

---

## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

---

**Bill No:** SB 448                      **Hearing Date:** July 14, 2015  
**Author:** Hueso  
**Version:** June 17, 2015  
**Urgency:** Yes                              **Fiscal:** No  
**Consultant:** JM

**Subject:** *Sex Offenders: Internet Identifiers; Proposition 35*

### HISTORY

**Source:** Safer California Foundation; San Diego Police Officers Association

**Prior Legislation:** Proposition 35 of the 2012 General Elections – Californians Against Sexual Slavery (CASE) Act

**Support:** AFSCME, Local 685; Association of Deputy District Attorneys; Association for Los Angeles Deputy Sheriffs; Californians Against Slavery; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Narcotics Association; Crime Victims United of California; Los Angeles Police Protective League; Los Angeles Probation Officers Union; Peace Officers Research Association of California; Riverside Sheriffs Association; Safer California Foundation; San Diego Police Officers Association

**Opposition:** American Civil Liberties Union; California Reform Sex Offender Laws; California Civil Liberties Advocacy; One individual

### PURPOSE

*The purpose of this bill is to: 1) require a sex offender, when registering with local law enforcement, to report his or her Internet identifiers used for interactive communications, as specified; 2) provide that Internet identifiers do not include user names, screen names or e-mail addresses used solely to read content, purchase products or communicate with government on line; 3) require the registrant to notify law enforcement within five working days of any changes in these identifiers; 4) provide that a law enforcement agency may only release the Internet identifier information to another law enforcement agency "for the sole purpose of preventing or investigating a sex-related crime, a kidnapping, or human trafficking"; and 5) authorize the Attorney General to disclose a registrant's Internet identifiers to another person under specified limited circumstances.*

*Existing law:*

1. Generally requires a person convicted of enumerated sex offenses and sexually-related human trafficking crimes to register within five working days of coming into a city or

county, with law enforcement officials, as specified. (Pen. Code § 290.) Registration generally must be updated annually, within five working days of a registrant's birthday. (Pen. Code § 290.012 (a).) In some instances, registration must be updated once every 30 or 90 days, as specified. (Pen. Code §§ 290.011, 290.012.)

2. Requires registrants to provide the following information:
  - A signed statement giving information as required by the Department of Justice (DOJ) and giving the name and address of the person's employer and place of employment;
  - The fingerprints and a current photograph of the person taken by the registering official;
  - The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person;
  - A signed statement by the registrant acknowledging that he or she may have a duty to register in any other state upon relocation; and
  - Adequate proof of residence. (Pen. Code § 290.015.)
3. Provides that it is a crime for any person who is required to register to willfully violate the requirements of registration. (Pen. Code § 290.018.) Specifically, current statute includes the following provisions:
  - Misdemeanor underlying sex crime: Any person who is required to register based on a misdemeanor conviction or juvenile adjudication who willfully violates any requirement of the Act is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year. (Pen. Code § 290.018, subd. (a).)
  - Felony underlying sex crime: Except as provided, any person who is required to register under the Act based on a felony conviction or juvenile adjudication who willfully violates any requirement of the Act or who has a prior conviction or juvenile adjudication for the offense of failing to register under the Act and who subsequently and willfully violates any requirement of the Act is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or 2 or 3 years. (Pen. Code § 290.018, subd. (b).)
  - Transient registrants: Transient registrants who willfully fail to comply with the requirement of registering no less than every 30 days is guilty of a misdemeanor, punishable by jail for at least 30 days, but not exceeding six months. "A person who willfully fails to comply with the requirement that he or she reregister no less than every 30 days shall not be charged with this violation more often than once for a failure to register in any period of 90 days. Any person who willfully commits a third or subsequent violation of the (transient registration requirements) shall be punished (based on their underlying offense, as described above). (Pen. Code § 290.018, subd. (g).)
  - Sexually violent predator registrants: Any person who has ever been adjudicated to be a sexually violent predator (Welf. & Inst. Code § 6600) must verify his or her address and place of employment, including the name and address of the employer, no less than once every 90 days. (Pen Code § 290.12.)
4. Provides, with specified exceptions, that a law enforcement entity may inform the public about a registered sex offender by whatever means the entity deems appropriate, when

necessary to ensure the public safety based upon information concerning that specific person. (Pen. Code § 290.45, subd. (a)(1).)

5. Requires the Department of Justice (DOJ) to make available information concerning persons who are required to register as a sex offender to the public via an Internet Web site, as specified. (Pen. Code § 290.46, subd. (a)-(b)(1).)
6. Includes the Californians Against Sexual Slavery (CASE) Act, enacted pursuant to the passage of Proposition 35 in November of 2012 to expand the definition of human trafficking, increase human trafficking penalties and impose new requirements on persons required to register as sex offenders, as specified. As relevant to this bill, the CASE Act requires each person registered as a sex offender to provide the following information with his or her registration:
  - A list of any and all Internet identifiers he or she established or used;
  - A list of any and all Internet service providers he or she established or used; and
  - A statement signed by the registrant that he or she acknowledges the requirement to register and update the specified Internet-related information. (Pen. Code §§ 290, subd. (a) and 290.015, subd. (a)(4)-(6).)
7. Provides that a sex offender registrant must send written notice within 24 hours to his or her registering law enforcement agency if one or more of the following occur:
  - The registrant “adds or changes his or her account” with an Internet service Provider;
  - The registrant “adds or changes an Internet identifier;” or
  - Directs law enforcement agencies to make information about any changes to a registrants’ Internet information available to the Department of Justice (DOJ). (Pen. Code § 290.014, subd. (b).)
8. Provides the following definitions applicable to registration of Internet information:
  - “Internet service provider” means a business, organization or entity providing a computer and communications facility directly to consumers through which consumers can access the Internet, but does not include an entity that provides only telecommunications services, cable services or video services, or any system operated by a library or educational institution.
  - “Internet identifier” means an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking or similar Internet communications. (Pen. Code § 290.024.)

*This bill:*

1. States legislative intent to further objectives of the CASE Act by amending its provisions to conform with the requirements of the court in *Doe v. Harris*. (Case Nos. 13-15263 and 13-15267 -N. D, of Cal.; 9<sup>th</sup> Circuit Court of Appeals.)

2. Provides that a registered sex offender must, in his or her annual registration, include the Internet identifiers he or she uses for communicative purposes, as defined.
3. Defines an Internet identifier as an email address, user name, screen name or similar identifier actually used to participate in online communications, including, but not limited to Internet forum or chat room discussions, e-mailing, instant messaging, social networking or similar methods of online communication.
4. Provides that an Internet identifier does not include Internet passwords, or any e-mail address, user name screen name or similar identifier used solely to read content online or for "transactions with a lawful commercial enterprise or government agency concerning a lawful commercial or governmental transaction."
5. Provides that where any person registered as a sex offender adds or changes an Internet identifier, as defined, he or she shall send written notice within five working days to law enforcement agency with which he or she currently registered.
6. Requires a law enforcement agency to which an Internet identifier is submitted to make the Internet identifier available to the DOJ.
7. Finds that restrictions on public disclosure of the Internet identifiers or registrants limits the public' right of access to meetings of public bodies and disclosure of the writings of public officials, as required by the Article I, Section 3 of the California Constitution.
8. Finds that the limits on public disclosure of Internet identifiers are necessary to protect the First Amendment rights of sex offender registrants.
9. Provides that a law enforcement agency that receives Internet identifiers from a registrant may only release the information to another law enforcement agency "for the sole purpose of preventing or investigation a sex-related crime, a kidnapping, or human trafficking."
10. Prohibits a law enforcement agency from releasing a registrant's Internet identifiers to the public.
11. Authorizes DOJ to disclose an Internet identifier "to another person if the Attorney General has determined, based on specific, articulable facts, that the disclosure is likely to protect members of the public from sex-related crimes, kidnappings, or human trafficking, and the person to whom the disclosure is made signs an oath promising to use the information only for the identified purpose, to maintain the confidentiality of the information, and to refrain from disclosing the information to anyone who has not been granted access to the information by the Attorney General."

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee

has applied its “ROCA” policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as “of February 11, 2015, 112,993 inmates were housed in the State’s 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity.”( Defendants’ February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

## COMMENTS

### 1. Need for This Bill

According to the author:

In November of 2012 California voters approved Proposition 35, also known as the Californians Against Sexual Exploitation Act (CASE). The act was approved with 81% of the vote. In order to provide law enforcement with a tool to investigate sex trafficking online, Proposition 35 required all registered sex offenders in California to submit their internet identifiers to the local law enforcement agencies in the jurisdiction in which they are registered. Upon passage of the Case Act, the ACLU and the Electronic Frontier Foundation filed a

lawsuit challenging the Internet registration provisions of Proposition 35. A temporary restraining was immediately granted. On November 18<sup>th</sup> of 2014 the 9<sup>th</sup> Circuit upheld the injunction against the provision, finding that it would most likely violate the 1<sup>st</sup> amendment on the grounds that:

- The definition of an internet identifier was too vague and overly broad.
- The act did not sufficiently protect anonymous speech
- The one day reporting requirement was onerous and would have a chilling effect on speech.

On April 7<sup>th</sup> 2015, the district court gave the sponsors of Proposition until the end of this legislative session to address the concerns of the 9<sup>th</sup> circuit. This bill addresses those concerns in the following manner:

- Provides for a clearer definition of Internet Identifier by striking the Internet Service Provider language and clarifying that internet identifiers only include *those actually used to participate in online communications, including, but not limited to, Internet forum discussions, Internet chat room discussions, emailing, instant messaging, social networking, or similar methods of communicating online.*
- Clarifies that Internet identifiers do not *"include Internet passwords, or any electronic mail address, user name, screen name, or similar identifier used solely to read online content, or solely for transactions with a lawful commercial enterprise or government agency concerning a lawful commercial or governmental.*
- Allows sex offenders to report their identifiers within five working days.
- Prevents the release of the identifiers to members of the general public, but allows the Attorney General (AG) to share the identifiers with a member of the public if the AG determines, based upon specific facts, that the information will likely protect the public from sex related crimes, kidnappings, or human trafficking and the person receiving the information signs an oath promising to use the information only for the identified purpose and to maintain confidentiality.
- Only allows a law enforcement agency to access Internet identifiers if the agency is investigating a sex related crime, a kidnapping or human trafficking.

Human Trafficking is a major problem in California. The AG has reported that between July 1, 2010 and June 30, 2012, California's nine anti-trafficking task forces initiated 2,552 investigations, identified 1,277 victims of human trafficking, and arrested 1,798 individuals. In the age of the Internet, it has become easier for traffickers to find and abuse their victims. The AG reported in 2012: "The business of sex trafficking ... has moved online. Traffickers use the Internet to increase their reach, both in recruiting victims through social media and finding clients via advertisements posted on classified advertising websites."

## **2. Pending Federal Court Case; Permanent Injunction Barring Enforcement of Certain Provisions of the CASE Act Stayed Until September 15, 2015 Pending Legislative Fix**

California Reform Sex Offender Laws, the ACLU and the Electronic Frontier sued in federal court to block enforcement of the provisions of the CASE Act (Prop. 35 of 2012) that required sex offenders to disclose Internet identifiers and service providers when registering with local law enforcement. On January 13, 2013, the United States District Court for the Northern District of California (San Francisco) granted a preliminary injunction barring enforcement of the Act.

The Attorney General and intervenors (sponsors of the Initiative) appealed the order to the 9<sup>th</sup> Circuit Court of Appeals. On November 18, 2014, the Court of Appeals affirmed the district court order in full. On April 7, 2015, the District Court issued an order enjoining the Attorney General of California from enforcing the Internet identifiers provisions of the CASE Act. The court stayed enforcement of the injunction until September 15, 2015 to allow the Attorney General and the CASE Act sponsors to seek legislation resolving the matters before the court. The next hearing in *Doe v. Harris* is set for October 26, 2015. (*Doe v. Harris*, Case No.12-cv-05713-THE (April 7, 2015.)

This bill was gutted and amended on June 17, 2015 to contain the provisions now before the Committee.

## **3. Ninth Circuit Opinion; Federal District Court Injunction Affirmed**

In its opinion dated November 18, 2014, The Ninth Circuit Court of Appeals affirmed the district court's order preliminarily enjoining provisions of the CASE Act. The court noted that the CASE Act "sought to supplement and modernize" existing California law concerning registered sex offenders by adding the following requirements of registration:

- Any and all Internet identifiers established or used by the person;
- Any and all Internet service providers used by the person; and
- Any changes in the registrant's Internet service account or identifiers, within 24 hours of the change. (*Roe v. Harris*, No. 13-15263 D.C. No. 3:12-cv-05713-THE (Nov. 18, 2015) at 5.)

The court explained, the "CASE Act defines the term 'Internet identifier' as 'an electronic mail address, username, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication. . . . The Act defines 'Internet service provider' as 'a business, organization, or other entity providing a computer and communications facility directly to consumers through which a person may obtain access to the Internet.'" (*Id.* at 7 (citations omitted).)

The court found that the sex offenders who are no longer on parole or probation have full First Amendment rights. (*Id.* at 10-11.) The court found that the Act did not violate the First Amendment by being facially overbroad, as the Act does not regulate the content of speech. (*Id.* at 22.) The Act is thus "content neutral." The court specifically found that while the Act regulated registered sex offenders as a class of speakers, it did not do so as a way of suppressing what registrants would or could say. Therefore, the Act need not be subjected to strict scrutiny,

which would require the state to demonstrate a compelling state interest that could not be otherwise advanced. (*Id.*)

The court, however, found that the law did burden anonymous online speech. (*Id.* at 32.) The Act must therefore be subjected to "intermediate scrutiny" to determine if the law is "narrowly tailored to serve the government's legitimate, content-neutral interests." The specific test is whether the means chosen to advance the legitimate state interest "burden substantially more speech than is necessary" to advance the state's legitimate interest. (*Id.* at 23.) The court concluded in part:

California has a substantial interest in protecting vulnerable individuals, particularly children, from sex offenders, and the use of the Internet to facilitate that exploitation is well known to this Court. . . .

Although California clearly has a legitimate interest, the more difficult question is whether the means California has chosen "burden[s] substantially more speech than is necessary to further the government's legitimate interests." . . . "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." . . . The concern that an overbroad statute deters protected speech is especially strong where, as here, the statute imposes criminal sanctions. . . .

We conclude that the CASE Act unnecessarily chills protected speech in at least three ways: the Act does not make clear what sex offenders are required to report, there are insufficient safeguards preventing the public release of the information sex offenders do report, and the 24-hour reporting requirement is onerous and overbroad. (*Id.* at 24-25 (citations omitted).)

#### *District Court Order*

The district court order affirmed by the Ninth Circuit, issued on January 11, 2013, stated that Internet identifiers that must be reported could be narrowed to identifiers actually used to post a comment, send e-mail, enter an Internet chat, or engage in another kind of Internet communication. With such narrowing, a registrant would not report identifiers used solely to buy products or read content online. (Or. pp. 8-9.)

The district court then considered when a registrant would be required to report an identifier that could be associated with interactive Internet use, but is used solely for purchases and reading content. The state told the court that the registrant would only need to report the identifier within 24 hours of using it for interactive communications. (Or. pp. 8-9.)

As to Internet service providers, the state told the court that the plain language of the Act requires the registrant to report only those providers with which the registrant has an account at the time of registration. The registrant would not be required to report providers he or she only accesses or uses without an account. The registrant must update his report on service providers only when he or she adds or changes an account. The court made no findings as to the state's description of the plain language of the Act. The court stated it was permissible to read the Act in that manner and would do so. (Or. p. 8.)

The court summarized its narrowed construction of the act: The registrant must report Internet service providers "with which the registrant has a current account at the time of registration or

with which [he or she] later creates an account. He or she must report Internet identifiers "actually used by the registrant to engage in interactive communications with others" within 24 hours of use of the identifier for that purpose. (Or. p. 9.)

#### 4. The District Court's Application of Intermediate Scrutiny to a Narrowed Act

The district court addressed whether the Act as construed was sufficiently narrowly tailored to justify the burden it placed on speech in advancing the state's interests. The court found that the purposes of the Act were legitimate, content neutral state concerns and that the Internet information required by the Act could advance the legitimate state purpose. The purposes or goals of the Act are as follows:

- To combat human trafficking;
- To allow law enforcement to track and prevent online sex offenses and human trafficking; and
- The Act also "expresses an interest in deterring predators from using the Internet to facilitate human trafficking and sexual exploitation.

The court noted that the Internet information could be used to find registrants who used the Internet to recruit human trafficking victims and to determine if a registrant perpetrated a sex offense. The court noted that these results could only occur if the perpetrator of human trafficking or a sex crime was a registrant and that the "re-offending registrant complied with" the Act. (Or. p. 10, fn. 8.) The court stated that although the government provided no "real-life examples ... of Internet information in a sex offender registry to prevent or solve a crime," the challenged provisions could conceivably advance the legitimate purposes of the Act. (Or. p. 10.)

The court, the parties and the interveners considered a Utah statute that had been initially found unconstitutional, but was later upheld as amended. (*Doe v. Shurtleff* (10th Cir. 2010) 628 F.3d 1217.) The Utah statute initially required registrants to report Internet identifiers and addresses that are similar to those in the Act. The law was struck down because it included no limits on the state's use of the information, "implicating protected speech and criminal activity alike." (Or. p. 11, quoting the district court in *Shurtleff*.)

The Utah law was substantially narrowed to limit use of the Internet information to investigations of *committed* kidnapping and sex-related crimes and apprehending the offenders. The legislature amended the state public records act to make reported Internet identifiers confidential, to be disclosed only pursuant to court order or legislative subpoena. The information could be shared only if the receiving government agency complied with the restrictions on use. The information could not be disclosed to the public. The Federal 10th Circuit Court of Appeals found the amended statute constitutional in that it did not unnecessarily interfere with a registrant's freedom to speak anonymously.

California law enforcement may disclose the information to the public if the agency finds disclosure necessary to protect the public and their children from sex offenders. In this regard, the court found that the California registration disclosure law is comparable to the original, unconstitutional, Utah law. California law is also similar to an unconstitutional Georgia law that gave law enforcement wide discretion to disclose the information to "law enforcement agencies for law enforcement purposes" and to the public "as necessary" for public protection. Disclosures under Georgia law could allow members of the public to search and monitor

communications by a registrant on matters of public policy, violating the First Amendment. (Or. pp. 12-13.)

The Attorney General in *Doe v. Harris* asserted that there must be some nexus between Internet information and criminal activity before law enforcement could access the information. However, no such nexus was required by the Act and the court could not presume that the state would comply with a self-imposed limitation. The Act thus improperly chilled speech because a registrant has no guarantee that the state would not share Internet identifiers the registrant could use for protected, anonymous speech. (Or. p. 13.)

A reporting time limit of 72 hours in the Georgia law improperly chilled speech. The chilling effect of the California law is "heightened" because disclosure of Internet identifiers could be made to law enforcement at the time the registrant speaks, or in no less than 24 hours, during which time the registrant's speech could be continuing. A contemporaneous disclosure requirement burdens speech more than an after-the-fact disclosure because contemporaneous disclosure directly ties the speaker to the message. (Or. p. 13.)

The court also found that California law also substantially chills speech because a violation of the Internet identifier reporting requirement is punishable by a prison term of up to three years.<sup>1</sup> A registrant who is not certain what he or she must disclose could be very reluctant to speak anonymously online. The chilling effect is heightened further because the federal court's narrowing of the Act is not binding on California state courts.

*The Act is not Narrowly Tailored, as it Applies to all Registrants, Regardless of Risk*

The court stated that the chilling effect of the Act might be justified if the law was narrowly tailored, but it is not. All 75,000 California registrants must report their Internet identifiers. A registrant must report identifiers regardless of the risk he or she presents to reoffend generally and, in particular to reoffend through use of the Internet. The court noted that the majority of registrants paroled since 2005 tested as low or moderate-low risk on the Static-99 risk-classification instrument. The court also commented with some significance that the risk of re-offense is lower for online conduct than other offenses. (Or. pp. 13-15.)

The court rejected the Intervener's argument that the Act's reporting requirements are justified because pedophiles who molest boys and rapists of adult women have recidivism rates of 52% and 39% respectively, or that overall recidivism rates for all registrants is between 14% and 20%.

The state argued that the Static 99 could not be used to limit the number of registrants who must provide Internet information because the instrument and the Act served different purposes. Specifically, the state argued that the purpose of the Act is to provide the ability "to find somebody if we need to," while Static-99 is used to estimate a sex offender's risk of re-offense after release. (Or. p. 16.)

---

<sup>1</sup> The court actually substantially understated the potential sentence a registrant faces for failing to report an identifier. Most crimes requiring registration are serious felonies. A person who has been previously convicted of a serious felony is subject to a doubled Two Strike sentence when convicted of any felony in the current case. Further, most registrants with two prior serious felony convictions would be subject to a sentence of 25-years-to-life for failing to report identifiers, although that crime is not a serious felony. While most defendants convicted in the current case of a non-serious felony are not subject to a life term Three Strike sentence, very many registrants have been convicted of a so-called "super strike," felony. A super strike includes any sex crime committed by force, duress, threats or deceit, and any conviction for a sexually motivated touching of a child under the age of 14.

The court found that the issue is not whether registrants recidivate. Instead, the problem is that the government has not explained why the collection of Internet-identifying information from registrants who present a low or moderately low risk of re-offending, and a potentially even lower risk of re-offending online, is narrowly tailored to the Act's purpose. Based on the State's own risk assessments, the uniform application of the CASE Act appears overbroad. (Or. p. 15.)

The court also found that if the Act were limited to registrants whose risk of recidivism justified Internet identifier reporting, the Act "extend[s] to too much speech." The court noted that the court in the case that struck down the Georgia statute - *White v. Baker* (N.D.Ga. 2010) 696 F.Supp.2d 1289 - found that online solicitation for sexual exploitation generally does not occur in communications that are posted publicly on sites dedicated to discussions of issues of public interest and concern. "The government has not shown the utility of requiring registration of Internet identifiers used" for such "public commentary. (Or. p. 16.) ¶ Nonetheless, the CASE Act... extend[s] to all such websites," improperly chilling anonymous commentary on matters of public, political and civic concern. (Or. p. 16.)

## 5. Comparing the Federal Court Order With This Bill

### *Internet Identifiers required under SB 448*

This bill limits the information a registrant must provide to law enforcement. Specifically, the registrant must disclose identifiers for use in online communications - chat rooms, Internet forums and e-mail. These *are* forms of communication through which one could recruit human trafficking victims and lure sex crime victims, although they could be used for a wide range of other speech. The court noted that solicitation for sexual exploitation "generally does not occur" in publicly posted comments on sites dedicated to public, political or social issues. (Or. p. 16.) The provisions in SB 448 defining Internet identifiers subject to reporting include identifiers that could be used for publicly commenting on sites dedicated to public issues. It appears that SB 448 could be subject to a challenge that the required identifiers are overly broad.

### *Time Allotted to Report Internet Identifiers*

The bill gives a registrant five working days to report Internet identifiers in an annual registration and when the registrant obtains a new identifier. The court clearly found that granting a registrant 24 hours to report was insufficient. A person would be forced to disclose his or her identifiers at the time he or she is would seek to speak anonymously on matters of public concern. The likelihood that the registrant's speech would be directly and contemporaneously tied to identifier has an improper chilling effect. The court did note that a 72-hour or 3-day requirement in a Georgia law was unconstitutional. It is not clear whether the court would approve the time frame in the bill of five working days. As noted, the court was particularly concerned about the chilling effect of requiring disclosure of identifiers while the registrant was still speaking on matters of public concern and intending to remain anonymous while doing so.

### *Requiring all Registrants to Report Internet Identifiers*

The court found the CASE Act to be over-inclusive in requiring all registered sex offenders to report Internet identifiers to law enforcement when registering or updating registration. The court specifically questioned whether registered sex offenders should be screened or evaluated for risk or reoffending generally, but more importantly, risk of re-offending online.

The court noted that since 2005, the state's risk assessment tool - the Static 99 - assessed the majority of sex offenders released on parole to be at low or moderate-low risk for re-offense. Paroled offenders were not specifically assessed for risk of reoffending online. However, the court noted that the risk of online offense was lower than general re-offense.

The bill does not distinguish among registered sex offenders in determining which registrants must disclose Internet identifiers. As in the original version of the law, all registrants must provide their Internet identifiers. This appears to leave open the issue of whether the court would find the Act as amended by this bill over-inclusive as concerns those who must register.

#### *Limits on Disclosure and use of Identifiers*

The court faulted the Act for including insufficient limitations on disclosure of Internet information submitted by registrants to law enforcement. The court specifically noted that California law authorized a law enforcement agency to release sex offender registrant information to the public if the agency concluded that release was necessary to protect the public.

The bill authorizes a law enforcement agency to release the information only to another law enforcement agency, and only for preventing or investigating a sex-related crime, kidnapping or human trafficking.

The bill includes an exception to the prohibition on disclosure of the Internet information to the public. Specifically, the Attorney General may disclose the information "to another person" ... "based on specific, articulable facts, that the disclosure is likely to protect members of the public from sex-related crimes, kidnappings, or human trafficking, and the person to whom the disclosure is made signs an oath promising to use the information only for the identified purpose, to maintain the confidentiality of the information, and to refrain from disclosing the information to anyone who has not been granted access to the information by the Attorney General."

The court compared the original Act unfavorably with a Utah statute that authorized disclosure of the information even to law enforcement only to investigate kidnappings or sex crimes that had already been committed and to apprehend the perpetrators. From the court's description of the constitutional Utah statute, it appears that law enforcement must obtain a warrant or legislative subpoena to access the information. The information may not be disclosed to the public.

This bill authorizes disclosure of the information to prevent or investigate human trafficking, kidnapping or a sex crime. Authorization of disclosure to prevent crimes is arguably a very broad standard. One of the basic stated purposes of the Act is to prevent the noted crimes. It appears that prevention could be based on information providing probable cause for a warrant, or prevention could mean use algorithmic analysis of the information provided by all registrants.

The authorization of the Attorney General to disclose the information is also relatively broad. The reference to disclosure to "another person" appears to mean any number of persons. It is not clear what would constitute specific, articulable facts to protect the public, and it appears that the Attorney General would determine if such facts exist. It is not clear what it means for a person receiving the disclosure to *sign an oath promising* to keep the information confidential and use it for authorized purposes. An oath is essentially an affirmation or declaration - an assertion generally made under penalty of perjury. (Civ. Code § 14; Code of Civ. Proc. § 17, subd. (a); Pen. Code §§ 7, 118-119.) It would appear that a promise is something less than that. This provision is arguably redundant or could be interpreted to mean that a person receiving the

information would sign an oath stating that he or she would promise at some later point to keep the information confidential.

Members may wish to consider whether SB 448 adequately addresses the constitutional infirmities of the CASE Act found by the federal court. Further, members may wish to ask the sponsor and author what the next step will be in responding to the court's granting of a stay on the effective date of the injunction prohibiting enforcement of the Internet identifier disclosure provisions of the CASE Act.

**DOES THIS BILL RESOLVE THE CONSTITUTIONAL MATTERS BEFORE THE FEDERAL COURT?**

**WHAT FURTHER RECOURSE WILL BE AVAILABLE TO THE STATE IF THE STAY OF THE PERMANENT INJUNCTION IS LIFTED IN THE FALL?**

**-- END --**