IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–1045

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LLOYD LAVERNE ASCHBRENNER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HON. MITCHELL E. TURNER, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Aschbrenner requests retention. *See* Def's Br. at 13. The State agrees that both challenges raised in this case warrant retention.

The Iowa Supreme Court recently held *juvenile* sex offender registration is punitive. *See generally In re T.H.*, 913 N.W.2d 578 (Iowa 2018). That holding was premised on the reality that juveniles are different from adults. Still, challenges like Aschbrenner's leverage *In re T.H.* to create uncertainty about whether adult sex offenders must comply with sex offender registration requirements that were adopted after the commission of their underlying offenses. This Court should dispel that uncertainty by reaffirming precedent that permits retroactive application of new registry statutes to adult sex offenders.

Additionally, this challenge to the registration requirement pertaining to "internet identifiers" presents a constitutional issue that Iowa courts have not yet considered. Constitutional avoidance may influence construction of the statute. *See State v. Dahl*, 874 N.W.2d 348, 351 (Iowa 2016). Iowa agencies charged with enforcing registry requirements should be advised of any "judicial gloss" on the relevant provisions as soon as possible, to guide enforcement action. As such, retention is warranted. *See* Iowa R. App. P. 6.1101(2)(a), (c), (d), & (f).

STATEMENT OF THE CASE

Nature of the Case

This is Lloyd Laverne Aschbrenner's direct appeal from his conviction for violating requirements of the sex offender registry (second/subsequent offense), a Class D felony, in violation of Iowa Code sections 692A.103, 692A.104, and 692A.111 (2017). He filed a motion to dismiss that argued that applying post-2007 requirements to him would violate protections against *ex post facto* punishment, and would violate his First Amendment rights. The district court denied that motion. After that, Aschbrenner and the State stipulated to a bench trial on the minutes of testimony, and Aschbrenner was found guilty as charged. The district court sentenced Aschbrenner to a five-year term of incarceration, and it suspended that sentence and placed Aschbrenner on supervised probation for two years. *See* Adjudication of Guilt and Sentencing Order (5/30/18); App. 68.

Aschbrenner now appeals, renewing both arguments that were raised and rejected in litigation on his motion to dismiss.

Course of Proceedings

The State generally accepts Aschbrenner's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 7–9.

Facts

Aschbrenner was convicted of lascivious acts with a child in violation of section 709.8(3) in 2007. As a result of that conviction, Aschbrenner was required to register as a sex offender. He was also convicted of violating registry requirements in 2008 and in 2014, which lengthened the duration of his required registration period. *See* State's Ex. 1 (5/30/18), Minutes (8/14/17); C-App. 6.

An anonymous tip submitted through the sex offender website informed DCI that Aschbrenner "had a Facebook profile under the name Cyrus Templar." However, Aschbrenner had not notified the sheriff's office of his use of that internet identifier on social media. *See* State's Ex. 1; C-App. 6. DCI investigation confirmed that records showed that Cyrus Templar profile was created and maintained from IP addresses that matched Aschbrenner's residence and workplace. *See* State's Ex. 1; C-App. 6. Cyrus Templar was listed as a member of the band "Lipstick Slick," which "frequently performs in different bars and establishments in the area." *See* State's Ex. 1; C-App. 6. A member of the band confirmed Aschbrenner had been playing in the band for about two months, calling himself "Buddy." *See* State's Ex. 1; C-App. 6.

Investigators interviewed Aschbrenner about failing to notify the sheriff's office and update his registration information to reflect his Cyrus Templar profile page on Facebook. Aschbrenner admitted that he had violated that requirement. *See* State's Ex. 1; C-App. 6.

Additional facts will be discussed when relevant.

ARGUMENT

I. Chapter 692A Is Not "Punitive" When Applied to Adult Sex Offenders, and Registration Requirements Are Not Ex Post Facto Punishments When Applied to Adults Convicted of Sex Offenses Committed Before 2009.

Preservation of Error

This challenge was raised in Aschbrenner's motion to dismiss and ruled upon by the trial court. *See* MTD Ruling (1/25/18) at 8; App. 64; MTD (10/16/17); App. 9. That ruling preserved error. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

This is a constitutional claim. Review is de novo. *See Formaro v. Polk County*, 773 N.W.2d 834, 838 (Iowa 2009); *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005).

Merits

Until recently, this claim would have been fully foreclosed by Iowa precedent. *See Formaro*, 773 N.W.2d at 843–44; *Seering*, 701 N.W.2d at 666–69; *In re S.M.M.*, 558 N.W.2d 405, 406 (Iowa 1997); *State v. Pickens*, 558 N.W.2d 396, 397–400 (Iowa 1997). However, Aschbrenner is correct that the Iowa Supreme Court recently held that "mandatory sex offender registration for juvenile offenders is sufficiently punitive to amount to imposing criminal punishment."

In re T.H., 913 N.W.2d 578, 598 (Iowa 2018). Thus, after *In re T.H.*, juvenile sex offenders "can no longer be subjected to a new or different registration requirement enacted after [their] underlying conviction." *Id.* at 610 (Mansfield, J., dissenting in part). But the unique concerns about juveniles that animated the *Mendoza-Martinez* analysis from *In re T.H.* are absent when analyzing registration requirements for adult sex offenders. *See id.* at 599–92, 595–96 (majority opinion). This Court should recognize that reality and distinguish *In re T.H.*

The sex offender registry is not intended to be punitive. *See, e.g.*, *State v. Iowa Dist. Court ex rel. Story Cnty.*, 843 N.W.2d 76, 81 (Iowa 2014) ("[T]he purpose of the registry is protection of the health and safety of individuals, and particularly children, from individuals who, by virtue of probation, parole, or other release, have been given access to members of the public."). It may still be rendered punitive if its "effects and impact" are "sufficiently punitive to render the scheme penal in nature." *See In re T.H.*, 913 N.W.2d at 588. Iowa courts use the *Mendoza-Martinez* factors for analyzing the effects and impact of a measure to determine whether it is penal or simply regulatory:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will

> promote the traditional aims of punishment-retribution or deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

Pickens, 558 N.W.2d at 398–99 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)); *accord In re T.H.*, 913 N.W.2d at 588 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69). Aschbrenner's challenge fails because of critical differences between adult sex offenders and juvenile sex offenders on three key factors.

A. Adult sex offenders are not burdened by the same "affirmative disability or restraint" recognized in *In re T.H.* because exclusion zones do not isolate adult sex offenders from their peer groups.

In re T.H. found sex offender registry requirements imposed a special "affirmative disability or restraint" on juveniles because they prohibited juveniles from spending time within 300 feet of "any place intended primarily for the use of minors"—and that "could prevent juveniles from participating in prosocial after-school activities, sports teams, and youth clubs that are available to their peers, which in turn severely limits their opportunities to develop communication and social skills with children their own age." *See In re T.H.*, 913 N.W.2d at 588. Adult sex offenders are not automatically isolated from their

peer groups by these exclusion zones, nor would any such isolation impact them at a vulnerable developmental stage. *Cf. State v. Lyle*, 854 N.W.2d 378, 396–97 (Iowa 2014) (noting various "differences of constitutional magnitude between adults and children in an array of nonpunishment contexts" arising from immaturity and vulnerability).

Aschbrenner argues that adult offenders "have, if anything, more 'relevant information' than juveniles." *See* Def's Br. at 41. But neither that assertion nor the applicable notification requirements establish any meaningful disability or restraint on Aschbrenner. *See Seering*, 701 N.W.2d at 668 (evaluating residency restrictions under prior version of registry statute, concluding "the disabling nature of the statute is not absolute," and recognizing "a statute that imposes some degree of disability does not necessarily mean the state is imposing punishment"); *Pickens*, 558 N.W.2d at 399 (assessing prior version of statute and concluding it "does not allow such a widespread dissemination of information that the statute imposes an affirmative disability or restraint under the *Mendoza-Martinez* analysis"). Indeed, "[t]he pre–2009 version of chapter 692A had more severe residency restrictions"—and those were *still* non-punitive as applied to adults. *See State v. Showens*, 845 N.W.2d 436, 440–41 (Iowa 2014); *accord*

Wright v. Iowa Dept. of Corrections, 747 N.W.2d 213, 218 (Iowa 2008) (rejecting a claim that residency restriction amounted to punishment because Wright was "still free to engage in most community activities and free to live in areas not covered by the residency restrictions").

Aschbrenner argues the similarity between probation/parole is made clear by requirements that certain registration updates be made in person and that registrants appear for periodic in-person check-ins every so often (quarterly, at most). *See* Def's Br. at 42–43. But that is nearly the full extent of the similarity—probationers and parolees are subject to various terms that enable more intensive supervision, which may include warrantless searches and electronic monitoring. *See*, *e.g.*, Iowa Code § 692A.124 (stating that sex offender registrants cannot be "supervised by an electronic tracking and monitoring system" unless they have also been placed on some "type of conditional release" like probation, parole, or special sentence); *State v. Brooks*, 888 N.W.2d 406, 414–15 (Iowa 2016) (finding search of probationer's bedroom permissible under the special-needs exception to Article I, Section 8 because "[c]lose supervision of probationers furthers legitimate goals such as rehabilitating the probationer, protecting the community at large, and reducing recidivism"). Moreover, the in-person check-ins

have a valid regulatory purpose: they give the sheriff's office a chance to take an updated photograph that reflects any recent changes in the registrant's appearance, and they allow the sheriff's office to verify that the registrant is physically present in their county of residence. *See United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012) ("To appear in person to update a registration . . . serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance."); *see also United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013) (quoting *United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2001)) ("Appearing in person may be more inconvenient, but requiring it is not punitive."). Any passing similarity to probation and parole is not enough to transform the sex offender registry into a punitive measure.

In re T.H. found "affirmative disability or restraint" from the "actual exclusion zones" and "employment conditions" set out in chapter 692A. *See In re T.H.*, 913 N.W.2d at 588–89. But most of the exclusion zones and employment conditions only apply to registrants who were "convicted of a sex offense against a minor." *See* Iowa Code §§ 692A.113, 692A.114(1)(c). That is not an enhanced punishment—if

it were, *Alleyne* would require the victim's minor status to be charged as an element, proven beyond reasonable doubt, and found by a jury. *See generally Alleyne v. United States*, 570 U.S. 88 (2013). Instead, these regulations are calibrated to exclude registrants who committed specific offenses against minors from certain specific locations where minors congregate—not as punishment, but as a preventative and protective regulatory measure. And generally applicable restrictions on registrants' employment are "less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive." *See Smith v. Doe*, 538 U.S. 84, 100 (2003). "While recognizing the burden that the registration requirement places on many registrants, on balance the law does not constitute an affirmative disability." *See ACLU of Nevada v. Masto*, 670 F.3d 1046, 1056–57 (9th Cir. 2012).

B. Publicizing information about adult sex offenders is not "historically regarded as punishment"—unlike information about juveniles, information about adult offenders is routinely made public.

Aschbrenner argues that "[t]he sex offender registry is similar to public shaming" *See* Def's Br. at 43–44. *In re T.H.* held this factor weighed in favor of finding a punitive nature because the information about juveniles on the sex offender registry was being made public, and because "historically, information from juvenile adjudications

has been made public only when a juvenile's case is transferred to adult criminal court *for punitive purposes*." *In re T.H.*, 913 N.W.2d at 590–92 (quoting *United States v. Juvenile Male*, 590 F.3d 924, 937 (9th Cir. 2009), *vacated on other grounds by* 564 U.S 932 (2011)). But for adult offenders, their criminal convictions are already matters of public record, so that information is already made publicly available. "[I]t is significant that the registry provides information that is already a matter of public record, and dissemination of registration information does not place new information into the public domain." *See Pickens*, 558 N.W.2d at 399 (collecting and citing similar cases). Aschbrenner argues this dissemination is qualitatively more punitive because that information "is now at the click of the mouse." *See* Def's Br. at 43–44. *In re T.H.* suggests some agreement with that claim. *See In re T.H.*, 913 N.W.2d at 591–92 (quoting *Commonwealth v. Perez*, 97 A.3d 747, 765–66 (Pa. Super. Ct. 2014) (Donahue, J., concurring)). Even so, posting true information on adult offenders is *not* punitive.

> Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for

> the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.
>
> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. 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.

Smith, 538 U.S. at 98–99; *accord In re T.H.*, 913 N.W.2d at 589–90 (noting "the dissemination of accurate information about a criminal record is not historically punitive for adults"). The Internet allows this to be done more effectively and efficiently—but the goal was always to saturate the relevant community with information that residents need to ensure their continuing safety as offenders re-enter the community. Dissemination of accurate information on adult sex offenders cannot become punitive simply because modern technology enables the State to succeed in accomplishing that objective. And even with the benefit of modern communications technology, "the notification system is a passive one: An individual must seek access to the information." *See*

Smith, 538 U.S. at 104–05; Iowa Code § 692A.121(13) (noting that notifications "shall be available by free subscription" and specifying that certain options shall be available "if selected by a subscriber").

Any "public humiliation" that occurs is a necessary byproduct of legitimate endeavors to inform Iowa residents that Aschbrenner may present a specific danger that warrants certain precautions. *See Masto*, 670 F.3d at 1055–56. Here, "[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *See Smith*, 538 U.S. at 99.

C. Registry requirements are not "excessive in relation to the nonpunitive purpose" with regard to adult sex offenders, who pose a greater danger of recidivism than juvenile sex offenders.

In re T.H. discussed social science research that showed that "juvenile sex offenders exhibit drastically lower recidivism rates than their adult counterparts." *See In re T.H.*, 913 N.W.2d at 595. This was specifically explained in those comparative terms, relying on studies showing "criminal sexual behaviors of adult sex offenders appear to be more 'the result of deeply ingrained and long-standing pathology.'" *See id.* at 595–96 (quoting Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 34, 42 (2008)). That statement is generally the consensus view on

this issue. *See* Christopher Lobanov-Rostovsky, U.S. DEP'T OF JUSTICE, *Recidivism of Juveniles Who Commit Sexual Offenses* 5 (July 2015), https://www.smart.gov/pdfs/JuvenileRecidivism.pdf ("Recidivism rates for juveniles who commit sexual offenses are generally lower than those observed for adult sexual offenders."). But Aschbrenner ignores that comparative finding and advances his own advocacy that "the same social science shows that the rates of reoffending for adults overall are very low." *See* Def's Br. at 48. Aschbrenner is wrong, and the Ellman & Ellman article that he relies upon is deeply flawed.

Most of Ellman & Ellman is devoted to strident judicial criticism. The only real empirical data cited in Ellman & Ellman comes from a meta-analysis of 21 sex-offender-recidivism studies involving nearly 8,000 offenders. *See* Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 39 CONST. COMMENT. 495, 501–04 (2015) (citing R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 (15) J. OF INTERPERSONAL VIOLENCE 2792, 2792–813 (2014), *available at* https://perma.cc/8HEG-L6T4). However, that aggregated recidivism data provides strong support for the conclusion that adult sex offenders present a unique danger of recividism.

> Without controlling for time at risk, the observed sexual recidivism rate for all cases was 11.9% (n = 7,740), 2.9% for the low risk cases (n = 890), 8.5% for the moderate cases (n =4,858), and 24.2% for the high risk cases (n = 1,992). The average follow-up period was 8.2 years (SD = 5.2, range of 0.01 to 31.5)

See Hanson, *High-Risk Sex Offenders*, at *7. Put in simpler terms, a randomly-selected sex offender has an 11.9% chance of committing a new sex offense within 8.2 years of release from incarceration. *See id.* That is about an order of magnitude higher than the sex offense rates for released offenders who *do not* have prior sex offense convictions:

> Previous large sample studies have found that the likelihood of an "out of the blue" sexual offence to be committed by offenders with no history of sexual crime is 1% to 3%: 1.1% after 4 years (Duwe, 2012); 1.3% after 3 years (Langan, Schmitt, & Durose, 2003); 3.2% after 4.5 years (Wormith, Hogg, & Guzzo, 2012).

See Hanson, *High-Risk Sex Offenders*, at *11. This means convicted sex offenders are far more likely to commit new sex offenses, and it validates the legislature's decision to target convicted sex offenders for post-release supervision. *See State v. Wade*, 757 N.W.2d 618, 626 (Iowa 2008) ("Because sex offenders present a special problem and danger to society, the legislature may classify them differently."); *accord* Patrick A. Langan et al., *Recidivism of Sex Offenders Released From Prison in 1994* at 7 (Nov. 2003), https://perma.cc/H5ER-FRTH

("Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime").

Moreover, the "baseline rate" in Hanson's meta-analysis is the sex-offense-conviction rate for *other offenders* released from prison, not for the general population. Consider this rough analysis: In 2009, there were approximately 3,000,000 people living in Iowa. *See* STATE DATA CTR. OF IOWA, *Total Population Estimates, 2000–2009*, https://perma.cc/Y45X-ARE9. Department of Public Safety data from 2009 showed 2,068 reported incidents of sexual assault/abuse. *See* IOWA DEP'T OF PUBLIC SAFETY, *Offense Breakdowns 2009*, tbl.3, https://perma.cc/76Z2-PTS2. Assuming each reported incident was committed by a different offender, this means an average Iowan had a 0.069% chance of being reported for committing a sex offense in 2009. Using that data (and, yet again, assuming zero repeat offenders), an average Iowan would have an 0.69% chance of committing a reported sex offense in that ten-year period. Even the lowest-risk sex offenders in Hanson's meta-analysis committed sex offenses at far higher rates: "the 10-year sexual recidivism rate for the low risk offenders was 3.1% from time of release and 3.4% for those who remained offence-free in the community for 10 years." Hanson, *High-Risk Sex Offenders*, at *8.

Even if a previous sex offense only *quadruples* the risk that someone will commit another sex offense within 10 years of release, the decision to subject adult sex offenders to these registration requirements has an unmistakably strong connection to a critical public safety interest. *See In re T.H.*, 913 N.W.2d at 595; *Commonwealth v. Lee*, 935 A.2d 865, 885 (Pa. 2007) ("There is little question that the threat to public safety and the risk of recidivism among sex offenders is sufficiently high to warrant careful record-keeping and continued supervision.").

In reality, the across-the-board recidivism rate for sex offenders is likely even higher than the "11.9% over 8.2 years" figure reported in the block-quote above. A much larger meta-analysis, "which included over 29,000 sex offenders, found that within four to six years of release, 14 percent of all sex offenders will be arrested or convicted for a new sex crime"—and when analyzed over a 15-year period, "recidivism rates for all sex offenders averaged 24 percent." *See* HUMAN RIGHTS WATCH, *No Easy Answers: Sex Offender Laws in the US*, at 26–27 (2007), https://perma.cc/96Z4-GHNN. Moreover, analyzing conviction data underestimates actual recidivism rates because of under-reporting. *See, e.g.*, Chris Lobanov-Rostovsky & Roger Przybylski, *Sex Offender Management Assessment and Planning Initiative*, U.S. DEP'T OF

JUSTICE at 16–17 (updated 2017), https://perma.cc/99LR-QYVW ("Research has clearly demonstrated that many sex offenses are never reported to authorities. . . . [O]nly about 25 to 33 percent of rapes or sexual assaults have been reported to police over the past 15 years").

Aschbrenner quotes criticism from *Does #1–5 v. Snyder*, which examined a set of registry requirements that "makes no provision for individualized assessments of proclivities or dangerousness." *See* Def's Br. at 37–38 (quoting *Does #1–5 v. Snyder*, 834 F.3d 696, 704–05 (6th Cir. 2016)). But Iowa's residency restrictions and exclusion zones *are* tailored to different sex offenders, based on whether their offenses targeted a minor and whether they qualified as "aggravated." *See* Iowa Code §§ 692A.113, 692A.114(1)(c). The frequency of required in-person check-ins is calibrated based on the tier of the offense and the offender's history. *See* Iowa Code §§ 692A.102, 692A.108(1). And the legislature may rationally determine that no further distinctions would be helpful or prudent, in light of the reality that plea bargaining involves charging concessions and may produce convictions that mask the extent and severity of any given sex offender's underlying conduct (especially in contexts where prosecutors are uniquely motivated to spare victims from being retraumatized by depositions and at trial).

Even if the data were in equipoise, the legislature's views on the likelihood of recidivism "are arguably correct and that is sufficient." *See State v. Kingery*, 774 N.W.2d 309, 315 n.4 (Iowa Ct. App. 2009) (quoting *State v. Radke*, 657 N.W.2d 66, 75 n.38 (Wis. 2003)). And the legislature is empowered to make reasonable judgments about the threshold risk of recidivism that justifies these regulatory measures and the threshold level of scientific certainty that would be necessary to justify a conclusion that sex offender registration requirements ought to be abandoned. *See People v. Pepitone*, 106 N.E.3d 984, 992–93 & n.3 (Ill. 2018) (quoting *People v. Minnis*, 67 N.E.3d 272, 289 (Ill. 2016)) (observing "the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems" and that it is "perhaps subjective" whether a given recidivism rate is "low or high"). It is the legislature's prerogative to make the empirical assessment and value judgment that risks of recidivism from adult sex offenders are high *enough* and frightening *enough* to warrant these measures. Aschbrenner cannot show these requirements are not "reasonable in light of the nonpunitive objective" as applied to adult sex offenders. *See In re T.H.*, 913 N.W.2d at 594 (quoting *Smith*, 538 U.S. at 105). Without that critical factor, Aschbrenner's challenge cannot prevail.

D. None of the other *Mendoza-Martinez* factors weigh in favor of finding that the sex offender registry is predominantly punitive in effect.

Before it found the impact on juvenile offenders compelled its conclusion that the sex offender registry requirements were punitive when applied to juveniles, *In re T.H.* recognized that the purpose and effect of the registry requirements promoted regulatory ends, rather than objectives traditionally associated with punishment:

> While the registry certainly produces deterrent and retributive effects, requiring juvenile offenders to abide by exclusion zones and employment restrictions directly promotes the civil objective of alerting the public to the presence of a sexual offender. Although the severity of the requirements may incidentally deter individuals from committing an initial offense, that fact does not detract from the primary purpose and effect of the statute, which is reducing the opportunities for juveniles who have committed aggravated sexual offenses to reoffend.

In re T.H., 913 N.W.2d at 593–94. That same purpose and effect is present here, as applied to adult sex offenders like Aschbrenner—but this time, it is not outweighed by "adverse psychological damage to a child's identity formation and social development" during vulnerable developmental stages that "cannot be understated." *See id.* at 604 (Appel, J., dissenting in part). Nor is that nonpunitive purpose/effect undermined by the fact that registration requirements are triggered as an eventual aftereffect of a conviction for a qualifying sex offense.

Generally, "[w]hen reducing recidivism is the nonpunitive goal, using a conviction of a sexual offense is a natural and nonsuspect means of achieving that goal." *See id.* at 594 (majority opinion).

All in all, the district court's analysis was wholly correct.

> This Court does not view the inclusion of internet identifiers and the reporting thereof to the Sheriff, or any other expansion of the sex offender statute since Defendant's initial sentencing, to be substantially different from the other requirements of the statute that already have been found by the Iowa Supreme Court not to be punitive. Technology and accessibility thereto have changed since the original enactment of the statute, and, as in *Pickens*, the Court views the current version of the statute as remaining fairly characterized as remedial and not as a statute for deterrence or retribution purposes. Finally, this Court finds that changes to the statute have been motivated by concern for public safety, not to increase the punishment. . . . The Court concludes that chapter 692A is not punitive and is not ex post facto.

MTD Ruling (1/25/18) at 8; App. 64. *In re T.H.* found the registry was punitive as applied to juvenile offenders—but that conclusion was specifically tied to its explanation that Iowa courts "prevent youths from enduring lasting stigma for adolescent blunders" except when "they are deemed to be in need of punishment," and to data showing that "the primary justification for the sex offender registry" has been "substantially diminished with respect to juvenile offenders." *See In re T.H.*, 913 N.W.2d at 589–96. Aschbrenner does not have access to

any of those arguments, and *In re T.H.* does not strengthen his claim. This Court should reject Aschbrenner's invitation to depart from its applicable precedent finding the sex offender registry is not punitive as applied to adult sex offenders. *See Formaro*, 773 N.W.2d at 837 n.1 (rejecting ex post facto challenge to the 2005 version of residency exclusion after 2009 amendments had already been adopted, and noting that Formaro's challenge was not mooted by amendments because, "[w]hile minor structural changes exist, we do not believe any of the revisions are material to the claims presented here"); *accord Seering*, 701 N.W.2d at 668; *Pickens*, 558 N.W.2d at 400.

II. The Requirement That Sex Offenders Notify the Sheriff's Office of "Internet Identifiers" Does Not Impermissibly Burden Free Speech and Does Not Violate Constitutional Rights to Freedom of Speech.

Preservation of Error

This challenge was raised in Aschbrenner's motion to dismiss and ruled upon by the trial court. *See* MTD Ruling (1/25/18) at 10; App. 66; MTD (10/16/17); App. 9. That ruling preserved error. *See Lamasters*, 821 N.W.2d at 864.

Standard of Review

This is a constitutional claim. Review is de novo. *See Formaro*, 773 N.W.2d at 838; *Seering*, 701 N.W.2d at 661.

Merits

It is important to start by clarifying the scope and meaning of the relevant provisions of chapter 692A before considering the merits of Aschbrenner's challenge to this specific registration requirement.

As a registered sex offender living in Linn County, Aschbrenner was required to notify the Linn County Sheriff's Office of any "change in relevant information" within five business days of the change. *See* Iowa Code § 692A.104(3). Aschbrenner needed to appear in person at the sheriff's office when "changing a residence, employment, or attendance as a student." *See* Iowa Code § 692A.104(2). Aschbrenner could notify the sheriff's office of changes to other relevant information "in person, by telephone, or electronically." *See* Iowa Admin. Code R. 661-83.3(4); *accord* Iowa Code § 692A.104(3).

"Relevant information" includes any "internet identifiers." *See* Iowa Code § 692A.101(23)(a)(9). Chapter 692A defines that term:

> "Internet identifier" means an electronic mail address, instant message address or identifier, or any other designation or moniker used for self-identification during internet communication or posting, including all designations used for the purpose of routing or self-identification in internet communications or postings.

Iowa Code § 692A.101(15). Aschbrenner's counsel provides a list of information that he believes he "might have to disclose" if he were

subject to registration requirements. *See* Def's Br. at 67–68. Some of those are clearly e-mail or instant message identifiers; any reading of this definition would require an offender to register those usernames. Any other username, handle, or account only qualifies when it is "used for self-identification during internet communication or posting"—so it would not qualify and would not need to be reported if the account was not used to communicate or post. For example, a Netflix account would not qualify if the offender used it solely to watch Netflix, but it *would* qualify if the offender used it to write and post movie reviews.

A different reading could construe "communication" more expansively to include commercial identifiers for online shopping, which technically involves communicating acceptance of an offer and routing the subsequent delivery. *See* Def's Br. at 67–68. An even more expansive reading could construe "designations used for the purpose of routing" to include data-routing identifiers like IP addresses, which help route incoming/outgoing data to internet users. But registrants cannot possibly know all technical identifiers used to route their data. This Court should adopt a reasonable construction of this provision that avoids any potential unconstitutionality—and an absolute bar on sex offenders using the internet would be unconstitutional under

Packingham v. North Carolina, 137 S.Ct. 1730 (2017). Moreover, the clear objective of this provision is to require registration updates for internet identifiers that are user-generated and attached to posts or other communications, to identify when messages are posted or sent by specific people who present a danger of recidivist sexual abuse—not to snoop on their browsing history or commercial transactions. That becomes even clearer after examining the statutes that govern use and limited public disclosure of registrants' internet identifiers.

Internet identifiers are not among the types of information that are posted and made publicly available by default. *See* Iowa Code § 692A.121(2)(b). But members of the public may use internet identifiers to query the registry records: "A person may contact the department or a county sheriff's office to verify if a particular internet identifier . . . is one that has been included in a registration by a sex offender." *See* Iowa Code § 692A.121(9). An internet identifier may also be used with an offender's name in a request for more detailed information about a specific offender. *See* Iowa Code § 692A.121(5). But the public cannot access a list of internet identifiers associated with sex offenders, and neither the sheriff's office nor the department of public safety may disclose that information to the general public. *See* Iowa Code §

692A.121(14) ("Sex offender registry records are confidential records not subject to examination and copying by a member of the public and shall only be released as provided in this section.").

These registrations are intended to enable responses to queries under section 692A.121(9)—for example, when a parent is concerned about communications between their child and a pseudonymous user on a social media site and wants to know if that specific username is associated with a known sex offender. Additionally, these provisions are intended to facilitate inter-agency cooperation on investigations. *See* Iowa Code 692A.121(2)(a). When the best lead on a missing child's whereabouts comes from the child's recent contacts on social media, this data "allows the State to use an offender's internet identifiers to 'assist in investigating kidnapping and sex-related crimes, and in apprehending offenders.'" *See Doe v. Shurtleff*, 628 F.3d 1217, 1225 (10th Cir. 2010) (quoting Utah Code Ann. § 77-27-21.5(2) (2008)). Both of these purposes are served by requiring reporting of identifiers used for communication and messaging—but neither are served by requiring reporting of data-routing identifiers or shopping accounts. This Court should construe section 692A.101(15) accordingly and resolve any ambiguity by limiting its reach/scope to the messages,

posts, and other user-generated communications that implicate the public safety concerns animating this self-reporting requirement and may conceivably be the subject of inquiries from message recipients about their authorship under section 692A.121(9). *See*, *e.g.*, *State v. Coleman*, 907 N.W.2d 124, 137 (Iowa 2018) (quoting *State v. Nail*, 743 N.W.2d 535, 543 (Iowa 2007)) (explaining "we give the statute a reasonable, contextual interpretation that is workable, promotes symmetry, and which therefore best manifests legislative intent"). Under this construction, an account name is an "internet identifier" if it is an e-mail address or an instant messaging address, or if it is used for messaging, posting, or other user-generated communications.

A. This registration requirement only creates a very slight, content-neutral burden on free speech. Intermediate scrutiny would apply, at most.

Aschbrenner suggests this registration requirement might be reviewed under strict scrutiny. *See* Def's Br. at 57–59. He is wrong.

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994). This regulation is content-neutral, so intermediate scrutiny would apply.

Aschbrenner argues this is "a regulation that was based on the identity of the speaker and not the content of the message," like the campaign finance rules that *Citizens United v. FEC* invalidated under a strict-scrutiny analysis. *See* Def's Br. at 58. But this measure does not prohibit adult sex offenders from using the internet, so it does not "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *See Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010). Pseudonymous speech by adult sex offenders may still continue and may be taken seriously as political advocacy even after a concerned member of the public uses section 692A.121(9) to discover the speaker's registration status.

The First Amendment is implicated by measures that prohibit anonymous speech. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). However, "the Supreme Court has suggested a distinction between the mandatory disclosure in public of a speaker's identity and the requirement that a speaker provide information to the government that could later be used to trace speech back to its source." *Shurtleff*, 628 F.3d at 1222–23 (citing *Buckley v. American Constitutional Law Foundation*, Inc., 525 U.S. 182, 199–200 (1999)). That distinction is relevant here, because section 692A.121 prohibits

public disclosure of a registered internet identifier unless a member of the public inquires about whether that particular internet identifier is associated with a registered sex offender. *See* Iowa Code § 692A.121(9).

In *Doe v. Shurtleff*, the Tenth Circuit considered a similar set of registration requirements about internet identifiers, and it rejected an argument that strict scrutiny applied because the measure burdened a registrant's "right to choose whether to speak anonymously or under a pseudonym." *See Shurtleff*, 628 F.3d at 1223. Instead, it found the measure was content-neutral because it "says nothing about the ideas or opinions that Mr. Doe may or may not express, anonymously or otherwise," and it was not an attempt at "suppress[ing] the expression of unpopular views." *Id.* (second excerpt quoting *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000)); *accord Doe v. Harris*, 772 F.3d 563, 574–75 (9th Cir. 2014) (noting "the CASE Act broadly applies to *all* identifiers that a registrant uses for online communication" and concluding that "the law may be broad, but at least it is content neutral"); *Doe v. Prosecutor, Marion Cnty., Ind.*, 705 F.3d 694, 698 (7th Cir. 2013) (explaining that a law prohibiting sex offenders from using social media "is content neutral because it restricts speech without reference to the expression's content"). Here,

like in *Shurtleff*, the internet identifier registration requirements do not burden actual speech or communication because they target "secondary effects of speech." *See Shurtleff*, 628 F.3d at 1222–23. Nothing in chapter 692A would bar Aschbrenner from social media or prohibit him from communicating his chosen message—it only seeks to enable members of the community to query the registry to ascertain if a specific communication has a "secondary effect" of drawing them (or their children) into closer contact with a registered sex offender. Therefore, intermediate scrutiny is the most exacting form of review that could possibly apply to this registration requirement.

To survive intermediate scrutiny, a measure must be "narrowly tailored to serve a significant governmental interest"; in this context, narrow tailoring means that the registration requirement must not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 134 S.Ct. 2518, 2534–35 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 799 (1989)). The internet identifier registration requirement survives intermediate scrutiny because it does not prohibit speech, and any chilling effect is minimal. Moreover, preventing recidivists from soliciting unsuspecting victims is a vital government interest.

B. The internet identifier registration requirement serves a compelling government interest in preventing recidivist offenders from victimizing vulnerable or unsuspecting internet users.

Aschbrenner argues "[t]he dangers requiring disclosure of internet identifiers is not significant." *See* Def's Br. at 70–71. Aschbrenner mentions a DOC study that found an overall recidivism rate of 5% (presumably for adult sex offenders). *See* Def's Br. at 70. But recidivism rates are likely much higher, as previously discussed, and even a 5% recidivism rate would be far above the baseline and would justify special preventative measures targeting adult sex offenders.

The government has a compelling interest in preventing recidivist sex offenders from finding and victimizing new targets. To adult sex offenders, young internet users are often low-hanging fruit.

> The Internet is a dynamic, interactive environment that youths actively participate in creating (Greenfield & Yan, 2006), and it is this aspect of the Internet that creates risks for youths who behave in specific ways. . . . Aggressive solicitations do not necessarily involve sexual approaches from online molesters, and few youths who receive such solicitations agree to meet solicitors. Nonetheless, these findings from YISS-2 interviews with a nationally representative sample of youth Internet users are consistent with what we know about the dynamics of Internet-initiated sex crimes. Online child molesters often seduce youths by using online communications to establish trust and confidence, introducing talk of sex, and then arranging to meet youths in person for sexual encounters (Wolak et al., 2004). . . .

> Visiting chatrooms is another interactive behavior that is related to receiving aggressive sexual solicitations (Mitchell et al., 2007b). Chatrooms allow for immediate, direct communications between participants, and many of those geared to adolescents are known for explicit sexual talk, sexual innuendo, and obscene language (Subrahmanyam, Smahel, & Greenfield, 2006). This atmosphere may attract online child molesters. Also, the youths who visit chatrooms may be more at risk than other youths. There is some evidence that adolescents who visit chatrooms are more likely to have problems with their parents, to suffer from sadness, loneliness, or depression, to have histories of sexual abuse, and to engage in risky behavior than those who do not go to chatrooms (Beebe, Asche, Harrison, & Quinlan, 2004; Sun et al., 2005). Youths who are lonely, shy, or lacking in social skills may interact with others in chatrooms to compensate for problems they have forming friendships offline (Peter, Valkenburg, & Schouten, 2005). Younger adolescents, in particular, may not be developmentally prepared to avoid or respond to the explicit sexual invitations they are likely to encounter in many chatrooms (Greenfield, 2004). Most of the online child molesters described in the N-JOV Study met their victims in chatrooms.

See Janis Wolak et al., *Online "Predators" and Their Victims*, 63 AM. PSYCHOLOGIST 111, 116 (2008), https://perma.cc/LP93-B9AU. This is far from a hypothetical. *See Packingham*, 137 S.Ct. at 1740 n.3 (Alito, J., concurring) (collecting examples); *Anderson v. State*, 801 N.W.2d 1 (Iowa 2011); *Iowa Supreme Court Atty. Disciplinary Bd. v. Blazek*, 739 N.W.2d 67 (Iowa 2007); *State v. Pace*, No. 06–2120, 2008 WL 942281 (Iowa Ct. App. Apr. 9, 2008); *State v. Mabie-Bahr*, No. 06–0143, 2007 WL 1827470 (Iowa Ct. App. June 27, 2007).

Consider the bleakest possibility: that a sex offender reaches out to a child over social media, and that child subsequently disappears. The overwhelmingly compelling interest in locating that child and ensuring their safe return is served by maintaining an updated list of internet identifiers associated with registered sex offenders—and if the identifier associated with the social media messages that the child received before they disappeared is on that list (or is similar to other internet identifiers on that list), investigators gain an invaluable lead. *See*, *e.g.*, *Harris v. State*, 985 N.E.2d 767, 776 (Ind. Ct. App. 2013) ("Harris concedes that as originally conceived, the registry is "a tool to assist law enforcement [to] quickly [identify] potential abductors should a child go missing.'"); *Shurtleff*, 628 F.3d at 1225 (explaining that Utah's identifier-disclosure requirement "allows the State to use an offender's internet identifiers to 'assist in investigating kidnapping and sex-related crimes, and in apprehending offenders'").

Preventative measures "must be the State's first resort to ward off the serious harm that sexual crimes inflict." *See Packingham*, 137 S.Ct. at 1737. Even a 5% recidivism rate for adult sex offenders would present a compelling government interest, demanding state action to protect Iowans from that danger of victimization by known offenders.

Here, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *See New York v. Ferber*, 458 U.S. 747, 757 (1982).

C. The internet identifier registration requirement is narrowly tailored to that compelling interest and does not burden more speech than necessary.

Aschbrenner is correct that some courts have struck down internet-related registration requirements after finding they were burdening more speech than necessary to serve the state interest. *See* Def's Br. at 60–63. But those cases are distinguishable; they involve requirements that are far more burdensome than Iowa's version.

Chapter 692A does not forbid Aschbrenner from accessing social media—he may maintain a Facebook account, so long as he updates his registration to notify the sheriff's office of its existence. *Contra Packingham*, 137 S.Ct. at 1733–34. And chapter 692A does not require sex offenders to register passwords or other information that would enable law enforcement to log in to their protected accounts. *Contra White v. Baker*, 696 F.Supp.2d 1289, 1295 (N.D. Ga. 2010).

Chapter 692A places strict limits on public disclosure of those registered identifiers. *See* Iowa Code § 692A.121(14). This is not the same as the registration requirement challenged in *Doe v. Harris*,

which "allows law enforcement to disclose [registrants'] identifying information to the public without imposing sufficient constraints on law enforcement's discretion to do so." *See Harris*, 772 F.3d at 574. That requirement also required sex offenders to register identifiers "within 24 hours of using a new Internet identifier—a shorter time than is given by registration laws in other jurisdictions." *Id.* at 581. That law also required updates in written form, which was "not only psychologically chilling, but physically inconvenient, since whenever a registered sex offender obtains a new ISP or Internet identifier, he must go somewhere else within 24 hours to mail that information to the State." *See id.* at 581–82. But Iowa's registration requirements for this type of relevant information are governed by a department rule that allows registrants to communicate any updates "in person, by telephone, or electronically." *See* Iowa Admin. Code R. 661-83.3(4); *accord* Iowa Code § 692A.104(3). Additionally, Iowa registrants have "five business days" to update the sheriff's office about a new identifier, which is much longer than the 24-hour period in *Harris*—and longer than the 72-hour period in *White*, which *Harris* cites as an example of requirements from other jurisdictions. *See* Iowa Code § 692A.104(3); *Harris*, 772 F.3d at 581 (citing *White*, 696 F.Supp.2d at 1294).

These relatively permissive guidelines for updating registration information alleviate most concerns about "chilling effects" that led other courts analyzing different requirements to find that they failed intermediate scrutiny. *See Harris*, 772 F.3d at 581–82; *Doe v. Snyder*, 101 F.Supp.3d 672, 704 (E.D. Mich. 2015) (holding "SORA's 'in person' reporting requirement imposes a substantially greater, and apparently unnecessary, burden on protected First Amendment speech"). Because guidelines are set by statute and by a department rule that applies statewide, Iowa's requirements avoid the arbitrariness problem that invalidated some regulations that were calibrated on the local level. *See Doe #1 v. Marshall*, No. 2:15-CV-606-WKW, 2018 WL 1321034, at *17 (M.D. Ala. Mar. 14, 2018) ("[B]ecause ASORCNA leaves it up to individual law enforcement agencies to develop their own requirements on how an offender must report, there is no objective limiting principle to prevent arbitrary or discriminatory enforcement."). And because Chapter 692A places strict limits on public disclosure of identifiers, the chilling effect that would result from automatic public disclosure of the identity and sex offender status of the registrant behind every pseudonymous post is absent. *Contra Harris*, 772 F.3d at 579–581; *White*, 696 F.Supp.2d at 1311. Thus, those cases are distinguishable.

Accord Coppolino v. Noonan, 102 A.3d 1254, 1281–83 (Pa. Commw. Ct. 2014) (analyzing *Shurtleff*, *Harris*, and other relevant cases, and concluding that in assessing constitutionality of these requirements, "the determining factor is whether a given statute permits or makes likely disclosure of a registrant's Internet identifiers to the public"). Indeed, one of Aschbrenner's cases helpfully distinguishes itself. *See Doe v. Nebraska*, 898 F.Supp.2d 1086, 1122 (D. Neb. 2012) (striking down Nebraska's broader registration requirement, but remarking that Nebraska's requirements were "an entirely different thing" from less onerous regulations "requiring Internet identifiers and addresses, including designations for purposes of routing or self-identification, as permitted by the federal Attorney General's Guidelines"); *see also Snyder*, 101 F.Supp.3d at 703 (invalidating SORA because of in-person notification requirement, but rejecting a series of other attacks because "SORA neither prohibits registrants from engaging in any particular speech on the Internet, nor does it unmask registrants' anonymity to the public," and finding that "unveil[ing] registrants' anonymity to law enforcement" does not impermissibly burden registrants' speech). Chapter 692A's registration requirement for internet identifiers avoids the problems that invalidated requirements in other jurisdictions.

Illinois recently rejected a similar First Amendment challenge to a registration requirement that was similar to Iowa's (although it permitted broad public dissemination of registered identifiers, and it only required periodic and retroactive registration updates). It held:

> [D]espite its plainly legitimate sweep, the Internet disclosure provision is tailored to avoid chilling more speech than necessary, . . . [T]he provision does not operate as a prior restraint. Rather, it requires the sex offender to disclose his or her Internet identities and the websites to which he or she uploaded content or posted messages or information during the previous registration period . . . . While this retroactive operation does not remove the provision from first amendment scrutiny, it certainly constitutes an example of narrow tailoring. . . . Further, the provision requires disclosure only of Internet identities and websites through which a sex offender has communicated with others. Thus, the legislature "did no more than eliminate the exact source of the evil it sought to remedy." Indeed, any attempt to more narrowly tailor the disclosure provision to exclude "innocent" subjects, whatever they may be and however chosen, would defeat the purpose of the provision.

Minnis, 67 N.E.3d at 291 (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984)). Iowa's requirement is less burdensome than the regulation upheld in *Minnis*—it does not permit broad public disclosure, and it avoids the need for registrants to keep meticulous records of all new/temporary identifiers on file until their next registration update (which may be months away). This Court should adopt similar reasoning and reach the same result.

Aschbrenner argues this registration requirement is not narrowly tailored because it "should only apply in those offenders where the internet figured in the particular offense." Def's Br. at 68 (citing *State v. Cutshall*, No. 16–1646, 2017 WL 2875693 (Iowa Ct. App. July 6, 2017). *Cutshall* is irrelevant because it only concerned conditions of probation, which must relate to the specific defendant's circumstances or offense in some reasonable manner. *See Cutshall*, 2017 WL 2875693; *State v. Valin*, 724 N.W.2d 440, 446 (Iowa 2006). The legislature is not required to subdivide registration requirements for adult sex offenders and only pursue policies that would prevent or dissuade each registrant from re-committing their previous sex offense through the same means—it may make a legislative determination that such safeguards are warranted for any and all adult sex offenders. *See Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005) (citing *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7–8 (2003)); *accord Seering*, 701 N.W.2d at 686 ("Because there are no exemptions [to the residency requirements] in the statute, Seering was not entitled to a hearing before he was charged under the statute to attempt to persuade the court that the statute should not be applied to him."). As discussed, both research and experience show this concern is well-founded.

Section 692A.121(9) enables some public disclosure of records linked to a specific registrant by an internet identifier—but only upon a particularized request for records linked to that particular identifier. *See* Iowa Code § 692A.121(9). But Aschbrenner is wrong to claim that "[t]his ability to publicly confirm internet identifiers presumably would act in the same chilling manner" as the requirement in *Harris*. Def's Br. at 70. The problem in *Harris* was the specter of spontaneous, widespread disclosure of any/all of a registrant's internet identifiers whenever a law enforcement entity concluded that such disclosure was "necessary to ensure the public safety based upon information available to the entity concerning that specific person." *See Harris*, 772 F.3d at 580. That possibility of arbitrary, total exposure of their pseudonymous internet presence (and the accompanying attention to their already-known real-world identity) would presumably give rise to a constitutionally significant chilling effect. *See id.* at 581 ("If their identity is exposed, their speech, even on topics of public importance, could subject them to harassment, retaliation, and intimidation."). And the possibility that law enforcement could make that disclosure in retaliation for political advocacy would naturally have a chilling effect on registrants' protected political speech. *See id.* at 580–81.

Section 692A.121(9) only authorizes disclosure of registration status in response to requests inquiring about whether an identifier is linked to a sex offender. Moreover, it only authorizes the department or the sheriff's office to "verify if a particular internet identifier . . . is one that has been included in a registration by a sex offender," and it does not authorize the agency to identify that offender in its response. *See* Iowa Code § 692A.121(9). This provision is exquisitely tailored to enable members of the public to determine if they (or their children) are communicating with a known sex offender, without exposing that sex offender's identity. More specific information about that offender can only be disclosed in response to a request made by somebody who *already knows* the sex offender's identity and includes their real name. *See* Iowa Code § 692A.121(5)(a)(4). It is impossible to devise a more narrowly tailored registration requirement that could allow Iowans to determine whether a stranger on the internet is an adult sex offender and "empower the public, if it wishes, to make the informed decision to avoid such interactions." *See Minnis*, 67 N.E.3d at 290; *cf. State v. Musser*, 721 N.W.2d 734, 741–42 (Iowa 2006) (finding strict scrutiny was satisfied because "[w]e cannot conceive of a less restrictive way in which the state could accomplish its goal" other than chosen means).

Without the possible chilling effect from public disclosure, there is no way for Aschbrenner to show any unconstitutional chilling effect. A constitutionally significant chilling effect does not "arise merely from the individual's knowledge that a governmental agency was engaged in certain [information-gathering] activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *See Shurtleff*, 628 F.3d at 1225 (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). The limits on public disclosure ensure that state agencies cannot retaliate against disfavored speech. The only chilling effect arising from awareness that law enforcement has the registrant's internet identifiers is a *desired* chilling effect that furthers the compelling state interest in preventing victimization.

> Some researchers who have treated online child molesters have suggested several Internet mechanisms that may promote offending. . . . [One] possible catalyst to sexual offending may be the anonymity that the Internet appears to afford offenders, who can groom and seduce victims from their homes under the assumption that they will not be observed. This anonymity, combined with the high degree of arousal that results from online sexual stimulation, could lower internal restraints that would normally inhibit acting on inappropriate sexual urges, or it could trigger impulsive behavior (Carnes, 2003; Cooper, Delmonico, Griffin-Shelley, & Mathy, 2004; Galbreath et al., 2002; Quayle & Taylor, 2003).

Janis Wolak et al., *Online "Predators" and Their Victims*, 63 AM. PSYCHOLOGIST at 120; *see also* OFFICE OF THE ATTORNEY GENERAL, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030–01, at 38055, 2008 WL 2594934 (July 2, 2008) ("Among other potential uses, having this information may help in investigating crimes committed online by registered sex offenders—such as attempting to lure children or trafficking in child pornography through the Internet—and knowledge by sex offenders that their Internet identifiers are known to the authorities may help to discourage them from engaging in such criminal activities.").

Every time this registration requirement deters a registrant from soliciting a minor for sex on the internet, it prevents harm.

> . . . 28% of solicited youth said an incident left them feeling very or extremely upset and 20% felt very or extremely afraid. Thirty-four (34) percent of aggressive incidents left youth feeling very or extremely upset, and 28% left youth feeling very or extremely afraid. Also youth were very or extremely embarrassed in 19% of aggressive solicitations and 49% of distressing incidents. Further in one-quarter of all solicitation incidents, youth had one or more symptoms of stress, including staying away from the Internet or a particular part of it, being unable to stop thinking about the incident, feeling jumpy or irritable, and/or losing interest in things.

Janis Wolak et al., *Online Victimization of Youth: Five Years Later*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN at 34–35 (2006),

https://perma.cc/YW98-MB9R. To the extent that any chilling effect results from this registration requirement, it is not unconstitutional and it furthers the compelling interest in preventing victimization.

The same concerns that animated the *Packingham* holding that states cannot forbid sex offenders from using social media—that "social media users employ these websites to engage in a wide array of protected First Amendment activity"—justify the internet-identifier registration requirement, because Iowans deserve protection from victimization within that new public space. *See* MTD Ruling (1/35/18) at 9–10; App. 65–66 (quoting *Packingham*, 137 S.Ct. at 1735–36). This registration requirement advances that critical public safety interest, and it is calibrated to minimize any incidental burden on registrants' First Amendment rights. Therefore, because this internet identifier registration requirement is narrowly tailored to further a compelling government interest, Aschbrenner's challenge fails.

CONCLUSION

The State respectfully requests that this Court reject Aschbrenner's challenges and affirm his conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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