No. 119563

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) On Appeal from the) Circuit Court of the) Eleventh Judicial Circuit,
Plaintiff-Appellant,	) McLean County, Illinois)
v.	) No. 14 CF 1076)
MARK MINNIS,	) The Honorable) Robert Freitag,
Defendant-Appellee.	) Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

CAROLYN E. SHAPIRO
Solicitor General

MICHAEL M. GLICK
JOSHUA M. SCHNEIDER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-3565
jschneider@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

Defendant asks the Court to recognize a broad First Amendment right to anonymity, and argues that Section 3(a)'s disclosure requirements are unconstitutional because they deprive sex offenders of that right. Because the public generally disapproves of sex offenders, defendant reasons, any mechanism that allows the public to identify sex offenders chills sex offenders' speech, since engaging in the public discourse would expose them to expressions of that disapproval. By this reasoning, however, the First Amendment prohibits any sex offender registry that allows the public to recognize a sex offender, be it in person or online, as well as publicly available conviction records, since those, too, could expose a sex offender to public disapproval and chills their speech. But there is no absolute First Amendment right to anonymity. Rather, the First Amendment protects a speaker's anonymity (1) where it is a catalyst for speech and (2) to the extent that the speaker's interest in anonymity is not outweighed by the public's interest in disclosure. Sex offenders have no First Amendment right to compel the government to conceal their sex offender status from the public.

Moreover, under Section 3(a) sex offenders need disclose only the virtual identities under which they interact with the public and the online forums in which they have used those identities. The governmental purpose of the disclosures — to protect the public from recidivist sex offenders by aiding law enforcement investigation of recidivist sex crimes and alerting the public to the presence of sex offenders in the community — outweighs sex offenders' interests in concealing their sex offender status from the public. Because the

disclosure requirements are narrowly tailored to the governmental interest in protecting the public from recidivist sex offenders, they are not overbroad.

Moreover, Section 3(a)'s disclosure requirements have no chilling effect at all on the speech of juvenile sex offenders — that is, sex offenders like defendant, whose registration obligations arise from delinquency adjudications rather than adult convictions. Unlike adult sex offenders' registry information, juvenile sex offenders' information is unavailable to the public, thus shielding juvenile sex offenders from any chilling expressions of public disapproval.

I. The Circuit Court Lacked Jurisdiction to Rule on the Constitutionality of Section 3(a) Disclosure Requirements Other Than the One that Defendant Was Charged with Violating.

Section 3(a) lists eight distinct disclosure requirements in a single sentence. *See* 730 ILCS 150/3(a). As defendant acknowledges, Def. Br. 12[1], he was charged with violating only one of these requirements — that he disclose "all blogs and other Internet sites . . . to which the sex offender has uploaded any content or posted any messages or information," 730 ILCS 150/3(a). Specifically, he was charged with failing to "register an Internet site, a Facebook page, which he had uploaded content to." C10. Thus, only that disclosure requirement was properly before the circuit court. *See People v. Mosley*, 2015 IL 115872, ¶ 11.

Defendant argues that the circuit court had jurisdiction to rule on two of the remaining seven disclosure requirements — the two other requirements addressing Internet

[1] Citations to the People's opening brief appear as "Peo. Br. __," to defendant's brief as "Def. Br. __," and to amici's brief as "Am. Br. __."

activity — because although he was not charged with violating those requirements, he *could* have been so charged. Def. Br. 14-17. But he cites no authority to support this argument, *see id.* at 12-17; Ill. S. Ct. Rule 341(h)(7), nor can he, for his position is contrary to Illinois law: courts may not "consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009); *see Mosley*, 2015 IL 115872, ¶ 11. Here, defendant is charged with failing to disclose a website to which he uploaded content, C10; the circuit court's holding that Section 3(a) cannot constitutionally require defendant to disclose his e-mail addresses or registered URLs has no affect on that charge, any more than would a holding that Section 3(a) could not constitutionally require him to disclose his telephone number or current place of employment. *See* 730 ILCS 150/3(a). Because those disclosure requirements have no bearing on defendant's charge, they were not before the circuit court.

Defendant also argues, without citation to authority, that circuit court had jurisdiction to consider the two virtual disclosure requirements that he was not charged with violating because the sentence listing all of the requirements is contained within a single statutory subsection, unlike the provisions at issue in *Mosley*, which were divided among separate subsections.[2] Def. Br. 13. In other words, defendant argues that statutory provisions within a single subsection are not severable. But how provisions are placed in subsections does not determine severability. Rather, statutory provisions are severable from one another if they

[2] Defendant does not argue that the five other disclosure requirements listed in the same sentence as the three challenged requirements — that sex offenders provide a current photograph, address, place of employment, telephone numbers, and so on — must also be stricken, but offers no reason why his position would exempt them, since they, too, share the same statutory subsection as the disclosure violation that he was charged with violating.

are not "essentially and inseparably connected in substance," such that "the legislature would not have passed the valid portions without the invalid portions." *People v. Woodrum*, 223 Ill. 2d 286, 314 (2006) (citing *People v. Jordan*, 218 Ill. 2d 255, 267 (2006)). There is no indication that the General Assembly would not have enacted Section 3(a)'s requirement that sex offenders disclose their e-mail addresses and registered URLs if it could not also require that they disclose websites to which they have uploaded content. Although the three virtual disclosure requirements are complementary, each requirement is "complete in and of itself, and is capable of being executed wholly independently of" one another. *Mosley*, 2015 IL 115872, at ¶ 30. This independence is not compromised by the fact that they are contained within a single subsection. *See, e.g.*, *Woodrum*, 223 Ill. 2d at 314 (holding first sentence of 720 ILCS 5/10-5(b)(10) severable from unconstitutional second sentence of same subsection). Indeed, SORA's severability provision provides not that "statutory subsections" are severable, but that "provision[s]" and "applications" of the Act are severable. *See* 730 ILCS 150/10.9. Accordingly, the circuit court lacked authority to rule on the constitutionality of any disclosure requirement that defendant was not charged with violating.

Moreover, to the extent that defendant's overbreadth challenge is founded on the assumption that sex offenders' speech is chilled by the public dissemination of registry information collected pursuant to Section 3(a)'s disclosure requirements, *see* Def. Br. 24-27, that challenge is properly directed at the Notification Law, *see* 720 ILCS 152/101, *et seq.*, not the disclosure requirements. Any chilling exposure to public disapproval arises from the dissemination of registry information pursuant to the Notification Law, not the collection of registry information pursuant to the disclosure requirements. Indeed, defendant does not

argue that disclosing the information required under Section 3(a) to law enforcement, to facilitate investigations of recidivist sex crimes, chills sex offenders' speech, *See* Def. Br. 24-27. Rather, he argues only that dissemination of that information to the public chills sex offenders speech by deterring their participation in the public discourse for fear of the public's disapproval. *See id.* But invalidation of the Notification Law, like invalidation of the disclosure requirements that defendant was not charged with violating, would have no effect on defendant's case; his registration obligations under Section 3(a) are independent of the Notification Law, and the primary interest these requirements further — protecting the public by aiding investigations of recidivist sex crimes — are not inextricably intertwined with the separate but related interest furthered by dissemination of registry information under the Notification Law — protecting the public by alerting it to the presence of sex offenders in the community. Because the charge against defendant arises from his failure to comply with one of Section 3(a)'s disclosure requirements, defendant's challenge to the Notification Law was also not properly before the circuit court.

II. Section 3(a)'s Virtual Disclosure Requirements Are Not Unconstitutionally Overbroad Under the First Amendment Because They Are Narrowly Tailored to Serve the Substantial Governmental Interest of Protecting the Public from Recidivist Sex Offenders.

A. Defendant Does Not Dispute the Scope of Section 3(a)'s Disclosure Requirements.

Because "[t]he first step in an overbreadth analysis is to construe the challenged statute," *United States v. Williams*, 553 U.S. 285, 293 (2008), the People's opening brief mapped the scope of Section 3(a)'s disclosure requirements by analyzing the plain language of the statute. *See* Peo. Br. 10-15. That analysis revealed that the disclosure requirements

allow sex offenders to say whatever they like to whomever they like, whenever and wherever they like, without disclosing either the substance or audience of their speech. *See id.* Rather, sex offenders must disclose only the Internet identities under which they interact with the public — their virtual identities — and the Internet forums in which they have done so — their virtual whereabouts. *See id.*

Defendant asserts, without reference to the statutory language, that the Court should reject the People's analysis because "most" of the People's constructions of the disclosure requirements "have nothing to do with the plain text or purpose of the statute." Def. Br. 22. But he does not identify *which* constructions he believes are not founded in the Section 3(a)'s language or purpose, much less why they are not so founded or what the correct constructions might be. *See id.* Indeed, he offers no argument at all, instead citing without explanation to the Ninth Circuit's decision in *Doe v. Harris*, 772 F.3d 563, 578-79 (9th Cir. 2014). *Id.* There, although the Ninth Circuit concluded that the California sex offender registration disclosure requirements, which differ from Illinois', were not susceptible to a limiting construction, the court also explained that it could not apply a limiting construction to uphold the statute in any event because Federal courts' constructions of state statutes are not binding on state courts. *Harris*, 772 F.3d at 578-79. But that is no basis to reject the People's construction here, for this Court's constructions of Illinois statutes are binding on Illinois courts.

B. Section 3(a)'s Content-Neutral Disclosure Requirements Are Subject to Intermediate Scrutiny Because Their Speaker-Based Distinction — Applying Only to Sex Offenders — Is Not Intended to Enforce Governmental Content Preferences.

Section 3(a)'s disclosure requirements are subject to intermediate scrutiny because they are content-neutral, applying to sex offenders' virtual identities and whereabouts "without reference to the ideas or views expressed" under those identities or in those forums. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994); 730 ILCS 150/3(a). Defendant concedes that the disclosure requirements are facially content-neutral, but argues that they nonetheless "voice implicit government opposition to sex offender speech on the Internet in general" by allowing members of the public to decide whether to reduce their risk of being victims of recidivist sex crimes by limiting their interactions with sex offenders online. Def. Br. 19.

Whether a content-neutral statute was enacted as "a subtle means of exercising a content preference," *Turner Broad. Sys.*, 512 U.S. at 645, and thus subject to strict rather than intermediate scrutiny, turns on the underlying legislative intent, *see id.* at 646. The legislative intent of SORA is clear: to protect the public from the danger of recidivist sex offenders. *See People v. Johnson*, 225 Ill. 2d 573, 585 (2007) ("The purpose of the Act is to aid law enforcement by facilitating ready access to information about sex offenders and, therefore, to protect the public."). Equally clear is that the disclosure requirements are intended to protect the public in two ways: by aiding law enforcement agencies in their investigations of recidivist sex crimes, *People v. Cornelius*, 213 Ill. 2d 178, 194 (2004), and by "alerting the public to the risk of sex offenders in their communit[y]," *Smith v. Doe*, 538 U.S. 84, 103 (2003) (internal quotations omitted) (alteration in original); *People v.*

Grochocki, 343 Ill. App. 3d 664, 671 (3d Dist. 2003) ("The intended purpose of this system is to inform and protect persons who may otherwise unwittingly come into contact with such offenders."). This legislative intent is not altered by the fact that the public availability of this information provided by the disclosure requirements might have other effects as well. *See Smith*, 538 U.S. at 99 ("The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.").

Defendant also argues that the widespread public disapproval of sex offenders means that publicly identifying sex offenders is an attempt to silence them by exposing them to that disapproval. *See* Def. Br. 20-21. But "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith*, 538 U.S. at 101. The reason for making registry information available to the public is "so members of the public can take the precautions they deem necessary before dealing with the registrant." *Id.*[3] Because the disclosure requirements' content-neutrality is not a facade, they are subject to intermediate scrutiny. *See Turner Broad. Sys.*, 512 U.S. at 645.

Defendant and amici also argue that, notwithstanding its content-neutrality, Section 3(a)'s speaker-based distinction — *i.e.*, the application of its disclosure requirements to sex

[3] Moreover, as previously explained, *see supra*, § I, defendant has not challenged the Notification Law, which is what mandates disclosure, nor does he acknowledge that as a juvenile sex offender his registry information was not made public.

offenders only — is subject to strict scrutiny simply because it is a speaker-based restriction. Def. Br. 19; Am. Br. 11. In support, they rely on *Citizens United*'s statement that "restrictions distinguishing among different speakers, allowing speech by some but not others" may be subject to strict scrutiny "[q]uite apart from the purpose or effect of regulating content," when, "[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." Def. Br. 19 (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340-41 (2010)); *see* Am. Br. 11. But *Citizens United* concerned a statute banning political speech by certain organizations. *See Citizens United*, 558 U.S. at 339 (observing that statute at issue constituted "ban on speech" and that "[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office") (citations and internal quotation marks omitted).

In contrast, Section 3(a)'s disclosure requirements ban no speech, much less political speech, and so do not "tak[e] the right to speak" from sex offenders. Indeed, the disclosure requirements do not restrict speech at all — they place no limitation on what a sex offender may say or when, where, how, or to whom he may say it. *See* 730 ILCS 150/3(a). Rather, to the extent they implicate the First Amendment right to free speech, it is not because they restrict speech, but because they burden the prophylactic First Amendment interest in anonymity "where it serves as a catalyst for speech." *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) ("[T]he First Amendment protects anonymity where it serves as a catalyst for speech."); *see Buckley v. Am. Constitutional Law Found.*,

Inc., 525 U.S. 182, 645-46 (1999). In fact, *Citizens United* declined to apply strict scrutiny to a separate disclosure requirement that expressly targeted political speech. *See Citizens United*, 558 U.S. at 366. Accordingly, courts have applied intermediate scrutiny to content-neutral disclosure requirements. *See Harris*, 772 F.3d at 575 (applying intermediate scrutiny to sex offender registry disclosure requirements); *Doe v. Shurtleff*, 628 F.3d 1217, 1223 (10th Cir. 2010) (same); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1107-08 (D. Neb. 2012) (same); *White v. Baker*, 696 F. Supp. 2d 1289, 1307-08 (N.D. Ga. 2010) (same); *see also Doe v. Prosecutor, Marion Cnty., Ind.*, 705 F.3d 694, 698 (7th Cir. 2013) (applying intermediate scrutiny to statute prohibiting sex offenders from using social networking websites).

C. Section 3(a)'s Disclosure Requirements Are Not Overbroad Because They Do Not Unconstitutionally Burden Sex Offenders' First Amendment Interest in Anonymity and Are Narrowly Tailored to Serve the Governmental Interest in Protecting the Public from Recidivist Sex Offenders.

1. Section 3(a)'s disclosure requirements do not unconstitutionally burden sex offenders' First Amendment interest in anonymity.

Defendant and amici argue that the disclosure requirements are overbroad because they "eliminate[ ] the protected first amendment right to anonymous speech." Def. Br. 23; *see* Am. Br. 23. But there is "no such freewheeling right" — the First Amendment protects "the right to speak, not the . . . right to speak anonymously." *John Doe No. 1 v. Reed*, 561 U.S. 186, 217 n.4 (2010) (Stevens, J., concurring). Rather, disclosure requirements implicate the First Amendment right to speak only to the extent that they prohibit anonymity "where it serves as a catalyst for speech." *Peterson*, 478 F.3d at 632; *see Buckley*, 525 U.S. at 198-99. Accordingly, courts have distinguished between disclosure requirements that compel speakers to identify themselves to their audience while speaking and requirements that

compel speakers at some other time to provide information that, if consulted by the public, would allow the public to identify the speakers. *See Buckley*, 525 U.S. at 198-99.

Buckley upheld the requirement that petition circulators identify themselves in affidavits, distinguishing it from the unconstitutional requirement that circulators wear identification badges. *Id.* at 198-99. As the Court explained, "[w]hile the affidavit reveals the name of the petition circulator and is a public record, it is tuned to the speaker's interest as well as the State's" because, "[u]nlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks." *Id.* at 198. The name badge requirement "force[d] circulators to reveal their identities at the same time they deliver their political message," at "the precise moment when the circulator's interest in anonymity is greatest" and "reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned." *Id.* at 198-99 (internal citations and quotation marks omitted). The affidavit requirement, "in contrast, [did] not expose the circulator to the risk of 'heat of the moment' harassment." *Id.* at 199.

The disclosure required here — the blogs and websites to which sex offenders uploaded content or posted messages or information, *see supra*, § I — has even less effect on sex offenders' anonymity than the affidavit requirement upheld in *Buckley*. As defendant acknowledges, Def. Br. 5, unless a sex offender moves or changes his place of employment, telephone number, or school, he cannot be required to register more than four times per year, 730 ILCS 150/6, and could be required to register as infrequently as once a year. Thus, the information collected under this disclosure requirement and disseminated under the Notification Law simply allows the public to identify online forums in which the sex

offender has been active at some unspecified time within the offender's previous, potentially year-long registration period. Although this delayed record of a sex offender's online whereabouts allows the public to take protective measures against the risk of recidivism posed by the sex offender in those forums — for example, by limiting their discussion in those forums of topics such as the neighborhood where they live and the ages of their children, or by avoiding the forum altogether — it does not alone allow them to identify the sex offender or his speech.

Finally, the combined effect of the three virtual disclosure requirements — the one before the Court and the two that are not, *see supra*, § I — on sex offenders' anonymity is constitutional. Like the effect of the affidavits on the petition circulators' anonymity in *Buckley*, they allow the public to identify a speaker, but do not compel the speaker to identify himself to his audience. Contrary to defendant's assertions, the information collected under Section 3(a) and disseminated under the Notification Law does not mark all sex offender speech with a scarlet letter, Def. Br. 19; rather, "[t]he process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality," *Smith*, 538 U.S. at 99. The statutory language refutes defendant's assertion that Section 3(a) requires that sex offenders "regularly report details of any speech they have made on the internet," Def. Br. 7, allowing "everyone on the planet to identify any Internet speech from a sex offender registered under SORA," *id.* at 9.

Although defendant quibbles with the People's characterization of the information a sex offender must disclose as his virtual identities and virtual whereabouts, *see* Def. Br. 7,

he does not dispute the substance of those disclosures: the identities under which a sex offender interacts with the public online — his "e-mail addresses, instant messaging identities, chat room identities, and other Internet Communication identities," 730 ILCS 150/3(a) — and the forums in which he has interacted with the public — the URLs "registered or used" by him and the "blogs and other Internet sites maintained by the sex offender or to which the sex offender has uploaded any content or posted any messages or information," *id.* Disclosure of this information does not "eliminate" sex offenders' ability to speak anonymously online. Because Section 3(a) largely requires only retroactive disclosure of a sex offender's virtual identities and whereabouts — a sex offender must disclose his virtual identities prospectively only if he "plans to use" them at the time of registration, *see id.*, and must disclose his virtual whereabouts only retrospectively, *see id.* — the disclosure requirements do not affect a sex offender's ability to speak anonymously under any virtual identity that arises subsequent to his last registration and does not allow the public to contemporaneously track his virtual whereabouts. Rather, the information disclosed allows a member of the public, should he or she review it, to identify a sex offender when he speaks under a previously used alias and to identify online forums in which the sex offender has been active sometime during the offender's previous registration period.

Section 3(a)'s disclosure requirements have still less effect on the exercise of free speech rights by juvenile sex offenders — meaning sex offenders whose registration obligations arise from a delinquency adjudication rather than an adult conviction, *see* 730 ILCS 150/3-5 — because juvenile sex offenders' registration information is not generally available to the public. Rather, it "may be disseminated to a member of the public only if

that person's safety might be compromised for some reason and only in the appropriate agency's or department's discretion," *In re J.W.*, 204 Ill. 2d 50, 71 (2003); 730 ILCS 152/121(a), and to the principal or chief administrative officer of the offenders' school and guidance counselor, to "be kept separately from any and all school records maintained on behalf of the juvenile sex offender," 730 ILCS 152/121(b). Defendant incorrectly asserts that a juvenile sex offender's registration information would become public to the same extent as a non-juvenile sex offender's should he fail to register. *See* Def. Br. 26. A juvenile offender's failure to register may extend the duration of his registration term as a juvenile sex offender, *see* 730 ILCS 150/7, but does not affect the public availability of his registration information or require that he register as a non-juvenile sex offender, *see* 730 ILCS 150/2(B) (omitting failure to register from offenses requiring sex offender registration).

Accordingly, the prospect that sex offenders will be deterred from speaking online under the burden of these disclosure obligations is too speculative to support defendant's First Amendment challenge. *See Wisconsin v. Mitchell*, 508 U.S. 476, 488-89 (1993) (rejecting First Amendment overbreadth challenge to hate crime statute because prospect of statute deterring expression was "too speculative" to support overbreadth claim); *People v. Rokicki*, 307 Ill. App. 3d 645, 654 (2d Dist. 1999) (same); *cf. Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 537, 537 n.12 (9th Cir. 2015) (disclosure requirement for official proponents of legislative initiative petitions did not chill right to speak because "proponent may choose to remain anonymous at the point of voter contact just like any ordinary circulator").

At bottom, defendant's argument rejects the legitimacy of the governmental interest in protecting the public from recidivist sex offenders by alerting them to the presence of sex offenders in the community, and it therefore would apply equally to much of the publicly available registry information that has nothing to do with the Internet. A sex offender's ability to speak anonymously online is no more compromised by a registry containing his virtual identities and the forums in which he has used them than is his ability to speak anonymously in person or on the phone by a registry containing his current photograph and telephone number. But the governmental interest is not only legitimate, but compelling. *See Doe v. Biang*, 494 F. Supp. 2d 880, 892 (N.D. Ill. 2006) (citing *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999)). And the constitutionality of the disclosure requirements furthering that interest is a question of the weight of this substantial government interest relative to the weight of sex offenders' interest in ensuring the public's inability to discover their sex offender status. *Cf. People v. Williams*, 235 Ill. 2d 178, 201 (2009) (statute not overbroad where defendant failed to meet burden of "establish[ing] that the social costs swing in his favor"); *Doe v. Public Citizen*, 749 F.3d 246, 273-74 (4th Cir. 2014) (courts restrict pseudonymous litigation, balancing public interest in identification of litigants and openness of judicial proceedings against litigants' stated need for anonymity) (collecting cases); *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004) (anti-mask law not unconstitutional even if it deters some members of Ku Klux Klan from participating in rallies because "the individual's right to speech must always be balanced against the state's interest in safety"). Although sex offenders may have a First Amendment interest in not being compelled to identify themselves to their audiences, they have no First

Amendment right to compel the government to conceal their sex offender status from the public. The governmental interest of protecting the public from recidivist sex offenders outweighs sex offenders' interest in preventing public discovery of their sex offender status.

2. Section 3(a)'s disclosure requirements are narrowly tailored to the governmental interest in protecting the public from recidivist sex offenders.

Defendant and amici argue that the disclosure requirements are overbroad because they apply to all sex offender public speech. Def. Br. 37; Am. Br. 19-20. But breadth is not overbreadth; a regulation affecting a broad range of speech is only overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *People v. Clark*, 2014 IL 115776, ¶ 11 (citing *United States v. Stevens*, 559 U.S. 460, 473 (2010)). In other words, a content-neutral statute is not overbroad because it burdens speech, but because it burdens substantially more speech than necessary to effect its legitimate purpose.[4] Here, the governmental interest in protecting the public from recidivist sex offenders requires broad disclosures. As the People explained, *see* Peo. Br. 23-29, any place the public may encounter a sex offender is related to that interest because those are the places that are relevant to law enforcement investigations of recidivist sex crimes and those are the places where the public must be on its guard against sex offenders. The governmental interest in aiding law enforcement investigations of recidivist sex crimes applies equally wherever sex offenders are present and interacting with the public, as does

[4] *Doe v. Harris* failed to engage in this critical comparative analysis, finding the California disclosure requirements overbroad simply because public dissemination of sex offenders' disclosures would chill their speech, not because the scope of the chilling effect was substantially broader than required by the statutory purpose. *Harris*, 772 F.3d at 581.

the governmental interest in alerting the public to the presence of sex offenders.[5] Thus, the disclosure requirements are narrowly tailored to serve those interests.

Even if the disclosure requirements applied to virtual identities and online forums that (somehow) could never be used in any connection with a sex crime, defendant's overbreadth argument would fail because the disclosure requirements would not unconstitutionally burden sex offenders' speech under those identities or in those forums. The specific disclosure requirement at issue here requires only that sex offenders disclose where they have spoken. *See* 730 ILCS 150/3(a); Peo. Br. 14-15. This disclosure does not place any constitutionally significant burden on sex offenders' speech because it does not preclude their ability to speak anonymously. *See supra*, II.C.1. And the three virtual disclosure requirements combined require only that sex offenders disclose where they have spoken and under what identities; they need not disclose what they have said, when they said

---

[5] The federal cases declaring sex offender registration disclosure requirements overbroad fail to recognize the necessary breadth necessary to protect the public. This failure appears to arise from the courts' belief that sex offenders would not exercise poor judgment by leaving publicly available evidence that might lead to their apprehension. In *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012), the court found the requirement that offenders disclose "all blogs and Internet sites maintained by the [them] or to which [they] ha[ve] uploaded any content or posted any messages or information" overbroad because "[b]logs are by their nature open to the public and pose no threat to children" and "[a] site publicly available on the Internet poses no threat to children" because "every police officer in the world can see it." *Id.* at 1121. Similarly, in *White v. Baker*, 696 F. Supp. 2d 1289, 1310 (N.D. Ga. 2010), the court found the requirement that offenders disclose their usernames in blogs and other interactive online forums overbroad because "[t]his internet communication form does not reasonably present a vehicle by which a sex offender can entice a child to have illicit sex"; rather, "[i]n the Court's experience," such enticements "occur privately in direct email transmissions . . . and in instant messages." *Id.* But, as demonstrated in the People's opening brief, *see* Peo. Br. 28, sex offenders cannot be relied upon to refrain from committing sex offenses with discoverable connections to public forums.

it, or to whom. Any burden that disclosure of this information places on speech when disseminated under the Notification Law is highly speculative. There is no reason to believe that a sex offender will refrain from commenting under an alias on an article in the New York Times or ESPN websites for fear that people could, were they to review his sex offender registry information at the local law enforcement offices, discover that he uses that alias on the New York Times or ESPN websites, find his comment, and respond with their own meanspirited comments.

Again, defendant essentially argues that the First Amendment prohibits *any* sex offender registry that would allow the public to recognize a sex offender. Disclosure of a sex offender's virtual identities and the forums in which he uses them compromises his ability to speak online anonymously about sports or politics or religion to the same extent that disclosure of his current photograph and telephone number compromises his ability to speak anonymously in person or on the phone about those topics. And these disclosure requirements are narrowly tailored to the governmental interest of protecting the public against recidivist sex offenders. As the People explained in their opening brief, *see* Peo. Br. 25-26, any attempt to tailor them more narrowly to exclude forums not generally associated with sex crimes would turn those forums into safe havens where law enforcement investigations cannot pursue sex crime investigations and the public relaxes its guard, unaware of the presence of sex offenders.

Amici argues that the disclosure requirements are overbroad in relation to the governmental interest in aiding law enforcement investigations of recidivist sex crimes because "sex offender who intends to reoffend" is unlikely to comply with the disclosure

requirements to the extent that they will interfere with his recidivism. Am. Br. 21. But this argument presumes that recidivism is always premeditated months in advance, such that any telling details can be deliberately concealed from law enforcement, rather than relatively spontaneous, corresponding to an unanticipated intersection of a chance encounter and a moment of weakness. There is no reason to believe this is so.

Amici also argue that disclosure requirements collecting sex offenders' virtual whereabouts are overbroad in relation to the governmental interest in alerting the public to the risk of recidivism posed by sex offenders in the community because they are broader than the requirements collecting sex offenders' real-world whereabouts, since sex offenders need not disclose every physical location that they visited during a registration period. Am. Br. 22-23. But amici forget a key difference between the real world and the Internet; sex offenders' movements are constrained by physical geography in the real world in a way that they are not online. *See* Peo. Br. 23-24. Disclosure of a sex offender's home and workplace suffice to define the general area within which the public should expect to encounter him, and disclosure of his current photograph ensures that the public is able to identify him wherever they encounter him, whether within that community or not. Thus, the real-world disclosure requirements are actually broader the virtual disclosure requirements; the public is able to identify sex offenders everywhere, whether they speak at a given location or not, allowing not only responsive but preemptive expressions of disapproval to sex offenders' engagement in the public discourse and thereby chilling sex offenders' speech to a far greater extent.

3. Defendant's argument that sex offenders do not pose a high enough risk to justify registration is a policy argument unsuitable for judicial resolution.

Defendant argues that the disclosure requirements are unconstitutionally overbroad because they apply to sex offenders who may not pose a sufficient risk of recidivism to justify their registration and to juveniles who, as a class, are more readily rehabilitated. Def. Br. 27-28. But this is a policy argument for the General Assembly; "criticisms against the wisdom, policy or practicability of a law are subjects for legislative consideration and not for the courts." *People v. Howard*, 228 Ill. 2d 428, 438 (2008) (internal quotation marks omitted); *see People v. Huddleston*, 212 Ill. 2d 107, 138 (2004) (acknowledging the "considerable debate" over efficacy of sex offender treatment, but stating that "it *is* clear that state legislatures may respond to what they reasonably perceive as a 'substantial risk of recidivism'") (emphasis original); *Smith*, 538 U.S. at 103 ("Alaska could conclude that conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class").

Defendant relies on *No Easy Answer: Sex Offender Laws in the U.S.*, Human Rights Watch, Vol. 19, No. 4(G) (Sept. 2007), for the proposition that recidivism rates are as low as 24%. *See* Def. Br. 33. Setting aside the question of whether a one in four likelihood of a sex offender committing a new sex offense is sufficient to warrant legislative action, the General Assembly could reasonably reject that figure because the study that produced it defined recidivism as being "arrested or convicted for a new sex crime." *See Sex Offender Laws*, Vol. 19, No.4(G), at 27. As *Sex Offender Laws* notes, "recidivism rates vary

depending on how recidivism is defined" and "many sex offenses are never reported to police." *Id.* at 26 n.39. In fact, arrest and conviction rates dramatically underrepresent offenses; as this Court has noted, "most cases never come to the attention of law enforcement," *Huddleston*, 212 Ill. 2d at 137. By some reports, "less than one third of all sexual abuse or assault cases are actually reported and investigated by child protective authorities" and "the chance of being apprehended for child molestation may be as low as 3%." *Id.*; *see also, e.g.*, *In re Det. of Melcher*, 2013 IL App (1st) 123085, ¶¶ 7-12 (sex offender arrested for offenses against four victims admitted to offenses against 172 victims); *In re Det. of Lenczycki*, 405 Ill. App. 3d 1041, 1042-43 (2d Dist. 2010) (sex offender arrested for offenses against three victims admitted to offenses against approximately 30 young boys). The question of which studies should guide legislative policy is a question for the legislature.

Similarly, defendant's argument that juvenile sex offenders "do not belong on this registry," Def. Br. 31, because they "have a low risk of reoffending and a high potential for rehabilitation," *id.* at 28, is a policy argument for the legislature, not the Court. *See In re J.W.*, 204 Ill. 2d at 72 (explaining that "[c]learly there is a rational relationship between the registration of juvenile sex offenders and the protection of the public from such offenders" and that "[w]hether there are better means to achieve this result . . . is a matter better left to the legislature"); *see also Roselle Police Pension Bd. v. Vill. of Roselle*, 232 Ill. 2d 546, 557 (2009) (explaining that Court "do[es] not sit as a superlegislature to weigh the wisdom of legislation nor decide whether the policy which it expresses offends the public welfare") (quoting *Hayen v. Cnty. of Ogle*, 101 Ill. 2d 413, 421 (1984)) (internal quotations omitted). Indeed, defendant's reliance on reports by advocacy groups and governmental advisory

commissions reveals the legislative character of his policy argument. *See* Def. Br. 28-31 (citing publications by Human Rights Watch and Illinois Juvenile Justice Commission).

Moreover, many of the policies that defendant faults the General Assembly for not enacting are already in place. The Act already allows for early termination of juvenile offender registration terms based on an individualized risk assessment. A juvenile sex offender may petition for termination of his registration term within two years or five years of his delinquency adjudication or release from custody, depending on whether the offense would have been a misdemeanor or felony if charged as an adult. 730 ILCS 150/3-5(c). At the termination hearing, the court hears evidence regarding the risk posed by the juvenile offender, including a risk assessment performed by a licensed evaluator and information regarding the petitioner's mental, physical, educational, and social history and rehabilitation. 730 ILCS 150/3-5(e). If the court finds by a preponderance of the evidence that the petitioner does not pose a risk to the community, the court may grant the petition and terminate the petitioner's registration term. 730 ILCS 150/3-5(d). In any event, upon the conclusion of a juvenile sex offender's registration term, his name, address, and all other identifying information are removed from all State and local registries. 730 ILCS 150/3-5(g).

Here, defendant was required to register at the time of his 2014 offense because he either declined the opportunity to petition for termination of the registration period, *see* 730 ILCS 150/3-5(c); C39, or the court denied a petition for termination upon concluding that he still posed a threat to the community. The record does not reveal whether defendant petitioned for termination as he could have done as early as 2012.

III. The Dislosure Requirement that Defendant Was Charged with Violating Is Not Unconstitutional as Applied to Him.

The requirement that defendant disclose the blogs and websites to which he uploaded content or posted messages or information could not, and did not, chill his speech rights. Because his registration obligation arose from a juvenile delinquency adjudication, defendant's registry information is not available to the public, and so has no effect on his ability to speak anonymously online. *See supra*, § II. C.3. Moreover, the requirement that defendant disclose the Facebook page to which he uploaded a photograph did not implicate his First Amendment anonymity interest because anonymity was not a catalyst for his speech on that page, which identified him by name and included his photograph. *See Peterson.*, 478 F.3d at 632 (requirement that registrants of certain websites disclose personal information did not chill registrant's right to speak anonymously where his postings on site were "wholly inconsistent with his invocation of this right because they demonstrate[d] that his expression did not rely on his ability to remain anonymous").

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Court reverse the judgment of the circuit court.

May 4, 2016

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

CAROLYN E. SHAPIRO
Solicitor General

MICHAEL M. GLICK
JOSHUA M. SCHNEIDER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-3565
jschneider@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 6,881 words. In preparing this certificate, I relied on the word count of the WordPerfect X4 word-processing system used to prepare this brief.

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

The undersigned certifies that on May 4, 2016, the **Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois using the Court's electronic filing system, and three copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in an envelope bearing sufficient first-class postage:

Daaron Kimmell
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe, Suite 303
P.O. Box 5240
Springfield, Illinois 62705

Rebecca K. Glenberg
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan Avenue
Suite 2300
Chicago, Illinois 60601

Adam Schwartz
Sophia Cope
Electronic Frontier Foundation
815 Eddy Street
San Francisco, California 94109

Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail the original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General