Court of Appeals Docket No. 13-15263
(Consolidated With Court of Appeals Case Number 13-15267)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE; JACK ROE; CALIFORNIA REFORM
SEX OFFENDER LAWS, on behalf of themselves
and others similarly situated,

Plaintiffs-Appellees,

v.

DAPHNE PHUNG; CHRIS KELLY,
Intervenors-Appellants,

v.

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

Defendant.

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

REPLY BRIEF OF INTERVENORS-APPELLANTS

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INTRODUCTION

Since 1947, California has protected the public by collecting identifying information from individuals who have been convicted of sex crimes. This information includes sex offenders' names, aliases, addresses, physical descriptions, and photographs. Over time, California has collected new information, like DNA samples, to correspond to changes in technology. Much of this information is made available to the public through the State's Megan's Law website, so the public can search for a sex offender using his name or alias and they can find his address, photograph, and physical description, including distinguishing features like scars and tattoos.

Following the enactment of the federal Sex Offender Registration and Notification Act in 2007, which required that states collect sex offenders' Internet identifiers or lose 10% of their federal criminal justice funding, many states, including California, now require sex offenders to report their Internet identifiers. The explosive growth of the Internet and its undisputed use by predators to lure children into sexual activity justifies the requirement. In 2013, an Internet identifier is simply an alias that is used in the virtual world, and the requirement that sex offenders report it is no different than the requirement that they report the aliases they use in the physical world.

Plaintiffs argue that the collection of their Internet identifiers violates their First Amendment rights because it chills their right to engage in anonymous speech. But plaintiffs' argument proves too much, because if they were correct, the entire sex offender registration scheme would violate their First Amendment rights because it compels them to provide other

information that can be used to identify them when they speak. Moreover, plaintiffs are incorrect, because Proposition 35, like California's sex offender registration law, has at most an incidental effect on their speech because it requires registration, not a ban on speech. Under U.S. Supreme Court precedent, it does not trigger First Amendment scrutiny.

But even if it did, it is no different than numerous other disclosure requirements that have survived such scrutiny, even in the context of core political speech. Thus, the courts have upheld laws requiring disclosure of the names of petition circulators, campaign contributors, and the names of donors on political communications themselves.

Furthermore, the law is narrowly tailored to achieve what even plaintiffs concede to be an important governmental interest. Plaintiffs complain that the law reaches too many speakers and too much speech, but the Supreme Court allows states to make categorical judgments with respect to sex offender registration requirements. And the State may draw a bright line to capture identifiers used in interactive communications given the evolving use of the Internet by predators.

Thus, plaintiffs will not succeed on the merits, and the balance of hardships tips decidedly in favor of the State. Even if Proposition 35 prevented or solved a single crime, it would significantly outweigh the plaintiffs' interest in being free of a registration requirement that adds little to the burden that is already imposed on them as a result of their conviction of a sex offense.

ARGUMENT

I.

PROPOSITION 35 DOES NOT TRIGGER FIRST AMENDMENT SCRUTINY

Plaintiffs argue that Proposition 35 "directly regulate[s] speech" and "restricts anonymous speech." Appellees' Opening Brief ("ROB") at 19. Like the sex offender registration law, Proposition 35 requires sex offenders to report information that can be used to identify them in order to protect the public. And like the registry law, it does not restrict their right to engage in speech, even anonymous speech. At most, then, Proposition 35 has only an incidental effect on speech, and as a result, does not trigger First Amendment scrutiny.

Plaintiffs dispute this, arguing that "every case addressing sex-offender online speech registration requirements has correctly held that First Amendment scrutiny applies." *Id.* In fact, the courts are divided. Plaintiffs' cases considered laws that went much further than Proposition 35. *See* *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1120 (D. Neb. 2012) (striking down law requiring registrants to consent to computer searches); *White v. Baker*, 696 F. Supp. 2d 1289, 1309-10 (N.D. Ga. 2010) (striking down law requiring registrants to provide Internet passwords). In *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010), the court assumed that the First Amendment applied without considering the issues raised here. In *Doe v. Raemisch*, 895 F. Supp. 2d 897, 912 (E.D. Wis. 2012), however, the court held that the First Amendment did not apply to a law that required Internet identifiers without passwords.

Furthermore, a law that has only an incidental effect on speech does not trigger First Amendment scrutiny unless it targets particular

viewpoints or falls only on those engaged in protected First Amendment activity. Requiring a sex offender to report his Internet identifier no more affects his expressive activity than requiring him to report his name, which he uses to communicate every day. Similarly, the law targets sex offenders not because of their speech, but because they have been convicted of a sex crime. And it applies to all registered sex offenders, whether they use the Internet to engage in activities protected by the First Amendment – like posting a comment on CNN.com – or to trade in child pornography.

Citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), plaintiffs argue that even if Proposition 35 had only an "incidental effect" on speech, it would nonetheless be subject to First Amendment scrutiny. ROB at 24. *Arcara* says no such thing; to the contrary, *Arcara* makes clear that not every law that affects speech triggers First Amendment scrutiny. In *Arcara*, the owners of an adult bookstore challenged an order closing the store as a public health nuisance on the grounds that it interfered with their First Amendment rights to sell books. The Court rejected the argument, explaining that "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities" yet those sanctions are not subject to First Amendment scrutiny "simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." *Id*. at 705-06. So here. Proposition 35 does not trigger First Amendment scrutiny because it does not target a viewpoint or single out only those engaged in protected First Amendment activity.

Plaintiffs try to distinguish *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2nd Cir. 2004), asserting that the conduct regulated by the law in that case – wearing a mask – was not expressive activity while requirements such as those contained in

Proposition 35 – the compelled disclosure of names – affect expressive activity.[1] ROB at 24. But the cases upon which *Kerik* relies for this proposition – *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) and *Talley v. California*, 362 U.S. 60 (1960) – involved outright prohibitions on anonymous leafleting, not disclosure requirements. Furthermore, even if plaintiffs were correct that disclosure requirements trigger First Amendment scrutiny, it is California's existing sex offender registration law that compels sex offenders to disclose their names, not Proposition 35, and in any event, plaintiffs fail to explain how the disclosure of Internet identifiers affects expressive activity any more than the disclosure of sex offenders' aliases does.

Instead, plaintiffs cite *Doe v. Prosecutor, Marion County, Indiana*, 705 F.3d 694, 702 (7th Cir. 2013) for the proposition that the existing reporting requirements have "nothing to do with speech." ROB at 25. In fact, *Marion County* says nothing about whether reporting a name, alias, address, or other identifying information implicates the First Amendment. It does not even discuss the other registration requirements, much less explain how the requirement to report names and aliases does not implicate the First Amendment while a requirement that sex offenders report Internet identifiers does. Indeed, reporting one's name, address, photograph, physical description, and license plate number places a greater burden on the ability of a sex offender to engage in anonymous speech than reporting his Internet identifiers. After all, it would be far easier for a member of the

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[1] Actually, a Klansman's mask is very much like an online speaker's alias: it may embolden the speaker to speak by hiding his identity.

public, based on information available on the Megan's Law website, to identify a sex offender making a speech on a soapbox in a public park than it would be to identify him as the author of a posting by John123 on CNN.com.[2]

Plaintiffs also suggest that a sex offender is not required to report an alias that he uses to send a letter to the editor. ROB at 25 n.7. In fact, California requires sex offenders to report aliases, and there is no exception for an alias that is used to send a letter to the editor. *See People v. Vincelli*, 132 Cal.App.4th 646, 654 (2005) ("The notion that an offender may assume a new identity, or even multiple identities, but need only report under his original name is simply absurd."). Thus, plaintiffs utterly fail to address how Proposition 35 "directly regulate[s]" speech while the long-standing requirement that they report other identifying information by website does not.[3]

Plaintiffs also take issue with the requirement that they report their Internet service provider (ISP), arguing that it impinges on their First Amendment rights because "[a] person who wants to participate online as a speaker . . . needs access to the Internet." ROB at 26. But requiring a sex offender to report that Comcast is his ISP does not burden his right to

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[2] Indeed, California's Megan's Law website includes the home addresses of more than 41,000 offenders. *See* http://www.meganslaw.ca.gov/. Internet identifiers are not included on the website.

[3] Such reporting requirements have been upheld against constitutional challenges. *See*, *e.g.*, *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (upholding Connecticut registration law against due process challenge); *Bruggeman v. Taft*, 27 Fed. Appx. 456 (6th Cir. 2001) (upholding Ohio registration law against First Amendment challenge).

engage in speech any more than the '"arrest of a newscaster for a traffic violation"' would. *See Arcara*, 478 U.S. at 708 (O'Connor, J., concurring).

II.

PROPOSITION 35 DOES NOT IMPINGE ON ANONYMOUS SPEECH

Plaintiffs assert that Proposition 35's registration requirements "criminalize[ ]" their anonymous speech and are therefore unconstitutional. ROB at 27. But a registration requirement does not limit speech, and the Supreme Court has repeatedly rejected the argument that registration impermissibly chills anonymous speech.

Plaintiffs quote Supreme Court cases about anonymous speech but do not address the holdings of those cases. *Id.* The Supreme Court's jurisprudence on anonymous speech has been limited to striking down laws prohibiting anonymous pamphleteering[4] and compelling identification by petition circulators at the time they are collecting signatures.[5]

Disclosure requirements, however, are different. They do not limit anonymous speech. "[D]isclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking." *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 365 (2010) (citations omitted). Moreover, registration occurs in a different setting from the speech. Thus, in *Buckley*, the Court distinguished between a requirement that petition circulators wear

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[4] *Talley*, 362 U.S. 60; *McIntyre*, 514 U.S. 334.

[5] *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999).

an ID badge when speaking and a requirement they file an affidavit with the government:

> While the affidavit reveals the name of the petition circulator and is a public record, it is tuned to the speakers interest as well as the State's. Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks.

Buckley, 525 U.S. at 198.

As a result, the Supreme Court has repeatedly upheld registration requirements, even in the area of core political speech. *See*, *e.g.*, *Citizens United*, 558 U.S. at 369; *see also Family PAC v. McKenna*, 685 F.3d 800, 809 (9th Cir. 2011) (upholding disclosure requirements on small donors); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (rejecting challenge to disclosure requirements for campaign expenditures). Incredibly, plaintiffs do not even address these cases, simply stating they represent a "contrary proposition." ROB at 28.

Most important, these cases reject plaintiffs' argument that Proposition 35 is unconstitutional because it discourages sex offenders who would like to remain anonymous from communicating online. The courts have concluded that while registration requirements may deter some individuals from engaging in speech, that "modest" burden is insufficient to invalidate those requirements. *Family PAC*, 685 F.3d at 806-07; *Citizens United*, 558 U.S. at 366. *Cf. Doe No. 1. v. Reed*, 130 S. Ct. 2811, 2820 (2010) (disclosure of petition signers was modest even though "several groups plan to post the petitions [including names and addresses of the signers] in searchable form on the Internet and then encourage other citizens

to seek out the . . . signers.”). Simply asserting generic and self-serving claims that some plaintiffs may be discouraged from communicating on the Internet is not remotely sufficient to overturn Proposition 35.

The registration cases make one additional point: because they do not limit speech, registration requirements need not operate with surgical precision. Disclosure and reporting thresholds are “inherently inexact” and “courts therefore owe substantial deference to legislative judgments” in this area. *Family PAC*, 685 F.3d at 811.

III.

PROPOSITION 35 IS NARROWLY TAILORED AND SERVES AN IMPORTANT INTEREST

Plaintiffs do not seriously contest that, if First Amendment scrutiny applies, the District Court correctly applied intermediate scrutiny.[6] ROB at 31-32. Nor do plaintiffs dispute that the District Court effectively subjected Proposition 35 to strict scrutiny by requiring the “least restrictive” means and failing to consider that Proposition 35 leaves ample room to communicate online. *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

[6] Plaintiffs suggest that strict scrutiny may apply because Proposition 35 exempts identifiers used for commercial transactions. ROB at 32 n.10. Yet the test for determining content neutrality is whether the government’s regulatory purpose is based on “disagreement with the message.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Id.* Proposition 35 targets communicative interactions without regard to message for the purpose of deterring and detecting criminal conduct. The law is content-neutral.

Furthermore, all parties agree that the State has a legitimate interest in deterring, tracking, and preventing individuals from using the Internet to facilitate human-trafficking and sex crimes. ROB at 34; Appellants' Excerpts of Record ("ER") at 9-10. Thus, the question presented is whether Proposition 35 is narrowly tailored to advance those interests.

A. Proposition 35 Is Narrowly Tailored

1. Proposition 35 leaves open ample channels for online communications

"[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726. Here, Proposition 35 would leave sex offenders free to engage in all legal online communications and to do so anonymously, without any reasonable fear of detection.

Plaintiffs do not even cite *Hill*, or seriously dispute the many "means of communication" that would remain open to plaintiffs. Instead, plaintiffs reiterate the fears they alleged below. ROB at 6-9. The problem for plaintiffs is that those hypothetical harms will not flow from Proposition 35.

First, plaintiffs claim that Doe used to operate websites that provided sex offenders with "an anonymous online forum." *Id.* at 7. Roe also purports to maintain "a blog that discusses matters of public concern" where users can "comment anonymously." *Id*. Likewise, California Reform Sex Offender Laws ("California Reform") maintains a website where registrants can discuss "issues affecting registrants." *Id*. at 8-9. Doe worries

that Proposition 35 "will interfere with his ability to provide offenders with a forum to communicate with each other about sensitive subjects," and Roe fears "retaliation from those he criticizes" online. *Id.* at 7-8. But these fears are irrational. Doe, Roe, and California Reform can operate their websites any way they wish. If they want to allow all commenters to use the identifier "anonymous," or no identifier at all, they can do so. If they prefer, they can create password-protected forums so offenders can use unique identifiers without worrying that the public could monitor their communications.

Second, plaintiffs allege that Roe likes to comment anonymously on news articles, but fears that Proposition 35 will unmask his online identities. ROB at 8; ER at 555. Once again, these fears are irrational. Roe can choose "anonymous" or non-distinct identifiers like "JR" or "Jack2013" to prevent anyone from being able to definitively link his comments with his identity. Proposition 35 will do nothing to interfere with any of plaintiffs' described activities.

There is a good reason for this. Intervenors – the proponents of Proposition 35 – did not draft the law with the goal of being able to monitor sex offenders' online speech. Frankly, intervenors do not care about the online lives of sex offenders until the moment they begin to stalk a new victim. It is in those situations where Proposition 35 can save lives because police could link a sex offender to a particular identifier used to engage in criminal conduct.

Third, Doe complains that compiling a list of identifiers would be so burdensome that it would deter his online speech. ROB at 7, ER 559. But this is nonsense. Doe can limit any burden by using the same identifier on multiple sites. If he prefers or needs to use different identifiers, Doe can

minimize his "burden" by filling out the registration form (name, address, and the like), photocopying it, writing a new identifier on the form after creating it, and dropping it in the mail the next morning. Many Internet users already maintain lists of their Internet identifiers for their own convenience. Proposition 35 requires little more effort than that from sex offenders.

Because plaintiffs would remain free to express their views online, anonymously or otherwise, Proposition 35 satisfies "the tailoring requirement even though it is not the least restrictive . . . means of serving the statutory goal." *Hill*, 530 U.S. at 726.

2. <u>Proposition 35 does not apply to too many speakers</u>

The District Court's ruling that California must use an individualized risk assessment tool to exempt certain sex offenders from its registration requirements (ER at 15-16) is incompatible with the Supreme Court's ruling in *Smith v. Doe*, 538 U.S. 84, 104 (2003), which allows a state implementing a sex offender registry to "dispense with individual predictions of future dangerousness." Intervenors-Appellants' Opening Brief ("AOB") at 23-24 (quoting *Smith*, 538 U.S. at 103-04); ER at 15-16. Plaintiffs do not even cite *Smith*, let alone explain why California must do what the Supreme Court has declared that no state must do.

Instead, plaintiffs cite two cases that require the State to engage in individualized assessments in an entirely different context: when deciding whether to impose significant deprivations of liberty on sex offenders as a condition of supervised release from prison. ROB at 39-40. In both cases, this Court required the State to assess the sex offenders before imposing such conditions on them precisely because of the "particularly

significant liberty interest" at stake. *United States v. Weber*, 451 F.3d 552, 568-69 (9th Cir. 2006) (requiring individual assessment before requiring sex offender to submit to physically and mentally intrusive testing); *United States v. Wolf Child*, 699 F.3d 1082, 1094 (9th Cir. 2012) (requiring individual assessment before prohibiting sex offender from contact with children, including his own).

The *Smith* decision establishes that the same kind of individualized risk assessment is not required here. While the Court acknowledged that individualized assessments may be required to impose a serious deprivation of liberty, it held that individualized assessments are *not* required when imposing the relatively "minor condition of registration." *Smith*, 538 U.S. at 104; *see also Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (no individualized assessments needed to impose residency restrictions; experts testified that sex offenders are more dangerous "as a class" and that "any sex offender is always going to be of some concern forever.").

Plaintiffs also fail to cite any evidentiary basis for the District Court's ruling. A risk assessment tool can tell the State that convicted sex offenders are a dangerous group, but it cannot tell us which individuals within that group will recidivate. Thus, plaintiffs' assertion that "California could, with tools it already uses, distinguish between those registrants who pose a real risk of using the Internet to commit a crime and those who do not" (ROB at 9-10) is simply not true.

It is well established that the recidivism estimates generated by Static-99 "are group estimates based upon re-convictions" that "*do not directly correspond to the recidivism risk of an individual offender*." *United States v. Wetmore*, 766 F. Supp. 2d 319, 335 (D. Mass. 2011) (emphasis

added). None of plaintiffs' experts even suggest that assessment tools can reliably identify truly dangerous individuals. Far from it, plaintiffs' declarants speak only in terms of "the statistical likelihood that one will commit a sex crime," and discuss "probabilit[ies]" when comparing different "categories of sex offenders." ER at 374-75, 381-82. Consequently, the evidence establishes that risk assessment tools tell us that offenders who are older than 25 are less likely to reoffend than offenders who are 25 or younger, but they cannot tell us which older offenders will strike again.

Nor can we even be sure of the reliability of these group assessments. Mr. Hanson candidly concedes that risk assessment tools and studies *underestimate* the recidivism rate in all reference groups, in part because they only measure new sex offenses that result in arrests or convictions. ER at 377, 380; *see also* ER at 484. For these reasons, courts broadly agree that Static-99 has "only 'moderate predictive accuracy.'" AOB at 26 (*see* cases cited therein).

Plaintiffs respond to this by asserting that Proposition 35 applies to "registrants who pose no more danger of committing a future sex crime *than a typical member of the population*." ROB at 40-41 (emphasis added). But in fact, the study upon which they rely found that sex offenders "who remain free of arrests for a sex offense will eventually become less likely to reoffend sexually *than a non-sexual offender* is to commit an 'out of the blue' sexual offense." ER at 378-79 (emphasis added). In other words, some sex offenders may become less likely to commit an impulsive sexual crime *than other kinds of convicted criminals*. Left unexplained is whether sex offenders are more likely to commit premeditated sex crimes.

Plaintiffs ignore the fact that there is no evidence to support the use of a risk assessment tool to exempt anyone from mere registration

requirements. Plaintiffs' own declarants only recommend that these tools be used to determine which sex offenders receive scarce resources when there are not enough resources to treat or supervise all sex offenders. ER at 378, 382, 486-87.

Finally, plaintiffs argue that Proposition 35 is overbroad because it does not exempt sex offenders who did not use the Internet to facilitate their prior sex offenses. ROB at 40. But intervenors are aware of no evidence which suggests that such a requirement is even rational, let alone constitutionally mandated. Certainly plaintiffs do not cite anything suggesting that child molesters, rapists, or child pornographers who commit their initial crimes in the physical world would necessarily (or even probably) refrain from initiating their next crime in the virtual world. Thus, the fact that a child molester met his first victim at a neighborhood park provides no assurance that he will not meet his next victim on a gaming website. Moreover, plaintiffs' notion is at odds with existing registry requirements, which require everyone to provide the same identifying information. All sex offenders are required, for example, to register their license plate number regardless of whether they used their car to facilitate their prior sex offenses. Cal. Pen. Code § 290.015(a)(3). Indeed, the record establishes that criminals adapt their strategies to stay ahead of law enforcement, particularly in the online environment. ER at 257, 419-20.

3. <u>Proposition 35 does not apply to too much speech</u>

Plaintiffs want the State to limit its registration requirements to those communications that convey or respond to "'sexual advances'" and that registration requirements may not constitutionally extend to

communications on websites that are "open to the public," including "newspaper websites." ROB at 35 (citation omitted).

Plaintiffs misunderstand law enforcement needs. For the State to effectively track and prevent online crimes, law enforcement officials must be able not only to identify those who sexually solicit children, but those who engage in communications that precede solicitation, when the predator is "grooming" a new victim. Consequently, registration requirements cannot focus exclusively on sites where one might expect to find a pimp offering a child for sale. They must extend to sites where a sexual predator might go to meet and lure his next victim, which in the virtual world can include any site that a vulnerable woman, child, or teenager may visit.

The District Court abused its discretion by concluding otherwise because there is no evidence to support that conclusion. Plaintiffs rely on the same cases the District Court cited without explaining why the results in those cases should govern here, given the far narrower reach of Proposition 35. *Id.* Thus, plaintiffs cite the Nebraska District Court's conclusion that Nebraska's registration law would "surely deter[ ] faint-hearted offenders from expressing themselves on matters of public concern" without mentioning that Nebraska's law (unlike California's) required offenders to "consent to a search of [their] computers," inform the State of the Internet sites where they post content, and banned the use of social networking websites, instant messaging, and chat room services. *Id.*; *Doe v. Nebraska*, 898 F. Supp. 2d at 1093-95, 1121 (D. Neb. 2012). And plaintiffs point to the tailoring analysis in *White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010) without acknowledging that Georgia's law (unlike California's) required usernames and passwords, and applied to online transactions with

banks and retail outlets that were purely "commercial." *White*, 696 F. Supp. 2d at 1310.

The only other case that plaintiffs cite is *Marion County*, 705 F.3d 694, but that case also involved a law that is unlike Proposition 35. In fact, *Marion County* did not even involve a registration law; it involved a law that flatly prohibited sex offenders from using any social networking site or instant messaging or chat room program that a minor could access. 705 F.3d at 695-96. The Seventh Circuit concluded that the Indiana law was not narrowly tailored because it "targets substantially more activity than the evil it seeks to redress." *Id.*, 705 F.3d at 699.

Incredibly, plaintiffs assert that this same "narrow-tailoring analysis applies" here, even though *Marion County* "involved a prohibition rather than a registration requirement." ROB at 36. Plaintiffs are wrong.[7] The *Marion County* Court declared that its analysis turned on the fact that the Indiana law banned speech:

> "A complete ban" such as the social media ban at issue "can be narrowly tailored, but only if each

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[7] Plaintiffs' cases do not say otherwise. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (content-based restriction must satisfy heightened scrutiny regardless of whether it burdens or bans speech); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-62 (2001) (prohibition on tobacco advertising within 1,000 feet of schools would effectively prevent advertising in 91% of Boston and thereby operate as a ban). Here, Proposition 35 is not content-based, and not even plaintiffs claim that Proposition 35 would effectively ban all online speech.

> activity within the proscription's scope is an appropriately targeted evil."
>
> 705 F.3d at 698 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

By contrast, the Supreme Court applies a different standard when the law merely burdens some but not all speech:

> [W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.
>
> *Hill*, 530 U.S. at 726.

The different standards explain the different results. Because it considered a "complete ban," the *Marion County* Court demanded that nearly all of the speech that Indiana's law would prohibit be the kind of speech that the State legitimately sought to eliminate, *i.e.*, "illicit communication" between a predator and a victim. 705 F.3d at 699. The *Hill* Court, however, considered a law that only restricted some forms of speech within 100 feet of health clinics. *Hill*, 530 U.S. at 707-08. After reviewing the speech that remained available to protesters, the Court affirmed the law, even though it restricted more speech than necessary to achieve the State's goal of protecting patients. *Id.* at 729-30.

Finally, plaintiffs ignore the holding in *Hill* that allows states to use bright-line rules where individualized assessments would "often [be] difficult to make accurately." 530 U.S. at 729. That holding clearly applies here, where it is not possible to predict which registrants will offend again, and where on the Internet they will do it.

B. Proposition 35 Furthers An Important Government Interest

Although the District Court concluded that Proposition 35's registration requirements would advance the State's interests in deterring, tracking, and preventing online sex crimes (ER at 9-10), plaintiffs still complain that the government has not explained "how collecting this information will actually serve a legitimate purpose." ROB at 47.

Plaintiffs need only read the District Court's decision, which explains how Proposition 35 would advance its public safety goal:

> [I]f a registered sex offender used a social networking site to recruit victims for human trafficking, being able to match the Internet identifier used to do the recruiting against a database of registered Internet identifiers could help to identify the perpetrator.

ER at 10.

The Court based its example on the experience of Sharmin Bock, an Alameda County prosecutor. Ms. Bock "prosecuted a case where twin 13-year-old girls were initially recruited on a social networking site, sold online, and eventually rescued by the [police] after being ordered online by a police officer posing as a customer at the behest of the girls' mother." ER at 256. The police were never able to apprehend the trafficker, but Ms. Bock explained that if Proposition 35 had been in effect, "we could have compared the trafficker's Internet identifier to the Internet identifiers of registered sex offenders in the area in an effort to apprehend" him. *Id.*

A California Senior Assistant Attorney General assigned to the eCrime Unit, Robert Morgester, also explained how "very useful" Internet identifiers and ISP information would be "in conducting an investigation." ER at 335-36. Just like having a suspect's name, alias, and home address, an

online alias "is a critical starting point for conducting investigations of crimes facilitated through the virtual world. Having this information may provide enough of a head start on the investigation to save the life of a victim in, for example, the case of abduction, or to expedite the apprehension of someone who already has committed one crime and may be intending to commit another." *Id.*

Plaintiffs dismiss these declarations as "conclusory," but they are not. Bock and Morgester described real-life examples of crimes that were committed online, and explain how registration information could have helped solve those crimes.

Curiously, plaintiffs fault the declarants for failing to describe how Proposition 35 would assist "in cases where the victim knows the offender." ROB at 47. But they did not have to, because plaintiffs' own expert did. David Finkelhor testified that child molestation involving perpetrators who know their victims is "increasingly enacted and evident online." ER at 421. According to Finkelhor, "most of the increase in Internet-related crimes involved offenders who used technology to facilitate[ ] sex crimes against victims they already knew face-to-face." ER at 420-21. Thus, Finkelhor has established that Proposition 35 can serve the same law enforcement purpose in those cases involving perpetrators who know their victims.

Plaintiffs also fault the State for failing to point to experiences in other states that have already implemented similar requirements. ROB at 47-48. Yet the very General Accounting Office report that plaintiffs cite explains why it is not possible to do so: *there have been no studies evaluating SORNA's effects on public safety following implementation*. U.S. Gov't Accountability Office, GAO-13-211, Sex Offender Registration and

Notification Act, 23-25 (2013). Plaintiffs also assert that there are no "examples from anywhere that Internet registration requirements have ever helped solve a crime." ROB at 48. Their only citation for this sweeping statement is the District Court's opinion, which only observes that defendants did not "respond[ ] to Plaintiffs' observation that data from other jurisdictions where Internet registration requirements are in effect could shed light on the potential impact of such requirements in California." ER at 10. Of course, defendants cannot provide data that does not yet exist.

Plaintiffs next suggest that "the law would be completely useless" if offenders could use the screen name "anonymous" or "John2013" rather than something more distinctive. ROB at 48-49. But plaintiffs miss the point of the law, which is not to engage in *surveillance*, but to *aid criminal investigations*. Consequently, the law is not interested in random, online comments to news articles by anonymous speakers. The law is interested in pseudonymous interactions between sex offenders and their intended victims.

Consider plaintiffs' own example. Assume there are hundreds of thousands of individuals, including plaintiff John Doe, who use a common Internet identifier like "Angry_User." *Id.* Neither law enforcement nor the public would be able to engage in surveillance of Doe if they learned that he registered such an identifier, because they would have to guess at whether the "Angry_User" who posted a comment at CNN.com was Doe or one of the many other users of that identifier. But if law enforcement learned that an individual who called himself "Angry_User" had been interacting online with a teenager immediately prior to her disappearance, law enforcement could immediately zero in on the relatively small number of sex offenders who use that identifier and quickly determine whether they

had anything to do with the disappearance. As this example illustrates, plaintiffs have little to fear from Proposition 35 – assuming they do not engage in criminal conduct online – while law enforcement has much to gain.

It is crucial to note how important it is for law enforcement to move quickly in these cases, and how much Proposition 35 would help them to do so. When a child is abducted, "[t]he first 48 hours following the disappearance . . . are the most critical in terms of finding and returning that child safely home." Appellants' Request for Judicial Notice, Ex. A. If the child's computer contains clues about who had been communicating with the child in the days preceding the abduction, the police could spend those first 48 hours pursuing a known suspect, rather than trying to figure out the true identity behind an online alias.

Finally, plaintiffs complain that the law does not advance the government's purpose because criminals will not follow it. ROB at 50. Of course, this criticism could be leveled at thousands of laws that remain on the books. The current registry law, for example, requires sex offenders to register their license plate number even though an offender could rent a car the day that he abducts his next victim. The possibility that a law will not solve every ill does not render it invalid.

IV.

PROPOSITION 35 GIVES REGISTRANTS "FAIR NOTICE" OF ITS REQUIREMENTS

Having failed to persuade the District Court that Proposition 35 is unconstitutionally vague, plaintiffs rehash the same arguments here. But the District Court acted within its discretion in finding Proposition 35 readily

susceptible to a reasonable construction. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). If "'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution . . .,'" courts give the statute that meaning "'rather than another in conflict with the Constitution.'" *Braxton v. Mun. Ct.*, 10 Cal. 3d 138, 145 (1973) (citation omitted); *Center for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 792 (9th Cir. 2008) ("California courts regularly construe arguably ambiguous statutes narrowly to avoid First Amendment problems.").

When construing a statute, California courts "'give a reasonable and common-sense construction consistent with the apparent purpose and intention of the lawmakers – a construction that is practical rather than technical, and will lead to wise policy rather than mischief or absurdity.'" *People v. Smith*, 81 Cal. App. 4th 630, 641 (2000) (quoting *People v. Martinsen*, 193 Cal. App. 3d 843, 848 (1987)).

The definitions in question must therefore be read in the context of Proposition 35's purpose, which "is to strengthen the registration laws to give law enforcement a tool to investigate and to prevent online sex crimes." ER at 83:5-7, 97:25 – 98:2. Plaintiffs, however, take the definitions of "Internet Service Provider" and "Internet identifier" out of context and quibble with the precise meaning of terms they use, but due process does not require the use of words with "the precision of mathematic symbols . . ." *See Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

Plaintiffs complain that Proposition 35 fails to define the terms "chat rooms," "instant messaging," "Internet forum discussion[s]" or "social networking." ROB at 54. It stretches credulity, however, to suggest plaintiffs do not understand what those terms mean, especially given the

technologically-saturated world they describe.[8] Furthermore, "[t]o the extent these terms are unclear when read in isolation, they find clarity when read in context with the entire provision . . ." *Hunt v. City of Los Angeles*, 638 F.3d 703, 714 (9th Cir. 2011). When read in context, it is reasonable to conclude, as did the District Court, that "[t]he Act may be reasonably interpreted to require reporting only of Internet identifiers actually used to post a comment, send an email, enter into an Internet chat, or engage in another type of interactive communication on a website, and not identifiers a registrant uses solely to purchase products or read content online." ER at 8.

Plaintiffs also suggest that it is unclear whether the definition of "Internet identifier" encompasses email addresses. ROB at 54-55. Plaintiffs argue that if the phrase "used for the purpose of" modifies the list of terms it follows (as is obvious from a plain reading of the law), it would exempt email addresses because they are not used to engage in "Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or *similar Internet communications*." ER at 83:11-13. Of course, as the last phrase makes clear, the list is not exhaustive; it merely provides examples of the types of interactive Internet communications in which an identifier may be used. To suggest that email communications are not "similar Internet communications" is simply absurd.

The plaintiffs also object to the District Court's finding that the definition does not reach commercial transactions. ROB at 56. But the

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[8] Indeed, one commenter on the California Reform website pointed to the statute itself to clarify its terms. *See* ER at 547 ("Definitions are provided within the proposition's language that answer your questions. Internet service provider and internet identifier are spelled out.").

Court merely followed the rule that courts should avoid interpretations that would produce absurd results. *See Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564, 575 (1982). Given the purpose of the statute – to capture Internet identifiers that could be used to groom potential victims of sex crimes – it would be absurd to extend the reporting requirement to include communications with the "help desk" at Best Buy.

Plaintiffs also argue that it is unclear whether the definition of "Internet service provider," requires a sex offender to report his roommate's ISP or a café that does not require an account. ROB at 56-57. But as the District Court concluded, the definition only extends to ISPs with which the offender has an "account." ER at 7-8. In both of plaintiffs' examples, therefore, the offender would not have to report the ISP. By contrast, if the offender must establish an account to gain access to the Internet, he must register the ISP. This construction is consistent with "both the common understanding of 'Internet service provider' and California Penal Code section 290.014(b), which requires a registrant to update law enforcement only when he or she 'adds or changes his or her *account* with an Internet service provider.'" ER at 8 (emphasis in original).

Finally, plaintiffs take issue with the State's assurance that it will develop a form, along with instructions, to help sex offenders report the information required by Proposition 35, complaining that the State has not yet developed the form. ROB at 57. Of course, the reason the State has not yet completed the form is that plaintiffs sued to enjoin the implementation of the law the day after the voters adopted it. Until this litigation is resolved, it would be premature to finalize the form.

V.

THE BALANCE OF HARDSHIPS FAVOR THE STATE

As demonstrated above, plaintiffs will not succeed on the merits. The balance of hardships also tips sharply in the State's favor given that Proposition 35 will not actually result in the harm plaintiffs have articulated (pp. 10-12), while online sex crimes and human trafficking indisputably harms women and children in ways that are both horrific and irreparable. Finally, the public's interest in lifting this injunction is compelling, given California's need to prevent and investigate some of the most heinous crimes imaginable.

CONCLUSION

Intervenors therefore respectfully urge the Court to reverse the order entering the preliminary injunction.

Dated: May 22, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE TO
FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 13-15263

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,963 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

Dated: May 22, 2013

s/ James C. Harrison

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ James C. Harrison

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