

EXHIBIT 2



October 31, 2012

By United States mail, electronic mail, and facsimile

Attorney General Kamala Harris
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Re: Challenge to Proposition 35

Dear Attorney General Harris:

I am writing on behalf of the American Civil Liberties Union of Northern California and the Electronic Frontier Foundation, to notify your office that if Proposition 35 passes on November 6, we intend to file suit to stop implementation of its requirements that persons required to register under Penal Code § 290 provide the police with information about their online speech, in particular, their “internet identifiers” and “internet service providers.”¹ This aspect of Proposition 35 is facially unconstitutional under the First Amendment because it criminalizes constitutionally protected anonymous speech, it burdens a huge amount of non-anonymous online speech, and it is not appropriately tailored to any legitimate government purpose. *See White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010). It also violates the Due Process and Equal Protection Clauses.

Because the initiative states that all registrants must provide this information to the police “immediately” after the initiative becomes effective,² immediate injunctive relief is necessary to avoid irreparable harm to constitutional rights. We therefore plan to bring a facial challenge in federal court³ on November 7, 2012, seeking declaratory and injunctive relief, and also requesting a temporary restraining order and an order to show cause why a preliminary injunction should not issue.

We ask that your office advise us by the close of business on November 5, 2012 of the following:

- 1) Will the State agree to stipulate to a temporary restraining order?

¹ Proposed Cal. Penal Code § 290.015(4), (5).

² Section 11 of the initiative (proposed § 290.014(b)) states that “Each person to whom this subdivision applies at the time this subdivision becomes effective shall immediately provide the information required by this subdivision.” The initiative takes effect the day after the election. See Cal. Const., Art. II, §10(a).

³ The Federal District Court for the Northern District of California.

The initiative would require the more-than 73,000 Californians required to register under § 290 to immediately provide information about their internet identifiers and internet service providers, which information in turn law enforcement agencies are required immediately to provide to the Department of Justice.⁴ Prop. 35 would thus impose burdensome reporting requirements not only on § 290 registrants but also law enforcement agencies, and would require the Department of Justice to create entirely new information systems. A temporary restraining order would thus serve the interests of administrative convenience, by deferring complex implementation issues until after a federal court has had the opportunity to review the measure's constitutionality with full briefing by the parties.

- 2) Will the State stipulate to provisional class certification, without prejudice to the state's right to move for modification or decertification of the class under Rule 23(d)(2)? We intend to seek immediate certification of a class defined as follows: "All persons who are required to register under California Penal Code § 290, including those whose duty to register arises after the class has been certified."

Class certification is clearly appropriate because plaintiffs intend to bring a facial challenge.⁵ Class certification also serves the State's interest in avoiding re-litigation of the merits, as any final judgment in this action would bind absent class members.

- 3) Some plaintiffs intend to seek the court's leave to proceed anonymously. Will the State consent to this request?

Plaintiffs in this action seek to preserve their constitutional right to engage in anonymous speech. In order to protect the marketplace of ideas, the First Amendment protects Plaintiffs' right to privacy while contributing to public discourse. *See In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). Prop. 35 would require plaintiffs to reveal the identifiers they use when speaking on the internet. Requiring them to proceed without pseudonyms would exacerbate the very privacy injuries they seek to protect by bringing suit. Courts of the Northern District of California have granted leave to proceed anonymously to avoid, as here, "additional invasion of [plaintiffs'] privacy." *See Doe v. Penzato*, 2011 WL 1833007 *4 (N.D. Cal. May 13, 2011); *see also Dept. of Fair Employment and Housing v. Law School Admission Council, Inc.*, 2012 WL

⁴ See Proposed Cal. Penal Code § 290.014(b).

⁵ *See, e.g., Davis v. Astrue*, 250 F.R.D. 476, 488 (N.D. Cal. 2008) ("because plaintiff has brought this action as a facial attack to [defendants'] policies ..., common questions of law and fact exist"); *Mental Disability Law Clinic v. Hogan*, 2008 WL 4104460, *22 (E.D.N.Y. Aug. 28, 2008) ("Since plaintiff is challenging the facial validity of Kendra's law, as opposed to its application, commonality and typicality are satisfied."); *Doe v. Miller*, 216 F.R.D. 462, 465 (S.D.Iowa 2003) (commonality established in facial constitutional challenge to residency requirement applicable to class of sex offenders).

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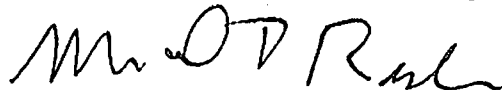
3583023, *3 (N.D. Cal. Aug. 20, 2012). Given plaintiffs' facial challenge, the State does not need to take individual discovery and would thus suffer no prejudice. To the extent individual discovery at a subsequent juncture of this case becomes necessary, Plaintiffs would be willing to stipulate to a protective order to facilitate appropriate discovery.

- 4) We will of course serve all papers on your office through appropriate service of process, but we would also like to provide email copies for your convenience as soon as possible after we learn that the initiative has been enacted. Please advise us of the name and contact information for the attorneys to whom we should direct our papers and correspondence in this matter.

We look forward to your response on each of the above matters by the close of business on November 5, 2012. I would be happy to discuss any of the above matters with any of your staff.

Thank you for your prompt attention to this matter.

Sincerely,



Michael Risher
Staff Attorney

cc:

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