IN THE

SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

POINT AND AUTHORITIES

The Sex Offender Registration Act's Internet-speech reporting requirements are unconstitutional under the first amendment.

A.

All of the Internet-speech reporting requirements were properly before the trial court and heightened first-amendment scrutiny should apply here.

1.

Because the charged conduct of uploading content to a Facebook account could fall under *each* of the Internet-speech reporting requirements of section 3(a), the trial court had jurisdiction to analyze the constitutionality of all of those reporting requirements at the pre-trial stage.

2.

Registered sex offenders are entitled to full first-amendment protections.

3.

Strict scrutiny, or alternatively, intermediate scrutiny, applies here.

B.

The statutory text is not readily susceptible to the State's limiting constructions; but even with those constructions, the Internet-speech reporting requirements are unconstitutional under the first amendment.

ISSUE PRESENTED FOR REVIEW

Whether the Sex Offender Registration Act's Internet-speech reporting requirements are unconstitutional under the first amendment.

STATUTES AND RULES INVOLVED

Sex Offender Registration Act, 730 ILCS 150 (2014):

730 ILCS 150/3: **Duty to register**

(a) A sex offender *** shall *** register in person and provide accurate information as required by the Department of State Police. Such information shall include *** all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use, all Uniform Resource Locators (URLs) registered or used by the sex offender, all 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 ***.

730 ILCS 150/6: **Duty to report; change of address, school, or employment; duty to inform**

*** Any other person who is required to register under this Article shall report in person to the appropriate law enforcement agency with whom he or she last registered within one year from the date of last registration and every year thereafter and at such other times at the request of the law enforcement agency not to exceed 4 times a year.

***

If any other person required to register under this Article changes his or her residence address, place of employment, telephone number, cellular telephone number, or school, he or she shall report in person, to the law enforcement agency with who he or she last registered, [all of the information in section 3(a).]

730 ILCS 150/7: **Duration of registration**

*** Any other person who is required to register under this Article shall be required to register for a period of 10 years after conviction or adjudication if not confined to a penal institution, hospital or any other institution or facility ***.

***

The Director of State Police, consistent with administrative rules, shall extend for 10 years the registration period of any sex offender *** who fails to comply with the provisions of this Article *** beginning from the first date of registration after the violation.

730 ILCS 150/10: **Penalty**

(a) Any person who is required to register under this Article who violates any of the provisions of this Article *** is guilty of a Class 3 felony.

Sex Offender Community Notification Law, 730 ILCS 152 (2014):

730 ILCS 152/115: **Sex offender database**

(a) The Department of State Police shall establish and maintain a Statewide Sex Offender Database for the purpose of identifying sex offenders and making that information available to the persons specified in Sections 120 and 125 of this Law. The Database shall be created from the Law Enforcement Agencies Data System (LEADS) ***. The Department of State Police shall examine its LEADS database for persons registered as sex offenders under the Sex Offender Registration Act and shall identify those who are sex offenders and shall add all the information, including photographs if available, on those sex offenders to the Statewide Sex Offender Database.
(b) The Department of State Police must make the information contained in the Statewide Sex Offender Database accessible on the Internet ***.

730 ILCS 152/120: **Community notification of sex offenders**

(b) The Department of State Police and any law enforcement agency may disclose, in [their] *** discretion, the following information to any person likely to encounter a sex offender, or sexual predator:

> (1) The offender's name, address, date of birth, e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities, all Uniform Locators (URLs) registered or used by the sex offender, and all 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.
>
> ***

(c) The name, address, date of birth, e-mail addresses, instant messaging identities, chat room identities, other Internet communications identities, all Uniform Resource Locators (URLs) registered or used by the sex offender, all 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 *** shall be open to inspection by the public as provided in this Section.

***

(d) The Department of State Police and any law enforcement agency having jurisdiction may, in the Department's or agency's discretion, place the information specified in subsection (b) on the Internet or in other media.

730 ILCS 152/121: **Notification regarding juvenile offenders**

(a) The Department of State Police and any law enforcement agency having jurisdiction may, in the Department's or agency's discretion, only provide the information specified in subsection (b) of Section 120 of this Act, with respect to an adjudicated juvenile delinquent, to any person when that person's safety may be compromised for some reason related to the juvenile sex offender.

ARGUMENT

The Sex Offender Registration Act's Internet-speech reporting requirements are unconstitutional under the first amendment.

The Supreme Court once quoted Justice Holmes for the proposition that "the use of the [post-office] mails is almost as much a part of free speech as the right to use our tongues[.]" *Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301, 305 (1965). It could be said that the Internet now occupies that role in American society, today providing, as the mail once did, the "main artery through which the business, social, and personal affairs of the people are conducted[.]." *Pike v. Walker*, 121 F.2d 37, 39 (D.C. Cir. 1941); see, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997) (explaining, many years ago, that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers").

On December 15, 2010, Mark Minnis was adjudicated as a delinquent juvenile for criminal sexual abuse, a Class A misdemeanor that includes consensual sex between two minors under the age of seventeen. (C. 28, 39-42) 720 ILCS 5/12-15(b) (2010). Mark was then required to register under the Sex Offender Registration Act (SORA) at least once a year for ten years.[1] Among other things, SORA requires registrants to repeatedly report:

> "all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the

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[1] Beyond the yearly requirement, SORA requires Mark to register with local law enforcement "at such other times at the request of the law enforcement agency not to exceed 4 times a year." 730 ILCS 150/6 (2014). And Mark also has to register any time he "changes his or her residence address, place of employment, telephone number, cellular telephone number, or school[.]" 730 ILCS 150/6.

> sex offender uses or plans to use, all Uniform Resource Locators (URLs) registered or used by the sex offender, all 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 ***." 730 ILCS 150/3(a) (2014).

On at least two registration forms that appear in the record, Mark dutifully disclosed his Facebook account and two email addresses. (C. 39-42)

When registering again on August 29, 2014, Mark neglected to include his Facebook account on the form. (C. 7) Normal police investigated, and on viewing Mark's publically accessible Facebook profile online, "observed previous post [*sic*] prior to Mark coming in and registering on 8/29/14, such as changing his cover photo on 7/20/14." (ALL CAPS removed.) (C. 7) For this, Mark was charged with unlawful failure to register as a sex offender, a Class 3 felony. (C. 10)

In its ruling granting a pre-trial defense motion to dismiss, the trial court struck down SORA's Internet-speech reporting requirements, contained in 730 ILCS 150/3(a), as unconstitutional under the first amendment on their face and as applied to Mark. (C. 115-17) This Court should affirm that decision.

At the core of the State's argument now, in this appeal of that ruling, is an analogy that neither accurately represents the nature of the Internet, nor properly frames the issues in this case as arguments over the first-amendment right to free speech on the Internet. The State describes section 3(a)'s Internet-speech reporting requirements as a mere extension of SORA's ongoing collection of data on sex offenders' "real-world identities and physical whereabouts," to also provide information to law enforcement and the general public on sex offenders' "virtual identities and virtual whereabouts" on the Internet. (St. br. at 4)

The State's repeated reliance on "virtual whereabouts" and "online community" analogies (St. br. at 5) seriously misrepresent the fundamental nature and operation of the Internet. The Internet consists of a vast network of instantly-accessible speech forums, which lack any true physical locations or dimensions; no one physically visits them, because there is nowhere to visit. When the State describes the public "encountering" a person on the Internet, the State is using a euphemism to describe the public reading that person's speech on the Internet.

And because the first amendment protects speech rights, but not the location of one's physical home and work addresses, the State's analogy between issues that invoke first-amendment protection and issues that do not tells us nothing about whether a constitutional violation is occurring. This formulation both oversimplifies and masks the first-amendment issues presented in this appeal.

Rather, this case is about speech; specifically, whether the first amendment permits the State to require a politically-marginalized group of people to regularly report details of any speech they have made on the Internet including all websites on which they spoke and any pseudonyms they used to speak on penalty of criminal charges. But there is a further complication: law enforcement agencies are required and allowed to openly share all of this information with the public. This Court should conclude, as the trial court did, that SORA's Internet-speech reporting requirements are unconstitutional under the first amendment.

The State initially asserts that the purpose of SORA is to "protect the public from the danger of recidivist sex offenders[.]" (St. br. at 4, 17) This is no doubt a legitimate interest. SORA requires those people who have been convicted of sex offenses to periodically register with local law enforcement for a statutory

period of years, providing a long list of personal information, including the Internet-speech information at issue here. 730 ILCS 150/3(a) (2014); 730 ILCS 150/7 (2014). The State then asserts that the collected Internet-speech information (1) "aids law enforcement agencies by allowing them to locate the potential recidivists"; and, because law enforcement agencies can freely share this information with the public on the Internet (and in other ways), (2) it "protects the public by alerting them to the presence (and potential risk) of sex offenders[.]" (St. br. at 4)

But to be clear, protecting the public is the purpose; the two points above are *means* by which SORA works to *achieve that purpose*. It is important to keep them separate. Later in its brief, the State shifts to arguing that distributing sex offenders' Internet-speech information to the public is itself a "substantial government interest[.]" (St. br. at 25) It is not.

Rather, it is a method of achieving the State's purpose of protecting the public. A companion law to SORA, the Sex Offender Community Notification Law, allows law enforcement agencies to openly share a sex offender's registration information including the Internet-speech data with the general public by posting it on the Internet (among other ways). 730 ILCS 152/115(b) (2014); 730 ILCS 152/120(d) (2014).

This is the equivalent of branding all speech by a registered sex offender on the Internet with a scarlet letter, for all to see. And because this eliminates registrants' protected first-amendment right to anonymous speech on the Internet, SORA's Internet-speech reporting requirements are unconstitutional.

The operation of the statute is also overbroad in sweep in other ways, capturing both: (1) many people who objectively present little-to-no risk of

reoffending, including juvenile offenders like Mr. Minnis and numerous low-risk adult offenders; and (2) an enormous amount of speech that has nothing whatsoever to do with the harms the State wishes to target. Because of the looming risk of criminal charges, all of this surely creates a substantial chilling effect on speech.

In defense of the statute, the State asserts that SORA's targeting of *any and all speech by a sex offender on the Internet* is narrowly tailored to its asserted interest of protecting the public, implying that all sex offenders' speech is always potentially dangerous to the public and best "avoid[ed]" by the public altogether. (St. br. at 22) These laws give the public the tools to do just that, allowing everyone on the planet to identify any Internet speech from a sex offender registered under SORA.

But, of course, people will not stop at "avoiding" Internet speech by sex offenders, whatever that means. As is already the case for sex offenders in their lives offline, they will now likely receive on the Internet regular harassment, abuse, and threats of violence, along with some actual violence since their home addresses are also openly available for all to see. See, *e.g.*, *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997) (noting "numerous instances in which sex offenders have suffered harm in the aftermath of notification ranging from public shunning, picketing, press vigils, [and] ostracism, *** to threats of violence, physical attacks, and arson"); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir.1997) ("The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. *** Retribution has been visited by private, unlawful violence and threats and, while such incidents of 'vigilante justice' are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them[.]").

Nothing could more surely destroy sex offenders' speech rights on the Internet than the State's scarlet-letter approach of outing the speakers to the whole world as registered sex offenders, all while burdening a great deal of protected speech and many people that present no threat to the public.

Standard of Review

This Court reviews *de novo* a trial court's ruling that a statute is unconstitutional. *People v. Melongo*, 2014 IL 114852, ¶ 20. In doing so, "[t]his court has a duty to construe a statute in a manner that upholds its constitutionality, if reasonably possible." *People v. Clark*, 2014 IL 115776, ¶ 9.

Authorities

The first amendment, applicable to the states through the fourteenth amendment, provides that "Congress shall make no law *** abridging the freedom of speech." U.S. Const., amend. I. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

"In the First Amendment context, *** a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (Internal quotation marks omitted). *Stevens*, 559 at 473. As this Court has explained:

> " 'Overbreadth is a judicially created doctrine which recognizes an exception to the established principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court. *** The reason for this special rule in first amendment cases is

> apparent: an overbroad statute might serve to chill protected speech. A person contemplating protected activity might be deterred by the fear of prosecution. The doctrine reflects the conclusion that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.' " *People v. Melongo*, 2014 IL 114852, ¶ 24 (quoting *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 395 (2006)).

"The concern that an overbroad statute deters protected speech is especially strong where, as here, the statute imposes criminal sanctions." *Doe v. Harris*, 772 F.3d 563, 578 (9th Cir. 2014). And although the restriction at issue in this case is not an outright ban on protected speech, the "distinction between laws burdening and laws banning speech is but a matter of degree[.]' " *Sorrell v. IMS Health Inc.*, U.S. , 131 S. Ct. 2653, 2664 (2011) (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000)). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 131 S. Ct. at 2664; see *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (striking down a speaker-based tax that "targeted a small group of newspapers").

A.

All of the Internet-speech reporting requirements were properly before the trial court and heightened first-amendment scrutiny should apply here.

1.

Because the charged conduct of uploading content to a Facebook account could fall under *each* of the Internet-speech reporting requirements of section 3(a), the trial court had jurisdiction to analyze the constitutionality of all of those reporting requirements at the pre-trial stage.

The State asserts that the trial court did not have jurisdiction to rule on the constitutionality of all of the Internet-speech reporting requirements listed in section 3(a). (St. br. at 6-8) The State believes that Mark was exclusively charged with violating one of those requirements and declares that the other requirements therefore were not properly before the court. (St. br. at 6-8) But this issue is not so simple.

"Section 111-3(a) requires the charging document to be in writing and to state the name of the offense, the relevant statutory provision violated, the nature and elements of the offense charged, and the name of the accused[.]" *People v. Selby*, 298 Ill. App. 3d 605, 615 (4th Dist. 1998); 725 ILCS 5/111-3(a)(3) (2014). The purpose of providing this information is to "inform the defendant of the nature of the charges against him so as to allow him to prepare a defense and to assure the charged offense may serve as a bar to subsequent prosecutions for the same conduct." *Selby*, 298 Ill. App. 3d at 615.

Mark was indicted for failing to "register an internet site, a Facebook page, which he had uploaded content to, in violation of 730 ILCS 150/3(a)[.]" (C. 10)

Because this alleged conduct using a Facebook account to upload content could support a charge for failure to register based on *any* of the Internet-speech reporting requirements in section 3(a), all of those requirements were properly before the court. In other words, these terms all *overlap* to simultaneously apply to the charged conduct of using a Facebook account. All of the terms were therefore properly before the court.

The State cites *People v. Mosley*, 2015 IL 115872, ¶ 10, in which this Court stated that "subsections setting forth offenses of which [the] defendant had not been charged or convicted were not justiciable matters before the trial court." Yet *Mosley* dealt with the appeal of a final conviction, rather than a pretrial motion, and the matters held to be beyond the jurisdiction of the court there spanned multiple different statutory subsections that were clearly distinct from the statutory subsection cited in the charging document and sentencing order. *Mosley*, 2015 IL 115872, ¶ 10.

Here, by contrast, all of the statutory disclosure requirements at issue are found in the same statutory subsection (in one run-on sentence). Along with other information, section 3(a) of SORA requires a sex offender to repeatedly disclose:

> "all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use, all Uniform Resource Locators (URLs) registered or used by the sex offender, all 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 ***." 730 ILCS 150/3(a).

The trial court struck down all of these terms as unconstitutional. (C. 116)

The State concedes that the trial court had jurisdiction to analyze the constitutionality of the term: "all 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[.]" (St. br. at 8) That leaves these two terms:

- "all email addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use,"[2] and
- "all Uniform Resource Locators (URLs) registered or used by the sex offender[.]" 730 ILCS 150/3(a).

All of these terms easily apply to the use of a Facebook account.

One must have a registered Facebook account to use Facebook at all, and the use of a Facebook account (to do just about anything) satisfies the first disclosure requirement, because everything that a person does on Facebook appears as an item on that person's Facebook profile page (and on some other people's Timeline feeds) under the person's Facebook account user name. See, *e.g.*, *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013).

The *Bland* court's description of Facebook is worth quoting at length for further context:

> "Facebook is an online social network where members develop personalized web profiles to interact and share information with other members. Members can share various types of information, including news headlines, photographs, videos, personal stories, and activity updates. Daily more than 500 million Facebook members

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[2] The State has grouped these terms together into a single unit for purposes of this analysis. (St. br. at 6-8)

> use the site and more than three billion 'likes' and comments are posted. Every Facebook user has a profile, which typically includes, among other things, the User's name; photos the User has placed on the website (including one photo that serves as the User's profile photo); a brief biographical sketch; [and] a list of individual Facebook Users with whom the User [interacts, known as 'friends'] ***. Included on a [User's] home page is a news feed, which *** is a constantly updating list of stories from people and Pages that [the User] follow[s] on Facebook." (Citations and some internal quotation marks omitted.) *Bland*, 730 F.3d at 385.

Each Facebook account also automatically comes with an email address ([accountname]@facebook.com). See Julianne Pepitone, *Facebook is trying to hijack your email address*, CNN Money (June 25, 2012), http://money.cnn.com/2012/06/25/technology/facebook-emails/ ("If you're a Facebook user, you have a @facebook.com email address, whether you use it or not."). And Facebook also includes a "Messenger" feature that allows a user to send instantaneous messages to one or more people at a time, much like chat rooms, and to make voice or video phone calls. See *Facebook Messenger*, Wikipedia (last visited April 4, 2016), https://en.wikipedia.org/wiki/Facebook Messenger.

In this case, when registering as a sex offender in the past, Mr. Minnis actually listed his Facebook account on the only two registration forms that appear in the record here (from December 17, 2010, and May 2, 2011) in the space on the registration forms for "Other Internet Communication Identities[,]" rather than in the space for "Internet sites to which individual uploaded any content or posted any message or information[.]" (C. 39, 41) For these reasons, the charged conduct of using a Facebook account to upload content can also satisfy the statutory

term of: "all email addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use[.]" 730 ILCS 150/3(a).

That leaves only "all Uniform Resource Locators (URLs) registered or used by the sex offender[.]" 730 ILCS 150/3(a). As the State notes, a URL is a string of letters and symbols that form the Internet address of a website. (St. br. at 11) The State defines the statutory word "used" narrowly, in conjunction with the word "registered," to mean something like "operating" a website (having active control over it), rather than mere passive viewing of a website. (St. br. at 12)

Yet even following the State's understanding, use of a Facebook account to post or upload content again fits this description. Each Facebook account receives its own unique URL Internet address, within the broader Facebook directory, with http://www.facebook.com as the root of the tree, and each user's account assigned a numbered URL address of https://www.facebook.com/profile.php?id=# (with a unique number string in place of the #). Each user actively "operates" that page by controlling all of the content shown on her profile and setting the rules for who else can view or post on the page. See *Facebook*, Wikipedia (last visited April 4, 2016), https://en.wikipedia.org/wiki/Facebook. The charged conduct of using a Facebook account to upload content can satisfy each of these terms.

Mark was charged under section 3(a), where all of these Internet-speech reporting requirements are listed in one long, run-on sentence. 730 ILCS 150/3(a). Due to the sprawling, complex nature of Facebook itself, Mark's alleged charged conduct of failing to "register an internet site, a Facebook page, which he had uploaded content to, in violation of 730 ILCS 150/3(a)" (C. 10) could have supported

a charge based on failing to satisfy any (or all) of the Internet-speech disclosure requirements. The prosecution itself explained this before the trial court. (R. 12-13) (Arguing: "[E]ven if the charge had not been failing to identify his Facebook page as an internet site to which he uploaded content, he's being charged with failing to disclose his Facebook profile as an internet communication identity. *** There's no question that a Facebook profile was an internet communication identity.")

There is no danger of a court issuing an advisory opinion in this case, because there exists a real controversy between the parties on all of the statutory terms at issue. This Court should hold that all of these requirements were therefore properly before the trial court for purposes of jurisdiction.

Even if this Court reaches the opposite conclusion, however, all of the arguments below still fully apply to the requirement that the State concedes was properly before the trial court: "all 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[.]" (St. br. at 8)

2.

Registered sex offenders are entitled to full first-amendment protections.

Although the State does not explicitly make this argument, one might be forgiven, after reading the State's brief, for coming away with the impression that registered sex offenders do not enjoy the same protections under the first amendment as other people. It therefore bears repeating that even though they may be required to register as sex offenders for a statutory period of time, registered sex offenders are still entitled to the full protection of the first amendment. *Doe v. Harris*, 772 F.3d 563, 570-72 (9th Cir. 2014). Inclusion on a sex offender registry does not in any way alter or diminish a person's protected freedom of speech.

3.

Strict scrutiny, or alternatively, intermediate scrutiny, applies here.

The State concedes that SORA implicates the first amendment, triggering some form of heightened first-amendment scrutiny. The State asserts that intermediate scrutiny should apply here, based on its belief that SORA's Internet-speech reporting requirements are content neutral. (St. br. at 16-17) These requirements are indeed content neutral on their face, but this Court should find that the type of speaker-based distinction the statute engages in, combined with the nature of the State's motivation behind the statute, requires the higher bar of strict scrutiny. Yet, in any event, this Court should affirm the trial court under either standard strict scrutiny or intermediate scrutiny.

Most of the time, in a case involving the first amendment, the level of scrutiny to be applied depends on the "'content neutrality' of the statute." *Hill v. Colorado*, 530 U.S. 703, 719 (2000). "Content-based laws those that target speech based on its communicative content are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests": strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, U.S. , 135 S. Ct. 2218, 2226 (2015); see *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). On the other hand, intermediate scrutiny generally applies to "regulations that are unrelated to the content of speech[.]" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

The State asserts in a footnote that "[s]peaker distinctions are permitted, provided they 'are not a subtle means of exercising a content preference.' " (St. br. at 16 n.3) (quoting *Turner*, 512 U.S. at 645). The Supreme Court has "insisted that 'laws favoring some speakers over others demand strict scrutiny *when the*

legislature's speaker preference reflects a content preference[.]'" (Emphasis added.) *Reed*, 135 S. Ct. at 2230 (quoting *Turner*, 512 U.S. at 658).

Yet, the Supreme Court has also explained that an attempt to disfavor certain speakers may still be illegitimate, even if it is done in a content-neutral manner:

> "Speech restrictions based on the identity of the speaker are all too often simply a means to control content. *Quite apart from the purpose or effect of regulating content, moreover*, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By 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." (Emphasis added.) *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340-41 (2010).

The State's own language helps explain this distinction. On the one hand, the State says that section 3(a)'s Internet-speech reporting requirements allow sex offenders to say "whatever they like[,] to whomever they like, [] whenever and [] wherever they like[.]" (St. br. at 16) That is true the statute is content neutral on its face. 730 ILCS 150/3(a). Yet, on the other hand, the State admits that it seeks to empower the public to "avoid interacting with sex offenders" on the Internet, by allowing the public to identify what speech on the Internet has emanated from sex offenders registered in Illinois. (St. br. at 22)

This scarlet-letter approach to law enforcement, tagging or unmasking speakers on the Internet as sex offenders so that the public may "avoid" their speech or worse creates not only a clear speaker-based distinction, but also voices implicit government opposition to sex offender speech on the Internet in general. Although the State makes no content distinction, it would have the public shun *all* sex offender speech on the Internet. See *Citizens United*, 558 U.S. at 339

(striking down law that had the "purpose and effect *** to silence entities whose voices the Government deems to be suspect").

This goes well beyond a run-of-the-mill speaker-based distinction. Instead, the government is openly promoting public "prejudice against [a] discrete and insular minorit[y] ***, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). This should be taken into account in the analysis.

The Ninth Circuit analyzed this issue in *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014). Faced with a similar statute requiring sex offenders to report details of their Internet speech, the Ninth Circuit distinguished *Citizens United* and held that strict scrutiny should not apply because "although it is true that the Act singles out registered sex offenders as a category of speakers, it does not target political speech content, nor is it a ban on speech." *Harris*, 772 F.3d at 575.

But the complete political powerlessness of the burdened group should matter here, because "for groups such a sex offenders, who are 'arguably the most despised members of our society,' some laws burdening their First Amendment rights can likely be understood not as an attempt to remove a particular type of 'content' from public discourse but to limit the speech of disfavored speakers altogether." *First Amendment Speaker-Based Distinctions* *** [*in*] *Doe v. Harris*[], 128 Harv. L. Rev. 2082, 2088-89 (2015); see *In re M.A.*, 2015 IL 118049, ¶ 32 (noting the legislature has "concluded that it was a greater stigma to be categorized as a sex offender than a violent offender"). The Internet-speech reporting requirements at issue in this case should be understood in just such a way, when viewed in light of the State's hope of allowing the public to "avoid" all sex offender speech on the

Internet. (St. br. at 22) Some people may indeed choose to merely "avoid" Internet speech by a sex offender, whatever that means. Others, however, will likely try to harass sex offenders into silence with threats and abuse. See, *e.g.*, *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir.1997).

It is true that SORA does not directly ban any speech. But if the hostility of the public against scarlet-letter-tagged sex offenders who speak on the Internet drives the speakers away, into silence, the effect is the same: the outcome looks like a ban. See *Smith v. Doe*, 538 U.S. 84, 109 (2003) (Souter, J., concurring in the judgement) ("Widespread dissemination of offenders' [registry information] serves not only to inform the public but also to humiliate and ostracize the [registrants]."); *id.* at 111-12 (Stevens, J., dissenting) ("[T]here can be no doubt that the '[w]idespread public access,' *** to this personal and constantly updated information has a severe stigmatizing effect."). And SORA certainly *captures* all political speech on the Internet (in addition to all other speech), even if it does not specifically target political speech.

Based on these unique considerations, this Court should apply strict scrutiny in this case. Strict scrutiny in this context "requires the Government to prove that the restriction furthers a compelling interest that is narrowly tailored to achieve that interest[.]" (Internal quotation marks omitted.) *Reed*, 135 S. Ct. at 2231. The State cannot meet this high and exacting standard. But even under intermediate scrutiny, this Court should affirm the trial court's holding that SORA's Internet-speech reporting requirements are unconstitutional. For this reason, Mark will primarily focus on the intermediate-scrutiny standard. Yet all of the arguments below apply even more forcefully under strict scrutiny.

B.

The statutory text is not readily susceptible to the State's limiting constructions; but even with those constructions, the Internet-speech reporting requirements are unconstitutional under the first amendment.

To survive intermediate scrutiny, a restriction on protected speech must be "narrowly tailored to serve a significant government interest, and *** leave open ample alternative channels for communication of the information." (Internal quotation marks omitted.) *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "Narrow tailoring in this context requires *** that the 'means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799). The State must also "demonstrate that the recited harms are real *** and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664.

When engaging in this analysis, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997). But where the legislature has sent unclear or inconsistent signals in writing a statute, a court should tread carefully and should "not rewrite a ... law to conform it to constitutional requirements." *Reno*, 521 U.S. at 884 (quoting *Virginia v. American Bookseller's Assn., Inc.*, 484 U.S. 383, 397 (1988)).

The State puts forward a variety of limiting constructions to narrow the application of section 3(a)'s requirements. (St. br. at 10-15) Because most of these constructions have nothing to do with the plain text or purpose of the statute, this Court should find that the statute is not readily susceptible to those limits. See, *e.g.*, *Doe v. Harris*, 772 F.3d at 578-79.

Yet, even if this Court adopts the State's limiting constructions, SORA's Internet-speech reporting requirements are still unconstitutionally overbroad under the first amendment, for at least three reasons. First, the fact that law enforcement agencies are required or allowed to share all of this Internet-speech information with the public eliminates the protected first-amendment right to anonymous speech on the Internet. This creates a vast chilling effect by empowering the public to not only shun outed sex-offender speakers on the Internet, as the State hopes, but also to harass them into silence, or worse.

Second, far too many people who have little-to-no risk of reoffending are required to submit this Internet-speech information, burdening their speech rights for no reason. And third, far too much protected speech nearly all of it wholly innocent is required to be reported. The criminal penalties that may follow any error in reporting this information create a serious chilling effect on speech. This Court should affirm the trial court's holding that SORA's Internet-speech reporting requirements are unconstitutional under the first amendment.

Although the trial court did not rule on some aspects of this argument, this Court "may affirm for any basis presented in the record." *People v. Williams*, 2016 IL 118375, ¶ 33; *People v. McDonough*, 239 Ill. 2d 260, 275 (2010). All of these issues relate to the statute's overbreadth and are properly before this Court. Even if some were not well developed below, this Court should still address them on their merits. See, *e.g.*, *Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 11-12 (1996) ("[A] reviewing court may consider an issue not raised in the trial court if the issue is one of law and is fully briefed and argued by the parties."). These issues, furthermore, present questions that are "of substantial public importance," such that "the public interest favors consideration of [their] merits." *Comm. for Educ. Rights*, 174 Ill. 2d at 12.

1.

The Internet-speech reporting requirements unconstitutionally eliminate the protected first-amendment right to anonymous speech on the Internet, due to Illinois's open sharing of sex offender registration information.

The Supreme Court has long held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment," and this "freedom to publish anonymously extends beyond the literary realm" to other forms of speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); see *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999); *Talley v. California*, 362 U.S. 60, 64 (1960) (noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind").

Indeed, "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley*, 362 U.S. at 64. Sex offenders certainly form such a persecuted group, for whom anonymous speech allows the presentation of ideas for public analysis untainted by prejudice against the speakers, so their ideas whatever they may be might enjoy the kind of fair public hearing that would otherwise prove impossible. See *McIntyre*, 514 U.S. at 357 ("Anonymity is a shield from the tyranny of the majority *** [that] exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation and their ideas from suppression at the hands of an intolerant society.").

For first amendment purposes, "[a]lthough the Internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech[.]" *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011). In other

words, the protections of the first amendment apply just as fully to online speech as they do to other kinds of speech.

Here, the State asserts that the purpose of SORA is "to protect the public from the danger of recidivist sex offenders[.]" (St. br. at 4) It claims that the Internet-speech reporting requirements in section 3(a) serve this purpose in two ways: the collected information (1) allows law enforcement "to locate the potential recidivists"; and, (2) on being disseminated to the public, the information "protects the public by alerting them to the presence (and potential risk) of sex offenders in their community." (St. br. at 4)

Sharing of sex offender registration data is controlled by the Sex Offender Community Notification Law, 730 ILCS 152/101 (2014) (the Notification Law). Section 115 of the Notification Law ("Sex offender database") requires the State Police to create a statewide sex offender database which must include "all the information [available from LEADS] on those sex offenders" and to "make the information *** accessible on the Internet by means of a hyperlink labeled "Sex Offender Information" on the Department's World Wide Web homepage." 730 ILCS 152/115 (a)-(b) (2014).

Section 120 of the Notification Law ("Community notification of sex offenders") additionally allows: the "State Police and any law enforcement agency may disclose, in [their] *** discretion, [all of the information SORA requires to be reported,] to any person likely to encounter a sex offender, or sexual predator[.] 730 ILCS 152/120 (b) (2014). It also requires that this information "shall be open to the public" for viewing at law enforcement agencies. 730 ILCS 152/120(c) (2014). And furthermore, the "State Police and any law enforcement agency having jurisdiction may, in [their] *** discretion, place the information *** on the Internet or in other media." 730 ILCS 152/120(d) (2014).

In other words, the State Police and other agencies are required to allow the public to view this information at police stations, and may at any time place the information on the Internet (or in other media) for anyone to view it. The only exception to this uniform disclosure of information appears in 730 ILCS 152/121 (2014). Agencies may only provide sex offender information on those who were juveniles at the time of their sex offense: "to any person when that person's safety may be compromised for some reason related to the juvenile sex offender." 730 ILCS 152/121(a) (2014). However, if a juvenile sex offender subsequently commits any adult sex offense such as failure to register that person's registry information can then be freely released to the public.

A number of other courts around the country have recently analyzed this issue. See, *e.g.*, *Coppolino v. Noonan*, 102 A.3d 1254, 1281-83 (Penn. 2014) (collecting cases). These other courts have uniformly done one of two things. They have: (1) struck down registration laws where disclosed Internet-speech details may be easily shared with the public. See, *e.g.*, *White v. Baker*, 696 F. Supp. 2d 1289, 1311 (N.D. Ga. 2010). Or they have: (2) upheld registration laws where robust prohibitions exist against the sharing of Internet-speech details with the public. See, *e.g.*, *Doe v. Shurtleff*, 628 F.3d 1217, 1224 (10th Cir. 2010).

Considering this issue in *Coppolino v. Noonan*, 102 A.3d 1254, the Pennsylvania Supreme Court found the "determining factor" to be "whether a given statute permits or makes likely [the release] of a registrant's Internet identifiers to the public." *Coppolino*, 102 A.3d at 1283. As the Ninth Circuit noted in reaching the same conclusion, "sex offenders' fear of disclosure in and of itself chills their speech. If their identity is exposed, their speech, even on topics of public importance, could subject them to harassment, retaliation, and intimidation." *Doe v. Harris*, 772 F.3d at 581; see *Doe v. Nebraska*, 898 F. Supp. 2d at 1121 (explaining that "the government reporting requirement that puts a stake through

the heart of the First Amendment's protection of anonymity surely deters faint-hearted offenders from expressing themselves on matters of public concern").

Here, as explained above, all of the Internet-speech details SORA requires to be reported may be freely shared with the public. Because they eliminate the protected right to anonymous speech on the Internet, SORA's Internet-speech reporting requirements are not narrowly tailored and are therefore unconstitutional.

It is important to note that the State's *asserted interest* in SORA is to protect the public from potential recidivist sex offenders, while the related sharing of sex offender registration information with the public is merely one of SORA's two *means of achieving* that interest. (St. br. at 4) The fact that this particular means eliminates sex offenders' protected right to anonymous speech on the Internet renders it an illegitimate means of achieving the State's asserted interest. SORA's Internet-speech reporting requirements are therefore substantially overbroad under the first amendment.

2.

The Internet-speech reporting requirements are substantially overbroad because they apply to far too many people who have little-to-no risk to reoffend, burdening their protected speech for no reason.

The means the State has chosen here burden substantially more protected speech than is necessary to further its interest. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). The State asserts that the public must be protected from *all* sex offender speech on the Internet, implying that all Internet speech, by anyone registered as a sex offender on the Illinois sex offender registry, is potentially dangerous to the public so all that speech must be tracked by police and avoided by the public. (St. br. at 25-27)

This goes too far, in part because the disclosure requirements apply to many people who have little-to-no risk of reoffending. The State's asserted purpose behind SORA is to protect the public against recidivist sex offenders. (St. br. at 4) But sex offenders are not all alike; many objectively have little-to-no risk of ever reoffending. The inclusion of these people in SORA's Internet-speech disclosure scheme is substantially overbroad under the first amendment, because it burdens their speech without at all furthering the government's purpose.

Application of the Internet-speech reporting requirements to juvenile sex offenders, like Mark, is unnecessary and counterproductive to public safety.

Juvenile sex offenders like Mark (C. 28, 39-42) have a low risk of reoffending and a high potential for rehabilitation due to their continuing brain development. The inclusion of juvenile offenders on the sex offender registry not only fails to serve the purpose of protecting the public, it is counterproductive to that purpose. The application of the Internet-speech reporting scheme to juvenile sex offenders, like Mark, therefore renders it substantially overbroad under the first amendment. For the same reasons, this scheme is unconstitutional as applied to Mark.

Many have long objected to the inclusion of juvenile sex offenders on state sex offender registries. See, *e.g.*, *No Easy Answers: Sex Offender Laws in the U.S.*, Human Rights Watch, Vol. 19, No. 4(G), p. 66 (Sep. 2007), https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf (hereinafter *Sex Offender Laws*); see generally, Sarah Stillman, *The List: When juveniles are found guilty of sexual misconduct, the sex-offender registry can be a life sentence*, The New Yorker (March 14, 2016), http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes.

This is no small issue: "A Justice Department study concluded that more than a quarter of all sex offenders committed their offense when they were themselves a minor." Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme*

Court's Crucial Mistake About Sex Crime Statistics, 30 Const. Comment. 495, 504 (2015) (hereinafter *Crucial Mistake*). Most juvenile sex offenses are non-violent and some involve consensual sexual conduct. *Sex Offender Laws*, Human Rights Watch, Vol. 19, No. 4(G) at 68, 72. And the perpetrators of many sex offenses that involve a juvenile victim are juveniles themselves. *Adolescent Sex Offenders: Common Misconceptions vs. Current Evidence*, National Center on the Sexual Behavior of Youth, Office of Juvenile Justice Programs, p. 1 (July 2003), http://www.ncsby.org/sites/default/files/resources/Adolescent%20sex%20offenders%20-%20%20Common%20Misconception%20vs%20Current%20Evidence%20--%20NCSBY.pdf (noting that juvenile sex offenders account for one-third of reported sex offenses against children); see *Sex Offender Laws*, Human Rights Watch, Vol. 19, No. 4(G) at 68 ("Forty percent of the offenders against very young children (under the age of six) were themselves children; a similar proportion (39 percent) of offenders whose victims were age six to 11 were children.").

Some states have now held that juvenile sex offenders cannot be uniformly lumped together with adult offenders on state registries, in part because juvenile sex offenders have very low rates of reoffending. *In re J.B.*, 107 A.3d 1, 17 (Pa. 2014) (finding that a "presumption that sexual offenders pose a high risk of recidivating is not universally true when applied to juvenile offenders" because "juvenile sexual offenders exhibit low levels of recidivism (between 2-7%), which are indistinguishable from the recidivism rates for non-sexual juvenile offenders"); see *id.* (noting the trial court's observation "that an extensive, meta-analysis of sixty-three studies involving 11,200 children found a sexual recidivism rate of 7.09% compared to 13% for adults"); *In re C.P.*, 967 N.E.2d 729, 749 (Ohio 2012) (striking down lifetime sex offender registry requirement for juvenile offenders as cruel and unusual punishment).

These views align well with the Supreme Court's recent opinions distinguishing between juvenile and adult criminal culpability and rehabilitative potential. See *Miller v. Alabama*, U.S. , 132 S.Ct. 2455, 2464 (2012) (explaining that juveniles "have diminished culpability and greater prospects for reform"); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Roper v Simmons*, 543 U.S. 551, 570 (2004) (stating that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed").

Juvenile sex offenders are more easily rehabilitated than adult offenders. Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 13 (2013) ("Juvenile sex offenders are generally responsive to treatment--more so than adults--because of their youth and developmental status. With effective treatment, they are less likely to commit either sexual re-offenses or non-sexual offenses." (Footnotes omitted.)). And effective individualized risk assessment methods do exist: they allow for higher-risk juvenile sex offenders to be effectively identified and treated on an individual basis. *In re J.B.*, 107 A.3d at 19 (concluding "that individualized risk assessment *** provides a reasonable alternative means of determining which juvenile offenders pose a high risk of recidivating").

These concerns apply just as fully to Illinois. In a 2014 report to the General Assembly and Governor, the Illinois Juvenile Justice Commission recommended that Illinois completely "[r]emove young people from the state's counter-productive sex offender registry and the categorical application of restrictions and collateral consequences." *Improving Illinois' Response to Sexual Offenses Committed by Youth: Recommendations for Law, Policy, and Practice*, Illinois Department of Human Services, Illinois Juvenile Justice Commission, p. 4 (March 2014), http://ijjc.illinois.gov/sites/ijjc.illinois.gov/files/assets/IJJC%20-%20Improving

%20Illinois%27%20Response%20to%20Sexual%20Offenses%20Committed%20by%20Youth%20updated.pdf (hereinafter *Recommendations*).

Key findings in the commission's report include that:

- "Illinois sex offense charges can encompass a wide range of youth behavior and do not differentiate between nature, harm, or severity of unlawful sexual conduct";
- "[m]ost youth who sexually offend never repeat their harmful conduct";
- "treatment effectively reduces sexual reoffending";
- "Illinois'[s] current practice of requiring youth to register as sex offenders and imposing collateral restrictions without regard to risk *does not enhance public safety*"; and
- "research indicates that applying these strategies can actually undermine rehabilitation and the long-term well-being of victims, families, youth, and communities." (Emphasis added.) *Recommendations*, Illinois Juvenile Justice Commission, p. 4.

The report further explains that:

> "Research over the last few decades has conclusively established that youth are highly amenable to treatment and highly unlikely to sexually reoffend. Research also indicates that strategies used with adults [such as] sex offender registries*** are not only unnecessary as applied to youth, but also counterproductive, as they often jeopardize victim confidentiality and can interfere with youth rehabilitation to an extent that undermines the long-term safety and well-being of our communities." *Recommendations*, Illinois Juvenile Justice Commission, p. 6.

Juvenile offenders do not belong on this registry; their inclusion is actively counterproductive for public safety. And for purposes of this case, the application of SORA's Internet-speech reporting requirements to juvenile sex offenders like Mark does not serve the State's asserted interest in protecting the public. For this reason, the Internet-speech disclosure scheme is both unconstitutional as applied to Mark, and substantially overbroad on its face.

Application of the Internet-speech reporting requirements to all sex offenders, without taking into account each individual's risk of reoffending and the nature of his or her offense, is over inclusive.

Beyond the issue of juvenile offenders, the Internet-speech reporting scheme applies to far too many people, in general. The State's interest in SORA is to protect the public from potentially recidivist sex offenders — those who have committed a prior sex offense and might do so again. The rate of sex offender recidivism (of another sex crime), however, is not only much lower overall than the State maintains, it also varies substantially from case to case, depending on a range of factors. Yet SORA applies the Internet-speech reporting requirements to all registered sex offenders, whether they are likely to reoffend or not, without conducting any individualized risk assessment, so that sex offenders with no risk to reoffend are included alongside high-risk offenders. Besides being poor policy in general, this makes the speech burdens at issue here dramatically overbroad.

The State repeats the quote, which originated from the four-judge opinion in *McKune v. Lile*, 536 U.S. 24, 34 (2002) (opinion of Kennedy, J., announcing judgment of the Court), that "[t]he risk of recidivism posed by sex offenders is 'frightening and high[.]'" *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune*, 536 U.S. at 34). (St. br. at 17)

Though often repeated, that statement is wrong. Ellman, *Crucial Mistake*, 30 Const. Comment. at 498-99 (explaining that "the evidence for *McKune*'s claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons"); see *Sex Offender Laws*, Human Rights Watch, Vol. 19, No. 4(G), p. 28 ("Sex offenders do not recidivate at far higher rates than other offenders, as is often believed.").

Instead, "numerous, rigorous studies analyzing objectively verifiable data — primarily arrest and conviction records — indicate sex offender recidivism

rates are far below what legislators cite and what the public believes." *Sex Offender Laws*, Human Rights Watch, Vol. 19, No. 4(G), pp. 26-28. Indeed, although "[s]ome politicians cite recidivism rates for sex offenders that are as high as 80-90 percent[,]" the available science refutes those assumptions, showing instead that "most (three out of four) former sex offenders do not reoffend and most sex crimes are not committed by former offenders." *Id.* at 4, 26-27 (explaining that "[t]he most comprehensive study of sex offender recidivism to date[,] *** a meta-analysis of numerous studies yielding recidivism rates for *** over 29,000 sex offenders, found that *** [o]ver a 15-year period, recidivism rates for all sex offenders averaged 24 percent" a rate which, while not "trivial[,] *** indicates that three out of four sexually violent offenders do not reoffend" (footnotes omitted)). Sex offender registries are premised on the belief that people who have been convicted of sex crimes will likely commit those crimes again. Yet this premise does not hold up.

And regardless of the overall average rate, the risk of reoffending varies quite a bit from one person to another; for example, the meta-analysis discussed above "found that recidivism rates varied markedly depending on the kind of sex crime committed." *Sex Offender Laws*, Human Rights Watch, Vol. 19, No. 4(G), p. 27. When viewed in this light, the issue of the recidivism rate becomes much more nuanced.

For purposes of this overbreadth analysis, this Court should agree that the State's generalized interest in "public safety cannot justify policies that impose serious burdens on entire categories of individuals when many of them actually present little risk" to the public, and especially where "more accurate assessment criteria employing established actuarial measures, *** could easily be employed instead." Ellman, *Crucial Mistake*, 30 Const. Comment. at 506.

SORA's one-size-fits-all approach fails to analyze and differentiate between the different risk levels of sex offenders to potentially commit a new sex offense.

The best research available shows that most sex offenders will not sexually reoffend, in part because the reoffense risk varies dramatically among sex offenders, and we have tools available to accurately identify the high-risk offenders. SORA's burden on the protected speech rights of the majority of registered sex offenders is therefore unconnected to the State's asserted purpose, making SORA's Internet-speech reporting requirements substantially overbroad.

3.

The Internet-speech reporting requirements apply to too much speech.

SORA's Internet-speech reporting requirements also apply to far, far too much speech. The State asserts that the requirements apply to *any* speech at all made by a registered sex offender on the Internet. (St. br. at 25-26) The immense sweep of these requirements in capturing all Internet speech goes many orders of magnitude beyond the State's purpose of protecting the public from potential sex offenses: the State's purpose is a needle in a haystack of burdened speech.

As the trial court explained in its order, "the statute has no limitations on the type of speech or communication which the offender is required to report and register, regardless of whether that speech is in any way related to the legitimate purpose of the statute. *** [T]his broad requirement '... clearly chills offenders from engaging in expressive activity that is otherwise perfectly proper, and the statute is therefore insufficiently narrow[.]' " (C. 116) (quoting *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1120 (D. Neb. 2012)).

The State attempts to justify this blanket coverage by arguing that because a few sex offenses can be initiated or completed through online speech alone, therefore all speech by a sex offender on the Internet is potentially dangerous. (St. br. at 27) This assertion demonstrates a basic misunderstanding of how much of the Internet works. For many forums on the Internet, the State's concern simply does not apply.

A few examples should suffice:

- discussion of one's favorite sports team in the comments sections of articles on a sports news website like ESPN;
- posting public comments to review any hotel, restaurant, bank, rental property, professional, service, or other business, on review websites such as Yelp;
- posting public comments describing the quality of items bought on commercial websites such as Amazon;
- self-publishing literary writing by posting it on one's own website;
- blogging about personal interests ranging from politics to cat videos;
- discussing current events with others in the comments sections of any news, politics, or popular culture website articles;
- (and so on the possible examples are endless).

None of these commonplace examples of Internet speech forums are remotely related to and therefore, conducive to the attempted commission of a sex offense. As a practical matter, none of these forums would be fruitful ground for the illegal behaviors the State fears.

But more fundamentally, many of the types of websites discussed above are actively moderated by the companies or users running them, so inappropriate posts or comments will either be quickly taken down, or never appear in the first place. See, *e.g.*, *Using NYTimes.com: Comments*, The New York Times (last visited April 4, 2016), http://www.nytimes.com/content/help/site/usercontent/usercontent.html ("A few things we won't tolerate: personal attacks, obscenity, vulgarity, profanity (including expletives and letters followed by dashes), commercial promotion, impersonations, incoherence and SHOUTING. *** By screening submissions, we have created a space where readers can exchange intelligent

and informed commentary that enhances the quality of our news and information."); Tauriq Moosa, *Comment sections are poison: handle with care or remove them*, The Guardian (Sept. 12, 2014), https://www.theguardian.com/science/brain-flapping/2014/sep/12/comment-sections-toxic-moderation) ("People remain people, whether behind keyboards or at your dinner table. That means we can and do take action and decide what kind of spaces we want to create: it's for this reason, comment systems have blocking tools, social media sites have restrictions!").

Other courts have rejected such a blanket Internet-speech restriction as substantially overbroad under the first amendment because it implicates much more protected speech than the asserted harm. See *Doe v. Nebraska*, 898 F. Supp. 2d at 1120; *White v. Baker*, 696 F. Supp. 2d 1289, 1311 (N.D. Ga. 2010); see also *Doe v. Prosecutor, Marion County, Indiana*, 705 F.3d 694, 699 (7th Cir. 2013) (striking down a ban on all social media use because it "targets substantially more activity than the evil it seeks to redress"). The State asserts that such courts have simply "misapprehended the purpose of disclosure requirements." (St. br. at 27-28)

The State disputes the Nebraska District Court's conclusions that: "'[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.' " (St. br. at 28) (quoting *Doe v. Nebraska*, 898 F. Supp. 2d at 1121). In an attempt to disprove these points, the State cites one case in which the "defendant solicited [a] police officer posing as [a] fourteen-year-old girl in [a] chat room" which seems to support the court's reasoning, rather than undermine it; and two cases involving child pornography which certainly is harmful to children involved in *making* the pornography, but has little to do with what the court was discussing, the active predation of children on the Internet.

(St. br. at 28) But the broader point is that the statute captures an overwhelming amount of protected speech that is wholly innocent and unconnected to the State's interest of protecting the public from new sex offenses by registrants.

The crux of the State's position is that personal interactions that develop into terrible sex crimes may start out as innocent Internet discussions between strangers, and innocent discussions may happen *anywhere* on the Internet and involve *any* topic of discussion; therefore all Internet speech by a sex offender is fair game. (St. br. at 25, 27-29) But that is not a constitutional argument. The first amendment does not allow the State to burden so much protected speech on such an attenuated basis this is a far cry from narrow tailoring. While on the one hand, a "state's regulation 'need not be the least restrictive or least intrusive means of' combating the state's legitimate interests," *Doe v. Prosecutor, Marion County, Indiana*, 705 F.3d at 699 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)), neither can the State simply default to burdening *all speech*, as the State does here, see *Doe v. Prosecutor, Marion County, Indiana*, 705 F. 3d at 699 (striking down a law because it "targets substantially more activity than the evil it seeks to redress").

The State briefly attempts to justify the immense reach of the statute by asserting that a more targeted approach would "run[] afoul of the First Amendment's prohibition against content-based regulations[.]" (St. br. at 26) But the mere fact that it may prove difficult to narrowly tailor speech restrictions to a targeted harm cannot itself then justify a failure to attempt narrow tailoring.

And even in this case, the State has arbitrarily applied its broad view of the statute's sweep. Mark went to the local police station and registered on August 29, 2014, as it appears he had been dutifully doing for the past few years. (C. 7, 39-42) The police then investigated and discovered that this last registration

document (which does not appear in the record) did not list a Facebook account or an eBay account, which were registered to one of Mark's listed email addresses. (C. 7) (Mark had previously disclosed the Facebook account in earlier registration documents which do appear in the record, and which appear to have been prepared by the police and then signed by Mark.) (C. 39-42) Mark was then charged with a crime for failing to disclose the Facebook account, but not for anything to do with the eBay account. (C. 10)

Yet use of an eBay account also involves speech. Selling anything on eBay involves a public posting of information to allow others to bid on the item being sold; and buying anything on eBay involves public bidding and communicating with the seller of the item. *Who we are*, eBay.com (last visited April 4, 2016), https://www.ebayinc.com/our-company/who-we-are/. All of these activities involve elements of speech on the Internet. But the prosecution arbitrarily decided that the Internet-speech reporting requirements did not apply to Mark's eBay account, but did apply to Mark's Facebook account. (C. 35) (Arguing: "Defendant also did not register his eBay account, yet he was not charged with any offense regarding that account because police and/or prosecutors believed that such conduct fell outside of SORA's reporting requirement.")

There is no coherent way to make such a distinction here. This kind of arbitrary enforcement will only exacerbate the chilling effect of the statute on protected speech, by creating ongoing confusion over what must be disclosed. "[U]nclear laws inevitably lead citizens to 'steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.' " (Some internal quotation marks omitted.) *Doe v. Harris*, 772 F. 3d at 579 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

SORA requires that each time a sex offender decides whether to speak on the Internet, for any reason, he must weigh whether making that speech is worth the effort of registering that speech later, and because he might make a mistake on the form or forget to include the details on an incident of speech whether making that speech is worth the risk of a felony prosecution. Because this implicates and chills far too much protected speech, the Internet-speech reporting requirements are substantially overbroad.

In sum, SORA eliminates the protected right to anonymous speech on the Internet and applies to far too many people and far too much protected speech. The resulting chilling effect on speech is immense. For all of these reasons, this Court should conclude that section 3(a)'s Internet-speech reporting requirements are substantially overbroad, and therefore facially unconstitutional under the first amendment. This Court can also find that they are unconstitutional as applied to Mark.

CONCLUSION

For the foregoing reasons, Mark Minnis respectfully requests that this Court affirm the judgment of the circuit court.

Respectfully submitted,

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Deputy Defender

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CERTIFICATE OF COMPLIANCE

I, Daaron V. Kimmel, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 40 pages.

/s/Daaron V. Kimmel
DAARON V. KIMMEL
Assistant Appellate Defender

APPENDIX TO THE BRIEF

INDEX TO THE RECORD

Report of Proceedings

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF McLEAN

THE PEOPLE OF THE STATE OF ILLINOIS,

VS. CASE NO. 14 CF 1076

MARK MINNIS,
DEFENDANT.

ORDER

THIS CAUSE having come on for hearing on defendant's Motion To Dismiss, filed 14 May 2015, the court having heard the arguments of counsel and now being fully advised, DOES HEREBY FIND AND ORDER:

1. That the court has jurisdiction of the parties and subject matter;

2. That the motion seeks dismissal of the indictment based upon the defendant's argument that the statute under which he has been indicted is unconstitutionally vague and/or overbroad;

3. That the court first finds that the statute as applied to defendant's alleged conduct herein is not unconstitutionally vague. In order to invalidate a statute as vague, the statute must be impermissibly vague in all of its applications, (People v. Law, 202 Ill.2d 578 (2002). If the conduct alleged to have been committed by the relevant defendant is clearly proscribed by the statute challenged, then that defendant cannot complain that the statute is vague as it may be applied to some other person's conduct, (Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)). Here, the indictment alleges, in relevant part, that the defendant "...did not register an internet site, a Facebook page, which he had uploaded content to." The challenged statute, 730 ILCS 150/3, states, in relevant part, that a person required to register as a sex offender must provide accurate information, to include all "...Internet sites maintained by the sex offender or to which the sex offender has uploaded any content or posted any messages or information." A reasonable person can understand this to mean that if the sex offender has uploaded content or posted messages or information to an Internet site then the sex offender must report this Internet site. That is precisely what the indictment alleges the defendant herein failed to do. The statute is therefore not facially vague;

4. That the court finds that the statute is unconstitutionally overbroad under the First Amendment. To succeed on an over breadth challenge the defendant must demonstrate that the statute, despite serving a legitimate State interest, prohibits constitutionally protected speech and is not sufficiently narrowly tailored to serve that legitimate purpose, (Ward v. Rock

Against Racism, 491 U.S. 781 (1989)). In the instant case, defendant concedes that the challenged portion of the statute at issue serves a legitimate State interest, that being protecting the public, and in particular minors, from improper sexual comments and/or solicitation from convicted sex offenders on the internet. While not bound by a decision of a federal district court, the court finds the reasoning of the court in Doe v. Nebraska, 898 F.Supp.2d 1086, (D.Nebraska 2012) to be persuasive and sound. That case addressed a Nebraska statute with language very similar to that in the instant statute. 730 ILCS 150/3 requires, in relevant part, that a sex offender report "...*all* e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses *or plans to use*, *all* Uniform resource Locators (URLs) registered or used by the sex offender, *all* 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," (emphasis added). By its terms, the statute has no limitations on the type of speech or communication which the offender is required to report and register, regardless of whether that speech is in any way related to the legitimate purpose of the statute. As noted in defendant's brief, the statute requires a sex offender to report things such as use of banking, restaurant or hotel reviews, or political sites to which the offender may have uploaded content, posted a comment or sent a message. As noted by the federal district court in Doe, this broad requirement "...clearly chills offenders from engaging in expressive activity that is otherwise perfectly proper, and the statute is therefore insufficiently narrow," (Doe v. Nebraska, 898 F.Supp.2d 1086 at 1120). The court therefore finds that the provisions of 730 ILCS 150/3 referenced above are plainly overbroad and facially unconstitutional under the First Amendment;

5. That in compliance with Supreme Court Rule 18, the court specifically finds:

(a) That this finding of unconstitutionality is being made in this written order;

(b) That the portion of 730 ILCS 150/3 that is being held unconstitutional is the language referred to above, found in subsection (a), as follows:

...all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use, all Uniform resource Locators (URLs) registered or used by the sex offender, all 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...;

c) (1) That the constitutional provision upon which the finding of unconstitutionality is based is the First Amendment of the United States Constitution;

(2) That the portion of the statute cited above is being found unconstitutional on its face and as applied;

(3) That the portion of the statute being held unconstitutional cannot reasonably be construed in a manner that would preserve its validity;

(4) That the finding of unconstitutionality made herein is necessary to the judgment rendered in this order, and that such judgment cannot rest upon an alternative ground;

(5) That the notice required by Rule 19 has been served, and that those served with such notice were given adequate time and opportunity under the circumstances to defend the statute challenged, and in fact did appear and argue the against the motion;

WHEREFORE, the Motion to Dismiss the indictment is allowed.

DATE: 7 July 2015

CIRCUIT JUDGE

A-5

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	No. 14 CF 1076
	)	
v.	)	
	)	
MARK MINNIS,	)	The Honorable
	)	Robert Freitag,
Defendant.	)	Judge Presiding

NOTICE OF APPEAL
TO THE ILLINOIS SUPREME COURT

An appeal is taken by the People of the State of Illinois from the order described below.

1. Court to which appeal is taken:

   Supreme Court of Illinois, pursuant to Illinois Supreme Court Rule 302(a)

2. Name of appellant and address to which notices shall be sent:

   Jason Chambers
   McLean County State's Attorney
   104 West Front Street
   Bloomington, Illinois 61701
   stateattny@mcleancountyil.gov

3. Name and address of appellant's attorney on appeal:

   Joshua M. Schneider
   Assistant Attorney General
   100 West Randolph Street, 12th Floor
   Chicago, Illinois 60601
   jschneider@atg.state.il.us

4. Date of judgment or order:

   July 7, 2015

5. Offense of which convicted:

Not applicable. (See answer to number 7).

6. Sentence:

Not applicable. (See answer to number 7).

7. If appeal is not from a conviction, nature of order appealed from:

This is a direct appeal to the Illinois Supreme Court from the July 7, 2015 order of the circuit court holding that 730 ILCS 150/3(a) is unconstitutional under the First Amendment of the United States Constitution, both facially and as applied. A copy of that Rule 18 complaint order is attached hereto as Exhibit A.

Respectfully submitted,

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