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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RODERICK L. MITCHELL,  
Plaintiff,  
v.  
JERRY BROWN, GOVERNOR OF  
CALIFORNIA, et al.,  
Defendants.

No. 2:14-cv-2993 MCE AC (PS)

FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding in this action pro se and in forma pauperis. This proceeding was referred to this court by Local Rule 302(c)(21). On February 3, 2015, the court permitted plaintiff’s Section 1983 claim against the Governor to proceed. ECF No. 3. Plaintiff alleges that California’s version of Megan’s Law, as amended in 2004, Cal. Penal Code § 290.46, violates his rights under the Ex Post Fact Clause of the U.S. Constitution.

The Governor has now moved to dismiss on sovereign immunity grounds, asserting that the face of the complaint shows that he is immune from suit and therefore, he argues, this court lacks subject matter jurisdiction over the case against him. In the alternative, the Governor moves to dismiss the complaint for failure to state a claim.

I. SUBJECT MATTER JURISDICTION

The Governor argues that this court lacks subject matter jurisdiction over the case against

1 him because he enjoys Eleventh Amendment sovereign immunity. Defendant’s Motion for  
2 Summary Judgment (“Defendant’s Motion”) (ECF No. 9 at 10-13. However, “[t]he [Eleventh]  
3 Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the  
4 federal judiciary's subject matter jurisdiction.” Idaho v. Couer d'Alene Tribe, 521 U.S. 261, 267  
5 (1997); Hill v. Blind Industries and Services of Maryland, 179 F.3d 754, 760 (9th Cir. 1999), as  
6 amended, 201 F.3d 1186 (2000) (“the Eleventh Amendment is not a true limitation upon the  
7 court's subject matter jurisdiction, but rather a personal privilege that a state may waive”).  
8 Accordingly, the Governor’s motion will be considered under the standards applicable to motions  
9 to dismiss under Fed. R. Civ. P. 12(b)(6). See ASARCO, LLC v. Union Pacific R. Co., 765 F.3d  
10 999, 1004 (9th Cir. 2014) (“Dismissal under Rule 12(b)(6) on the basis of an affirmative defense  
11 is proper only if the defendant shows some obvious bar to securing relief on the face of the  
12 complaint”).

## 13 II. DISMISSAL STANDARD UNDER RULE 12(b)(6)

14 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
15 claim upon which relief can be granted tests the legal sufficiency of a claim.” Conservation Force  
16 v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011) (internal quotation marks omitted), cert. denied,  
17 132 S. Ct. 1762 (2012). “Dismissal can be based on the lack of a cognizable legal theory or the  
18 absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police  
19 Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

20 For a complaint to be dismissed because the allegations give rise to an affirmative  
21 defense, the allegations of the complaint must “‘suffice to establish’ the defense.” Sams v.  
22 Yahoo! Inc., 713 F.3d 1175, 1179 (9th Cir. 2013) (quoting Jones v. Bock, 549 U.S. 199, 215  
23 (2007)). Those allegations must show some “obvious” and “insuperable” bar to securing relief.  
24 ASARCO, 765 F.3d at 1004 (citing 5B Charles Alan Wright et al., Federal Practice and  
25 Procedure § 1357 (3d ed.1998) (“a dismissal under Rule 12(b)(6) is likely to be granted by the  
26 district court only in the relatively unusual case in which the plaintiff includes allegations that  
27 show on the face of the complaint that there is some insuperable bar to securing relief . . .”)).  
28 However, “[i]f, from the allegations of the complaint as well as any judicially noticeable

1 materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is  
2 improper.” Id. (citing Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir.1984) (per curiam)).

3 In reviewing a challenged complaint under Rule 12(b)(6), the court “must accept as true  
4 all of the factual allegations contained in the complaint,” Erickson v. Pardus, 551 U.S. 89, 94  
5 (2007) (citing Twombly, 550 U.S. at 555-56), construe those allegations in the light most  
6 favorable to the plaintiff, Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954,  
7 960 (9th Cir. 2010) (citing Twombly), and resolve all doubts in the plaintiff’s favor. Hebbe v.  
8 Pliler, 627 F.3d 338, 340 (9th Cir. 2010) (citing Hospital Bldg. Co. v. Trustees of Rex Hospital,  
9 425 U.S. 738 (1976)). The court need not accept as true, legal conclusions “cast in the form of  
10 factual allegations.” Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

### 11 III. THE COMPLAINT

12 The complaint alleges that on November 4, 2000, plaintiff was convicted of sex crimes  
13 that occurred in December 1998 and August 1999. Complaint (ECF No. 1) at 12. It further  
14 alleges that plaintiff became obligated to “register with local law enforcement and be placed on a  
15 classification & notification Internet data base per ‘Megan’s Law’ which was enacted in  
16 November of 2004.” Id. The complaint alleges that because these obligations arose after the  
17 commission of the crimes, after the charges were brought, and after the conviction was obtained,  
18 the statute imposing them violates the Ex Post Facto Clause of the U.S. Constitution.

19 In his brief opposing the Governor’s motion to dismiss, however, plaintiff clarifies that he  
20 is only challenging, on ex post facto grounds, that portion of the law that “requires Plaintiff to be  
21 placed on an internet data base web site,” the obligation that was enacted in 2004. Plaintiff’s  
22 Memorandum of Points and Authorities in Opposition to Motion To Dismiss (“Plaintiff’s  
23 Opposition”) (ECF No. 15) at 4.

### 24 IV. ANALYSIS

#### 25 A. Eleventh Amendment Immunity

##### 26 1. The proper defendant

27 The Eleventh Amendment bars suits against a state, absent the state’s affirmative waiver  
28 of its immunity or congressional abrogation of that immunity. Papasan v. Allain, 478 U.S. 265,

1 276-77 (1986) (citing Pennhurst v. Halderman, 465 U.S. 89 (1984)). A suit that seeks to enjoin  
2 enforcement of a statute, and names the Governor as a defendant, is a suit against the State, unless  
3 the governor has “some connection with the enforcement” of the statute:

4 In making an officer of the state a party defendant in a suit to enjoin  
5 the enforcement of an act alleged to be unconstitutional, it is plain  
6 that such officer must have some connection with the enforcement  
of the act, or else it is merely making him a party as a representative  
of the state, and thereby attempting to make the state a party.

7 Ex parte Young, 209 U.S. 123, 157 (1908); Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697,  
8 704 (9th Cir. 1992) (“[t]his connection must be fairly direct; a generalized duty to enforce state  
9 law or general supervisory power over the persons responsible for enforcing the challenged  
10 provision will not subject an official to suit”). However, a suit seeking only to enjoin the proper  
11 state official from enforcing an unconstitutional state statute, faces no Eleventh Amendment  
12 sovereign immunity bar.<sup>1</sup> National Audubon Society, Inc. v. Davis, 307 F.3d 835, 847 (9th Cir.)  
13 (9th Cir.), as amended, 312 F.3d 416 (2002) (“[u]nder the principle of Ex Parte Young, private  
14 individuals may sue state officials for prospective relief against ongoing violations of federal  
15 law”).

16 The Governor argues that he must be dismissed because “the Complaint alleges no  
17 connection between the Governor and the enforcement of Megan’s Law.” Defendant’s Motion  
18 at 12. Since sovereign immunity is an affirmative defense, and not a matter of subject matter  
19 jurisdiction, this normally would not be sufficient to obtain a dismissal. However, in this case,  
20 the critical underlying facts may be discerned from the statute itself and other, binding authority,  
21 discussing the Governor’s role in law enforcement. The challenged statute does not itself grant  
22 the Governor any authority, nor does it authorize or require him to place names on the website,  
23 nor to maintain the website, nor does it authorize the Governor to remove names from the  
24 website. See Cal. Penal Code § 290.46.

25 Rather, the statute requires the California Department of Justice to make the sex offender

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27 <sup>1</sup> At oral argument on this motion, the court asked the Governor’s counsel to identify who is the  
28 official who has the ability to grant the requested relief, namely, removal of plaintiff’s name from  
the website. The Governor declined to name any official, inasmuch as no other official has yet  
been named as a defendant in this case, or served. ECF No. 18.

1 information available on a publicly available website, and to “update the Internet Web site on an  
2 ongoing basis.” Id. § 290.46(a). The Attorney General of California is the head of the  
3 Department of Justice. Cal. Gov. Code § 12510. The statute also specifically names the Attorney  
4 General (along with district attorneys and city attorneys) as the person to enforce certain other  
5 sections of the law, and to interact with the public and others regarding the use of the publicly  
6 available information put on the website. See Cal. Penal Code § 290.46(l)(4)(B), (o).

7       Because the statute does not create any connection between the *Governor* and the statute,  
8 and no other connection is alleged in the complaint, the court concludes from the face of  
9 complaint that plaintiff is suing the Governor based upon the Governor’s general supervisory  
10 authority as Governor, or possibly whatever general duty he may have to enforce California law.  
11 See Cal. Gov. Code §§ 12010 (“The Governor shall supervise the official conduct of all executive  
12 and ministerial officers”), 12011 (“The Governor shall see that all offices are filled and their  
13 duties performed”). However, this is an insufficient connection to the enforcement of this law to  
14 overcome the bar of sovereign immunity. See Association des Eleveurs de Canards et d'Oies du  
15 Quebec v. Harris, 729 F.3d 937, 943 (9th Cir. 2013) (“Governor Brown is entitled to Eleventh  
16 Amendment immunity because his only connection to § 25982 [banning the sale of foie gras] is  
17 his general duty to enforce California law”), cert. denied, 135 S. Ct. 398 (2014).

18       Accordingly, the Governor will be dismissed from this lawsuit on the basis of his  
19 sovereign immunity defense. However, plaintiff will be granted an opportunity to amend his  
20 complaint to name a proper defendant. Since plaintiff will have the opportunity to so amend his  
21 complaint, the court will go on to address the Governor’s other sovereign immunity argument,  
22 since it will similarly apply to whichever state official plaintiff names as a defendant.

## 23           2. Threat of enforcement

24       The Governor argues that in order to get past Eleventh Amendment sovereign immunity,  
25 there must be “a threat of enforcement,” relying upon Long v. Van de Kamp, 961 F.2d 151, 152  
26 (9th Cir. 1992) (per curiam). Defendant’s Motion at 12. However, no threat of enforcement is  
27 required. After discussing Long, the Ninth Circuit in National Audubon Society expressly  
28 rejected California’s argument that “the Ex Parte Young exception ‘require[s] a genuine threat of

1 enforcement by a state official before a federal court’ can hear a party’s claims.” National  
2 Audubon Society, 307 F.3d at 846. The Ninth Circuit there explained that Long (and similar  
3 cases):

4 are concerned with plaintiffs circumventing the Eleventh  
5 Amendment under Ex Parte Young simply by suing any state  
6 executive official. That is, they are concerned with the question of  
7 “who” rather than “when.” . . . We decline to read additional  
8 “ripeness” or “imminence” requirements into the Ex Parte Young  
9 exception to Eleventh Amendment immunity in actions for  
10 declaratory relief beyond those already imposed by a general  
11 Article III and prudential ripeness analysis. The Article III and  
12 prudential ripeness requirements . . . are tailored to address  
13 problems occasioned by an unripe controversy. There is thus no  
14 need to strain Ex Parte Young doctrine to serve that purpose.

15 Id. at 846-47. The court concludes that in the Ninth Circuit, no “threat of enforcement” is  
16 required to overcome Eleventh Amendment sovereign immunity.

#### 17 B. Constitutionality of Megan’s Law

18 Although the court will dismiss the Governor from this lawsuit, the question still remains  
19 whether granting plaintiff leave to amend by substituting a different defendant should be granted.  
20 If plaintiff’s lawsuit is plainly hopeless, the court will not waste scarce judicial resources by  
21 permitting plaintiff to amend, and then separately addressing yet another motion to dismiss, this  
22 time on the merits. See, e.g., Foman v. Davis, 371 U.S. 178, 182 (1962) (leave to amend shall be  
23 freely granted “in the absence of any apparent or declared reason,” including “futility of  
24 amendment”). Accordingly, the court considers the facial sufficiency of plaintiff’s claim.

##### 25 1. Chronology

26 At the time plaintiff committed the sex offenses for which he was convicted, Megan’s  
27 Law already provided for the registration of certain sex offenders. Cal. Penal Code § 290; Hatton  
28 v. Bonner, 356 F.3d 955, 959 (9th Cir. 2004) (noting that “California’s sex-offender registration  
statute requires persons convicted of various sex offenses to register with local law enforcement  
authorities,” and discussing the offenses to which the requirement applied in 1983, 1991 and  
1993). The law also provided for the collection and public disclosure of information regarding  
“high risk” sex offenders. See Wright v. Superior Court, 15 Cal. 4th 521, 529 (1997) (the law  
authorizes “law enforcement agencies to disclose information, including street addresses, about

1 certain high risk sex offenders as well as advise the public of their presence”); Doe v. California  
2 Dept. of Justice, 173 Cal. App. 4th 1095, 1102 (4th Dist. 2009) (even before the internet database  
3 requirement was enacted in 2004, California's Megan's Law provided “for the collection and  
4 public disclosure of information regarding sex offenders required to register under section 290”).

5 In 2004, California amended Megan’s Law by enacting Cal. Penal Code § 290.46. That  
6 provision requires the California Department of Justice to “make available to the public, via an  
7 Internet Web site,” information about convicted offenders who are required to register under  
8 Section 290. Cal. Pen. Code § 290.46(a); Doe, 173 Cal. App. 4th at 1102 (“In 2004 the  
9 Legislature enacted section 290.46, which requires the Department to maintain an Internet Web  
10 site that includes information on persons convicted of specified sex offenses, such as the  
11 offender's name, address, aliases, photograph, physical description, date of birth, criminal history  
12 and other information the Department deems relevant”). It is this amendment that plaintiff  
13 alleges violates his ex post facto rights.

14 Defendant moves to dismiss, arguing that Megan’s Law, including the broad publication  
15 of offender information on the Internet, is “nonpunitive.” Defendant’s Motion at 13; Defendant’s  
16 Reply Brief in Support of Motion To Dismiss Complaint (“Defendant’s Reply”) (ECF No. 16)  
17 at 7-8.

## 18 2. Ex post facto law

19 In order to determine whether § 290.46 constitutes “retroactive punishment forbidden by  
20 the Ex Post Facto Clause,” the court must undertake the “two-step analysis” prescribed by Smith  
21 v. Doe, 538 U.S. 84 (2003). Hatton, 356 F.3d at 961.

22 First, the court “must decide whether the intent of the California legislature” in enacting  
23 § 290.46 “was to impose punishment on sex offenders.” Hatton, 356 F.3d at 961; American Civil  
24 Liberties Union of Nevada v. Masto, 670 F.3d 1046, 1053 (9th Cir. 2012) (“The first step of the  
25 inquiry requires courts to determine whether the legislature intended to impose a criminal  
26 punishment or whether its intent was to enact a nonpunitive regulatory scheme”). If the answer is  
27 “yes,” the court’s analysis ends “because retroactive application of the statute would constitute an  
28 ex post facto violation.” Hatton, 356 F.3d at 961; Masto, 670 F.3d at 1053 (if there is a punitive

1 intent, “that is the end of the inquiry”).

2 If, however, the intent of the California legislature was to enact “a nonpunitive and civil  
3 regulatory regime,” the court moves to the second step of the analysis. Id. at 962. There, the  
4 court must decide whether § 290.46 “is ‘so punitive either in purpose or effect as to negate [the  
5 State's] intention to deem it civil.’” Id. (quoting Smith, 538 U.S. at 92). Under this second step,  
6 ““only the clearest proof will suffice to override legislative intent and transform what has been  
7 denominated a civil remedy into a criminal penalty.”” Id. (quoting Smith, 538 U.S. at 92).

8 a. First step: legislative intent

9 In support of his argument that the California legislature’s intent in enacting Cal. Penal  
10 Code § 290.46 was “nonpunitive,” the Governor cites (1) Smith, a Supreme Court case holding  
11 that *Alaska*’s legislature, in enacting its own version of Megan’s Law, had no punitive intent; (2)  
12 Ninth Circuit cases addressing the legislative intent of provisions of Megan’s law other than the  
13 challenged provision, Section 290.46; and (3) California cases, one of which addresses the  
14 legislative intent behind Section 290.46.

15 i. Smith v. Doe

16 In 2003, the Supreme Court found that Alaska’s version of Megan’s Law did not violate  
17 the Ex Post Facto clause when applied retroactively. Smith, 538 U.S. 84. The Court examined  
18 several facts relating to the enactment, implementation and enforcement of Alaska’s version of  
19 Megan’s Law, and concluded in the first part of the ex post facto inquiry, that the Alaska  
20 legislature’s intent “was to create a civil, *nonpunitive* regime.” Id. at 96 (emphasis added). In  
21 reaching this conclusion, the Court specifically examined (1) the statutory text for evidence of the  
22 “objective of the law,” (2) other “formal attributes” of the legislative enactment, including “the  
23 manner of its codification,” (3) the “procedural mechanisms to implement the Act,” and (4) the  
24 determination of which agency would be vested with the power to implement the law. Smith, 538  
25 U.S. at 93-96. Only after examining and fleshing out these factors did the Court reach its  
26 conclusion that the law was intended to be “nonpunitive.” Id.

27 The Governor appears to argue that the intent of the California legislature was also  
28 nonpunitive because the law that resulted is substantively identical to that of Alaska’s. It does

1 appear that in their implementation, the statutes are quite similar.<sup>2</sup> However, the Governor offers  
2 no explanation for why similar looking legislation must have resulted from identical non-punitive  
3 intents, and the court knows of none.

4 ii. Ninth Circuit cases

5 The Governor further argues that “the Ninth Circuit has repeatedly held that California’s  
6 scheme is nonpunitive and does not violate the Ex Post Facto Clause,” citing Hatton, 356 F.3d  
7 at 963-64, Doe v. Harris, 640 F.3d 972, 975-76 (9th Cir. 2011), and United States v. Hardeman,  
8 704 F.3d 1266, 1268 (9th Cir. 2013). Defendant’s Motion at 9; Defendant’s Reply at 8. This  
9 argument is entirely unpersuasive.

10 In Hatton, a habeas corpus case decided under the Antiterrorism and Effective Death  
11 Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254(d), the Ninth Circuit addressed the  
12 petitioner’s challenge to Cal. Penal Code § 290, which retroactively required that he register as a  
13 sex offender. See Hatton, 356 F.3d at 959-61. The case did not address Section 290.46, the  
14 statute challenged here, or the broad public dissemination regime – via the Internet – that it  
15 imposed.

16 In addition, Hatton followed the prescription set forth in Doe, and closely examined the  
17 legislative history, the language of the statute, pronouncements of the California Supreme Court,  
18 and the codification structure of the statute. Each of these factors applied to Section 290, the  
19 requirement to register with local law enforcement, not to Section 290.46, the requirement that  
20 the offender’s information be posted publicly on the Internet. The Governor has not addressed  
21 how those factors apply to Section 290.46. Nor does he show that the Section 290.46

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22 <sup>2</sup> Both states make similar information about sex offenders available to the public by posting the  
23 information on a website. Although the Alaska statute does not require sex offender information  
24 to be posted on an Internet website, see Alaska Stat. § 18.65.087, “Alaska has chosen to make  
25 most of the nonconfidential information available on the Internet.” Smith, 538 U.S. at 91. Both  
26 make similar information about the sex offender publicly available. The principal differences are:  
27 Alaska discloses the offender’s “place of employment,” while California does not; Alaska  
28 discloses the offender’s address, while California discloses it only for some offenses, and only  
discloses the “community of residence and ZIP code” for the rest; and California requires  
disclosure of the offender’s motor vehicles and his “SARATSO” “risk” level, while Alaska does  
not. Compare Alaska Stat. § 18.65.087(b), with Cal. Penal Code § 290.46(b)(1), (c)(1)  
and (d)(1).

1 requirements are sufficiently similar to the Section 290 requirements that it would be plausible to  
2 find that the legislative intent for one carries over to the other.

3 In any event, as noted, Hatton was reviewing a state court denial of a habeas corpus  
4 petition under the deferential standard imposed by AEDPA. In doing so, it found that (1) “the  
5 state court reasonably concluded that the legislature’s intent was not punitive,” and (2) the state  
6 court did not err, under AEDPA standards, in finding that the statute was not “so punitive either  
7 in purpose or effect as to negate [the State’s] intention to deem it civil.” Id. at 961-67 (quoting  
8 Smith, 123 S. Ct. at 1147). This case is not a deferential AEDPA review of a state court decision  
9 denying habeas relief, and Hatton therefore does not compel a finding that Section 290.46 was  
10 enacted with a non-punitive intent.

11 The Governor next cites Doe v. Harris, 640 F.3d 972, 975-76 (9th Cir. 2011). However,  
12 that case is about whether the application of Megan’s Law violated the offender’s plea agreement.  
13 It does not contain a holding relating to the ex post facto effect of any provision of Megan’s Law.  
14 Indeed, it contains no holding of any kind, as the decision only referred a question of contract  
15 interpretation to the California Supreme Court. Doe, 640 F.3d at 973. Its only reference to the  
16 Ex Post Facto clause is its mention of Hatton and Smith, discussed above, in a footnote. See id. at  
17 975 n.3.

18 Finally, the Governor cites United States v. Hardeman, 704 F.3d 1266, 1267 (9th Cir.  
19 2013). In that case, the defendant challenged a federal law, 18 U.S.C. § 2260, that “criminalizes  
20 the commission of certain federal offenses involving a minor while the perpetrator is under a legal  
21 duty to register as a sex offender.” Once again, the case is not about the ex post facto effect of  
22 Megan’s Law, although, like Doe, it does mention Hatton and Smith. However, if anything,  
23 Hardeman tends to undercut the Governor’s argument, because it states that “[t]he *reason* why  
24 those laws [Alaska’s Megan’s law, and Section 290], standing alone, do not violate ex post facto  
25 principles is that registration itself is not considered punitive.” Id. at 1268 (emphasis in text).  
26 Here, plaintiff is not challenging the registration provisions of Megan’s Law, Section 290, but  
27 rather the broad publication of his personal information on the Internet required by  
28 Section 290.46.

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iii. State cases

The Governor argues that state court cases establish that the California Legislature had a non-punitive intent in enacting Section 290.46, citing People v. Castellanos, 21 Cal. 4th 785, 799 (1999), and Doe, 173 Cal. App. 4th at 1114-15. This argument fails. First, Castellanos was decided five years before Section 290.46 was enacted, and does not address the punitive or non-punitive intent of the legislature in enacting that legislation.

Second, even if Castellanos did address that Section – and Doe does address an amendment to Section 290.46 – the question of whether a state enactment has a non-punitive intent is a federal question. “In applying the ex post facto prohibition of the Federal Constitution to state laws, a federal court accepts the meaning ascribed to them by the highest court of the state.” Murtishaw v. Woodford, 255 F.3d 926, 964-65 (9th Cir. 2001), cert. denied, 535 U.S. 935 (2002). But when its meaning is thus established, the issue of whether there has been an ex post facto violation is a constitutional question to be determined by the federal court. Id. at 965.

The Governor’s mere citation to the state court decisions is therefore ineffective. If the Governor believes those decisions should be followed because they are persuasive on the question, then he is free to argue that point. Thus far, he has not done so.

b. Second step: practical effect

Even if the court were to find that the California legislature had no intent to punish, it must then consider whether § 290.46 “is so punitive either in purpose or effect as to negate [the State’s] intention to deem it civil.” Smith, 538 U.S. at 84 (internal quotation marks omitted). In analyzing the effects of Alaska’s version of Megan’s law, the Supreme Court referred “to the seven factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 69 (1963),” which are “useful guideposts” in ex post facto analysis. Smith, 538 U.S. at 97. Of those seven:

[t]he factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or is [5] excessive with respect to this purpose.

Id. at 97.

1 The Governor says nothing about whether the statute’s effects are so punitive in nature as  
2 to negate the legislature’s intent to make the law civil. Nor does he address any of the factors  
3 used to make this determination. The Supreme Court analyzed these factors at some length  
4 before concluding that “respondents cannot show . . . that the effects of the law negate Alaska’s  
5 intention to establish a civil regulatory scheme.” Id. at 97 105. Similarly, in Hatton, the Ninth  
6 Circuit analyzed, at length, all seven factors set out in Kennedy. Hatton, 356 F.3d at 963. Those  
7 factors are:

- 8 (1) whether the sanction involves an affirmative disability or  
9 restraint; (2) whether the sanction has historically been regarded as  
10 a punishment; (3) whether the sanction comes into play only on a  
11 finding of scienter; (4) whether the sanction's operation will  
12 promote the traditional aims of punishment-retribution and  
13 deterrence; (5) whether the behavior to which the sanction applies  
is already a crime; (6) whether an alternative purpose to which the  
sanction rationally may be connected is assignable to it; and (7)  
whether the sanction appears excessive in relation to the alternative  
purpose assigned.

14 Id. The Governor offers no similar analysis of the effects of Section 290.46.

15 For all the reasons explained above, the Governor has not demonstrated that Section  
16 290.46 is non-punitive as a matter of law, or that plaintiff’s claims are otherwise facially  
17 insufficient to proceed. Accordingly, the court cannot conclude at this stage in the proceedings  
18 that permitting plaintiff to amend his complaint would be futile.

## 19 V. CONCLUSION

20 For the reasons stated above, IT IS HEREBY RECOMMENDED that:

- 21 1. The Governor’s motion to dismiss (ECF No. 9), be GRANTED, but only to the extent  
22 that the Governor enjoys sovereign immunity from this suit;
- 23 2. Plaintiff be granted 30 days from the date of this order to amend his complaint by  
24 deleting the Governor as a defendant, and substituting a proper defendant; and
- 25 3. These findings and recommendations are submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 21 days after  
27 being served with these findings and recommendations, any party may file written objections with  
28 the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a document

1 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any  
2 response to the objections shall be filed with the court and served on all parties within fourteen  
3 days after service of the objections. Local Rule 304(d). Failure to file objections within the  
4 specified time may waive the right to appeal the District Court’s order. Turner v. Duncan, 158  
5 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

6 DATED: June 30, 2015

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9 ALLISON CLAIRE  
10 UNITED STATES MAGISTRATE JUDGE  
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