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

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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.*

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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

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# OPENING BRIEF OF INTERVENORS-APPELLANTS

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**CORPORATE DISCLOSURE STATEMENT**

Neither of the intervenors-appellants have any parent corporation, and there is no publicly held corporation that owns 10% or more of their stock.

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## JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28(i) and Ninth Circuit Rule 28-4(i), intervenors join in the Attorney General's Jurisdictional Statement.

## STATEMENT OF ISSUES PRESENTED

1. Does Proposition 35, a facially neutral law that would be applied in a content-neutral manner, implicate the First Amendment because it might have a remote, chilling effect on pseudonymous speech by registered sex offenders whose anonymity is already compromised by registration requirements previously upheld by the Supreme Court?

2. Do registered sex offenders, who indisputably have a right to engage in activities protected by the First Amendment, also have an unlimited and unconditional right to remain "anonymous"?

3. Are Proposition 35's limited registration requirements narrowly tailored to serve California's strong interest in combating online sex crimes and recidivism by convicted sex offenders?

## ADDENDUM TO BRIEF

Intervenors have included pertinent statutes in a separately bound addendum, pursuant to Ninth Circuit Rule 28-2.7.

## STATEMENT OF THE CASE

Pursuant to Federal Rule of Appellate Procedure 28(i) and Ninth Circuit Rule 28-4(i), intervenors join in the Attorney General's Statement of the Case.

## STATEMENT OF THE FACTS

### A. Federal Law

The federal Sex Offender Registration and Notification Act ("SORNA") imposes minimum national standards for state sex offender registration and notification systems. *See* 42 U.S.C. § 16901 et seq. States must, among other things, establish a registry including sex offenders' names, addresses, license plate numbers, physical descriptions, sex offenses for which convicted, and current photographs. 42 U.S.C. § 16914. And states are *required* to obtain registrants' Internet identifiers and addresses. 42 U.S.C. § 16915a. The U.S. Department of Justice explains that doing so:

> . . . may help in investigating crimes committed online by registered sex offenders – such as attempting to lure children or trafficking in child pornography through the Internet – and knowledge by sex offenders that their Internet identifiers are known to the authorities may help to discourage them from engaging in such criminal activities.
>
> The National Guidelines for Sex Offender Registration and Notification,
> 73 Fed. Reg. 38,030, 30,055 (July 2, 2008).

Without Proposition 35, California is out of compliance with these requirements. States that do not comply with federal requirements lose 10% of their federal law enforcement funding as a consequence. *See* 42 U.S.C. § 16925(a).

### B. California Law And Proposition 35

California has long required post-conviction registration of persons convicted of certain sex crimes. *See* Cal. Pen. Code § 290 et seq. The law, which has been upheld by the California Supreme Court, ensures that registered sex offenders "shall be readily available for police

surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." *In re Alva*, 33 Cal. 4th 254, 264 (2004); *see In re Stier*, 152 Cal. App. 4th 63, 78 (2007). Convicted sex offenders must provide law enforcement such information as their names, aliases, residential addresses, fingerprints, license plate numbers, current photographs, and even DNA samples. Cal. Pen. Code §§ 290.014, 290.015, 296. Yet pre-Proposition 35 registration requirements do not address the explosive growth of the Internet and its use by sexual predators.

Proposition 35's Findings and Declarations explain that "the predatory use" of the Internet by "sex offenders has allowed such exploiters a new means to entice and prey on vulnerable individuals in our state." Proposition 35, Californians Against Sexual Exploitation Act, § 2, ¶ 4. Thus, Proposition 35 is intended "[t]o strengthen laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to track and prevent online sex offenses and human trafficking." *Id.*, § 3, ¶ 3. The ballot arguments declare that requiring sex offenders to disclose their Internet identities would help stop the exploitation of children, provide "information to authorities about [sex offenders'] Internet presence, which will help protect our children and prevent human trafficking," and "help prevent human trafficking online." Appellants' Excerpts of Record ("ER")[1] at 251-52.

Proposition 35 amends California Penal Code section 290.015 to add "Internet identifiers" and "Internet service providers" to the list of

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[1] Intervenors cite to the Excerpts of Record filed by defendants-appellants in the Consolidated Appeal, Case Number 13-15267.

information convicted sex offenders must already provide to law enforcement agencies. It also expands the scope of Penal Code section 290.014, which requires sex offenders to report a name change, to require sex offenders to send a written notice of changes in their Internet identifiers or Internet service provider within 24 hours.[2] Unlike reporting a name change, which must be done in person within five working days, a sex offender may use the mail to report a change in his Internet identifier or Internet service provider. Cal. Pen. Code § 290.14(b).

Proposition 35 defines "Internet service provider" ("ISP") 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. An Internet service provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.

*Id*., § 290.024(a).

It defines "Internet identifier" as:

> 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 communication.

*Id*., § 290.024(b).

[2] Proposition 35 also increases fines and jail time for people convicted of human trafficking and increases training for law enforcement officers. Plaintiffs do not challenge these provisions.

The District Court reasonably construed these provisions to apply only to ISPs with which the registrant has a current account, and to exclude Internet identifiers used "solely to purchase products or read content online." ER at 8-9.

Unlike registration laws in other states, Proposition 35 *does not* prohibit sex offenders from visiting any websites or engaging in any kind of online speech. It *does not* require sex offenders to consent to searches of their computers, nor does it require sex offenders to report the websites they visit, or their online passwords. It *does not* prohibit sex offenders from engaging in either anonymous or pseudonymous online speech.[3] It merely requires sex offenders to register their ISPs and Internet identifiers.

Proposition 35 does not amend the existing law governing public disclosure of registration information. Although state law requires the disclosure of some information about registered sex offenders to the public, such as names, aliases, and criminal history, federal law prohibits states from including registrants' Internet identifiers on their public sex offender websites. Cal. Pen. Code § 290.46; 42 U.S.C. §§ 16918(b), 16915a(c). And, as the Attorney General describes in greater detail, under California law and practice, only those law enforcement officials who acknowledge a "need to know, right to know" may access the sex offender

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[3] *Compare with Doe v. Prosecutor, Marion County, Ind.*, 705 F.3d 694, 703 (7th Cir. 2013) (striking down Indiana law prohibiting registrants from accessing social networking sites and chat rooms); *Doe v. Nebraska*, No. 8:09CV456, 2012 WL 4923131, at *27 (D. Neb. Oct. 17, 2012) (striking down Nebraska law requiring registrants to consent to computer searches); *White v. Baker*, 696 F. Supp. 2d 1289, 1309-10 (N.D. Ga. 2010) (striking down Georgia law requiring registrants to provide Internet passwords).

registry to learn which Internet identifiers a particular registrant uses. ER at 324. Furthermore, the public will only receive Internet registry information if law enforcement determines public disclosure is "necessary to ensure the public safety . . ." in connection with investigating or preventing online sex crimes. Cal. Pen. Code § 290.45(a)(1); Prop. 35, § 3, ¶ 3.

Any offender who willfully fails to comply with Proposition 35's registration requirements will be subject to the existing penalties for failure to comply with California's Sex Offender Registration Act. Cal. Pen. Code § 290.018. Penalties include up to three years in prison for willful violations by registrants with the most serious convictions. *Id.*

Finally, any eligible individual registrant who believes he should be exempt from registration requirements can petition the court for a certificate of rehabilitation and pardon. Cal. Pen. Code §§ 4852.01, et seq.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In November 2012, Proposition 35 brought California's sex offender registration law into the modern era (and into compliance with federal law) by requiring registered sex offenders to provide law enforcement with the names they use to engage in online communications with other members of the public. The plaintiffs immediately challenged the new law, arguing that it prohibited them from engaging in anonymous speech. But Proposition 35 prohibits no one from engaging in speech anywhere on the Internet, and it does not demand that the speaker disclose his identity to his audience. In fact, Proposition 35 does not regulate speech at all. It simply demands Internet identification information from convicted sex offenders, applying to the virtual world the same rules currently applied in the physical world. Because it is a content-neutral regulation designed to

enable law enforcement to investigate and prevent online sex crimes, rather than to suppress a particular point of view, Proposition 35 does not implicate the First Amendment.

When pressed below, plaintiffs conceded that what they really meant is that Proposition 35 chills their right to pseudonymous speech because law enforcement agencies might misuse the information or make it public. But even if one were to accept plaintiffs' premise that some registrants may refrain from speaking online because their identities could become public, it would not amount to a violation of their First Amendment rights, because plaintiffs do not have an unconditional right to remain anonymous. Indeed, the plaintiffs have already lost a significant degree of anonymity as a result of their status as convicted sex offenders under laws upheld by the Supreme Court against multiple constitutional challenges. Under existing law they are required to report their name, aliases, address, photograph, and physical description to law enforcement, and all of this information is made available to the public on the state's Megan's Law website. So when a registered sex offender sends a letter to the newspaper editor using an alias, a member of the public could identify him by comparing his alias to the aliases included on the Megan's law website. Proposition 35 merely extends the registration requirement to include online aliases.

The District Court did not address these arguments. Instead, under the guise of applying intermediate scrutiny, the District Court held that Proposition 35 was invalid because it did not implement the "least restrictive" means imaginable to serve its public safety goals. Thus, the District Court found fault in Proposition 35 because it applies to all registered sex offenders, not just those whose scores on risk assessment tests

predict they pose the greatest risk of recidivism. But the State is not required to make an individualized decision about the risk presented by a particular sex offender; the Supreme Court has made clear in upholding Alaska's sex offender registration law that a state may make categorical judgments when they relate to registration requirements.

The District Court also erred in concluding that Proposition 35 reaches too much speech. While it is true that Proposition 35 would require a sex offender to register an alias that he uses to post a comment on CNN.com, in addition to one he uses in a chat room populated by teens, the exponential growth of the Internet and its evolving use by sexual predators make it impossible for the state to predict what types of online forums could be used by predators to lure their victims. Under these circumstances, it is permissible for the State to draw a bright line by requiring that registrants report the aliases they use to engage in any online communications with other members of the public. Intermediate scrutiny requires that a law must be narrowly tailored to serve the government's legitimate interests, not the least restrictive or intrusive means of achieving those interests. Thus, the District Court erred by applying a more exacting test and plaintiffs have no likelihood of succeeding on the merits of their claim.

Intervenors therefore respectfully request that the Court overturn the preliminary injunction issued by the District Court.

## STANDARD OF REVIEW

Pursuant to Federal Rule of Appellate Procedure 28(i) and Ninth Circuit Rule 28-4(i), intervenors join in the Attorney General's Standard of Review.

## ARGUMENT

To obtain a preliminary injunction, plaintiffs must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of the preliminary injunction; (3) the balance of equities tips in their favor; and (4) the issuance of the preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

## I.

## PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

### A. This Is Not A First Amendment Case

#### 1. A mere incidental effect on speech does not implicate the First Amendment

Because Proposition 35 does not ban, restrict, or in any way regulate speech or expressive conduct, the only effect that Proposition 35 could have on activities protected by the First Amendment is an incidental chilling effect. The District Court assumed that this incidental effect was enough to implicate the First Amendment (ER at 4), but the United States Supreme Court has held otherwise.

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the Supreme Court considered the extent to which a law must affect First Amendment rights before First Amendment scrutiny applies. At issue was whether the First Amendment barred a city from closing a business that was used as a place for prostitution because the business was also used to sell adult books. The New York Court of Appeals struck down the closure order as overbroad. It concluded that even though the public health nuisance law that authorized the closure was facially neutral, and even though the order

itself was unrelated to the suppression of speech, the closure's incidental effect on the adult bookstore required the city to find a different way to restrict the prostitution taking place on the premises. *Id*. at 701-02.

The Supreme Court reversed, finding that facially neutral laws do not implicate the First Amendment merely because they have an incidental effect on speech – something more is required. *Id.* at 704-07. For example, the Court had previously found that a facially neutral law implicated the First Amendment when the law had an incidental effect on speech that fell exclusively on those who express "a particular political opinion." *Id.* at 702. Such was the case in *United States v. O'Brien*, 391 U.S. 367 (1968), which considered a statute that outlawed the knowing destruction of draft cards. Although the law "ordinarily" applied to non-expressive conduct, its application to expressive conduct fell on those who expressed a particular political opinion by burning their cards to express their opposition to the draft. *Arcara*, 478 U.S. at 702 (discussing *O'Brien*). Similarly, the Court had previously concluded that a facially neutral law implicated the First Amendment because it applied exclusively to "those engaged in protected First Amendment activities." *Id.* at 704. Such was the case in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983), where the state imposed a facially-neutral tax on ink that had the incidental effect of "singl[ing] out the press for special" burdens that did not fall on any other kind of business.

The *Arcara* Court distinguished these cases from the public health nuisance law before it, which had nothing but an incidental effect on speech. The law had not been invoked to punish partisan expressive conduct like the burning of a draft card; it had been invoked to crack down on prostitution. *Arcara*, 478 U.S. at 707. Nor did the public nuisance law

"inevitably single out" those engaged in First Amendment protected activities; it targeted all nuisances, regardless of their surrounding circumstances. *Id.* at 705.

The same analysis applies here. Proposition 35's registration requirements apply to every registered sex offender who has an ISP and an Internet identifier, regardless of that offender's political views. Likewise, Proposition 35 does not "single out" those engaged in activities protected by the First Amendment. It applies to all sex offenders, regardless of whether they use the Internet for activities like accessing child pornography or commenting on political issues.

Plaintiffs argued below that Proposition 35's application to the Internet, which is tied so closely to speech, triggers First Amendment scrutiny like the tax on ink in *Minneapolis Star*, because the registration requirements "burden[ ] instrumentalities uniquely associated with speech." ER at 173. But plaintiffs misread *Minneapolis Star*. That case does not trigger First Amendment scrutiny every time generally applicable governmental regulations affect First Amendment protected activities. To the contrary, the *Minneapolis Star* Court emphasized that states are free to "burden" newspapers with taxes as long as those taxes fall on other businesses, too. 460 U.S. at 581. The constitutional problem arose when Minnesota singled out newspapers for "differential treatment," because such treatment suggests that "the goal of the regulation is not unrelated to suppression of expression. . . ." *Id.* at 585. Proposition 35 presents literally the opposite situation. Far from "singling out" Internet-related activities for special burdens, Proposition 35 seeks to extend the same registration requirements that apply in the physical world to the virtual world. For example, if a registrant uses an alias to send a letter to the newspaper editor,

he must report that alias to law enforcement. Now, he must also report the aliases he uses on the Internet. Thus, Proposition 35 updates California's sex offender registration law to make it the kind of generally applicable governmental regulation that the Supreme Court has deemed to be free of constitutional problems. *Id.*, 460 U.S. at 581; *Arcara*, 478 U.S. at 705.

The Second Circuit Court of Appeals has applied *Arcara* to conclude that a mere incidental chilling effect on anonymous speech does not implicate the First Amendment. In *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2nd Cir. 2004), New York City sought to prevent members of the Ku Klux Klan from wearing masks while participating in a public demonstration by enforcing a statute that prohibited individuals from disguising themselves when congregating in public. *Id.* at 200-01. The Klan claimed that the anti-mask statute infringed their right to engage in anonymous speech, but the Second Circuit disagreed. The Court first determined that the purpose of the anti-mask law was to "deter[ ] violence and facilitat[e] the apprehension of wrongdoers" rather than "to suppress any particular viewpoint." *Id.* at 205. It then concluded that even if the inability to wear a mask would make some members "less willing to participate in rallies," "a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment." *Id.* at 209 (citing *Arcara*, 478 U.S. at 706). So it is here. Proposition 35 is a content-neutral statute of general application that provides a tool to law enforcement to combat online sex crimes and does not suppress any particular viewpoint.

### 2. A remote chilling effect on speech does not implicate the First Amendment

Although the Supreme Court has found that constitutional violations may arise from the "'chilling[ ]' effect of governmental regulations," some "chilling effect[s]" are too remote to implicate the First Amendment. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). In fact, an individual cannot invoke the First Amendment merely because he knows "that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and addition[a]l action detrimental to that individual." *Id.*

The Tenth Circuit applied that principle in the only appellate decision yet to address the constitutionality of Internet registration requirements for sex offenders. Although the Tenth Circuit acknowledged the possible chilling effect from the public disclosure of online aliases, it was "not persuaded that this possibility imposes a constitutionally improper burden on speech." *Doe v. Shurtleff*, 628 F.3d 1217, 1225 (10th Cir. 2010) (citing *Laird*, 408 U.S. at 11). In so holding, the Court noted that a chilling effect generally occurs "when an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression." *Shurtleff*, 628 F.3d at 1225. In the context of a sex offender registry, however, "such a disclosure would generally occur, if at all, at some time period following [an offender's] speech." *Id.*

The Tenth Circuit explained this distinction by citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999). *Buckley* struck down a law requiring petition circulators to wear a name badge while talking to voters, which it distinguished from a law requiring petition circulators to

print their names and addresses on affidavits they later submitted to the government.[4] As the *Buckley* Court explained:

> [T]he name badge requirement forces circulators to reveal their identities at the same time they deliver their political message; it operates when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned. The affidavit, in contrast, does not expose the circulator to the risk of "heat of the moment" harassment.
>
> *Buckley*, 525 U.S. at 198-99 (internal citations and quotations omitted).

Thus, *Shurtleff* concluded that a registry's alleged "chilling effect" is too tenuous to justify constitutional consequences under *Laird* if it is based on a speculative fear about future government conduct, and is too remote to justify constitutional consequences under *Buckley* if the law provides distance between the speaker and the speech.

The District Court distinguished *Shurtleff* on the grounds that the Utah law would lead to less public disclosure than Proposition 35. ER at 12. But *Buckley* and *Shurtleff* establish that public disclosure is not constitutionally suspect if it is remote in time and in distance from the speech. After all, *Buckley* approved of a law requiring petition circulators to print their names and addresses on affidavits even though the information would eventually become "a public record." *Shurtleff*, 628 F.3d at 1225; *Buckley*, 525 U.S. at 198-99.

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[4] Although the affidavit requirement was not before it, the Court concluded it was likely constitutional. *Buckley*, 525 U.S. at 200.

The District Court next distinguished *Shurtleff* on the grounds that Utah placed more distance between sex offenders' online speech and the disclosure of their online aliases than Proposition 35, which requires registrants to mail written disclosure "within 24 hours after speaking and potentially while the speech is ongoing." ER at 13. But the District Court falsely equated registration with an immediate loss of anonymity. The mere registration of an offender's online alias will not enable the government (or public) to connect the speaker with most speech, given that sex offenders do not have to register the websites where they are speaking.[5] For these reasons, *Shurtleff* applies.

### 3. Registered sex offenders do not have a right to anonymity

The District Court framed the legal question as involving "the First Amendment's protection of the right to speak anonymously online" but the Supreme Court has never found a separate, cognizable right to

[5] Thus, Proposition 35 is not designed to facilitate the monitoring of speech, but is designed to facilitate the investigation of crime. Proposition 35 would allow law enforcement, for example, to connect an email address used by a predator to "groom" a young girl with one used by a registered sex offender in order to prevent or investigate a crime.

anonymity, distinct from the First Amendment.[6] ER at 4. Rather, the Court has condemned laws that flatly ban anonymous speech, or force identification in a narrow setting: where the speaker is prohibited from cloaking him or herself in anonymity at the time of speaking, in face-to-face meetings. Thus, the Court struck down a prohibition on anonymous handbills in *Talley v. California*, 362 U.S. 60 (1960), and it struck down a prohibition on all anonymous campaign literature in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). And, as discussed above, the Court struck down a law forcing petition circulators to wear name badges while speaking to voters in *Buckley*, 525 U.S. 182. *See* pp. 13-14. But the Court has never declared a generalized right to speak anonymously at any time, in any setting.

To the contrary, the Supreme Court has upheld a series of laws against First Amendment challenges that compel speakers to disclose their identities, even in the area of core political speech, because those laws are "not a prohibition on speech, but instead a[re] *disclosure* requirement[s]. '[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.'" *Doe No. 1 v. Reed*, __ U.S. __,

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[6] At least two justices have flatly rejected the existence of a separate constitutional right to anonymity. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 373 (1995) ("Evidence that anonymous electioneering was regarded as constitutional right is sparse, and as far as I am aware evidence that it was *generally* regarded as such is nonexistent.") (Scalia, J., dissenting) (emphasis in original); *Doe No. 1 v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2831 n.4 (noting that "*McIntyre* posited no such freewheeling right" as a right to anonymous speech; "The right . . . is the right to speak, not the right . . . to speak anonymously." (Stevens, J., concurring).

130 S. Ct. 2811, 2818 (2010) (emphasis in original) (rejecting facial challenge to law that required public disclosure of the names and addresses of signers of referendum petitions; law did not impermissibly infringe on First Amendments rights) (citation omitted). Likewise, in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876 (2010), the Court upheld disclosure laws that required a person making electioneering communications to disclose information about the communication within 24 hours and identify the person making the communication on the communication itself. Noting that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," the Court had little trouble finding that the disclosure requirements met the exacting scrutiny standard: the governmental interest of providing the electorate with information about who was behind such communications was sufficiently important and reasonably related to the disclosure requirements. *Citizens United*, 130 S. Ct. at 915, 916 (2010).[7]

Under these authorities, then, it is not clear that *anyone* has a cognizable right to anonymity. Yet, even assuming that some individuals have such a right, it cannot be the case that convicted sex offenders have the same anonymity rights as those who not have engaged in criminal conduct. After all, convicted sex offenders have a diminished right to privacy generally. *U.S. v. Kreisel*, 632 F. Supp. 2d 1044, 1046-47 (W.D. Wash. 2009), citing *Green v. Berge*, 354 F.3d 675, 679-80

[7] In both *Doe No. 1* and *Citizens United*, the laws expressly burdened political speech and were not content-neutral. Thus, unlike here, the exacting review standard of First Amendment scrutiny applied. *Doe No. 1 v. Reed*, 130 S. Ct. at 2818; *Citizens United*, 130 S. Ct. at 914.

(7th Cir. 2004) (Easterbrook, J., concurring) and *Johnson v. Quander*, 370 F. Supp. 2d 79, 102-03 (D.D.C. 2005). And that diminished privacy right does not allow them to escape sex offender registration laws. *A.A. ex rel. M.M. v. New Jersey*, 341 F.3d 206, 211 (3d Cir. 2003) (citation omitted) ("[T]his case begins with the understanding and, indeed, the requirement that what might otherwise be private information [i.e., registrants' home addresses] be made public"); *see also United States v. Juvenile Male*, 670 F.3d 999, 1012-13 (9th Cir. 2012) ("sex offenders do not have a fundamental right to avoid publicity.").

Indeed, one of the valid and primary purposes of sex offender registration laws is to de-anonymize known sexual predators. *See*, *e.g.*, *Smith v. Doe*, 538 U.S. 84, 93 (2003) (noting that Alaska Legislature found that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety."); *In re Alva*, 33 Cal. 4th 254, 264 (2004). Thus, in *Bruggeman v. Taft*, 27 F. App'x 456 (6th Cir. 2001), the Sixth Circuit rejected a First Amendment challenge to Ohio's sex offender registration law, concluding that the First Amendment "does not guarantee a citizen the right to move and assemble in society free from being shunned by society" and that "there is no liberty interest in being free from having to register as a sex offender or from public disclosure of registry information." *Id*. at 458, citing *Cutshall v. Sundquist*, 193 F.3d 466, 478-83 (6th Cir. 1999).

Thus, while no one disputes that convicted sex offenders have First Amendment rights, the assertion that they have an unconditional right to remain anonymous has been repeatedly rejected by the courts. Under existing sex offender registration laws, plaintiffs' criminal conduct has already deprived them of the ability to remain anonymous at all times and in

all places. As a consequence, even if Proposition 35 did implicate plaintiffs' First Amendment rights, it does so in a way that imposes no greater burden than existing laws that have been upheld against constitutional challenge. *See*, *e.g.*, *Smith v. Doe*, 538 U.S. 84; *In re Alva*, 33 Cal. 4th 254.

## B. Proposition 35 Is Narrowly Tailored To Serve An Important Government Interest

### 1. The District Court correctly concluded that intermediate scrutiny applies to content-neutral regulations

Although it is far from clear that Proposition 35 implicates the First Amendment, it is clear that its registration requirements are content-neutral given that they "operate[ ] without regard to the message that any registrant's speech conveys." ER at 6. Accordingly, if First Amendment scrutiny applies at all, it is necessarily intermediate scrutiny. *Id*., citing *Doe v. Shurtleff*, 628 F.3d at 1223.

### 2. The District Court applied the wrong standard for intermediate scrutiny

The District Court misapplied the intermediate scrutiny standard. It correctly recited that intermediate scrutiny requires that "a law must 'be narrowly tailored to serve the government's legitimate, content-neutral interests.'" ER at 6 (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1566 (2012) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). But the Court ignored the law which provides that, "when 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 v. Colorado*, 530 U.S. 703, 726 (2000) (citing *Ward*,

491 U.S. at 798). Thus, the Court failed to consider the many ways in which Proposition 35 would leave registered sex offenders free to communicate online, and struck down Proposition 35 for failing to implement the "least restrictive" means imaginable to serve its public safety goals. This effectively subjects Proposition 35 to strict scrutiny, a clear abuse of discretion.

### 3. Proposition 35 is narrowly tailored to serve the State's strong interest in combating online sex crimes without infringing speech

It is undisputed that the government has a legitimate interest in promoting Proposition 35's purposes of: (1) "deter[ring] predators from using the Internet to facilitate human trafficking and sexual exploitation;" (2) "combat[ing] the crime of human trafficking;" and (3) "strengthen[ing] laws regarding sexual exploitation, including sex offender registration requirements, to allow law enforcement to track and prevent online sex offenses and human trafficking." ER at 8-9; Prop. 35, § 2, ¶ 6, § 3, ¶¶ 1 & 3. The District Court easily concluded that Proposition 35's registration requirements can be expected to advance those interests. ER at 9-10. Thus, the only question is whether Proposition 35 is narrowly tailored to advance the State's public safety goals.

#### a. 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 (citing *Ward*, 491 U.S. at 798). Thus, a statute that regulates speech-related conduct within 100 feet of health care

facilities satisfies the tailoring requirement by allowing protesters to speak through signs and oral statements, even though it would prevent protesters from delivering some handbills to some patients. *Hill*, 530 U.S. at 726-28.

Here, the District Court did not even consider the breadth of online speech that would remain available to sex offenders, and it grossly exaggerated the chilling effect that Proposition 35 could reasonably be expected to have.

To begin with, Proposition 35 does not ban or prohibit any kind of speech. Plaintiffs' mere assertion otherwise[8] is pure hyperbole. Proposition 35 would leave sex offenders free to access any website they wish and engage in any lawful communication once they get there. Nor, more specifically, does Proposition 35 ban anonymous online communications. A true ban on anonymous speech would prohibit the use of online aliases or prohibit communications that are not accompanied by a sex offender's true identity. Yet Proposition 35 does nothing like that, and so leaves offenders free to engage in all available First Amendment-protected online activities.

The District Court did not disagree, but instead made the unreasonable assumption that the possibility of public disclosure would chill anonymous speech. ER at 5, 11-14.

As an initial matter, the District Court exaggerates the risk of public disclosure. For all the reasons explained by the Attorney General, if the public receives any information about the online aliases of sex offenders, it would be under limited circumstances. Yet even if every single online

[8] *See*, *e.g.*, ER at 569 ("The statute prohibits *all* anonymous speech . . .") (emphasis in original).

alias that is ever registered by a sex offender were made available to the public, such disclosure could not reasonably chill the vast majority of anonymous, or even pseudonymous, online speech.

It is important to note that sex offenders have no justifiable basis for fearing that Proposition 35 would strip the anonymity from their *private* online communications, because Proposition 35 does not require sex offenders to register their online passwords. Thus, Proposition 35 will have no effect on the communications that sex offenders initiate through emails, or any other form of password-protected communication.

Nor would sex offenders have a reasonable basis for fearing that Proposition 35 would strip the anonymity from most public online communications that are *truly* anonymous. Sex offenders could continue to post anonymous online speech by using and registering the Internet identifier "anonymous," or non-distinct identifiers like "JD" or "John2013." Doing so would provide ample safeguards for controversial political opinions because the public, even if it had access to the registrant's Internet identifiers, could do little more than speculate as to whether a registered sex offender who uses the identifier "anonymous" was the same "anonymous" as the individual who posted a comment at CNN.com.

Consequently, if Proposition 35 has any chilling effect, it would be on public online communications that are pseudonymous, *and* which involve an online alias that is so distinct (for example, "Skywalker") that a member of the public could infer that the individual who posted a comment on CNN.com is the sex offender who registered the same alias. But such inferences could not be drawn with any frequency in the real world because Proposition 35 does not require sex offenders to report the names of the websites they visit. That will necessarily prevent law enforcement or the

public from learning where sex offenders speak online unless the postings contain a criminal element that brings them to the attention of law enforcement, or by pure happenstance, such as when someone happens to browse the comments at CNN.com after "Skywalker" posts, and also happens to know that "Skywalker" is the online alias used by a particular sex offender. Of course, the likelihood of such chance discoveries is vanishingly small given the vastness of the Internet and the fact that as many as 73,000 registered sex offenders will each register one or more Internet identifier, assuming they use the Internet to engage in online communications.[9]

Thus, Proposition 35's content-neutral regulations do not "entirely foreclose" online communications by registered sex offenders, and so may satisfy the tailoring requirement even though they are not the least restrictive means of advancing the statutory goal. *Hill*, 530 U.S. at 726.

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

No one disputes that registered sex offenders "recidivate." Plaintiffs' own evidence establishes that "'[p]edophiles who molest boys and rapists of adult women have recidivism rates of 52% and 39% respectively,'" and that "the overall average recidivism rate for registrants in all risk categories is between 14% and 20%.'" ER at 15 (quoting ER at 489). Given that "[t]he risk of recidivism posed by sex offenders is 'frightening and high,'" the United States Supreme Court has determined

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[9] It is also unlikely because California's sex offender registry would enable very few law enforcement officials to know the identity of "Skywalker." As described above (p. 5), only those law enforcement users who acknowledge a "need to know, right to know" would be able to use the registry to connect an Internet identifier with the name of an offender. ER at 324.

that a state implementing a sex offender registry may "conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Smith*, 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002). In doing so:

> [T]he State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions . . .
>
> *Smith*, 538 U.S. at 104.

The District Court nevertheless found that California may *not* conclude that a conviction for a sex offense provides sufficient evidence of substantial risk of recidivism for purposes of Proposition 35, but must instead use individual predictions of future dangerousness. More specifically, the Court deemed Proposition 35 to be "overbroad" because it does not use the results of the Static-99 risk-assessment tool[10] to exempt those sex offenders whose scores suggest that they pose a "low" or "moderate-low" risk of re-offending. ER at 15-16.

This ruling cannot be squared with *Smith* or relevant First Amendment precedent. Although the question in *Smith* arose in the context of an *Ex Post Facto* Clause challenge, it was resolved through an analogous legal framework. The *Smith* Court considered whether Alaska's sex

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[10] Static-99 is an actuarial assessment instrument that considers 10 static (unchanging) factors, such as the nature of the offense that led to the most recent arrest and the offender's age at release, to estimate the recidivism rate of convicted sex offenders. The Static-99 is intended to be used with adult male offenders who have reached the age of 18 prior to release to the community. ER at 375-76.

offender registry law was "narrowly drawn to accomplish" the government's public safety goals given that it applied to all convicted sex offenders "without regard to their future dangerousness. . . ." *Smith*, 538 U.S. at 103. The Court acknowledged that individuals can reform after committing a crime, but affirmed that states may nevertheless make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* Although such categorical judgments must yield when sex offenders face serious governmental restraints like involuntary confinement, "the more minor condition of registration" permits the state to "dispense with individual predictions of future dangerousness. . . ." *Id.* at 104. Because Proposition 35 also imposes mere registration requirements like the law considered in *Smith*,[11] California is free to rely on categorical rather than individualized assessments.

The alleged existence of a First Amendment issue does not change this analysis. The Supreme Court has elsewhere determined that states may make categorical rather than individualized judgments that have the effect of burdening speech if individualized assessments would "often [be] difficult to make accurately." *Hill*, 530 U.S. at 729. Thus, a state may impose a bright-line prohibition on all speech-related conduct within 100 feet of the entrance to a health care facility to protect those entering the facilities from unwelcome speech. The *Hill* Court concluded that it was constitutionally acceptable for the statute to sweep in some speakers whose

[11] The Alaska Sex Offender Registration Act requires any convicted sex offender or child kidnapper to register with local law enforcement agencies and regularly verify certain identifying information relating to the physical (though not virtual) world. *Smith*, 538 U.S. at 90-91.

conduct would ultimately prove "harmless" given the "great difficulty" in drafting a statute that could accurately characterize which speakers would be "harassing or not harassing." *Id.* at 729.

The District Court assumed that Static-99 could be used without difficulty to sort the dangerous offenders from those who are not dangerous, but this is far from true. The Eleventh and Seventh Circuits have noted that even Static-99's advocates concede that it has "only 'moderate predictive accuracy.'" *United States v. Farley*, 607 F.3d 1294, 1322 (11th Cir. 2010) (citing disclaimer in the Static-99 coding manual); *United States v. McIlrath*, 512 F.3d 421, 425 (7th Cir. 2008) (same); *see also Orozco v. Kramer*, CV 08-5504 AHM (CT), 2008 WL 6089860, at *16 (C.D. Cal., May 8, 2009) (citing expert). In fact, it is widely acknowledged that Static-99 is least effective when used in the way that the District Court insists California must use it: as a predictor of an individual's risk of re-offense. As a different district court phrased it:

> It is critical . . . to remember that the recidivism estimates generated [by actuarial risk assessment tools like Static-99] are group estimates based upon re-convictions and thus do not directly correspond to the recidivism risk of an individual offender. An offender's risk may be higher or lower based on other factors not adequately measured (or measured at all) by the actuarial instrument.
>
> *United States v. Wetmore*, 766 F. Supp. 2d 319, 335 (D. Mass. 2011).[12]

[12] *See also Farley*, 607 F.3d at 1322 (citing expert testimony that "Static-99 scores were merely group estimates, not a direct prediction of an individual offender's risk."); *United States v. Shields*, CIV A No. 07-12056-PBS, 2008

(continued . . .)

This is so because Static-99 considers only 10 static factors, such as the nature of the most recent sex offense that led to arrest, age at release, and sexual criminal history. ER at 375. It does not consider other relevant factors, including offenses that did not result in criminal convictions or whether the offender is receiving psychiatric treatment. *Id.* It is therefore also widely acknowledged that Static-99 provides, at best, a good place to start an analysis of an offender's future dangerousness, but not an end to it. *McIlrath*, 512 F.3d at 425; *Huftile v. Hunter*, No. CIV S-05-0174 GEB DAD P., 2009 WL 111721, at *5 (E.D. Cal., Jan. 16, 2009); *Orozco*, 2008 WL 6089860, at *16.

The facts in *Huftile v. Hunter*, 2009 WL 111721, illustrate these limitations. Michael Huftile appealed a jury verdict finding that he was a sexually violent predator who should be civilly committed for two years. *Id.* at *1. Huftile argued in part that the evidence did not support the jury's finding because his Static-99 score "put him at the lowest category of risk possible. . . ." *Id.* at *4. Huftile's Static-99 score of 3 was based on a 1984 conviction of the second degree rape of his seven to nine year old adopted daughter; a 1995 conviction for lewd and lascivious conduct with the seven to nine year old daughter of his girlfriend; and the fact that none of the victims were related to Huftile. *Id.* at *2, *5.

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( . . . continued)
WL 544940, at *1 (D. Mass., Feb. 26, 2008) (Static-99 test re-offense rates "are group estimates; they do not directly correspond to the recidivism risk of an individual offender."); *McGee v. Bartow*, No. 06-C-1151, 2007 WL 1062175, at *1 (E.D. Wis., Apr. 3, 2007) (assessing Static-99 score; "a statistical profile based on other individuals says nothing about whether the specific individual . . . will re-offend . . .").

But the jury also considered other factors, such as the many offenses that Huftile committed which did not result in a conviction. Thus the jury learned that Huftile sexually fondled two girls in a day care center where he volunteered, became sexually involved with young girls he babysat, and molested seven friends of the adopted daughter he raped. *Id.* at *2. The jury learned that he continued these offenses despite suffering severe consequences, including "police questioning, divorce, and incarceration." *Id.* at *6. He did so while involved in adult relationships, "thus showing his strong preference for children." *Id.* He rationalized his behavior "by explaining that the victims derived sexual pleasure from the molestations," and he "never affirmatively sought treatment." *Id.* Based on the entirety of this evidence, the district court affirmed the jury's verdict, even though Huftile's age of 53 and "relatively low score on the Static-99 test suggest his likelihood of reoffending is not high. . . ." *Id.* at *7, *8.

As these authorities establish, the Static-99 test often does not reliably predict the future dangerousness of individuals. Under *Smith* and *Hill*, California may therefore make categorical judgments about convicted sex offenders, even if those judgments would burden speech. *Smith*, 538 U.S. at 103; *Hill*, 530 U.S. at 729.

It is important to note that, according to the District Court, Proposition 35 is overly broad because it would require a person with a low-risk Static-99 score like Michael Huftile to register. ER at 15, 489. Intervenors strenuously disagree that anyone should be exempt from a mere registration requirement based on a score that tells us so little about the true danger posed to our communities.

The Court abused its discretion in concluding otherwise, not only because *Smith* and *Hill* are to the contrary, but because there is literally

no evidence in the record to support such a conclusion.[13] Although some of plaintiffs' witnesses testified that Static-99 should be used to determine where to concentrate scarce law enforcement resources, no one testified that it should be used to flatly exempt anyone from mere registration requirements. ER at 378, 382, 486-87.

The only expert to address Static-99 and registration requirements was Brian Abbott, one of plaintiffs' witnesses, who declared that the California Sex Offender Management Board ("CASOMB") recommends that registration duration "be based on Static-99" scores so that, for example, those with scores of 1-3 be required to register for only 10 years. ER at 486-87 (citing CASOMB: Recommendations Report (Jan. 2010)).[14] But Mr. Abbott is wrong. CASOMB did not recommend that offenders leave the registry based on Static-99 scores alone. It recommended exemptions for "low-risk" offenders who fulfilled other requirements, like committing no new offenses and complying fully with the registry law. *Id*. at 96. But it also recommended that offenders be required to register for at least 20 years if they committed "violent" crimes like rape, even if they receive a "low-risk" score on Static-99. *Id*. at 96-98. Thus, the District Court's ruling extends beyond the evidentiary record to grant sex offenders far more freedom than even plaintiffs' own witnesses advocate.

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[13] To the contrary, plaintiffs' own expert declared that there were serious errors in developing Static-99 and Static-99R, which *underestimate* the recidivism rate in all reference groups. ER at 484, 488.

[14] *See* http://www.casomb.org/docs/CASOMB%20Report%20Jan%202010_Final%20Report.pdf.

In the final analysis, California must protect vulnerable women and children from the sexual predators in their midst, and it must do so based on the information that is available. That information tells us that convicted sex offenders are a dangerous group, but it cannot tell us which individuals within that group will recidivate. The District Court would require California to tolerate the public safety risk that would flow from allowing the Michael Huftiles of this world to maintain secret, online identities. But California does not wish to accept that risk, and Supreme Court precedent does not permit the District Court to force a different choice upon it, given that Proposition 35 "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (citation omitted); *see also id*. at 797 ("The Court of Appeals erred in sifting through all the available or imagined alternative[s] . . . in order to determine whether the city's solution was 'the least intrusive means' of achieving the desired end.").

**c. Proposition 35 does not apply to too much speech**

According to the District Court, Proposition 35 applies to "too much speech" because it seeks Internet identifiers used on "sites dedicated to discussion of public, political, and social issues" which, in the Court's view, "have not been shown to pose any reasonable risk of leading to an online sex offense or human trafficking." ER at 16-17 (citation omitted).

This was an abuse of discretion because it is not supported by any law, let alone the cases cited by the Court below. While it is true that the *Nebraska* Court concluded that Nebraska's law infringed on First Amendment rights, Nebraska's law went far beyond the requirements of Proposition 35. ER at 16 (quoting *Doe v. Nebraska*, 2012 WL 4923131,

at *27 (D. Neb. Oct. 17, 2012)). The Nebraska statute required a sex offender to "consent to a search of his computers and electronic communication devices" and inform the State about all Internet sites maintained by the person or to which the person has uploaded any content or posted any information. *Id.* Proposition 35, of course, does nothing of the kind.

Likewise, the Court in *White v. Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010), did not conclude that Georgia's law was overbroad because it applied to sites dedicated to public, political, and social issues, but because it required usernames and *passwords* used on sites used "exclusively to conduct personal *commercial transactions with retail companies and banking institutions*." *Id.* at 1310 (emphasis added). Proposition 35, of course, does not require registration of passwords, and the District Court agreed that it cannot reasonably be read to apply to identifiers used "solely to purchase products." ER at 8-9.

The District Court also abused its discretion because there is literally no evidence in the record to support its assumption concerning issue-based sites. *U.S. v. Dixon*, 201 F.3d 1223, 1233 (9th Cir. 2000) (factual finding that lacks evidentiary support is clear error). To the contrary, the record contradicts the Court's conclusion. The Court ignored intervenors' citation to a case involving a conviction for uploading child pornography to an "Internet newsgroup." ER at 280 (citing *United States v. Cervini*, 16 F. App'x 865, 866-67 (10th Cir. 2001)). And it ignored testimony by Sharmin Bock, an Assistant District Attorney in Alameda County, that Internet use by sexual predators "is constantly evolving" in response to law enforcement efforts:

> At first, predators gravitated toward social networking sites to meet, recruit, and sell victims. Children, for example, were routinely sold on Craigslist. As a result of efforts to curtail the exploitation of certain high profile social networking sites, predators have simply moved elsewhere, such as to online gaming sites, chat rooms, and other legitimate, as well as illegitimate, sites. . . . [S]ex offenders have become more creative in their effort to locate victims, further challenging law enforcement in their effort to locate predators.

ER at 257.

Plaintiffs' witness agrees that "the online environment is a rapidly changing one" that requires "careful monitoring of trends . . . to identify emerging risks to young people." ER at 419-20. Thus, the available evidence indicates that it would be dangerous to confine law enforcement efforts based on the past criminal use of the Internet.[15]

Moreover, as discussed above, a state may utilize bright-line rules that have the effect of burdening speech if individualized assessments would "often [be] difficult to make accurately." *Hill*, 530 U.S. at 729. Some sites that are devoted to "public, political, and social issues" draw vulnerable women and children, and it would be exceedingly difficult to

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[15] The District Court ignored this evidence to rely on a statement by the *White* Court that online solicitations for sexual exploitation "generally" do not occur on sites dedicated to public, political, and social issues. ER at 16, citing *White*, 696 F. Supp. 2d at 1310. Yet this statement was based solely upon the *White* Court's own experience with the seven cases that had come before it involving online sexual predators between 2005 and 2010. *Id.* at 1304 n.11. Thus, it is precisely the kind of backwards-looking assessment that ignores law enforcement's need to respond to the "evolving" nature of the Internet.

draft a statute that captures such sites while exempting others. For example, a site devoted to the Boy Scouts[16] may provide a forum for discussing social issues, but it could also provide a forum for pedophiles to meet young boys. Even CNN.com could serve as a meeting place for predators and youth given that visitors are as likely to find stories about Justin Bieber[17] and the latest *Twilight* movie[18] as they are to find news stories.

It is constitutionally permissible for California to choose not to exclude such sites, even if it is not "the least intrusive means" for protecting its children, particularly where speakers would not be "entirely foreclose[d]" from any means of communication. *Ward*, 491 U.S. at 799; *Hill*, 530 U.S. at 726. That is the case here, where sex offenders would remain free to say anything legal anywhere on the Internet, with only a remote possibility that law enforcement or concerned members of the public could someday pierce their secret, online identities.

## II.

## THE BALANCE OF HARDSHIPS FAVORS THE STATE

"[W]hen . . . a party has not shown any chance of success on the merits, no further determination of irreparable harm or balancing of hardships is necessary." *Global Horizons, Inc. v. U.S. Dept. of Labor*,

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[16] *See*, *e.g.*, SCOUTER <http://www2.scouter.com>.

[17] Stephanie Goldberg, Justin Bieber: *From tween sensation to adult icon*, CNN (Mar. 29, 2013, 7:37 AM EDT) <http://www.cnn.com/2013/03/28/showbiz/music/justin-bieber-growing-up/index.html?hpt=hp_bn9#cnn-disqus-area>.

[18] *'Breaking Dawn – Part 2' cleans up at Razzies*, CNN (Feb. 25, 2013, 1:52 PM ET) <http://marquee.blogs.cnn.com/2013/02/25/breaking-dawn-part-2-cleans-up-at-razzies/?iref=allsearch>.

510 F.3d 1054, 1058 (9th Cir. 2007). Because plaintiffs cannot ultimately prevail, there is no need to weigh the hardships.

Yet even if hardships are compared, plaintiffs cannot prevail. At most, plaintiffs face the possibility that their pseudonymous identities will be revealed under rare circumstances. If such identities had not been used for criminal purposes, plaintiffs could easily develop new identifiers.

Even if such a fleeting injury were deemed to be irreparable, it does not justify injunctive relief if it is outweighed by a more compelling public interest. *See*, *e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). Here, the public faces the risk that convicted sex offenders will use the Internet to prey on vulnerable women and children with a greatly diminished fear of detection. Clearly, the public's interest in deterring some of the most heinous crimes imaginable outweighs a registered sex offender's desire to cloak his online identity in secrecy.

## CONCLUSION

Proposition 35 leaves registered sex offenders alone to say anything they want to say, anywhere on the Internet, and to do so anonymously. Proposition 35 even allows sex offenders to use an alias while interacting with members of the public online, and it does so under circumstances that ensure the vast majority of such communications will remain pseudonymous. Yet Proposition 35's registration requirement would no longer allow such aliases to be used behind a veil of complete secrecy. If a sex offender uses such an alias to exploit a woman or a child, Proposition 35 ensures that law enforcement could quickly pierce that veil to identify and track down the offender. In short, Proposition 35 could save

lives without ever providing sex offenders with reasonable grounds to curb their legal online communications.

The minimal effect that Proposition 35 might possibly have on speech has legal consequences. First, the effect is too incidental, and the possibility that it will reasonably chill anyone's speech is too remote, to implicate the First Amendment. Second, even if it did, plaintiffs cannot complain that the law will infringe their right to remain anonymous. If there is any such right under the Constitution, plaintiffs' own criminal activity has eliminated their ability to invoke it in the context of a mere registration requirement. Thus, this is not a First Amendment case, and the District Court erred in assuming otherwise.

Furthermore, Proposition 35's minimal effect on speech underscores how narrowly tailored the measure is to meet the State's important interest in protecting its citizens from sexual predators. Although it is possible to imagine registration schemes that would grant some sex offenders more online secrecy, the District Court abused its discretion in faulting this measure for failing to incorporate the least restrictive means of advancing its public safety goals.

For these reasons, intervenors respectfully urge this Court to reverse the order below.

Dated: April 10, 2013

Respectfully submitted,

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By: s/ James C. Harrison
James C. Harrison

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**STATEMENT OF RELATED CASES**

Intervenors are not aware of any known related cases pending in this Court.

**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 9,496 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

Dated: April 10, 2013

s/ James C. Harrison

## CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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

(00196146-4)