scope of permissible access to and use of a sex offender's Internet information. Contrast this with the ordinance in *Comite*, which prohibited solicitation and attempted solicitation of employment and business (657 F.3d 936, 941-42), and the greater specificity of the CASE Act becomes clear. Contrast the language of the CASE Act with the original

statute in *Shurtleff,* which had no restrictions on how Utah law enforcement could use sex offender internet information (628 F.3d at 1217, 1221), and again the CASE Act is observed to be much more specific. None of plaintiff-appellees' authorities refute the Attorney General's showing that whatever use California law enforcement might make of a sex offender's Internet information, the express language of the statute itself requires an articulable nexus between the use and the Act's stated purpose.

B. California law also restricts law enforcement access to, and use of, the information the Act requires to be registered.

1. Pursuant to Penal Code section 290.021, and Government Code section 6254(f), the required information is not a public record.

Penal Code section 290.021 provides that a registrant's information is not open to inspection by the public or any person, other than a regularly employed peace officer or other law enforcement officer. Cal. Penal Code § 290.021. This information also is exempt from disclosure under California's Public Records Act. Cal. Gov't Code § 6254(f).

Except for information made publically available on California's Megan's Law website, these provisions preclude a member of the general public from accessing a registrant's information.[1] In fact, absent an official nexus to preventing, investigating, or solving a sex-related crime, a peace officer has no greater rights to information beyond that provided on the Megan's Law website than any other member of the public. Thus,

[1] No Internet identifying information is posted, or proposed to be posted, on California's public Megan's Law website.

California requires that every law enforcement request for access to this information be based on a need-to-know, right-to-know. Declaration of Linda Schweig, ¶ 10, ER-0323. The public, whether a single person, a business, or a day-care center, cannot access a registrant's Internet information unless law enforcement releases it under specific circumstances to them and without subjecting itself to the penalties that accrue if that information is misused.

2. Penal Code section 290.45 cannot be read to permit unbridled, widespread disclosure of a registered sex offender's information.

In their brief, plaintiff-appellees acknowledge that California publically discloses varying amounts of information about registrants, depending on commitment offense and provides a process for registrants to apply for exclusion from the publically accessible website if they meet certain criteria. Appellees' Brief, p. 40, n.14. That statement reiterates a point the Attorney General made in her opening brief, *i.e.*, the Penal Code section 290 scheme in general, and section 290.45 in particular, does not permit widespread disclosure of any and all sex offender information pertaining to any and all registered sex offenders. Appellant's Opening Brief, p. 22. For this reason, plaintiff-appellees' allegation that Penal Code section 290 permits law enforcement a broad array of disclosure opportunities does not present an accurate picture of how the CASE Act information may be used.

Principally, plaintiff-appellees rely on statutory changes to Penal Code section 290.45 enacted in 2005 to support their "broad array" theory. Appellees' Brief, pp. 12-13. Plaintiff-appellees argue that the change, which

amended the 290.45 reasonable suspicion requirement, now implies that police are free to release a registered sex offender's Internet information to the public at large for any reason as long as it can be tied to a "when necessary for public safety" ground. It is true that the reasonable suspicion standard has been amended, but that change can only be understood in the context in which it was made.

California had been collecting and using registered sex offender information since 1947. Section 290.45 was added in 2003. Assuming (without conceding) plaintiff-appellees' argument that the change in section 290.45 in 2005 resulted in a loosening of restrictions on law enforcement, there is nothing in the record showing that law enforcement was misusing that limited public notification statute. If anything, it is reasonable to conclude that if law enforcement had misused the disclosure provisions in any way during the two years between 2003 and 2005, the Legislature would have tightened, not loosened, section 290.45 restrictions. Even to date, there is no evidence in the record of law enforcement misuse of this provision, and there is no showing that law enforcement has disclosed Internet information to the public. See Declaration of Linda Schewig, ¶ 16, ER-0327.

The Legislature showed that it was aware of the potential of law enforcement misuse of a registered sex offender's information in 2006 when it adopted Penal Code section 290.03. There, the Legislature expressly balanced the possibility of data misuse, as evidenced in Oregon and Washington, against the benefit to society in having information with which it may protect itself. Cal. Penal Code § 290.03. Put another way, after at least two years of actual practice in community notification, the Legislature expressed no reason whatsoever to further constrain law enforcement

practices. The histories of sections 290.45 and 290.03 express a view of law enforcement practice which is the polar opposite of the district court's assumption that law enforcement may overuse the public notification provisions of the current sex offender registration statutes.

C. California's collection of similar information during the year prior to the CASE Act demonstrates that the imagined chilling effects, if they exist at all, do not exist on any scale even remotely close to that advanced by plaintiff-appellees.

If law enforcement's collection of a registrant's Internet information had a chilling effect, that fact would have been manifest by now. But there is not a single claim of that happening, despite the fact that California had been collecting Internet identifying information over a year prior to enactment of the CASE Act. Declaration of Linda Schewig, ¶ 13, ER-0324. Plaintiff-appellees simply ignored this vital showing in their brief (and in the district court). Instead, they simply continue to press their arguments about all the terrible things that could potentially happen if registrants are required to provide this information as part of their registration process.

There was no evidence in the record (and we are aware of none) that, during the year that the Department of Justice and local law enforcement collected sex offender Internet information from registrants:

- Any registrant complained to the Department of Justice that his or her speech was chilled by the registration requirement;
- Any registrant complained that he or she did not understand what information to provide;
- There were any prosecutions for failing to provide the Internet information;
- There were any reported illegitimate attempts by law enforcement to access the information;

- There were any reports of widespread public dissemination (or any dissemination at all for that matter) of a registered sex offender's Internet information;
- There were any claims of improper surveillance.

It is remarkable that plaintiff-appellees can assert that the subsequent passage of the CASE Act in November 2012 will somehow suddenly raise the specter of these events happening and therefore intolerably chill their purported First Amendments rights.

Plaintiff-appellees argue that a 2009 survey by the California Sex Offender Management Board confirms that law enforcement has conducted community notifications and provided non-Internet information beyond that contained on the public Megan's Law website. Appellees Brief, p. 14. Upon examination of the survey itself, one discovers that there is no question that even calls for such a response. Appellees' Supplemental Excerpts of Record, pp. 014-023. Nor is there any information which explains: what information was released, why the specific information was selected, to whom the information was distributed, what restrictions were placed on the dissemination of the information, who decided to release the information, or what internal or external procedures were followed prior to, during and after the dissemination, whether there was any specific articulable repercussions, and if so, what actions law enforcement took to correct the situation. *Id.* In short, the propriety or impropriety of any community notification is extremely fact-specific and there is no showing of any broad dissemination.

Plaintiff-appellees are alarmed that information might be disseminated to the "public at large" (it is not clear what plaintiff-appellees mean by this term) "when no crime has been committed." But, the only reason a

registered sex offender is required to register in the first instance is because he or she committed a crime the Legislature has constitutionally considered serious enough to warrant registration in the interests of public safety. Also, the proposition that information may only be disseminated after a new crime has been committed ignores a major purpose of the section 290 scheme – that a member of the public must be provided with information to protect himself, herself, or their children before they become victims. Cal. Penal Code § 290.03(a)(2). Finally, the information may be needed to investigate actual ongoing criminal activity. As an example, if a parent of a young girl became concerned about suspicious Internet communications in which the child is engaged, that parent might need the help of law enforcement to at least exclude the possibility that the child is communicating with a registered sex offender. If the communicant is in fact a sex offender, further investigation may be warranted. To wait until law enforcement is certain "a crime has been committed" would be tragic.

Based on the express language of the CASE Act, before any Internet information may be disclosed to any member of the public there has to be some articulable nexus between public safety and the disclosure. Absent that nexus, it cannot be disclosed. This position is not simply and only an assurance by law enforcement, it is a matter of statutory restriction.

II. CALIFORNIA'S REGISTRATION PROCEDURES SUPPORT THE CASE ACT'S CONSTITUTIONALITY.

On the subject of the registration procedures themselves, plaintiff-appellees argue that the CASE Act requires production of information that

law enforcement would not have access to absent a search warrant. Appellee's Brief, p. 3. But the Internet information required by the CASE Act is nothing more than a cyber fingerprint. And, like physical fingerprints, the purpose of collecting them is to ascertain if an offense has been committed by a registered, prior sex offender. As to the commission of crimes, those previously convicted lose their right to reoffend under the cloak of complete anonymity – at least as to law enforcement.

Plaintiff-appellees also misunderstand the Department of Justice's use of forms to collect information from registrants. They are standardized registration *forms*: they provide boxes for registrants to fill in with information. Law enforcement can then quickly find that information on the form itself and the various fields can be entered in a uniform manner into electronic law enforcement databases. However, citing *Hynes v. Borough of Oradell*, 425 U.S. 610 (1976) and *United States v. Stevens*, 559 U.S. 460 (2010), plaintiff-appellees argue that the government has somehow admitted that it "must" create a form to cure the vagueness of the CASE Act. Appellees' Brief, p. 57. Not so. One, the district court did not think the statutory terms were vague and had no difficulty construing the statute in a way that answered such claims. ER-0007-09. Two, the Attorney General did not contend that she "had" to use forms to clarify an ambiguity. She simply observed that the Department of Justice had been collecting Internet information from registered sex offenders for more than a year using its standard registration form with no difficulties whatsoever and could easily adapt the form to collect the information the CASE Act requires. See, ER-0346-48. Three, the CASE Act itself defines the terms Internet Service Provider and Internet identifiers. Cal. Penal Code § 290.024. Four, as the

California Penal Code section 290 scheme attests, and the California Legislature agrees, the Department of Justice is in the best position to know what information would serve law enforcement's registration, crime prevention, and investigatory needs. Cal. Penal Code §§ 290.012(a), 290.015(a). Using a form to collect the data the CASE Act requires (or, for that matter, any other registrant information) only makes sense.

The decisions in *Hynes* and *Stevens* do not compel a different conclusion. In *Hynes*, a municipal ordinance requiring advance notice to the police before canvassing or solicitation for charitable causes was held facially unconstitutional both because the term "charitable cause" was too vague and because it was unclear what notice was required. 425 U.S. at 621-22. On the latter point, the police had not adopted any regulations clarifying what notice must be given and the Police Chief asserted in a declaration that "a canvasser must simply 'let us know who he is.'" *Id* at 622, n. 6. And, as explained above, in *Stevens* the Supreme Court rejected the government's attempt to read a ban on depicting animal cruelty as applying only to "crush videos." 559 U.S. 460, 442. Both authorities are completely unlike the CASE Act or the Department of Justice's very detailed registration forms.

On the vagueness issues, the district court agreed with appellants that the terms of the CASE Act were not ambiguous. ER-0007-09. The Department of Justice's use of forms would primarily facilitate collection of the data, but also potentially help address any potential ambiguity that a particular registrant faced, whether real or contrived. Again, California collected essentially the same Internet information for more than a year before plaintiff-appellees alleged it was impossible to do so without creating

confusion and panic among registrants. This shows that the terms on the registration forms can be understood by any person who does not willfully want to be confused and that the use of forms to collect this information is not a problem.

Lastly, plaintiff-appellees misunderstand the Attorney General's point that in the registration process the sex offender and law enforcement work together to complete the required form. Plaintiff-appellees contend that the "government cannot require speakers to meet with the police to determine whether their speech will subject them to criminal liability." Appellees' Brief, p. 58. Law enforcement officers facilitating the registration process are not making any determinations about a registrant's speech. Nor can a police officer decide what the law is. And the decision to prosecute for failing to register is one made by the district attorney – not local law enforcement. We believe it to be a practical reality that if a registrant asks local law enforcement what should be reported, and what does not need to be reported, and complies with the given instructions, the possibility of prosecution -- regardless of whether the law enforcement guidance was sound – is almost nil.

Plaintiff-appellees' cited authorities do no bear on this issue. In *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), a nonprofit corporation seeking to produce an election-related video within 30 days of a primary election feared it might be subject to civil and criminal penalties. It therefore brought an action against the Federal Election Commission for declaratory and injunctive relief to determine its rights to make and distribute the video. In view of the fact that the case involved political speech, the Supreme Court observed that "[a]s additional rules are created

for regulating political speech, any speech arguably within their reach is chilled." *Id.* at 334. In that regard, the Commission had adopted "568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975." *Id.* Citizens United's action for declaratory relief arose out of its inability to determine the possibility of prosecution from the regulations themselves. The Supreme Court concluded that the practical complexity of the regulations almost required a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against Commission enforcement to ask a governmental agency for prior permission to speak. *Id.* at 335.

The process for registering the identifying information required by the CASE Act is vastly different. It can be recorded in a few fields on a simple form with short identifying labels. The definitions of terms are included in the statute, in two short paragraphs, which the district court found amenable to a common-sense construction. No registrant has to ask law enforcement for permission to speak. And he or she has the opportunity to ask a question during the registration process if the need arises. Only if the sex offender *knows* that the information must be provided and willfully refuses to do so can he or she be subject to prosecution. *See People v. Aragon*, 207 Cal.App.4th 504, 510 (2012); *People v. Edgar* 104 Cal.App.4th 210, 212 (2002).

The decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999) is equally inapplicable. It involved an anti-gang loitering ordinance and was resolved on due process grounds – not the First Amendment. The ordinance prohibited gang members from loitering with one another in a public place and subjected an offender to fines and imprisonment if he or she failed to

obey a law enforcement order to disburse. *Id.* at 47. The Court held that the term "loitering" did not give the public fair notice of what conduct was prohibited, that the ordinance did not give law enforcement sufficient guidelines on what to enforce, and that a person should not have to wait until receiving an order to disburse before finding out his or her actions are prohibited. *Id.* at 55-64.

Unlike the ordinance at issue in *Morales*, the CASE Act is not vague. Also, in *Morales*, a person had to wait until after a police officer issued a disbursement order to know what conduct is prohibited. "Such an order cannot *retroactively* give adequate warning of the boundary between the permissible and the impermissible applications of the law. *Morales,* 527 U.S. 41, 59 (emphasis added). The CASE Act itself explains *beforehand* what information is required. And the interaction between law enforcement and a sex offender during registration is not equivalent to waiting for a warning order to determine what a person might be doing wrong. The former is a potentially helpful interaction with police prior to any potential criminal failure to register specific information. The latter is a warning. Finally, the *Morales* ordinance was a "criminal law that contain[ed] no *mens rea* requirement," and that is the exact opposite of what is required to prosecute for failure to register specific information by a sex offender. *Id.*, at 55.

CONCLUSION

Eighty-one percent of California voters said the CASE Act should become the law of the state in order that law enforcement may have another tool for preventing and, if necessary, solving horrible crimes. Experience already has shown that none of the conjured-up horribles and the asserted

"chilling effect" offered by plaintiff-appellees in support of the injunction actually happened during more than one year's worth of collecting Internet information from registered sex offenders prior to the Act. If there were instances of such incidents, they are not reflected in the record.

For the foregoing reasons, the defendant-appellant Attorney General of California respectfully requests that the decision of the district court to enjoin the implementation of the CASE Act be reversed.

Dated: May 22, 2013

Respectfully Submitted,

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SA2013110060

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May 22, 2013
Dated

/s/ ROBERT D. WILSON
Robert D. Wilson
Deputy Attorney General

9th Circuit Case Number(s) 13-15263, 13-15267

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