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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

KAMALA D. HARRIS, *et al.*,

Defendants.

No.: C 12-5713 TEH

INTERVENERS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Hearing:

Date: December 17, 2012
Time: 10:00 a.m.
Crtrm.: 12

(The Honorable Thelton E. Henderson)

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INTRODUCTION

Proposition 35 brings California's sex offender registration law into the modern era by requiring convicted sex offenders to register with local law enforcement not just their legal name and aliases, but also the screen name that they use when communicating on Internet sites. Offenders now will provide not just the physical street address of their home and place of employment, but also the address of the portal through which they enter the Internet. Courts already have ruled there is no reasonable expectation of privacy in the information shared with an Internet service provider or in an email address. Proposition 35 is fully compliant with the Constitution and federal law, which *requires* states to obtain this information. It is also virtually identical to a Utah statute upheld by the Tenth Circuit Court of Appeals in the only case on this issue to reach the appellate courts.

Plaintiffs nonetheless ask this Court for extraordinary relief – an order enjoining the State from implementing a portion of Proposition 35 on the ground that it is invalid on its face. To justify such "strong medicine," plaintiffs must show that that these provisions cannot be applied constitutionally under any circumstances. This they cannot do, because Proposition 35 does not "prohibit" or "criminalize" online anonymous speech as plaintiffs claim. 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. Just as a police officer might use the sex offender database to determine whether a registered sex offender lives in a neighborhood in which a rape occurred, law enforcement will use sex offenders' Internet identifiers to determine whether the email address of a person who used the Internet to lure a child into human trafficking belongs to a registered sex offender. Thus, the new reporting requirement in no way limits protected speech.

Plaintiffs speculate that law enforcement agencies could misuse this information and that some registrants may refrain from speaking online because their identities could become public. Yet Proposition 35 specifies that the information is to be used by law enforcement to combat online sex offenses, and it does not authorize public disclosure of a registrant's screen names. Indeed, such information is exempt from disclosure under the California Public Records Act and may only be

released by law enforcement when disclosure is necessary to ensure public safety based upon information related to the specific registrant. Any lingering fear of disclosure in the face of these protections does not serve as a basis for invalidating the law on its face. An individual's knowledge that the government is collecting information about him does not give rise to a constitutionally-recognizable chilling effect on his speech.

But even if Proposition 35 were treated as a restriction on plaintiffs' right to anonymous speech, the law would pass muster as a content neutral rule that is narrowly tailored to achieve a substantial state interest. Plaintiffs cannot seriously dispute that California has a substantial interest in combatting online sex crimes and recidivism by sex offenders. Instead, they argue that the law reaches too many speakers and too much speech. As to plaintiffs' first point, their quibble is with the State's existing registration requirements, which define the population to which Proposition 35 applies, but the California Supreme Court long ago upheld the State's broad registration requirements against constitutional attack. With respect to their claim that Proposition 35 reaches too much speech, plaintiffs misconstrue the statute. Proposition 35 does not require an offender to reveal the websites he visits or the content of his communications. And in most business or professional communications a person uses his or her legal name, which is already on the registry. While Proposition 35 may require a sex offender to provide law enforcement with the screen name he uses when he posts something on Craigslist or engages in an online dialogue on a video game site, the scope of the law is justified by the ever-evolving nature of sex offenders' use of the Internet to meet their victims.

As to plaintiffs' claims of unconstitutional vagueness, the term "Internet identifier" is similar to that used in the Utah law upheld by the Tenth Circuit, and the definition of "Internet service provider" comes directly from federal law. The definitions in Proposition 35 are sufficiently clear and definite to survive plaintiffs' word games.

Finally, plaintiffs' argument that the balance of hardships tips in their favor ignores the critical public safety issues at stake in this litigation. Plaintiffs' own experts acknowledge the risk of recidivism among registered sex offenders and the increased use of the Internet by sexual predators. Proposition 35 provides law enforcement with a necessary tool and delaying its implementation poses a risk of severe harm to our children and other innocent victims of online sex crimes. Furthermore,

plaintiffs are subject to Proposition 35 because they have been convicted of sex crimes that require them to provide their names and addresses to law enforcement; Proposition 35 simply extends this rule to the virtual world by requesting information as to which there is no reasonable expectation of privacy. Given the public risk posed by registered sex offenders and the negligible burden imposed by Proposition 35, the balance of hardships tips decidedly in favor of the voters and the State.

BACKGROUND

A. Federal Law

The federal government, the District of Columbia, and each of the 50 states have adopted sex offender registration requirements. *Smith v. Doe*, 538 U.S. 84, 90 (2003); *see also* The National Guidelines for Sex Offender Registration and Notification, Ex. A to Interveners' Req. for Judicial Notice ("Interveners' RJN") at 3. The U.S. Department of Justice has explained the purpose of these requirements:

> In their most basic character, the registration aspects of these programs are systems for tracking sex offenders following their release into the community. If a sexually violent crime occurs or a child is molested, information available to law enforcement through the registration program about sex offenders who may have been present in the area may help to identify the perpetrator and solve the crime. If a particular released sex offender is implicated in such a crime, knowledge of the sex offender's whereabouts through the registration system may help law enforcement in making a prompt apprehension. The registration program may also have salutary effects in relation to the likelihood of registrants committing more sex offenses. Registered sex offenders will perceive that the authorities' knowledge of their identities, locations, and past offenses reduces the chances that they can avoid detection and apprehension if they reoffend, and this perception may help to discourage them from engaging in further criminal conduct.
>
> *Id.* at 3.

In 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA") to provide a comprehensive set of minimum national standards for sex offender registration and notification systems throughout the states.[1] *See* 42 U.S.C. § 16901 et seq. The required information includes, among other things, sex offenders' names, addresses or locations (such

[1] Prior to passage of Proposition 35, a total of 16 states had met the federal requirements for implementation. Interveners' RJN, Ex. B. California was not among them, and therefore is subject to a 10% reduction in federal law enforcement funding. *See* 42 U.S.C. § 16925(a).

as place of employment or school attended), vehicle descriptions and license plate numbers, physical descriptions, sex offenses for which convicted, and current photographs. 42 U.S.C. § 16914.

Under SORNA, states are *required* to obtain registrants' Internet identifiers and addresses. 42 U.S.C. § 16915a. The Attorney General also requires the ongoing collection of all addresses used for Internet routing purposes. Interveners' RJN, Ex. A at 52. The U.S. Department of Justice describes this requirement as follows:

> INTERNET IDENTIFIERS AND ADDRESSES (§ 114(a)(7)): In the context of Internet communications there may be no clear line between names or aliases that are required to be registered under SORNA § 114(a)(1) and addresses that are used for routing purposes. Moreover, regardless of the label, including in registries information on designations used by sex offenders for purposes of routing or self-identification in Internet communications – e.g., e-mail and instant messaging addresses – serves the underlying purposes of sex offender registration and notification. Among other potential uses, having this information 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.
>
> *Id.* at 27.

SORNA states that jurisdictions are to "make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry," with certain mandatory exceptions, including the victim's identity and the registrant's social security number. 42 U.S.C. § 16918(b). States are prohibited from including registrants' Internet identifiers on their public sex offender websites. *Id.* § 16915a(c).

B. California Law And Proposition 35

California has long required post-conviction registration of persons convicted of certain sex crimes. *See* Cal. Penal Code § 290 et seq. The law, which has been upheld by the California Supreme Court, "assure[s] that persons convicted of the crimes enumerated therein 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). State law requires convicted sex offenders to provide law

enforcement such information as their names, aliases, birthdates, residential addresses, fingerprints, license plate numbers, current photographs, and even DNA samples. Cal. Pen. Code §§ 290.15, 296.

The explosive growth of the Internet and its use by sexual predators is not adequately addressed by the current system. After several failed attempts to secure a legislative solution, proponents Chris Kelly and Daphne Phung, proposed interveners here, gathered more than 874,000 signatures to qualify Proposition 35 for the ballot. Interveners' RJN, Ex. C. On November 6, 2012, California voters approved Proposition 35 by a margin of 81.3% to 18.7%. *Id.*, Ex. D. The measure provides law enforcement with the tools necessary to prevent, investigate, and prosecute human trafficking in the modern era. These tools include increased fines and jail time for people convicted of human trafficking; increased training for law enforcement officers; and a requirement that convicted sex offenders, including people convicted of human trafficking, provide law enforcement authorities with information regarding their Internet identifiers and Internet service providers.

The measure's Findings and Declarations explain that "[w]hile the rise of the Internet has delivered great benefits to California, the predatory use of this technology by human traffickers and sex offenders has allowed such exploiters a new means to entice and prey on vulnerable individuals in our state."[2] Proposition 35, Californians Against Sexual Exploitation Act ("Prop. 35"), § 2, ¶ 4. Thus, the purpose of Proposition 35 is "[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 also reflect the voters' intent that law enforcement use the new registration information to track and prevent online sex offenses and human trafficking. Voters were told 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

[2] To determine voter intent, courts consider the text of the measure "within the context of the subsequent conditions and the statement of purposes and intent and findings which are part of its enactment." *Westly v. Cal. Pub. Emps.' Ret. System Bd. of Admin.*, 105 Cal. App. 4th 1095, 1109 (2003). Courts may also consider the proponents' arguments in determining the voters' intent. *Robert L. v. Super. Ct.*, 30 Cal. 4th 894, 901 (2003).

protect our children and prevent human trafficking," and "help prevent human trafficking online." RJN, Ex. E at 46-47.

Proposition 35 thus amends California Penal Code section 290.015 to add "Internet identifiers" and "Internet service providers" to the list of information convicted sex offenders must provide to law enforcement agencies. It also expands the scope of Penal Code section 290.014, which requires registered sex offenders to report a change in name, to include a change in their Internet identifier or Internet service provider. Proposition 35 requires law enforcement agencies to make the information available to the California Department of Justice. *Id.* § 290.014(b).

Proposition 35 adds section 290.024 to the Penal Code to define its terms. "Internet service provider" is defined 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).

The term "Internet identifier" means:

> an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication.
>
> *Id.* § 290.024(b).

Proposition 35 provides that its provisions shall be deemed to be severable if any provision of the measure, or its application to any person or circumstances, is found to be unconstitutional or otherwise invalid. Prop. 35, § 16. It also permits legislative amendment of its provisions to further its objectives. *Id.* § 15.

Finally, contrary to plaintiffs' suggestion (Pls.' Mem. of P. & A. in Support of TRO ["Pls.' Mem."] at 7-8), Proposition 35 *does not* require registered sex offenders to compile and report a list of the websites they have visited.

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. Plaintiffs' Facial Overbreadth Challenge Cannot Succeed

1. Plaintiffs cannot demonstrate there are no circumstances in which Proposition 35 can be constitutionally applied

Plaintiffs bring a facial overbreadth challenge to Proposition 35.[3] The Supreme Court has considered "[a]pplication of the overbreadth doctrine in this manner" as "strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." [Citation.] Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" [Citation.] Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.
>
> *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008).

Plaintiffs have a particularly difficult row to hoe in asserting a facial challenge because Proposition 35 does not regulate or control *speech*; rather, it is part of a comprehensive non-punitive civil regulatory scheme. It requires the registration of a name used on the Internet, akin to the existing requirement that convicted sex offenders register their actual names and any aliases by which they are known. It requires the disclosure of the Internet service providers that serve as platforms from which sex offenders enter the Internet, akin to the disclosure of home address and place of employment by which sex offenders are located in the physical world.

Thus, in *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999), the Court held it was error to employ the facial overbreadth doctrine with regard to

[3] While the complaint also alleges that Proposition 35 is unconstitutional as applied, plaintiffs have stipulated that they will litigate this matter only as a facial challenge until further notice.

a statute that controlled access to government information because the statute did not restrict the dissemination of information one already possesses, and thus no First Amendment rights were abridged. "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

For this facial challenge to succeed, then, plaintiffs must demonstrate that "*no set of circumstances exists under which the Act would be valid.*" *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). "The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Id.* at 745 (citation omitted).

A recent case from the Eighth Circuit rejecting a facial challenge to a law concerning electronic monitoring of convicted child pornographers illustrates the point.

> Stephens' facial challenge . . . fails because Stephens cannot establish there are no child pornography defendants for whom a curfew or electronic monitoring is appropriate. *See Salerno*, 481 U.S. at 751, 107 S.Ct. 2095. One can imagine many defendants for whom curfew and electronic monitoring would be necessary to assure their presence at trial or ensure the safety of the community . . . *See United States v. Gardner*, 523 F. Supp. 2d 1025, 1030 n. 3 (N.D. Cal. 2007) (rejecting a similar facial attack because "[t]here are circumstances where [the Adam Walsh] Act can be applied constitutionally – e.g., where a court determines all the minimum conditions mandated by the Adam Walsh Act are in fact warranted"). District courts across this country have found curfew and electronic monitoring to be appropriate in particular child pornography trafficking cases in order to stem the risk of flight and ensure community safety.
>
> *United States v. Stephens*, 594 F.3d 1033, 1038 (8th Cir. 2010)[4]

Proposition 35 is directed only at persons who, by virtue of their status as registered sex offenders, already are subject to significant post-conviction monitoring, the constitutionality of which is no longer at issue. *Smith v. Doe*, 538 U.S. at 105-06 (upholding constitutionality of Alaska Sex

[4] *Accord United States v. Peeples*, 630 F.3d 1136, 1138 (9th Cir. 2010).

Offender Registration Act);[5] *In re Alva*, 33 Cal. 4th at 280 (upholding constitutionality of California Penal Code § 290 et seq.). Even using plaintiffs' own statistics (without conceding their validity), if 4% of convicted sex offenders employed the Internet to facilitate new crimes against children,[6] then surely the law could constitutionally be applied to them. Plaintiffs' facial challenge must therefore fail.

2. Because Proposition 35 does not regulate speech, the overbreadth doctrine does not apply

To have any chance of prevailing on their facial challenge, then, plaintiffs must articulate the precise nature of the *speech* at issue. Plaintiffs argue that Proposition 35 "sweeps within its prohibitions speech that is constitutionally protected anonymous online speech." Pls.' Mem. at 11. Yet nothing in Proposition 35 prohibits registered sex offenders from accessing any Internet sites or engaging in speech on the Internet, even anonymously. *Compare Doe v. Prosecutor, Marion Cnty., Ind.*, 2012 WL 2376141, at *1 (S.D. Ind. June 23, 2012) (hereafter "*Marion Cnty.*") (upholding statute prohibiting registered sex offenders from using social networking sites, instant messaging programs, and chat room programs). Moreover, plaintiffs are not being asked to reveal the actual speech they engaged in – the law does not collect information about specific webpages viewed or statements written on blogs and the like.

Plaintiffs admit that Proposition 35 requires only identifiers separated from the actual speech but argue that it is "functionally and legally equivalent" to a prohibition on anonymous online speech. Pls.' Mem. at 11. That same argument was rejected by the Tenth Circuit in upholding statutory provisions similar to those at issue here, which required the disclosure of a registered sex offender's online identifiers to state officials. In the only appellate decision yet to address the constitutionality of Internet registration statutes for sex offenders, the Tenth Circuit said that when the

[5] 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. While some of that information is kept confidential, such as driver's license number and anticipated change of address, other information is made available to the public, including name, aliases, address, photograph, physical description, motor vehicle identification and description, and place of employment. *Smith v. Doe*, 538 U.S. at 90-91.

[6] According to plaintiffs' experts, a 2006 study found that "4% of persons arrested for crimes against youth victims that involved the internet were registered sex offenders." Decl. of B. Abbott ("Abbott Decl.") ¶ 21; *see also* Decl. of D. Finkelhor ("Finkelhor Decl.") ¶ 18.

registration occurs "at some time period following [plaintiff's] speech and not at the moment he wished to be heard" it does not implicate the right to anonymous speech. *Doe v. Shurtleff*, 628 F.3d 1217, 1225 (10th Cir. 2010). Similarly, a district court found that Georgia's Internet registration law for sex offenders "is not a restriction on speech, anonymous or otherwise" because it does not restrict what the individual "may say or how he might say it." *White v. Baker*, 696 F. Supp. 2d 1289, 1307-08 (D. Ga. 2010).

Nor may a regulatory scheme be brought within the ambit of the First Amendment merely by arguing that the post-hoc collection of information about a speaker deters others from speaking.[7] Again, that claim was rejected by the Tenth Circuit, relying on a passage from the Supreme Court:

> "[T]his Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. In none of those cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain [information-gathering] 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 additional action detrimental to that individual."
>
> *Shurtleff*, 628 F.3d at 1225 (citations omitted).

In short, plaintiffs cannot demonstrate that their facial challenge implicates First Amendment speech rights, and they cannot demonstrate that there is no one as to whom the statute can constitutionally be applied. This challenge has no likelihood of success.

[7] Plaintiffs cite *Art of Living Found. v. Does 1-10*, 2011 WL 5444622, *1 (N.D. Cal. Nov. 9, 2011) for the proposition that disclosure of an anonymous online speaker's identification, even many months after the fact, may cause "irreparable harm" to the speaker's First Amendment rights. Pls.' Mem. at 11-12 & n.5. That case concerns disclosure in the context of a civil lawsuit brought against persons who had engaged in defamatory speech, copyright infringement, and the like by making anonymous negative comments about plaintiff's business. To the extent it has any relevance to this litigation, it lies in the acknowledgment that many courts have ordered disclosure of the identity of an anonymous online speaker when the need for the information outweighs the need for anonymity. *Art of Living Found.* at *4; *see In re Anonymous Online Speakers*, 661 F.3d 1168, 1179 (9th Cir. 2011) (upholding order to disclose identity of non-party anonymous speakers in commercial tort case alleging online smear campaign against business entity).

B. Plaintiffs Fail To Demonstrate That The Statute Cannot And Will Not Be Construed to Avoid Overbreadth

Even assuming plaintiffs could persuade the Court that their challenge implicates First Amendment speech rights, they cannot successfully demonstrate that "a 'substantial number' of [the statute's] applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Wash. State Grange*, 552 U.S. at 449 n.6 (citations omitted). That analysis begins with statutory construction.

> As we explained two Terms ago, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."
>
> *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citation omitted).

Plaintiffs ask this Court to construe this statute without benefit of implementation by the State or construction by the California state courts. That alone merits extreme caution. "Exercising judicial restraint in a facial challenge "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Wash. State Grange*, 552 U.S. at 450 (citation omitted).

In *Washington State Grange*, the Supreme Court rejected a facial challenge to an initiative that imposed a new "top-two" primary system on state elections. Noting that the challengers' claims of widespread voter confusion were speculative and that there were ways the state could implement the system to minimize confusion, the Court concluded in words that are equally applicable here:

> Respondents ask this Court to invalidate a popularly enacted election process that has never been carried out. . . . The First Amendment does not require this extraordinary and precipitous nullification of the will of the people.
>
> *Id*. at 458.

The Court's concerns about moving precipitously and without benefit of a fully fleshed-out statutory scheme are grounded in the very nature of the challenge being brought: "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613.

> [I]nvalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that it has been made criminal – has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.
>
> *United States v. Williams*, 553 U.S. 285, 292-93 (2008).

The Court must give weight to the State's own view of what the law entails. "'[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (citation omitted). "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Williams*, 553 U.S. at 307 (Stevens & Breyer, J.J., concurring) (citation omitted). Where the words themselves are unclear, "our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters." *Id.* This is especially true for statutes enacted by the voters, like Proposition 35. Under California law, it is the "solemn duty [of the courts] to jealously guard the precious initiative power. . . ." *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991). "'[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled.'" *DeVita v. County of Napa*, 9 Cal. 4th 763, 776 (1995) (citation omitted). As a result, when a ballot measure is subject to a legal challenge, courts must "resolve any reasonable doubts in favor of the exercise of this precious right." *Brosnahan v. Brown*, 32 Cal. 3d 236, 241 (1982) (emphasis omitted).

Nor is the Court bound to accept any possible interpretation proffered by plaintiffs, no matter how far-fetched.[8] "[F]anciful hypotheticals" of what the law may proscribe have little weight unless "there is a 'realistic danger'" of the feared conduct occurring. *Williams*, 553 U.S. at 301, 302 (citations omitted).

[8] Plaintiff Roe alleges that his fear of revealing his Internet identifiers has caused him to flee the State. *See* Supp. Decl. of J. Roe ¶¶ 4-5. He does not say to where he has fled. Given that federal law requires the inclusion of Internet identifier registration data to the sex offender registration systems currently operating in all 50 states, and that a number of states have already complied, it is not apparent that fleeing California addresses Mr. Roe's fear. Indeed, as discussed below, some jurisdictions have adopted far more onerous requirements than California.

> The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."
>
> *Id.* at 303 (citation omitted).

1. Intermediate scrutiny applies

Plaintiffs allege that Proposition 35's registration requirements are content-based because they discriminate based on one's status as a registered sex offender. Pls.' Mem. at 18. Yet those requirements are undeniably content neutral.

> The government's purpose is the controlling consideration. 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. [Citation.] Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech. [Citation.]"
>
> *Rock Against Racism*, 491 U.S. at 791-92, (emphasis in original).

In *Doe v. Shurtleff*, the Tenth Circuit rejected the plaintiff's claim that a Utah statute imposing an Internet communication registration requirement on sex offenders was a content-based restriction because it took away his "'right to choose whether to speak anonymously or under a pseudonym.'" 628 F.3d at 1223.

> On its face, [the statute] is a content-neutral regulation. The law says nothing about the ideas or opinions that Mr. Doe may or may not express, anonymously or otherwise. Neither is it aimed at 'suppress[ing] the expression of unpopular views,' [citation], but rather it is directed towards aiding the police in solving crimes. As in *Giani*, we therefore examine this law as a content-neutral regulation.
>
> *Id*.

"Content neutral regulation of protected speech is subject to 'an intermediate level of scrutiny.'" *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000) (upholding statute requiring registration of professional fundraising consultants as content neutral and therefore subject to intermediate scrutiny). The standards for intermediate scrutiny are much more likely to result in upholding a statute than if the measure were subject to strict scrutiny:

> To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less

> effectively absent the regulation.'" [Citation.] Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." [Citation.]
>
> *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

2. The State has a strong interest in collecting information about pseudonyms used by convicted sex offenders on the Internet

It is well-established that the State has a strong, indeed compelling interest, in registering and tracking information about convicted sex offenders. Indeed, in upholding California's lifetime registration law, the California Supreme Court, relying on similar pronouncements from the United States Supreme Court, said: "Given the general danger of recidivism presented by those convicted of criminal sexual misconduct, and the relatively minor burden registration represents, the Legislature may adopt a rule of general application for this class of offenders, and may guard against the demonstrated long-term risk of reoffense by imposing a permanent obligation on persons convicted of such crimes." *In re Alva*, 33 Cal. 4th at 279-80 (citing *Smith v. Doe*, 538 U.S. at 104). The California Legislature similarly has found that "[s]ex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protection of the public from reoffending by these offenders is a paramount public interest." Cal. Penal Code § 290.03(a)(1).

Sexual exploitation through use of the Internet poses risks to the public that are real and palpable. "It is well-recognized in our culture that children are at risk from sexual predators who seek, using the internet, to lure them into illegal sexual conduct. The creation and sharing of pornographic images of children is a further and wide-spread abuse of innocents in our country and abroad." *White v. Baker*, 696 F. Supp. 2d at 1308;[9] *see*, *e.g.*, *People v. Singh*, 198 Cal. App. 4th 364 (2011) (defendant viewed profile of person posing as 12-year-old girl in Internet chat room, engaged in sexually explicit conversation with her, then arrived at an address he thought was her home).

[9] That judge noted that "use of the internet by predators seeking to engage in sexual relations with children or to engage in conduct that victimizes children sexually is pernicious. In the past five years alone, this Court has presided over seven cases where a defendant was convicted of illegal use of the internet to induce a child into sexual relations, to transmit obscene images to a person the defendant believed was a child, or to participate in the transmission of child pornography." *Id.* at 1304 n.11.

Nor are social networking or chat sites the only places where minors are at risk from sexual predators. *See*, *e.g.*, *United States v. Lucas*, 670 F.3d 784, 786 (7th Cir. 2012) (upholding firearms conviction of defendant who struck up sexually explicit conversation with minor through online gaming site "World of Warcraft," then traveled from Massachusetts to Wisconsin in an elaborate scheme to kidnap him); *United States v. Cervini*, 16 Fed. Appx. 865, 866 (10th Cir. 2001) (defendant convicted of uploading child pornography to an Internet news group). The seriousness of the problem is confirmed by plaintiffs' expert, who acknowledges that "[t]here have been many prosecutions of adults during the past decade for directing sexual messages to youth" and that "these crimes represented serious threats to the well-being of young people at the hands of unscrupulous adults." (Finkelhor Decl. ¶¶ 14, 19-20.)

3. Proposition 35 is narrowly tailored to serve the State's strong interest in enhancing its sex offender registration efforts without infringing speech

Proposition 35 is a reasoned and narrowly tailored effort to advance the State's interest in an effective registration system for convicted sex offenders, without unduly harming those offenders' rights to engage in speech activities. Unlike statutes in Indiana and Louisiana, California's law does not ban convicted sex offenders from accessing or participating in certain types of Internet communications. *Compare Marion Cnty.*, 2012 WL 2376141, at *1 (upholding Indiana law prohibiting registered sex offenders from accessing social networking sites, instant messaging programs, and chat rooms); *Doe v. Jindahl*, 853 F. Supp. 2d 596, 599 (M.D. La. 2012) (invalidating Louisiana law prohibiting registered sex offenders from using or accessing social networking sites, chat rooms, or peer-to-peer networks). It does not require registrants to consent to a search of their computers and other communication devices. *Compare Doe v. Nebraska*, 2012 WL 4923131, at *27 (D. Neb. Oct. 17, 2012) (striking down such law). Nor does Proposition 35 require registrants to report the names of any websites to which the person has uploaded content or posted any messages or to consent to the installation of monitoring hardware and software on their computers. *Id.* at *29 ("[R]equiring Internet identifiers and addresses . . . is one thing," but compulsory updates about Internet postings "is an entirely different thing.").

Instead, Proposition 35 only requires the reporting of Internet identifiers and service providers. That requirement inflicts no new or recognizable harm on convicted sex offenders. Indeed, the courts already have found that no one has a reasonable expectation of privacy in information given to an Internet service provider. *People v. Stipo*, 195 Cal. App. 4th 664, 668-69 (2011); *see also White v. Baker*, 696 F. Supp. 2d at 1312; *cf. United States v. Forrester*, 512 F.3d 500, 509-11 (9th Cir. 2007) (no reasonable expectation of privacy in the to/from addresses of email messages or Internet provider addresses of websites visited).

Moreover, that disclosure does not unduly trample on the right to speak anonymously because it is not a precondition to speech and it does not prevent anonymous speech. For example, just as a registrant is free to engage in anonymous leafleting on a street corner notwithstanding the fact that his name is registered with law enforcement officials, so too can a registrant view and interact with any site on the Internet notwithstanding the fact that law enforcement officials have on file the screen name he is using, if any.[10]

> When the government obtains the to/from addresses of a person's e-mails or the IP addresses of websites visited, it does not find out the contents of the messages or know the particular pages on the websites the person viewed. At best, the government may make educated guesses about what was said in the messages or viewed on the websites based on its knowledge of the e-mail to/from addresses and IP addresses – but this is no different from speculation about the contents of a phone conversation on the basis of the identity of the person or entity that was dialed. . . .
>
> The government's surveillance of e-mail addresses also may be technologically sophisticated, but it is conceptually indistinguishable from government surveillance of physical mail. In a line of cases dating back to the nineteenth century, the Supreme Court has held that the government cannot engage in a warrantless search of the contents of sealed mail, but can observe whatever information people put on the outside of mail, because that information is voluntarily transmitted to third parties.
>
> *Forrester*, 512 F.3d at 510-11.

While the harm is nonexistent, the government's need is great. The requirement of disclosing one's name, whether screen name, alias, or given name, is closely tied to the government's

[10] If the site requires no identifying information from persons who view or engage with it, then there will be nothing for the registrant to report as a result of his visit there.

need for quick investigation. By requiring convicted sex offenders to register the "names" they use to communicate on the Internet and the Internet providers they use, the State will be far better able to quickly identify and investigate suspects when presented with evidence that a crime involving the use of the Internet to facilitate trafficking or sexual exploitation of minors has been or is about to be committed.[11] This is the same purpose served currently by the registration system under California Penal Code section 290. Under that system, when a sex crime involving a minor is committed, police can immediately draw up a list of prior sex offenders who reside in the area. Decl. of S. Bock ¶ 12. And when a sex crime involving a minor is committed through the Internet, the police will have a list of Internet pseudonyms to compare with the perpetrator's identifier. *Id.* ¶¶ 10-12.

Plaintiffs suggest that the statute is not narrowly tailored because it applies to some convicted sexual predators who have a lesser chance of recidivism than others, or who have not yet used the Internet to facilitate a crime, or whose crime involved children with whom they were already acquainted.[12] Plaintiffs' own experts, however, confirm that the risk of recidivism is real. "[L]ifetime sexual offense recidivism rates . . . averag[e] between 14 and 20%." Abbott Decl. ¶ 1(c). Pedophiles who molest boys and rapists of adult women have recidivism rates of 52% and 39%, respectively. *Id.* ¶ 15. Thirteen percent of persons incarcerated for sex crimes had been previously convicted of a violent sex offense. *Id.* ¶ 21. Of the registered sex offenders in the California Department of Justice

[11] *See*, *e.g.*, *United States v. Tank*, 200 F.3d 627, 630-31 (9th Cir.) (describing efforts to connect defendant Tank with screen name "Cessna" used in chat room conversations of club whose members discussed, traded, and produced child pornography).

[12] Plaintiffs misstate the law by asserting that the mere existence of feasible, readily identifiable, and less restrictive alternatives "confirm[s] that the statute 'is not narrowly tailored.'" Pls.' Mem. at 14. The case plaintiffs cite sets forth a very different standard, noting that a regulation "need not be the least restrictive or least intrusive means of achieving the government's goals," as long it does not "burden substantially more speech than is necessary." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011) (internal quotations and citations omitted). Indeed, plaintiffs' acknowledgement that the law could be tailored to those who have been convicted of offenses involving the Internet or who are at a high risk of reoffending makes clear that the law can be applied constitutionally. Pls.' Mem. at 14.

database, 31% are categorized as moderate-high and high risk.[13] *Id.* ¶ 9. When looking at whether sex offenders might commit another crime, plaintiffs' own expert advises that "the period of time immediately after an offender's release from prison or jail is an important indicator of that offender's ultimate success in the community. . . . Monitoring the individual during this period . . . could be valuable in assessing whether an offender is likely to reoffend." *Id.* ¶ 18.

According to plaintiffs' experts, when the potential victim is known to the offender, the ability to track down a suspect's Internet name is an especially important investigative tool. This is because "most" of the increase in technology-facilitated sex crimes against minors in recent years has "involved offenders who used technology to facilitate sex crimes against victims they already knew face-to-face." Finkelhor Decl. ¶ 12. The "existing vulnerability" of victims of family and acquaintance offenders "is increasingly enacted and evident online . . . ." *Id.* ¶ 13.

The analysis of the Tenth Circuit is instructive here. The court rejected the claim that because the Utah statute also applied to offenders whose offenses were not sex-related, it was not narrowly tailored to its stated purpose. *Shurtleff*, 628 F.3d at 1226 (citation omitted) ("'[I]f the ordinance may be validly applied to [the plaintiff], it can validly be applied to most if not all . . . parties not before the Court.'"). That court also concluded that the Utah statute "is readily susceptible of a much narrower construction than advanced by [plaintiff]." *Id.* at 1224. That narrower construction included reading the statute "as permitting sharing only among law-enforcement agencies, not the public at large, and only for the recited law-enforcement purposes." *Id.* at 1225. Similarly, the court found the statute's provision allowing the state to use an offender's Internet identifiers "'to assist in investigating kidnapping and sex-related crimes, and in apprehending offenders'" was limited to "only

[13] Plaintiffs may be understating the risks. In rejecting a similar argument that the Alaska sex offender registry swept too broadly, the U.S. Supreme Court allowed the state to err on the side of protecting the public because "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith v. Doe*, 538 U.S. at 103 (citing *McKune v. Lile*, 536 U.S. 24, 33-34 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.") (relying on statistics from the U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997) and Recidivism of Prisoners Released in 1983, p. 6 (1997))). Plaintiffs' own expert suggests that there were serious errors in developing Static-99, a tool used to estimate the risk posed by offenders, and that it *underestimates* the recidivism rate in all reference groups. Abbott Decl. ¶ 4.

allowing state actors to look beyond the anonymity surrounding a username in the course of an investigation after a new crime has been committed." *Id*. (citation omitted).

The reporting provisions in Proposition 35 are very similar to the requirements in Utah.[14] The information provided to law enforcement is intended to be used for the purposes of investigating online sex crimes and human trafficking. Prop. 35, § 2, ¶ 6; § 3, ¶ 3. Furthermore, contrary to plaintiffs' suggestion (Pls.' Mem. at 15), Proposition 35 does not authorize law enforcement agencies to share a registrant's Internet identifiers or Internet service providers with social networking sites or the public.[15] Indeed, under the California Public Records Act, such information is exempt from disclosure. Cal. Gov. Code § 6254(f). Similarly, federal law bars the inclusion of a sex offender's Internet identifiers on a state's public website. 42 U.S.C. § 16915a. California's existing sex offender registration law authorizes disclosure of non-public information about a registrant only in instances where law enforcement has demonstrated a public safety need related to that specific registrant. Cal. Penal Code § 290.45(a). Finally, California law authorizes a civil action for any misuse of a registered sex offender's registration information and criminal penalties if the information is used to commit a crime. *Id.* §§ 290.46, 290.45(e).

C. <u>The Law Is Sufficiently Clear And Definite</u>

Plaintiffs' claim that Proposition 35 is unconstitutionally vague has no merit. A statute comports with due process if it provides "a person of ordinary intelligence fair notice" of the proscribed behavior and provides sufficiently clear standards so as to avoid "seriously discriminatory enforcement." *Williams*, 553 U.S. at 304; *see also People v. Vincelli*, 132 Cal. App. 4th 646, 650, 654 (2005) (statute requiring sex offender to update registration when he or she "changes his or her name" provided sufficiently fair notice to defendant, who retained his name but added alias). Even where, as

[14] This case is not like *White v. Baker*, 696 F. Supp. 2d 1289, in which the court found the statute not narrowly tailored because, among other things, it required disclosure of passwords used in retail and banking transactions. *Id.* at 1310.

[15] Plaintiffs' suggestion that the release of such information could increase recidivism by cutting sex offenders off from a social network (Pls.' Mem. at 15) amounts to pure speculation both about the manner in which the State will implement the law and the manner in which offenders will respond.

plaintiffs argue here, "a law implicates First Amendment rights, the Constitution must tolerate a certain amount of vagueness." *Cal. Teachers Ass'n v. State Bd. of Educ*., 271 F.3d 1141, 1151 (9th Cir. 2001).

To withstand a vagueness challenge under the due process clause "'[a]ll that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *People v. Hsu*, 82 Cal. App. 4th 976, 991-92 (2000) (citation omitted) (statute prohibiting dissemination of harmful matter via Internet is not void for vagueness). When examining a state law in light of a vagueness challenge, federal courts must "determine whether the statute is 'readily susceptible' to a narrowing construction by the state courts." *Cal. Teachers Ass'n*, 271 F.3d at 1147 (citation omitted). Courts have long recognized that "enactments should be interpreted when possible to uphold their validity." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 598 (1976). *See also Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dept.*, 533 F.3d 780, 792 (9th Cir 2008) ("California courts regularly construe arguably ambiguous statutes narrowly to avoid First Amendment problems.").[16]

Here, the definitions of both "Internet service provider" and "Internet identifier" are sufficiently clear. *See* Cal. Penal Code § 290.024(a) & (b). The Act's definition of "Internet service provider" is drawn directly from federal law. *See*, *e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. Law 105-277, § 1101(f)(2)(A), 112 Stat. 2681 (1998) ("The term 'Internet access provider' means a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services."). With regard to the phrase "internet identifiers," it is very similar to the definition upheld by the Tenth Circuit, and to the federal definition. *Shurtleff*, 628 F.3d at 1221 n.1 (online identifier means "any electronic mail, chat, instant messenger, social networking, or similar name used for Internet

[16] The State has not yet had the chance to implement Proposition 35, but in doing so, it is likely to address many of the concerns plaintiffs raise. For example, plaintiffs suggest that the term "Internet service provider" could include Best Buy because it sells devices that can access the Internet. Pls.' Mem. at 18; Decl. of D. Post ¶ 47. This construction is absurd, and as a result, it is highly unlikely that the State would implement Proposition 35 in a manner that would require registrants to report Best Buy as one of their Internet service providers.

communication"); 42 U.S.C. § 16915a(e)(2) ("'Internet identifiers' means electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting."). It is limited to the names a registrant uses to interact with others on the Internet, which, as plaintiffs note, is the means by which many sex offenders communicate with their victims online. Pls.' Mem. at 12.

Furthermore, the terms used in the definitions of "Internet service provider" and "Internet identifier" are used in everyday language and have an objective and ordinary meaning that can be discerned from a dictionary. *See United States v. Santos*, 553 U.S. 507, 511 (2008) ("When a term is undefined, we give it its ordinary meaning."); *In re Greg F.*, 55 Cal. 4th 393, 406 (2012) (when construing a statute, courts begin by giving the words of a statute their "plain and commonsense meaning."). For example, plaintiffs quibble with the terms "list" and "account" in the definition of Internet service provider (Pls.' Mem. at 21), arguing that these words create confusion, but the words have a common sense meaning.

The phrases plaintiffs challenge in the Act's definition of "Internet identifier" also are plain and clear to a person of ordinary intelligence. Both "instant messaging" and "social networking" have an ordinary, objective meaning and are understood in everyday language. *Cf. Williams*, 553 U.S. at 306 (words susceptible to subjective meaning, *e.g.*, "annoying" or "indecent," may render statute unconstitutionally vague.). Indeed, in a world as technologically saturated as the one plaintiffs describe, it would be incredible if plaintiffs did *not* understand what is meant by the terms "instant messaging" and "social networking."

The phrase "used for the purpose of" is so widespread and commonly understood that courts rarely have occasion to pass on its meaning, but when they do so have found the phrase sufficiently clear. *See*, *e.g.*, *United States v. Simmons*, 96 U.S. 360, 363 (1877) ("allegation that the vessels were used 'for the purpose of . . .'" sufficiently advises the accused of the nature of the offence charged.). In this particular context, the phrase connotes an element of intent on the part of the registrant, which adds even greater clarity to the term. *See Cal. Teachers Ass'n*, 271 F.3d at 1154 (finding that ballot initiative's scienter requirement mitigated vagueness concerns).

Finally, the inclusion of "similar" identifiers and services in the definition of "Internet identifiers" does not create uncertainty. It is a canon of statutory construction that "'where general

words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (citation omitted). Here, the common thread among the phrases "electronic mail address," "user name," and "screen name," as used in California Penal Code section 290.024(b), is that they all encompass "a string of characters chosen" by the registrant to "uniquely" designate his identity when communicating with others online.[17] *See*, *e.g.*, *White v Baker*, 696 F. Supp. 2d at 1308-09.

Plaintiffs threaten a parade of horribles if the Act stands as written, but its language is not "potentially limitless." *Cal. Teachers Ass'n*, 271 F.3d at 1148. Plaintiffs' "basic mistake lies in the[ir] belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 305-06. "[T]he touchstone of a facial vagueness challenge in the First Amendment context, however, is not whether *some* amount of legitimate speech will be chilled; it is whether a *substantial* amount of legitimate speech will be chilled." *Cal. Teachers Ass'n*, 271 F.3d at 1152 (emphasis in original).

Proposition 35's language is sufficiently definite to give plaintiffs notice of what the statute requires and provides sufficiently clear guidance to officials responsible for enforcing its provisions. When read in light of the words' plain, ordinary, and everyday meaning, the purpose of the Act is clear: to require registered sex offenders to provide to law enforcement information about the identities they assume on the Internet. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (upholding anti-noise statute whose words were "marked by 'flexibility and reasonable breadth, rather than meticulous specificity,'" when it was clear what the enactment "as a whole prohibits") (citation omitted).

D. <u>The Law Does Not Interfere With Plaintiffs' Freedom Of Association</u>

It simply is not true that Proposition 35 forces registrants to disclose their associations with online communities or groups. Registrants will have to disclose their Internet service provider –

[17] Likewise the phrases "Internet forum discussions," "Internet chat room discussions," "instant messaging," and "social networking," as used in the same provision, share the common thread of requiring the registrant to interact, *i.e.*, they require some sort of two-way communications.

e.g., Comcast – and their Internet identifiers – *e.g.*, John54. They do not have to disclose which websites they visit and where they use those identifiers. In fact, if a law enforcement official wants to know whether the "John54" who is soliciting children through private communications on a gaming website is the same "John54" who is a registered sex offender, that official will have to take additional steps to find out, likely by securing a subpoena, a search warrant, or judicial order.[18]

Indeed, Proposition 35 is far *less* likely to result in the disclosure of registrants' associations than current registration requirements. For example, under current law, law enforcement officials know that plaintiff Roe is a registered sex offender; they know his name, his aliases, and license plate numbers; and they know what he looks like. Depending on the circumstances, other members of the community may know some of this information too. Thus, any time Roe attends a political meeting, social gathering, or any other kind of in-person meeting, Roe runs the risk that someone will recognize him as a sex offender and know his associations. The same is true every time he signs a petition and allows his name to be included on an organization's membership list.

Simply put, Proposition 35 is not designed to, and will rarely have the effect of, uncovering which Internet sites are visited by registered sex offenders. The exceptions will almost all involve instances where law enforcement is able to use an identifier to identify a particular individual who has used the Internet to facilitate a crime. Thus, the measure is narrowly drawn to achieve a strong, indeed compelling, interest in combatting online sex offenses. *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960) (Legislature can pursue legitimate, substantial interests through narrow means, even if they infringe on important rights).

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[18] Plaintiffs' cases do not address facts like these, where a statute creates the mere possibility that associations will be revealed if further steps are taken. Plaintiffs' cases involve efforts to force political organizations to directly and immediately disgorge their membership lists and political communications to the government or their political opponents. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (NAACP need not turn over its list of Alabama members to the Alabama Attorney General); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (Socialist Worker Party need not disclose its contributors to the State of Ohio); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010) (proponents of Proposition 8 must disclose internal campaign communications to opponents only upon a showing of a sufficient need that counterbalances proponents' First Amendment interests).

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*, 510 F.3d 1054, 1058 (9th Cir. 2007). Because plaintiffs' facial challenge cannot succeed for the reasons described above, there is no need to even weigh the hardships.

Yet even if hardships are compared, plaintiffs cannot prevail. Even though the State will not be ready to use sex offenders' Internet identifiers and service providers for law enforcement purposes until March 2013, the mere collection of that information serves a vital prophylactic purpose. After all, a human trafficker who must begin turning over his Internet identifiers immediately may be deterred from online predatory conduct immediately, based on the knowledge that the police will eventually track him down. It is that harm to potential online victims that must be weighed against the potential harm to plaintiffs' speech. There is literally no way to repair the harm that could befall a woman or child who falls victim to these crimes.

If plaintiffs suffer any harm at all from delayed injunctive relief, they would suffer no more harm than they experience as a consequence of current registration requirements that mandate disclosure of their names, addresses, and the like. Moreover, if the Internet registration requirements were eventually struck down, plaintiffs could simply 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). In *Spiegel v. City of Houston*, 636 F.2d 997, 1000 (5th Cir. 1981), the Fifth Circuit reversed a preliminary injunction as overbroad because it elevated the privacy rights of adult theater patrons over legitimate law enforcement goals by prohibiting the police from demanding the names, addresses, and other personal information from theater patrons while enforcing state obscenity statutes. *Id*. at 1002. Although the Court acknowledged that it may be appropriate to enjoin police from demanding patrons' names in order to discourage them from patronizing adult theaters, the Court found "considerable potential harm to the public interest in the overly broad terms of the injunction" which could prevent a vice officer from asking an underage patron for proof of his age. *Id*. Similar reasoning applies here with far greater force, where the public's

interest in deterring some of the most heinous crimes imaginable outweighs a registered sex offender's desire to protect his anonymity from law enforcement while engaging in online activities.

CONCLUSION

Proposition 35 does not restrict registered sex offenders from engaging in any lawful online communications, even anonymously. It merely requires that they report their Internet identifiers and Internet service providers – information that is the cyberworld equivalent of sex offenders' names, aliases, and addresses – to the law enforcement agencies with which they are already registered. Proposition 35 is narrowly crafted to provide law enforcement with a valuable tool to combat online sex crimes, while imposing only a minimal reporting burden on plaintiffs. Plaintiffs' motion for a preliminary injunction should therefore be denied.

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Respectfully Submitted,

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