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IN THE SUPREME COURT OF THE UNITED STATES

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LESTER GERARD PACKINGHAM, :

Petitioner : No. 15-1194

v. :

NORTH CAROLINA, :

Respondent. :

- - - - - x

Washington, D.C.
Monday, February 27, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

DAVID T. GOLDBERG, ESQ., Stanford, Cal.; on behalf of the Petitioner.

ROBERT C. MONTGOMERY, ESQ., Senior Deputy Attorney General, Raleigh, N.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-1194 Packingham v. North Carolina.

Mr. Goldberg.

ORAL ARGUMENT OF DAVID T. GOLDBERG

ON BEHALF OF THE PETITIONER

MR. GOLDBERG: Mr. Chief Justice, and may it please the Court:

There are three principal features of North Carolina's law that make it a stark abridgement of the Freedom of Speech.

First, Section 202.5 reaches vast swaths of core First Amendment activity that is totally unrelated to the government's preventative purpose.

Mr. Packingham is not accused of communicating with or viewing the profile of a minor. He violated Section 202.5 by speaking to his friends and family about his experience in traffic court. And if today he were to view or respond to any of the thousands of Twitter messages about his case in this Court, that would be a felony.

Second, the law does not operate in some sleepy First Amendment quarter. It operates and forbids

1 speech on the very platforms on which Americans today
2 are most likely to communicate, to organize for social
3 change, and to petition their government.

4 Third, Section 202.5 --

5 JUSTICE KENNEDY: Please go ahead. Please
6 go ahead.

7 MR. GOLDBERG: -- is a criminal law, Your
8 Honor, that imposes punishment for protected First
9 Amendment activity without any regard to individual
10 culpability or lack of culpability.

11 JUSTICE KENNEDY: Could a State impose this
12 restriction as a condition of parole?

13 MR. GOLDBERG: Your Honor, I think they have
14 much more authority to impose things as a condition of
15 parole, and -- and States do this all the time, and
16 they -- they -- they limit people's First Amendment
17 rights. I think that they -- if you had something that
18 was as sweeping as this, for life, for anybody who had
19 committed a sex offense, I don't think they could do
20 that.

21 JUSTICE GINSBURG: But --

22 JUSTICE KAGAN: Didn't --

23 JUSTICE GINSBURG: But they are --

24 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

25 JUSTICE GINSBURG: The most fundamental

1 right is taken away from ex -- fundamentals by some --
2 some States prohibit ex-felons from voting. Some States
3 in the Federal government prohibits keeping and bearing
4 arms. Those are constitutional rights.

5 MR. GOLDBERG: Right, Your Honor. So both
6 of those rights are different from the First Amendment.
7 They are equally fundamental, but they are different.
8 So in the case of voting, North Carolina does not take
9 away -- North Carolina draws the line at people who have
10 completed their parole, their period of supervised
11 release.

12 But in *Richardson v. Ramirez*, the Court
13 looked to the text and history and tradition and said in
14 Section 2 of the Fourteenth Amendment there was
15 affirmative sanction for felon disenfranchisement. If
16 you look at that same section, which dealt with the
17 people who rebelled in the Civil War, you didn't need to
18 restore their First Amendment rights.

19 And -- and with the Second Amendment, when
20 somebody is convicted of a crime, they immediately lose
21 their Second Amendment rights. They don't lose their
22 First Amendment rights. So in the *Simon & Schuster*
23 case, this Court vindicated the rights of somebody who
24 was a serial killer who wanted to write from prison,
25 where he was serving a life sentence for murder, about

1 his experience. So --

2 CHIEF JUSTICE ROBERTS: It's a little
3 difficult to -- you said look at the text and history.
4 We don't have a lot of history here concerning access to
5 websites and all the sort of things we're dealing with
6 here. So I don't think that's a very useful guide.

7 MR. GOLDBERG: I agree, Your Honor. But I
8 think when you look at what -- when we talk about the
9 history, the history is there isn't a tradition or a
10 history of taking away people's First Amendment rights.
11 When the Court said First Amendment rights are
12 inalienable, it has -- meaning when people --

13 CHIEF JUSTICE ROBERTS: My point is, though,
14 you don't have a lot of history of having -- having such
15 sites or access where they can provide broad access to
16 minors of the sort that is problematic with respect to
17 this individual.

18 MR. GOLDBERG: Well, I don't disagree -- we
19 know as with violent video games, as with any manner of
20 new technologies the Court has confronted, there
21 isn't -- there isn't a framing era or -- or
22 reconstruction-era analogue. But there is no history
23 when you talk about all of the things that the State
24 historically has restricted, they never said you lose
25 your right to publish a newspaper because you've been

1 convicted --

2 JUSTICE ALITO: Suppose we try to translate
3 this into terms that would be familiar at the time of
4 the adoption of the First Amendment. So suppose the
5 State enacted a law prohibiting anyone convicted of
6 kidnapping children from visiting a nursery school.
7 Would -- would that be a violation of the First
8 Amendment?

9 MR. GOLDBERG: I don't think so, Your Honor.
10 Obviously, at the framing, the First Amendment didn't
11 apply to the states. But the --

12 JUSTICE ALITO: All right. Suppose it
13 was --

14 MR. GOLDBERG: All right.

15 JUSTICE ALITO: -- in the District of
16 Columbia.

17 MR. GOLDBERG: So, Your Honor, the -- a
18 kindergarten -- first of all, I don't know that there's
19 a First Amendment right to visit a kindergarten. And
20 that's fundamental here. This law only applies in the
21 places where everything that happens is a First
22 Amendment activity, whether it's receiving information,
23 speaking, associating, petitioning.

24 JUSTICE GINSBURG: Suppose --

25 MR. GOLDBERG: When some --

1 JUSTICE GINSBURG: Suppose the law simply
2 said that someone who was a sex offender could not
3 communicate with a minor on social media. Would you
4 agree that that would be constitutional?

5 MR. GOLDBERG: Well, I think my first answer
6 is that it would be much less restrictive, and that
7 shows why this law is unconstitutional; right? And
8 that's exactly what the prosecutor --

9 JUSTICE GINSBURG: Well --

10 MR. GOLDBERG: If you look at the --

11 JUSTICE GINSBURG: Well, there's a --
12 there's a concern here --

13 MR. GOLDBERG: Sure.

14 JUSTICE GINSBURG: -- for the safety of
15 children. So I'm asking you -- yes, of course, it's
16 less restrictive. Would it be constitutional?

17 MR. GOLDBERG: I think --

18 JUSTICE GINSBURG: -- and no communication
19 with a minor?

20 MR. GOLDBERG: So I -- I think it probably
21 would be, Your Honor. I think that the difference here
22 is if you take the test, the narrow-tailoring test,
23 which is fundamentally a -- this Court had said in -- in
24 Ward, a quantitative test, and you say, what percentage
25 of what you suppress implicates the interest? When

1 you're talking about communicating with minors or
2 viewing the pages of minors, that is going to the
3 heartland of the protective interests that the State is
4 asserting.

5 But here, everything that -- that they're
6 suppressing is -- as we've said, it's indifferent as to
7 whether it's core speech. Obviously, Petitioner was
8 convicted for saying, "Thank you, Jesus. God is good"
9 about a parking ticket to an audience.

10 JUSTICE ALITO: But you think that even as
11 narrowly tailored as Justice Ginsburg's example, so it
12 would be a crime for a convicted sex offender -- or
13 let's say someone who was convicted previously of
14 committing a sex offense using the Internet from
15 contacting on the Internet a person who is known --
16 known by that person to be a minor without the consent
17 of the parents of the minor? That would be a violation
18 of the First Amendment?

19 MR. GOLDBERG: No. I -- I -- I said I think
20 that would be constitutional, Your Honor.

21 JUSTICE ALITO: Oh, I thought you said it
22 wouldn't be.

23 MR. GOLDBERG: I'm sorry if I -- if I wasn't
24 clear about that. I -- I would still say there are
25 narrow-tailoring questions. I'm not here to say that

1 particular hypothetical law, that one of the concerns
2 with this law that I think you've -- you've handled by
3 narrowing it to a subset of people, this applies to
4 everybody on the registry, and it applies in a --
5 essentially on a statistical basis on the theory that as
6 a collective, they have a higher rate of recidivism than
7 people on average.

8 And I think this Court's First Amendment
9 cases say that's a very problematic assumption to
10 just -- and especially with a population like this that
11 is so heterogeneous and that is constantly being
12 evaluated on an individualized basis. It's not clear to
13 me why you would take people's First Amendment rights
14 away for life if the theory --

15 JUSTICE SOTOMAYOR: What do you think your
16 best argument is? Is this statute too overbroad? Does
17 it fail scrutiny, whatever level we adopt? What's
18 the --

19 MR. GOLDBERG: Well, I -- I think --

20 JUSTICE SOTOMAYOR: What do you think -- I
21 know you say all of those things.

22 MR. GOLDBERG: Yes. All of the above, Your
23 Honor. And this is not a case where the level of
24 scrutiny is going to make a difference.

25 JUSTICE KENNEDY: Elizabeth Barrett

1 Browning, "Let me count the ways."

2 MR. GOLDBERG: Exactly, Your Honor. So --

3 JUSTICE KENNEDY: But -- but let me ask you:
4 Suppose there were an app -- a program in which officers
5 could monitor your -- your video and your -- and your --
6 and your cyber -- and your cyber equipment and disclose
7 if you are communicating with minors. Could that be a
8 law that every -- that every convicted person has to
9 consent to that -- to that app and to that surveillance?

10 MR. GOLDBERG: Well, I think that goes to
11 the question of -- which you don't need to answer and I
12 want to answer Justice Sotomayor's question as well in
13 this case. What does the status of being a registrant
14 mean in terms of somebody's constitutional rights? I --
15 I think that is clearly a much less restrictive from a
16 First Amendment perspective, because then, again, people
17 like Mr. Packingham, anybody who wants to do the things
18 that are harmless and fully protected is able to do it.
19 People have -- and it is -- is effective detection and
20 deterrent.

21 So from a First Amendment perspective,
22 that's a home run. There is a Fourth Amendment question
23 there, which is, ordinarily, once you're done with
24 supervised release, you have full --

25 JUSTICE KENNEDY: First Amendment for home

1 run, who hit the home run?

2 MR. GOLDBERG: I'm saying for the State,
3 Your Honor. I think it does everything. It's perfectly
4 tailored in a certain sense, except for the State has a
5 sense of -- of what you may be up to, which is a -- a
6 concern. But, essentially, they're able to deter
7 people, detect people. And the people who want to speak
8 and exercise their core First Amendment rights --

9 JUSTICE KAGAN: Well, I take it --

10 MR. GOLDBERG: -- have no problem
11 whatsoever.

12 JUSTICE KAGAN: I take it, Mr. Goldberg,
13 that a part of what the State is saying here is that it
14 doesn't have the capacity to do that. It doesn't have
15 the capacity to check message-by-message or
16 click-by-click what a person is doing. And in the
17 absence of that, that some kind of prophylactic remedy
18 is needed.

19 And that's not unheard of in First Amendment
20 law. I mean, if you think of a case like *Burson*, which
21 is the 50 feet with --

22 MR. GOLDBERG: Sure.

23 JUSTICE KAGAN: -- in the polling places,
24 that's kind of a prophylactic rule. So why wouldn't the
25 same be appropriate here?

1 MR. GOLDBERG: Well -- well, Your Honor,
2 we -- obviously, there are times when prophylactic rules
3 are permissible under the First Amendment.
4 Mr. Packingham, when he was convicted, got a condition
5 that said you shall not have any contact with the
6 specific victim of this crime. That would -- otherwise,
7 if that were applied to you or me, that would be a -- an
8 abridgement of our freedom of speech.

9 So there's no general rule. The Court has
10 said repeatedly that you should be suspicious of
11 prophylactic rules because, ordinarily, you don't want
12 to -- you want to allow people to speak. But even as
13 we've been talking about rules like -- that are focused
14 on teenagers on the Internet and having specific contact
15 with them, those are prophylactic rules too. So I don't
16 think it's -- the question is, can you do it at the
17 first step? And I think --

18 JUSTICE BREYER: What is -- what was your
19 answer? Which I forget. A statute prohibits a
20 convicted sex offender from being -- spending more than
21 five minutes at a children's playground. Is that
22 constitutional or not?

23 MR. GOLDBERG: I -- I think that's
24 constitutional because --

25 JUSTICE BREYER: All right.

1 MR. GOLDBERG: I -- I don't --

2 JUSTICE BREYER: If that's constitutional,
3 instead of what most of the briefs do, is interpret the
4 statute as broadly as possible, this is a facial
5 challenge. What about trying to interpret it as
6 narrowly as possible? And as narrowly as possible, it
7 seems to me a necessary condition is that a violator
8 cannot go to a site that facilitates the social
9 introduction between two or more persons, and these
10 are -- these are children they're talking about, I
11 guess -- for two or more persons for the purposes of
12 friendship, meeting other persons, or information
13 exchanges. So we have to say "or related information
14 exchanges."

15 And now we have a definition that sounds as
16 if they're talking about dating sites, or it sounds as
17 if they're talking about related play group sites, if
18 you take younger children. And is it possible to read
19 it that way? And if you do read it that way, is it
20 constitutional?

21 MR. GOLDBERG: Well, Your Honor, a couple
22 points. The-- the first answer to the playground, we --
23 I think you start with, what is the First Amendment
24 right that is being abridged? I'm not sure that I see a
25 First Amendment right being abridged.

1 JUSTICE BREYER: Yeah. But that's what I --
2 I wanted to be -- I wanted to get your answer, and I
3 think I have that.

4 MR. GOLDBERG: And then --

5 JUSTICE BREYER: But I'm really interested
6 in the narrow possibility of interpreting it narrowly,
7 as I said. And on that basis, it's facially
8 constitutional, though it could be applied
9 unconstitutionally. That's what I want your answer to.

10 MR. GOLDBERG: So, Your Honor, this is a
11 criminal case. It doesn't arise as a civil suit in
12 district court. This is first and foremost an
13 as-applied challenge because the relief that we're
14 seeking is to overturn the --

15 JUSTICE BREYER: You're not -- you're not
16 attacking the statute. You're only attacking it applied
17 to your client?

18 MR. GOLDBERG: In a criminal case, you --
19 the Court has the power to say -- and I think it's
20 appropriate in this case -- that this -- the problem
21 here is the problem for every application. And that's
22 what we've argued.

23 JUSTICE BREYER: Okay.

24 MR. GOLDBERG: And clearly --

25 JUSTICE BREYER: That's -- then we're back

1 to my question. So I'm treating it as an as-applied
2 challenge. I don't want to just repeat the question.

3 MR. GOLDBERG: Right.

4 JUSTICE BREYER: I want to get your answer
5 to the question.

6 MR. GOLDBERG: Right. So -- so the answer
7 is, Your Honor, that this -- that narrow construction,
8 I'm not sure that -- that's possible, and that narrow
9 construction isn't going to be -- in this case, make any
10 difference, because as I understand your hypothetical
11 statute or construction, that is not -- Mr. Packingham
12 did not violate the law, but --

13 JUSTICE BREYER: Wait. Don't you see, all
14 I'm doing is reading one word before information
15 exchange. And the word I'm reading is related
16 information exchange. And as so interpreted, that
17 clause, too, which you're much more familiar with than I
18 am --

19 MR. GOLDBERG: Sure.

20 JUSTICE BREYER: -- seems to be talking
21 about dating sites or the lower age level equivalent.

22 MR. GOLDBERG: I don't --

23 JUSTICE BREYER: If -- if that's -- it does
24 what it says, facilitates the social introduction between
25 two or more persons for the purposes of friendship,

1 meeting other persons or related information exchanges.

2 I've now got it a social dating or equivalent site.

3 MR. GOLDBERG: Right.

4 JUSTICE BREYER: I think I can say that.

5 Now, if I say that, is it constitutional? That's what

6 I'm trying to get your answer to.

7 MR. GOLDBERG: If -- if it were limited to
8 dating sites, I'm assuming that it is constitutional,
9 Your Honor. I don't think the State has ever said that
10 this is about dating sites. They -- they say there's a
11 category of --

12 JUSTICE GINSBURG: Well, they couldn't
13 because of your case.

14 MR. GOLDBERG: Right. Exactly.

15 JUSTICE GINSBURG: So your case involved
16 boasting about getting off a traffic ticket.

17 MR. GOLDBERG: Right. So -- so that -- that
18 is my first and most important point, that
19 Mr. Packingham was not on a dating site.

20 JUSTICE BREYER: So then the answer to this
21 would be they have not applied it that way here, and
22 given the way they've applied it here, they can't do
23 that.

24 MR. GOLDBERG: I don't --

25 JUSTICE BREYER: Now, we're going to have 40

1 other cases involved.

2 MR. GOLDBERG: I don't think they've ever
3 applied it. I think the main focus -- dating sites tend
4 to have age restrictions that go -- apply only to adults
5 and so I think it's their position that those are
6 excluded from this. I -- they're -- I think the State's
7 position, and you can hear from them, they've never
8 proposed that as a construction because they want to go
9 after these -- these sites, the classic
10 social-networking sites.

11 JUSTICE ALITO: Yeah, the -- the
12 interpretation that Justice Breyer -- the -- the
13 language that Justice Breyer is referring to and other
14 language in this statute, I think, could, for the
15 purpose of avoiding First Amendment problems, be limited
16 to core social networking sites, including Facebook and
17 things like Facebook, Google Plus, that sort of thing,
18 and excluding a lot of the other sites that the
19 electronic frontier says are included, like the New York
20 Times and Betty Crocker and things like that. So it
21 would be limited just to social networking sites.

22 Would you agree that it could be read at --
23 using constitutional avoidance, it could be narrowed to
24 at least those?

25 MR. GOLDBERG: So honestly, Your Honor, I'm

1 not sure that it can, but it's very important for the
2 constitutional question that that is irrelevant. And
3 this goes back to Justice Sotomayor's question, which
4 was what is -- how do we win this case? What is the --
5 the -- what is the biggest problem with this statute?
6 And the biggest problem is --

7 JUSTICE ALITO: Well, just to put it in --
8 in context. It -- it is important for purposes of an
9 as-applied challenge because if -- what your -- what
10 your client used was a social -- was Facebook, right?

11 MR. GOLDBERG: Right.

12 JUSTICE ALITO: Okay.

13 MR. GOLDBERG: So --

14 JUSTICE ALITO: Even if it were limited
15 to -- to those --

16 MR. GOLDBERG: Right.

17 JUSTICE ALITO: You would say it's
18 unconstitutional.

19 MR. GOLDBERG: Our -- our position -- and
20 for the very reason we've talked about, which is that
21 this -- just like the law in the Jews For Jesus airport
22 case from Los Angeles that said no First Amendment
23 activity in this place, this is a law that says no First
24 Amendment activity, and it says it indiscriminate, so --

25 JUSTICE SOTOMAYOR: Counsel, I mean, one of

1 my problems with all of these sites today is that none
2 of them are purely -- or very few of them are purely
3 anything anymore.

4 MR. GOLDBERG: Right.

5 JUSTICE SOTOMAYOR: Take something like
6 LinkedIn, which many, many people in our society today
7 are looking for jobs there, but high school students are
8 permitted to look for jobs and to post their data,
9 personal data on that site.

10 So, is that traditional social media or not?

11 MR. GOLDBERG: I -- I think the State says
12 that it is because it meets the definition.

13 I just want to get back to Justice Alito's
14 question --

15 JUSTICE SOTOMAYOR: But that's my point,
16 which is -- I'm -- Facebook, many people, many
17 businesses are using it for commercial advertising.

18 MR. GOLDBERG: Right. And -- and that's
19 very true and -- and there was another defendant who was
20 prosecuted alongside Mr. Packingham who was an IT
21 person, Mr. Christian Johnson, and he lost his job
22 because his employer said it's impossible for you to do
23 your job if you can't get on these sites, so --

24 JUSTICE SOTOMAYOR: Even if you don't --

25 JUSTICE KENNEDY: Well, all of -- all of

1 these questions implicate what Justice Sotomayor asked
2 earlier and I and others interrupted you.

3 What is the category that we use? If -- if
4 we rule for you, we say this statute is a violation of
5 the First Amendment because, what -- what are -- what
6 are the basic rules or the basic --

7 MR. GOLDBERG: So -- so the basic rules --

8 JUSTICE KENNEDY: -- doctrinal choices you
9 offer us to say why this is unconstitutional?

10 MR. GOLDBERG: Sure. So the most
11 straightforward, basic doctrinal basis to say it's not
12 narrowly tailored and stop there or overbroad, which is
13 the flip side. Sometimes overbroad is a -- is a
14 confusing word because it has this third-party standing
15 dimension. In the airport case, it was used to say this
16 goes way too far because it prohibits lots of First
17 Amendment speech.

18 So if you just take the word narrow
19 tailoring test or you take the test in *Frisby*, in
20 *Taxpayers v. Vincent* where you say does this -- is the
21 theory of this law that it restricts speech on the
22 possibility that that will lead to some other harm, that
23 inherently is not going to be a narrowly tailored law.
24 Or you can look at it the way *Weir* did which -- which
25 said let's look at how much of -- is -- is protected

1 activity is suppressed, how much of that implicates this
2 purpose and, again, that's a really straightforward way.

3 Now that -- we think, and our brief argues
4 that there are multiple prongs. If you go through every
5 prong of the word "analysis," this is a really stark
6 case in terms of alternative channels. This forecloses,
7 as I said, some of the most important channels of
8 communication in our society.

9 So -- so you could do that, you could say
10 that too. But what -- what the Court said in McCullen
11 is once you get -- if it's not narrowly tailored, that
12 then it's unconstitutional and I don't see --

13 CHIEF JUSTICE ROBERTS: Well, one of the --
14 I mean, under narrow tailoring, I think it's -- it's
15 incumbent upon you to come up with a narrow -- more
16 narrowly tailored alternative.

17 So if you wanted to -- you're in the North
18 Carolina legislature and you're told you can't do this,
19 what would you do as the most effective alternative?

20 MR. GOLDBERG: Well -- well, Your Honor,
21 I -- I think the opinion in McCullen said it was not
22 incumbent on the challenger to come up with the
23 alternative, but here it -- it said the State has to
24 show that it seriously considered alternatives, but --

25 JUSTICE GINSBURG: What -- I thought you

1 agreed with me earlier that North Carolina could ban
2 communicating with a minor --

3 MR. GOLDBERG: Right.

4 JUSTICE GINSBURG: -- via social media.

5 MR. GOLDBERG: Right. So I think that --
6 that --

7 CHIEF JUSTICE ROBERTS: Well, I guess in
8 response to that is, well, how do you know that it's --
9 that it's a minor or -- or how is the -- I -- I mean, I
10 assume that minors can put on -- they -- they don't have
11 to have their age in their e-mail. They don't have to
12 communicate it in the text of the --

13 MR. GOLDBERG: Right. So --

14 CHIEF JUSTICE ROBERTS: -- message that's
15 put on the site. So I -- I think the response might be
16 that that's not terribly effective.

17 MR. GOLDBERG: So -- so two -- two answers
18 to that. First of all, if you look at page 11 of the
19 blue brief where -- where there is the closing argument
20 by the -- the DA in this case, the DA lays out what --
21 again, this is not a case where we've come up with some
22 exotic theory about how you could narrow this law. And
23 the DA says to the jury, in order to convict, you might
24 not like this law, you might prefer a law that says
25 don't have specific contact on Facebook with minor

1 children or a law that says don't say specific things
2 that might entrap teenagers, and this law doesn't say
3 that. It doesn't. But even if you don't agree with it,
4 if you don't like it, the law says you can't access.
5 So --

6 CHIEF JUSTICE ROBERTS: Maybe he doesn't say
7 it because it wouldn't work. He doesn't say that the
8 law would be perfectly fine. He says here's an
9 alternative you might like. Maybe the legislature
10 didn't enact it because it made the -- concluded that it
11 wouldn't be effective.

12 MR. GOLDBERG: Well, Your Honor, I -- I
13 think it would be effective or ineffective exactly the
14 same way this law is effective or ineffective.

15 The -- the premise -- one of the things that
16 the State argues about effectiveness is that this law
17 will prevent people from doing something. The only way
18 it prevents people is by punishing them and deterring
19 them. It -- it doesn't enable the State to find people,
20 and -- and as Justice Kennedy was asking about
21 monitoring, that's a way that you can actually detect
22 what people are up to.

23 The nature of this law is that it finds --
24 it's most likely to find the people who are doing
25 nothing wrong, who have -- are doing innocent things.

1 And if you envision the subcategory of predators who are
2 using the -- these sites, they -- and lurking on these
3 sites, they are going to do their very best to hide
4 their identity.

5 JUSTICE SOTOMAYOR: Mr. -- Mr. Goldberg, why
6 was your client using an alias?

7 MR. GOLDBERG: I -- I think --

8 JUSTICE SOTOMAYOR: If he -- if he wasn't
9 lurking or otherwise trying to stay hidden?

10 MR. GOLDBERG: So, Your Honor, he wasn't
11 lurking. I don't think there's any basis for saying he
12 was lurking because they then looked at his hard drive.
13 They got the information from Facebook. There are
14 crimes that they could have charged him with, and
15 presumably, if he was doing something that was a serious
16 violation involving teenagers, he would have been
17 prosecuted for something like that.

18 So the alias that he was using was -- it --
19 and I'll put that in -- in scare quotes -- was his name
20 that he goes by and his middle name. And his -- his
21 page had his picture, and he had a profile that linked
22 to his father whose name is Lester G. Packingham,
23 Senior. And so the officer in this case was able to
24 find him in about two seconds. And obviously, he was
25 posting publicly about something that is -- about

1 religion and his experience at court that --

2 JUSTICE SOTOMAYOR: Go back to Justice
3 Kennedy's question, if you would, which is, is there a
4 capacity to determine the age of a user; meaning, is
5 there a way for the State to be able to track whether or
6 not a potential defendant is actually in communication
7 with a minor.

8 MR. GOLDBERG: Well, two things, Your Honor.
9 This statute -- the State's description of the statute
10 has always -- they already have a law about
11 communicating using the Internet with a minor. So they
12 already -- that's -- that's a different law. Their
13 theory of this case is about the power to gather
14 information.

15 The second thing is that people's ages are
16 verified by Facebook. And in a prosecution, if the
17 assumption was that the person was younger than 18, they
18 would then be able to verify that by getting the records
19 and finding out.

20 If the Court has no further questions, I'd
21 like to reserve the balance of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Montgomery.

24 ORAL ARGUMENT OF ROBERT C. MONTGOMERY

25 ON BEHALF OF THE RESPONDENT

1 MR. MONTGOMERY: Mr. Chief Justice, and may
2 it please the Court:

3 For many years, North Carolina, like other
4 States, had laws prohibiting sex offenders from being at
5 physical places where children congregate; schools,
6 playgrounds, day cares, and parks.

7 In 2008, North Carolina decided to prohibit
8 sex offenders from being at virtual places where
9 children congregate online; specifically, commercial
10 social networking websites.

11 North Carolina passed Section 202.5 to cover
12 the people most likely to sexually assault children.
13 Unlike some of the other alternatives -- or unlike the
14 alternatives proposed, this law is enforceable and
15 effective.

16 One of the things that was said --

17 JUSTICE KAGAN: Social networking, it
18 includes Facebook, obviously; it includes LinkedIn; it
19 includes Twitter; is that right?

20 MR. MONTGOMERY: That -- that would be
21 correct.

22 JUSTICE KAGAN: So -- so a -- so a person in
23 this situation, for example, cannot go onto the
24 President's Twitter account to find out what the
25 President is saying today?

1 MR. MONTGOMERY: That -- that's correct,
2 Your Honor.

3 JUSTICE KAGAN: Not only the President. I
4 mean, we're sort of aware of it because the President
5 now uses Twitter. But in fact, everybody uses Twitter.
6 All 50 governors, all 100 senators, every member of the
7 House has a Twitter account. So this has become a
8 crucial -- crucially important channel of political
9 communication. And a person couldn't go onto those
10 sites and find out what these members of our government
11 are thinking or saying or doing; is that right?

12 MR. MONTGOMERY: That's right. However,
13 there are alternatives. Usually those congressmen also
14 have their own web page. As far as Twitter --

15 JUSTICE KENNEDY: Well, it seems to me, I
16 don't know if -- that we ever did have a public square,
17 but assuming we had a public square a hundred years ago,
18 could you say that this person couldn't go into the
19 public square? The -- the sites that Justice Kagan has
20 described and their utility and their -- and their --
21 extent of their coverage are -- are greater than the
22 communication you could ever had, even in the paradigm
23 of public square.

24 MR. MONTGOMERY: In essence, States have
25 said that sex offenders can't go into the public square;

1 that they can't go into parks or they can't go into --
2 can't go near playgrounds.

3 JUSTICE BREYER: Maybe those have the same
4 problem. I mean, why -- why? Why are we trying to
5 limit that? People all the time want to speak to
6 18-year-olds, 17-year-olds. It doesn't -- it doesn't
7 limit this even to those that have sex problems with
8 children. All right? This is -- this is everybody
9 who's ever had a sex offense.

10 And you're not -- you're, I take it, you're
11 rejecting any effort that I might have hypothetically
12 made to narrow the statute, and you're saying, hey,
13 nowhere. Nowhere, really, because children are
14 everywhere. And I don't -- what is the difference? I
15 want to go to a park and I want to talk to 16-year-olds
16 about helping get some petition drives. You know, I can
17 make endless examples.

18 So what's the basis here? The State has a
19 reason? Yeah, it does. Does it limit free speech?
20 Dramatically. Are there other, less restrictive ways of
21 doing it? We're not sure, but we think probably, as
22 you've mentioned some. Okay. End of case, right?

23 MR. MONTGOMERY: No. No. Our position is
24 there are not any enforceable least-restrictive ways for
25 this particular interest that the State has --

1 JUSTICE BREYER: What about all the
2 orders -- about all the ways you just listed that they
3 have all the statutes would say you can't approach
4 children and say certain things. You remember you
5 started that way.

6 MR. MONTGOMERY: Certainly. And -- and
7 those are the -- that's in the physical world that they
8 can't be approached.

9 JUSTICE BREYER: What's the difference?

10 MR. MONTGOMERY: Well, there really is no
11 big difference. And that's why in the virtual world,
12 they shouldn't be allowed to approach either. And the
13 fact is, the Department of Justice has reported that
14 there's a 50 to 60 percent crossover from adult victim
15 rapists to children. So all of them, no matter what --
16 who the victim was, are capable of offending against
17 children. So that's why it would apply to everyone.

18 CHIEF JUSTICE ROBERTS: Are you able to find
19 out from the site operators, from Facebook, who one of
20 the registered offenders is communicating with?

21 MR. MONTGOMERY: There --

22 CHIEF JUSTICE ROBERTS: To the extent --

23 MR. MONTGOMERY: -- there may be some
24 instances in which that would happen, but most of these
25 sites have an Instant Messenger feature or some kind of

1 messenger feature which doesn't show up. In other
2 words, a police officer couldn't go to the website and
3 just look at it and necessarily know who was being
4 communicated with.

5 JUSTICE GINSBURG: I thought that Facebook
6 didn't allow -- didn't allow access by former sex
7 offenders.

8 MR. MONTGOMERY: That -- that's correct,
9 Justice Ginsburg. There is a prohibition on Facebook
10 and on some of the other major commercial sites --

11 JUSTICE GINSBURG: But that's Facebook's
12 choice, it's not the State.

13 MR. MONTGOMERY: That's correct. And
14 certainly the State has implemented this law to be a
15 deterrent so that these offenders will not go on
16 Facebook, whereas that -- the deterrent effect of
17 Facebook having the policy is not the same thing.

18 So the State has made a decision,
19 particularly in the area of information gathering,
20 because these offenders can go to these sites and can
21 quietly lurk and find out information. And there are
22 links. The -- the crucial factor that the State
23 believes that narrows the statute is that the site must
24 have links to other users' profile pages.

25 JUSTICE KAGAN: But -- but -- I mean, yes,

1 that narrows it. It -- it takes the nytimes.com out of
2 the statute, but it doesn't take the sites that people
3 use today, as I suggested -- whether it's Twitter or
4 whether it's Facebook -- which have become incredibly
5 important parts of our political culture, of our
6 religious culture.

7 If you ask, there are surveys that say how
8 many Americans have communicated their faith on social
9 networking sites in the -- in the past week, and it
10 turns out that one in five. That's about 50 million
11 Americans use this for religious community purposes.

12 So whether it's political community, whether
13 it's religious community, I mean, these sites have
14 become embedded in our culture as ways to communicate
15 and ways to exercise our constitutional rights, haven't
16 they?

17 MR. MONTGOMERY: There -- there are other
18 alternatives, still. This is a part of the Internet,
19 but it's not the entire Internet that is being taken
20 away from these offenders. They can still have their
21 own blog. They can read blogs. They can do podcasts.
22 They can go to nytimes.com. They can do other things to
23 communicate with people. This does not prohibit sites
24 that have discretely just e-mail or Instant Messenger or
25 message boards. So there are other alternatives.

1 And one point to make also about what's --
2 the Petitioner did in this case, he was arrested for
3 accessing Facebook, not for what he wrote on Facebook.
4 So he did post something on Facebook, but this law
5 prevented him from accessing Facebook.

6 JUSTICE KAGAN: But you're not making a
7 conduct speech distinction, are you? I thought you had
8 dropped that in your briefs.

9 MR. MONTGOMERY: No. No. That's -- that's
10 correct, Your Honor, although the North Carolina Supreme
11 Court certainly recognized that there was a conduct
12 component to this, just like going to a park or going to
13 a playground. But it is speech, that's correct. But
14 the fact that he made a religious statement, it wasn't
15 specifically because of that that he was arrested and
16 charged and convicted for this offense. But yes, it is
17 speech that is implicated.

18 JUSTICE GINSBURG: How was -- how was he
19 apprehended?

20 MR. MONTGOMERY: The -- the officer went to
21 his own Facebook account and had a -- had a list of sex
22 offenders that he was searching for using their names or
23 aliases or family members. And he was able to find
24 Mr. Packingham's father and then was able to see
25 Mr. Packingham -- even though he was using an alias --

1 was able to see his picture and know that it was him,
2 and he was on the list of sex offenders. So that's the
3 way that he did this. He apparently found six others or
4 so in this session that were sex offenders on Facebook.

5 JUSTICE BREYER: Can you have a statute says
6 convicted swindlers cannot go on Facebook -- or cannot
7 go on the Internet on sites that tell people -- that
8 tell people where to gather to discuss money?

9 MR. MONTGOMERY: I'm not sure about that --

10 JUSTICE BREYER: I mean, I can multiply
11 these examples. Convicted --

12 MR. MONTGOMERY: Certainly.

13 JUSTICE BREYER: We can think of -- you
14 know, pretty soon, you're going to have everybody
15 convicted of different things not being able to go
16 anywhere and discuss anything.

17 MR. MONTGOMERY: Well --

18 JUSTICE BREYER: I exaggerate. Let's just
19 stick with the -- we can't have convicted swindlers
20 going on Facebook to discuss money.

21 MR. MONTGOMERY: Well, swindlers are not sex
22 offenders, and that's --

23 JUSTICE BREYER: Does that make a
24 difference?

25 MR. MONTGOMERY: Yes.

1 JUSTICE BREYER: Why?

2 MR. MONTGOMERY: It does make a difference.

3 JUSTICE BREYER: Why?

4 MR. MONTGOMERY: Sex offenders have -- have
5 been -- there have been civil disabilities applied to
6 sex offenders and to other felons, but certainly to sex
7 offenders, such as the registry itself. As this Court
8 in Smith v. Doe said that the registry was -- was
9 constitutional. And lower courts have found that the
10 restrictions on going to parks or playgrounds and those
11 sorts of places are also constitutional.

12 These are some of the worst criminals who
13 have abused children and -- and others and committed sex
14 offenses. And this Court has recognized that they have
15 a high rate of recidivism and are very likely to do this
16 again. Even as late as 20 years from when they are
17 released, they may recidivate.

18 JUSTICE KAGAN: Mr. -- Mr. Montgomery, can I
19 ask you a question that has to do with the law's
20 exemptions? Because it just confused me when I was
21 reading it. It seems that some -- some of what's
22 exempted by the law seems, I have to say, some of the
23 most dangerous stuff. So you exempt any website that
24 provides only a chat room or only photo sharing. So why
25 is that? Because if I would have said, like, where the

1 most dangerous activity takes place, it's in chat rooms
2 and via photo sharing.

3 MR. MONTGOMERY: The -- the legislature in
4 North Carolina wanted to have some narrow tailoring to
5 this -- to this statute. So the fact that it eliminates
6 or exempts some of those things is really a virtue, not
7 a vice. Those are pure forms of communication. Yes --

8 JUSTICE KAGAN: It just seems to exempt the
9 stuff that's most easily used to -- to do exactly the
10 things that this statute is meant to prevent.

11 MR. MONTGOMERY: Well, this statute is -- is
12 meant to prevent at its core harvesting of information
13 anonymously, which is not something you find as much
14 when you're talking about chat rooms or -- or e-mail or
15 those sorts of things. Typically, there's not the
16 transparent amount of information or the anonymity that
17 comes with the social networking website in which you
18 can click on a link and go find out information about
19 someone that you don't know.

20 JUSTICE GINSBURG: Could --

21 MR. MONTGOMERY: And so --

22 JUSTICE GINSBURG: -- North Carolina --
23 could North Carolina bar those as well? Bar the photo
24 sharing and the chat room?

25 MR. MONTGOMERY: The problem then may be

1 that it would not be as narrowly tailored as it should
2 be.

3 JUSTICE GINSBURG: Then what did you mean in
4 your brief when you said that North Carolina can proceed
5 one step at a time, that it could take further steps
6 consistent with constitutional --

7 MR. MONTGOMERY: Well, certainly, there are
8 other steps that may be taken, and perhaps that would be
9 one. But -- but at this point, the --

10 JUSTICE GINSBURG: Well, what did you mean
11 in your brief, then, when you said North Carolina could
12 take other steps, additional steps?

13 MR. MONTGOMERY: There -- there are -- there
14 are certainly other laws that could be put in place to
15 try to prevent sex offenders from finding out
16 information.

17 JUSTICE KAGAN: When you just said to
18 Justice Ginsburg, well, maybe that would be
19 unconstitutional if they included these things that are
20 instead exempted, so you mean that there's a
21 constitutional right to use Snapchat, but not to use
22 Twitter?

23 MR. MONTGOMERY: I'm not sure I understand.
24 That -- that Snapchat -- Snapchat and Twitter seem to be
25 included under this statute.

1 JUSTICE KAGAN: Well, I would have -- I
2 would have thought that Snapchat is -- is -- maybe I
3 have it wrong. I'm not any expert on this. But isn't
4 Snapchat photo sharing?

5 MR. MONTGOMERY: I believe that is some of
6 it. I don't --

7 JUSTICE KAGAN: Yeah. So that falls under
8 the exemption; right? So you can use Snapchat, but you
9 can't use Twitter?

10 MR. MONTGOMERY: Well, Snapchat, as I
11 understand it, you don't get the level of information
12 that you get from something else. Because Twitter is --
13 you can find out much more information than you could
14 from however many seconds of video or pictures or
15 whatever you get with Snapchat.

16 So I think it's a -- it was a decision to go
17 for the sites in which the most anonymous information
18 could be collected by an offender. And that offender
19 then would use that to groom the child or otherwise use
20 that information to go meet the child and begin a
21 relationship so that the child --

22 JUSTICE BREYER: Look -- look: The case
23 books are filled with cases where to allow certain
24 groups of people to speak is actually dangerous. Like
25 the communists under -- you know, years ago, they said

1 it was a good idea to have a revolution. And all kinds
2 of people have said dangerous things.

3 Here, you take a group of people who've done
4 something wrong, been fully punished, and you're saying
5 that they might say something to somebody which would be
6 dangerous. And you're right; it might be. On the other
7 hand, your remedy from that is to cut off their speech.

8 Now, I suspect my law clerks, in the space
9 of half an hour, would find many cases that put it the
10 level of generality I've just put at, say it is hornbook
11 law that you can't. You can't unless there is at least
12 a clear and present danger, you know, homes. There are
13 lots of qualifications.

14 So why don't you tell me when my law clerks
15 are going to look all these up -- and I think I have a
16 few in mind -- what case we should look up to be sure we
17 get the opposite, which is what you're arguing, I think.

18 MR. MONTGOMERY: This case is much more like
19 *Burson v. Freeman*, in which this Court said that this
20 100-foot buffer zone, that a campaign-free zone at a
21 voting place was permissible. And that was suppressing
22 political speech.

23 JUSTICE KENNEDY: I -- I think that's --
24 does not help you at -- at all.

25 (Laughter.)

1 JUSTICE KENNEDY: That was -- number one, it
2 was applied to everyone. It was 100 yards. You could
3 have all the political speech in the world outside
4 the -- was it 100 yards or 100 feet, whatever it was.
5 It seems to me that -- do you have -- do you have any
6 better case than that?

7 (Laughter.)

8 MR. MONTGOMERY: Well, the only -- the
9 reason --

10 JUSTICE KENNEDY: If you cite Burson, I
11 think -- I think you lose.

12 MR. MONTGOMERY: The reason that that case
13 is the one that I mentioned is because the rationale for
14 that was that these kinds of crimes that happened in
15 that zone often go undetected --

16 JUSTICE KAGAN: Mr. Montgomery, I agree with
17 you. That's your closest case. It's the one that I
18 asked Mr. Goldberg about, because it's the only case
19 that I know of where we've permitted a prophylactic rule
20 where we've said not all conduct will have these
21 dangerous effects, but we don't exactly know how to
22 separate out the dangerous -- dangerous speech from the
23 not-dangerous speech, so we're going to have a
24 prophylactic rule. That is like one out of a zillion
25 First Amendment cases that we've decided in our history.

1 And as Justice Kennedy says, there are many reasons to
2 think it's distinguishable from this one.

3 MR. MONTGOMERY: Well, the fact that it
4 applied to all in Burson, I believe, makes our case a
5 better case because it doesn't apply to all. It applies
6 to sex offenders who have committed crimes, who have
7 shown that they cannot conform to the law and are likely
8 to be recidivists. So the fact that it's a narrower
9 group is not -- does not make it more problematic, but
10 makes it -- makes it better than Burson.

11 JUSTICE KENNEDY: Well, that was -- that was
12 not the rationale of Burson v. Freeman. Under that
13 rationale, you -- you could have said that it applies
14 only to members of a political party and it would have
15 been narrower. That would make it worse. The
16 Petitioner here is saying you are singling me out and
17 saying that I can't have the First Amendment rights that
18 everybody else does. That's exactly the opposite of
19 what was happening in Burson.

20 MR. MONTGOMERY: But it wouldn't be like
21 singling out a political party. These are people who
22 have committed sex offenses. So, again, they have had
23 certain disabilities already, civil disabilities. And
24 this Court has -- has certainly said that felons can be
25 prevented from having guns and felons can be prevented

1 from voting. Here is a situation in which you have sex
2 offenders who have committed heinous crimes and are
3 likely to recidivate.

4 CHIEF JUSTICE ROBERTS: Is -- is a provision
5 like this ever added to the sentences as opposed to
6 following from the sex registry?

7 MR. MONTGOMERY: As -- as part of probation,
8 there can be certainly those sorts of provisions added
9 for the length of parole, for instance, or probation.
10 They can be a condition. A lot of times, those are
11 completely banning the Internet altogether. And one of
12 the things about that is that when somebody is on
13 probation or parole, of course, they usually will
14 consent to having searches done. So it's a lot easier
15 for a parole officer to determine whether this person
16 has five computers or a smartphone or what they're using
17 during that period, unlike --

18 CHIEF JUSTICE ROBERTS: I suppose it's hard
19 to generalize, but do you have any idea what the period
20 of parole or probation is for someone who commits a sex
21 offense such as the one at issue here?

22 MR. MONTGOMERY: I -- I am not sure. I
23 think it's a -- I'm thinking that it's around three
24 years, but I'm -- I'm not positive on that. Yes.

25 JUSTICE SOTOMAYOR: Not if it's a Federal

1 crime.

2 MR. MONTGOMERY: Not if it was -- if it was
3 a --

4 JUSTICE SOTOMAYOR: It's much longer.

5 MR. MONTGOMERY: If it was a Federal crime,
6 it would be much longer.

7 JUSTICE SOTOMAYOR: I -- I -- I'm still
8 having some difficulty because you're building layer
9 upon layer of speculation or -- or statistical
10 inference.

11 Yes. There's a high statistical inference
12 that recidivism will follow with one sexual crime to
13 another, but then what's the statistical inference I
14 have to draw that people who have abused a neighbor's
15 child but never used the Internet, will now use the
16 Internet to abuse a different child? Because this rule
17 is not being applied to just people who have been found
18 to have enticed a child on Facebook or some form of
19 Internet usage. It's being applied indiscriminately to
20 people who have committed a sexual crime of statutory
21 rape or of -- or even if they're teenagers, more than
22 four years apart, or something else of that nature.

23 What -- what's the inference that every
24 sexual offender is going to use the Internet to lure a
25 child?

1 MR. MONTGOMERY: Well, it's -- it's often
2 impossible to know whether the sex offenders use the
3 Internet or not. Unless they contacted the victim
4 online, it may be impossible to know whether they use
5 the Internet. And certainly, as -- as far as
6 recidivism, you -- you don't know how many actual
7 offenses these sex offenders have committed when they
8 have -- have been in rehabilitation and said that they
9 committed -- they've only -- only about 5 percent of
10 what was reported is what came out when they took a
11 polygraph. So there's much more crime committed by
12 these offenders than ever gets reported.

13 So the fact is that they could -- they could
14 have used the -- the Internet for any of their crimes.
15 It may be impossible to know if they use the Internet
16 for their crimes. Some you would know, but many you
17 would not know.

18 JUSTICE SOTOMAYOR: But that might be true
19 of every criminal today.

20 MR. MONTGOMERY: It could --

21 JUSTICE SOTOMAYOR: Or committing almost any
22 crime.

23 MR. MONTGOMERY: That could be, but again,
24 we're talking about social --

25 JUSTICE SOTOMAYOR: Most of them can go onto

1 Facebook and find the location of the bank they want to
2 rob. They can go on the Internet and find out who's
3 employed there. The Internet could be used for almost
4 any crime --

5 MR. MONTGOMERY: Correct.

6 JUSTICE SOTOMAYOR: -- by anyone.

7 MR. MONTGOMERY: Those -- those are even
8 more speculative as to how many people would use that.
9 Here, we -- here we know from studies that about
10 82 percent of online sex crimes against children, social
11 networking websites were used to gain information about
12 their likes and dislikes. And 62 percent of online sex
13 crimes use -- use social networking websites to gain
14 home and school information. So we know that there's a
15 very high percentage of these offenders who -- who are
16 using social networking websites to find out
17 information.

18 JUSTICE SOTOMAYOR: Can they go on the
19 school website?

20 MR. MONTGOMERY: They can go on the school
21 website. I'm not sure that those have individual
22 information about students typically, personal
23 information that would be of the sort you get off a
24 social networking website, which is whether someone --
25 whether a child likes puppies or whether their parents

1 have recently been through a divorce, that kind of
2 information can't be gathered from a school website.

3 And -- and, again, there are ample
4 alternative channels here. These offenders can go on
5 noncommercial social networking websites. They can go
6 on social networking websites which only allow adults.
7 They can go to news sites. They can use blogs,
8 podcasts, those sorts of things, so there are other
9 ways. And, in fact, most -- there are plenty of people
10 who don't use these kinds of websites and find out their
11 information just fine. So it's not a matter of a
12 necessity to have this sort of a website that you can go
13 to.

14 JUSTICE KAGAN: How many people under 30 do
15 you think don't use these sites to get all their
16 information? Under 35? I mean, they're --
17 increasingly, this is the way people get everything
18 that -- all information.

19 MR. MONTGOMERY: They --

20 JUSTICE KAGAN: This is the way people
21 structure their civic community life.

22 MR. MONTGOMERY: They -- they do get a lot
23 of information. Obviously, most anything you can get
24 there, you can get somewhere else. The news is
25 typically not coming from Facebook. It's coming from

1 some other website if they're getting news there. There
2 are other ways that people can communicate other than
3 through Facebook. And certainly, when you have social
4 networking websites like Facebook, My Space, Instagram,
5 that say, as a sex offender we don't want you here, you
6 can't come here, obviously, there are ways those people
7 can get their information. They don't have to use that
8 to get that information.

9 JUSTICE GINSBURG: What about the -- and
10 there was a -- a brief -- the electronic frontier,
11 and -- and even if -- if the New York Times is not
12 included, the point is that these people are being cut
13 off from a very large part of the marketplace of ideas.
14 And the First Amendment includes not only the right to
15 speak, but the right to receive information.

16 I mean, you don't -- you don't question that
17 they are being cut off.

18 MR. MONTGOMERY: No. They are -- they are
19 being cut off. And again, it has to be remembered that
20 these are sex offenders who have been convicted of sex
21 offenses, and they should be cut off from sources of
22 information that they can use to perpetuate their crimes
23 against children. And so they are being cut off from
24 these particular websites, but they have other means in
25 which they can gather news, that they can communicate

1 with friends, that they can share pictures. Those kinds
2 of things can be done in other places.

3 I do think it's important to make it clear
4 that -- that the statute does not include nytimes.com.
5 And if --

6 JUSTICE SOTOMAYOR: Why? I got a page here
7 with -- printed from nytimes.com, from the New York
8 Times, where on the side there's commentary by people
9 who have created profiles on themselves having a public
10 discussion between them on a news article that was
11 printed in the New York Times. That appears to be a new
12 feature of the New York Times, but it appears to be a
13 common feature of most newspapers today that are printed
14 online.

15 MR. MONTGOMERY: They -- they often do allow
16 commenting, but the requirement in the statute is that
17 they allow someone to go to a profile page, and on that
18 profile page then link to people that they don't know.

19 JUSTICE KAGAN: Where is that in the
20 statute? Because I don't read the statute to impose
21 that as a requirement. So tell me where you find that.

22 MR. MONTGOMERY: Certainly. That -- that is
23 in (B)(iii) of the statute. So B sets out the four
24 broad requirements, four requirements to define a
25 commercial social networking website.

1 JUSTICE KAGAN: Right. So (B)(iii).

2 MR. MONTGOMERY: (B)(iii).

3 JUSTICE KAGAN: It -- it allows users to
4 create web pages or personal profiles that contain
5 information such as links to other personal web pages.

6 So you're reading the "such as" as a
7 requirement, but "such as" is not a requirement. "Such
8 as" is just like here's an example, but you don't
9 necessarily need this.

10 MR. MONTGOMERY: The -- the other way that
11 it can be read and the narrower way would be if you had
12 an implied colon after the word "contained," so that it
13 read "allows users to create websites or personal
14 profiles that contain," colon, and then four different
15 things; 1, information such as the name or nickname of
16 the user; 2, photographs placed from the personal --

17 JUSTICE KAGAN: Well, then you need an
18 implied colon and an implied semicolon.

19 MR. MONTGOMERY: Well, semicolons --
20 (Laughter.)

21 JUSTICE KAGAN: And then another implied
22 semicolon.

23 MR. MONTGOMERY: Semicolons would be --
24 semicolons would be --

25 JUSTICE KAGAN: And then another implied

1 semicolon.

2 MR. MONTGOMERY: Well, semicolons would
3 be -- would be better, but I -- I -- they certainly
4 would be better. I would be --

5 JUSTICE KAGAN: But all this implying of
6 punctuation marks, I mean, if you just read this, it's
7 contain information such as a bunch of things, which
8 none of which are necessary, but these are good examples
9 of things that characterize allowing users to create web
10 pages or personal profiles that contain information.
11 That's your requirement.

12 MR. MONTGOMERY: It really makes no sense
13 not to have all four of those, because that would mean
14 that you could have the -- the -- the fourth one, links,
15 but not the first one, the name of the person.

16 JUSTICE ALITO: Well, you know, you might
17 read this to -- you might read a personal profile to
18 mean something more than just a nickname. A personal
19 profile -- the definition of a profile is a concise
20 biographical sketch, which seems to be -- seems to refer
21 to enough information so that you can get a -- an idea
22 about who the person is.

23 Why don't you read it that way? And if you
24 read it that way, would it include nytimes.com?

25 MR. MONTGOMERY: No. That still would not

1 include nytimes.com because -- well, our position still
2 is that it has to have links, so I'm not sure I'm
3 answering your question exactly as I should.

4 JUSTICE ALITO: Well, I'm saying suppose we
5 think that -- that it's a stretch to get to links, but
6 it does require a personal profile, and I wouldn't think
7 that just a nickname. Somebody says my nickname is, I
8 don't know what, Joe, that that's a -- that's a profile?

9 MR. MONTGOMERY: No, that would not -- that
10 would not be a profile. The other point is --

11 JUSTICE SOTOMAYOR: So would a name and a
12 picture be a profile? And your ability to discuss in
13 that comment section personal information or public
14 information, whatever you want to discuss?

15 MR. MONTGOMERY: Not -- not under our
16 reading of the statute. It still would require all four
17 of these. And one other point about that is in -- in
18 subsection (b)(4), there's a list that starts with "such
19 as" and includes a -- a -- the word "or," whereas in
20 number 3 it has "such as," but it has the word "and."
21 So the legislature certainly knew how to say "or" or
22 "and" in those portions.

23 JUSTICE KAGAN: But "such as" does not mean
24 "each of." You're reading it as though "such as" means
25 "each of."

1 MR. MONTGOMERY: No. We're reading it as
2 "such as" only modifies the name or nickname of the
3 user, and then you have three other elements to it. So
4 there could be things in --

5 CHIEF JUSTICE ROBERTS: You can finish your
6 sentence.

7 MR. MONTGOMERY: In -- in this instance,
8 the -- not a co-defendant, but the other person charged
9 here in this case that's not before the Court used
10 initials. So there could be something besides a name or
11 a nickname.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Montgomery.

14 Mr. Goldberg, you have four minutes
15 remaining.

16 REBUTTAL ARGUMENT OF DAVID T. GOLDBERG
17 ON BEHALF OF THE PETITIONER

18 MR. GOLDBERG: Thank you, Your Honor.
19 I'll -- I'll try to make four points.

20 As to the New York Times, our main
21 submission is it doesn't matter. But that said --
22 because it is overbroad as applied to any one site --
23 but that reading of the statute doesn't work
24 grammatically. If you look in the (a) and in the (b),
25 it talks about sites that create web pages or personal

1 profiles. And in (a), it says to become members or
2 create personal web pages. So you can't have a links
3 requirement if there are sites that -- that qualify
4 without creating web pages.

5 Second, when they told Mr. Packingham what
6 this law requires and what this means, they didn't say
7 anything about links. If you look at the State supreme
8 court opinion, they assumed -- and not just for
9 decisional purposes -- they said to the extent that the
10 Petitioner is right, there are alternatives. So they
11 didn't embrace this construction.

12 And just recently on this question of
13 Snapchat, after the State filed the brief, which is all
14 about links, they prosecuted somebody for using
15 Snapchat, which is a site that doesn't have links of the
16 kind that -- that we're talking about.

17 So that construction and -- and, as my
18 friend is saying, maybe somebody might understand what
19 "profile" means, but this is a criminal statute. And I
20 think if any of us were advising somebody on the
21 registry whether they can do it, the plain language, the
22 history, and the Supreme Court opinion all say you're in
23 great danger of -- of liability here, steer clear. And
24 that's what the officer in this case, when he was
25 cross-examined on that question, that's what he said.

1 The second thing about alternative channels,
2 this is -- there is a President. There are also 500
3 million Tweets a day. There are 10 billion Snapchat
4 videos. It's not just people under 30 --

5 JUSTICE ALITO: Well, suppose this case had
6 come to us in 2003, before Facebook was created. Would
7 there be alternative channels then?

8 MR. GOLDBERG: In 2003, I'm not quite sure
9 what the -- in 2003, the predominant area was -- was
10 chat rooms and that's explicitly exempted. So I'm not
11 sure -- sure what that -- what they would be going
12 after.

13 I think on the -- on the question of -- so
14 there are people in Ladue who did not have lawn signs,
15 but there are more than three billion people in the
16 world who are using these sites, a very small --

17 JUSTICE ALITO: But --

18 MR. GOLDBERG: -- percentage of people --

19 JUSTICE ALITO: But what I'm asking is
20 whether the existence of alternative channels asks
21 whether these are channels that people like to use or
22 whether if the channels that are affected by the statute
23 are taken away, there are still alternative channels.

24 Now, I know there are people who think that
25 life is not possible without Twitter and Facebook and

1 these things and that 2003 was the dark ages.

2 (Laughter.)

3 JUSTICE ALITO: But I don't know that --
4 that any channels of communication that were available
5 at that time have been taken away. So if there were
6 alternative channels then, why would there not be
7 alternative channels now?

8 MR. GOLDBERG: Well, I think, Your Honor,
9 you have to look at it -- and this is back in 2008 --
10 and you have to look at it in practical terms about what
11 people's communicative life is and what -- what they're
12 able to do.

13 And if you look at the cases that had
14 enforced those -- that requirement, if you look at
15 Lindmark, you look at City of Ladue, are the two cases
16 that have struck down laws. Even in the context of
17 adult zoning, the Court has said that there has to be a
18 substantial amount of -- of access and protected speech.
19 In the Los Angeles Airport case, that was one place.
20 These are the places where everybody is speaking and
21 interacting and looking for work and petitioning the
22 government.

23 Every single representative -- there are
24 political debates. The President is speaking to the
25 people through this medium. So it is an extraordinary

1 argument to say not everybody does it. I don't think
2 that's the test. The test is how much of your core
3 First Amendment activity is foreclosed. And the ability
4 to speak with this networked group of people all over
5 the world is as strong -- this is, as Justice Kennedy
6 said, well beyond the traditional town square. And I'm
7 sure there were people who didn't go to the town square,
8 but that wouldn't be a basis for -- for upholding a
9 restriction there.

10 The -- the core point here, though, is that
11 Mr. Packingham -- this law reaches speech that is
12 fundamentally at the core -- I'm sorry, Your Honor.

13 CHIEF JUSTICE ROBERTS: You can finish that
14 sentence.

15 MR. GOLDBERG: I'll just say this -- this
16 case, this wolf comes as a wolf. This is core-protected
17 speech. There is nothing about it that implicates the
18 government's purpose. And the fact that he was
19 convicted for a felony is why this law is
20 unconstitutional.

21 Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

24 (Whereupon, at 11:06 a.m., the case in the
25 above-entitled matter was submitted.)

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