Required Registration of "Online Identifiers" and its Constitutional Conflict with the First Amendment Right to Anonymous Speech.[1]

INTRODUCTION

As made clear by the Speakers who have previously appeared at this conference, registration requirements for persons deemed "sex offenders" have had severe adverse impacts on the lives of registrants in a variety of ways. The objective of this presentation is to discuss more specifically the rise and application of the requirement that registrants provide to State authorities their personal "online identifiers" or risk conviction of a new felony offense for failure to comply with State Law sex offender registration requirements. Additionally, I will also outline an emerging body of caselaw that has considered whether, and in some cases has ruled that, "online identifier" requirements violate the First Amendment right to Freedom of Speech.

I. *Origin of "Online Identifier" Requirement in Sex Offender Registration Laws.*

The federal Sex Offender Registration and Notification Act ("SORNA"), which was enacted as part of the Adam Walsh Child Protection and Safety Act of 2006, gave the States powerful financial incentives to maintain a sex offender registry. Title 42 United State Code Section 16912 provided that each State shall maintain a jurisdiction-wide sex offender registry, and Section 16925(a) provided that a nonconforming State would not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the State under the federal "Omnibus Crime Control and Safe Streets Act of

[1] Prepared and presented by Richard Gladden, Attorney at Law, at the National Conference of Reform Sex Offender Laws ("RSOL"), *Public Registration: Untold Collateral Damages*, held at Dallas, Texas, June 25-27, 2015.

1968." As originally enacted, Section 16914(a) required States to include in their sex offender registries information such as a registrant's name and address, as well as "[a]ny other information required by the Attorney General of the United States." On July 2, 2008, in accordance with the authority conferred by Section 16914(a), U.S. Attorney General Michael Mukasey (while serving under President George W. Bush) issued guidelines requiring States to collect sex offenders' "internet identifiers" or "internet addresses."[2]

II. *State Law Definitions for "Online Identifiers."*

In compliance with the foregoing federal mandate issued by the U.S. Attorney General on July 2, 2008, States began enacting statutory provisions requiring sex offenders to provide their "online identifiers" as part of their sex offender registrations. However, definition of the term "online indentifier," as formulated by State Legislatures, often varied from State to State. Below are a few examples:

- **Utah**: In Utah the term "online identifier" is defined as "any electronic mail, chat, instant messenger, social networking, or similar name for Internet communication."[3]

- **Louisiana**: "[An] "[o]nline identifier' means any electronic e-mail address, instant message name, chat name, social networking name, or other similar Internet communication name."

- **Arizona:** "[A] '[r]equired online identifier' means any electronic e-mail address information or instant message, chat, social networking or other similar internet communication name, but does not include a social security number, date of birth or pin number."[4]

[2] See, *Doe v. Harris*, 772 F.3d 563, 569 n. 1 (9th Cir. 2014), citing *National Guidelines for Sex Offender Registration*, 73 Fed.Reg. 38030, 38055 (July 2, 2008); *see also* 42 U.S.C. Section 16915a(a)(requiring states to obtain registrants' Internet identifiers "of any type that the Attorney General determines to be Appropriate.").
[3] Utah Code Ann., Section 77-41-102 (12)(a).
[4] Ariz. Stat., Section 13-3822(D)(2).

- **Texas:** "[An] '[o]nline identifier' means electronic mail address information or a name used by a person when sending or receiving an instant message, social networking communication, or similar Internet communication or when participating in an Internet chat. The term includes an assumed name, nickname, pseudonym, moniker, or user name established by a person for use in connection with an electronic mail address, chat or instant chat room platform, commercial social networking site, or online picture-sharing service."[5]

III. *State Law Deadlines for Registering "Online Identifiers."*

Like State law provisions defining the term "online identifier," States that have imposed different deadlines for a registrant to comply and report to registering authorities his online identifiers. Here are a few examples:

- **North Carolina**: "If a person required to register changes an online identifier, or obtains a new online identifier, then the person shall, *within 10 days*, report in person to the sheriff of the county with whom the person registered to provide the new or changed online identifier information to the sheriff."[6]

- **Arizona**: "A person who is required to register pursuant to this article shall notify the sheriff either in person or electronically *within seventy-two hours*, excluding weekends and legal holidays, after a person makes any change to any required online identifier, *and before any use* of a changed or new required online identifier to communicate on the internet."[7]

- **Utah:** "*[W]ithin three business days* of every change" to any prior report of online identifiers.[8]

- **Texas:** "If a person required to register…changes any online identifier included on the person's registration form or establishes any new online identifier not already included on the person's registration form, the person, *not later than the later of the seventh day after the change or establishment or the first date the applicable authority by policy allows the person to report*, shall report the change or establishment to the person's primary registration authority *in the manner prescribed by the authority*."[9]

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[5] Tex.Code Crim. Proc., Article 62.001 (12).
[6] N.C. Gen. Stat., Section 14-208.9(e)(italics added).
[7] Ariz. Stat., Section 13-3822(C)(italics added).
[8] Utah Code Ann., Section 77-41-105(3)(italics added).
[9] Tex.Code Crim.Proc., Article 62.0551(a).

IV. ***Scope of State Government Disclosures.***

States statutes have also varied on the question of what, if any, "online identity" information reported to a governmental registering authority, by a registrant, may be disclosed to others, including law enforcement authorities not responsible for receiving registration information, or so-called "social media" entities in the private sector, and others. Additionally, those States that have authorized disclosure of "online identity" information to third parties, such as law enforcement authorities not responsible for receiving registration information, and so-called "social media" entities in the private sector, have differed over whether such disclosures must be limited to a demonstrated purpose of investigating, with "reasonable suspicion" or "probable cause," the commission of a criminal offense. Some State statutes are silent, or ambiguous, on the question of whether disclosures by a registering authority to third parties must be limited to a demonstrated purpose of investigating, with "reasonable suspicion" or "probable cause," the commission of a criminal offense. Below is a summary of a few States' positions on these questions:

- **Utah:** The State of Utah's statute ambiguously provides that online identifier information may be disclosed to third parties "to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders," but only "for the purposes" elsewhere stated, or in conformity with another provision that allows disclosure to third-party, private entities, if "use of the record…produces a public benefit that is greater than or equal to the individual privacy right that protects the record."[10]

[10] Utah Code Ann., Sections 77-41-103(C), and 63G-2-206(6)(b).

- **California:** Prior to being invalidated by a Federal Court of Appeals late last year in *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014)(discussed further below), California's statute provided in relevant part that:

> "Notwithstanding any other provision of law . . . any designated law enforcement entity may provide information to the public about a person required to register as a sex offender pursuant to Section 290, by whatever means the entity deems appropriate, *when necessary to ensure the public safety* based upon information available to the entity concerning that specific person."[11]

- **Texas:** Texas statutory law provides that:

> "On request by a commercial social networking site, the [Texas Department of Public Safety] may provide to [a] commercial social networking site… all public information that is contained in the database maintained under [the general registration statute];" as well as "any online identifier established or used by a person who uses the site, is seeking to use the site, or is precluded from using the site."[12]

V. *Source of Constitutional Protection.*

The constitutionality of "online identifier" statutes is a question that is presently still being litigated in State and Federal courts. The most promising legal theory for registrants challenging such statutes so far has been the claim that online identifier statutes violate one aspect of a registrant's First Amendment right to Freedom of Speech. Roughly two decades ago the U.S. Supreme Court ruled that the First Amendment to the U.S. Constitution protects a person's right to exercise freedom of speech "anonymously." In this connection, the Court noted that:

[11] Cal. Penal Code, Section 290.45(a)(1)(italics added).
[12] Tex.Code Crim.Proc., Article 62.0061(a). In accordance with Article 62.0061(b), the Texas Department of Public Safety has adopted rules governing the manner by which "commercial social networking sites" may acquire a registrant's "online identifiers." *See*, 37 Tex.Admin. Code, Rule 37.2.

> "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of publication, is an aspect of the freedom of speech protected by the First Amendment."[13]

And as the Court further explained:

> "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation --- and their ideas from suppression --- at the hand of an intolerant society."[14]

As is implicit from the foregoing quotations, the First Amendment has been interpreted to encompass a right to "anonymous" speech when a statute or governmental restriction would, without that protection, operate to deter or "chill" the speaker's otherwise unfettered will to express himself freely.

VI. ***Level of Constitutional Scrutiny and Legal Analysis.***

When a court is confronted with a constitutional challenge premised on an alleged violation of the Free Speech Clause of the First Amendment, it must first determine to which level, among several levels of legal "scrutiny," the allegedly offending statute or governmental conduct should be assigned. When a statute "on its face" (or by its literal terms) does not restrict speech depending on the "content" of the speech, the statute will usually be deemed "content-neutral." All courts to date have concluded "online identifier" statutes are "content neutral."

Once a Court has determined a statute is "content-neutral," it will be reviewed by the court under "intermediate scrutiny," meaning the statute will be upheld against constitutional challenge if: 1) it "serves a substantial governmental interest"; and 2) it is "narrowly drawn" to serve the identified governmental interest "without unnecessarily

[13] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995).
[14] *McIntyre v. Ohio Elections Commission, supra,* 514 U.S. at 357.

interfering with First Amendment freedoms."[15] On the first question, so far it appears that every court which has reviewed the constitutionality of an "online identifier" statute has ruled that "investigation of new sex offenses," or "apprehension of sex offenders suspected of new crimes," constitute "a substantial governmental interest." On the second question however, as further discussed below, courts have reached different conclusions about whether a particular "online identifier" statute "unnecessarily interfere[s] with First Amendment freedoms," or specifically, the First Amendment right to Anonymous Speech. In other words, the First Amendment question is often posed as whether a statute or governmental restriction "burdens substantially more speech than is necessary to further the government's legitimate interests."[16]

The First Amendment has also been interpreted to provide greater or lesser protection depending on whether the speech at issue is to be expressed in a "public" or in a "private" forum or location, respectively. On this question, the U.S. Supreme Court has strongly implied, and lower appellate courts have affirmatively ruled, that when accessed from one's home the internet constitutes a "public forum" for purposes of First Amendment analysis.[17] Moreover, some lower courts have ruled that an internet website remains a "public forum" even when operated by a private entity that retains discretion to "restrict, edit, delete or prohibit posts."[18]

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[15] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).
[16] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).
[17] *Doe v. Shurtleff*, 628 F.3d 1217, 1222 (10th Cir. 2010); *Doe v. Harris*, 772 F.3d 563, 574 (9th Cir. 2014), quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997); New.Net Inc. v. Lavasoft, 356 F.Supp.2d 1090, 1107-1108 (C.D.Cal. 2004). However, the Supreme Court has also ruled that, when the internet is accessed from a public library, the "public forum" doctrine does not apply. *United States v. American Library Assoc.*, 539 U.S. 194, 205-207 (Rehnquist, C.J., joined by O'Connor, Scalia and Thomas, JJ.)(plurality opinion); *accord*, *id.*, 539 U.S. at 215 (Breyer, J., concurring in judgment).
[18] *Piping Rock Partners v. David Lerner Associates*, 946 F.Supp.2d 957, 975 (N.D.Cal. 2013)(listing appellate court decisions).

The U.S. Supreme Court, in the context of the constitutional right to "anonymous" speech, has also suggested the "timing" of a person's obligation to self-report his identity may be relevant to the outcome of a constitutional challenge. In other words, the Court has indicated that there is a legal distinction between governmental requirements that compel a speaker to disclose their identity publicly at the moment (or before) exercising the right to speak (unconstitutional), and a requirement that the speaker disclose his or her identity in a manner that would *only later allow government* use of that information to trace speech back to its source (not unconstitutional).[19] This legal distinction, as discussed in the summary of cases below, may prove determinative of an online identifier statute's constitutionality, depending on: 1) when a registrant is obligated to self-report his online identifiers for registration purposes, and 2) whether the statute authorizes disclosure of the registrant's online identifiers allows *more than government use* of the information.

Finally, while there is a consensus among courts that persons who are on probation or parole have diminished rights under the First Amendment, at least one federal appellate court has ruled that registrants who are not on probation or parole "enjoy the full protection of the First Amendment."[20] Under this analysis, post-probation and post-parole restrictions are not characterized as "punitive," but rather either constitutionally permissible, or impermissible, "collateral consequences" of conduct that has previously been punished.

[1919] *Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182, 199-200 (1999).
[20] *Doe v. Harris, supra*, 772 F.3d at 572.

VI. *Judicial Decisions.*

- ***Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010):**

In *Doe v. Shurtleff* the Court, after considering the broader statutory scheme surrounding Utah's online identifier statute, narrowly interpreted the Utah reporting statute narrowly, and as intended to authorize disclosure of a registrant online identifiers only for "law enforcement purposes" confined to "aiding the police in solving crimes." For this reason, it was ruled not to violate registrants' constitutional right to anonymous speech. Id., 628 F.3d at 1224-1225.

- ***Harris v. State*, 985 N.E.2d 767 (Ind.App. 2013):**

Although not technically an "online identifier" case, in *Harris v. State* an Indiana State Court of Appeals considered the constitutionality of a statute that "outright banned" sex offenders from using "social networking sites, instant messaging programs, or chat room programs" that were "accessible [to] persons under the age of eighteen."[21] The statute was ruled unconstitutionally "overbroad" and in violation of the First Amendment for primarily two reasons. First, the Court observed that the statute prohibited a "considerable amount" of constitutionally protected speech "that did not involve harmful interactions with children at all."[22] Secondly, the Court noted that online solicitation of minors was already criminalized by a separate Indiana statute, and that the government had failed to prove the "outright ban" measurably furthered the State's interest preventing commission of that offense.

[21] 985 N.E. 2d at 777.
[22] 985 N.E.2d at 780.

- ***Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014):**

The federal court of appeals in *Doe v. Harris* struck down California's online identifier statute last November, and the California Assembly has yet to enact a new statute in its place. The Court prefaced its analysis by observing that "registered sex offenders who have completed their terms of probation and parole enjoy the same protection of the First Amendment" as non-registrants.[23] Noting that the California statute required registrants to notify the government in writing within 24 hours of establishing or using a new online identifier, the Court first found that the statute imposed a "substantial burden on sex offenders' ability to engage in legitimate online speech, and to do so anonymously."[24] Applying "intermediate scrutiny" to the statute because it was "content –neutral" on its face, the Court nonetheless found the statute burdened "substantially more speech than [was] necessary to further the government's legitimate interests."

As an additional and independent ground for declaring the statute unconstitutional, the Court in *Doe v. Harris* ruled that the statute unconstitutionally "chilled" protected speech under the First Amendment "because it too freely allow[ed] law enforcement to disclose sex offenders' Internet identifying information to the public."[25] In this connection, and as previously noted, the California statute vaguely permitted law enforcement to "provide information to the public about a person required to register as a sex offender," including a registrant's online identifiers, whenever law enforcement deemed such a disclosure to the public "*necessary to ensure the public safety*."

[23] 772 F.3d at 572.
[24] 772 F.3d at 574.
[25] 772 F.3d at 579-580.

- ***Doe v. Snyder,* No. 12-11194, 2015 WL 1497852 (E.D. Mich., March 31, 2015):**

In *Doe v. Snyder* the Court focused on the Michigan statute's requirement that a registrant report any newly established or used online identifier IN PERSON "within three business days." Finding this requirement imposed a substantially greater, and unnecessary, burden on a registrant's online speech than the 24-hour mail-in requirement held unconstitutional in *Doe v. Harris*, the Court ruled the statute was not "narrowly tailored" and therefore violated registrants' First Amendment rights to free speech.[26]

VII. *Is Texas' Online Identifier Statute Unconstitutional?*

Although there do not appear to be any Texas judicial decisions addressing the constitutionality of its online identified statute, comparison of the Texas statute and its application, to the decisions discussed above, reveals the Texas online identifier statute has at least two serious constitutional vulnerabilities. First, is the degree to which the Texas statute allows disclosure of a registrant's online identifier information to public and private third-parties for reasons wholly unrelated to investigating a completed crime, or a future crime for which there is individualized reasonable suspicion. This was the defect that persuaded the Federal Ninth Circuit Court of Appeals in *Doe v. Harris* to invalidate the California statute on the ground that such open-ended disclosures would "chill," if they would not actually deprive, registrants of their First Amendment right to anonymous speech in a public forum. As set out above, the Texas statutory scheme provides that:

[26] 2015 WL 1497852, * 29.

> "On request by a commercial social networking site, the [Texas Department of Public Safety] may provide to [a] commercial social networking site… all public information that is contained in the database maintained under [the general registration statute];" as well as "any online identifier established or used by a person who uses the site, is seeking to use the site, or is precluded from using the site."

Furthermore, the Texas statute does not appear to lend itself to a "narrowing" construction that would authorize disclosure of a registrant's online identifiers only for "law enforcement purposes" confined to "aiding the police in solving crimes," which is what saved the Utah statute from constitutional invalidation in *Doe v. Shurtleff*. Rather, the Texas statute's broad disclosure provision, set out above, strongly suggests it is merely an indirect mechanism designed to cause the "outright" elimination of a registrant's ability to engage in public communications on the internet. In other words, the Legislative assumption (and a likely correct assumption at that) appears to be that a third-party website, such as Facebook, upon discovering a person is a registrant as the result of the State's disclosure, will itself ban the person from its public forum. Thus, the Texas statutory scheme accomplishes indirectly what the Indiana statute sought unconstitutionally to enforce directly: an "outright ban"; and the Texas statute, like the Indiana statute found unconstitutional in *Harris v. State*, should encounter the same fate.

Additionally, the timing and manner in which the Texas statute requires registrant's to report the establishment or use of a new online identifier may subject the statute to constitutional invalidation for the same reason the Michigan statute were ruled unconstitutional in *Doe v. Snyder*. In this regard, the Texas statute provides that:

> "If a person required to register…changes any online identifier included on the person's registration form or establishes any new online identifier not already included on the person's registration form, the person, *not later than the later of the seventh day after the change or establishment.*..shall report the change or establishment to the person's primary registration authority *in the manner prescribed by the authority.*"[27]

As previously discussed, in *Doe v. Snyder* the Court found the Michigan statute's requirement that a registrant report any newly established or used online identifier IN PERSON "within three business days" operated to impose a substantially greater, and unnecessary, burden on a registrant's online speech than the 24-hour mail-in requirement held unconstitutional in *Doe v. Harris* (24-hour mail-in report requirement). While the 7-day requirement imposed by Texas' statute would not seem as burdensome if a person's "primary registering authority" prescribed that such a report could be complied with by mail, it is arguable that an "in-person" reporting requirement, every time a registrant established or used a new online identifier, might be ruled to "unnecessarily interfere[e] with First Amendment freedoms."[28]

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[27] Tex.Code Crim.Proc., Article 62.0551(a).
[28] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).