No. 15-1194

IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari
to the Supreme Court of North Carolina

BRIEF FOR PETITIONER

Glenn Gerding
Appellate Defender
OFFICE OF THE
APPELLATE DEFENDER
123 West Main Street
Suite 500
Durham, NC 27701

David T. Goldberg
Counsel of Record
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 498-8229
dgoldberg@law.stanford.edu

QUESTION PRESENTED

The North Carolina Supreme Court sustained petitioner's conviction under a criminal law, N.C. Gen. Stat. § 14-202.5, that makes it a felony for any person on the State's registry of former sex offenders to "access" a wide array of websites—including Facebook, YouTube, and nytimes.com—that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts. The law—which applies to thousands of people who, like petitioner, have completed all criminal justice supervision—does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose.

The question presented is: Whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner—who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

PARTIES TO THE PROCEEDING

Petitioner is Lester Gerard Packingham, Jr.[†] Respondent is the State of North Carolina.

Christian Martin Johnson is not a party to this case, though he and petitioner were co-movants in the Superior Court Motion to Dismiss Hearing. *See* Pet. App. 54a.

[†] In the proceedings below, the suffix "Jr." was incorrectly omitted from petitioner's name. Petitioner goes by the name "J.R."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules and Regulations

Legislative Materials

Other Authorities

BRIEF FOR PETITIONER

Petitioner Lester Gerard Packingham, Jr. respectfully requests that this Court reverse the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina, Pet. App. 1a, is reported at 777 S.E.2d 738. The opinion of the Court of Appeals, Pet. App. 36a, is reported at 748 S.E.2d 146. The order of the Superior Court denying the motion to dismiss, Pet. App. 54a, is unreported.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 6, 2015. The petition for a writ of certiorari was filed on March 21, 2016, and granted on October 28, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

North Carolina General Statutes Chapter 14, Section 202.5 provides in pertinent part:

> (a) Offense.—It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become

members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

* * * *

(e) Punishment.—A violation of this section is a Class I felony.

STATEMENT OF THE CASE

In April 2010, petitioner J.R. Packingham shared the following post on Facebook after a traffic ticket was dismissed:

> Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court costs, no nothing spent.....Praise be to GOD, WOW! Thanks JESUS!

J.A. 136 (ellipsis in original). Soon after, he was arrested and convicted for violating North Carolina General Statutes Chapter 14, Section 202.5.

1. Section 202.5 makes it a felony for a person on North Carolina's Sex Offender and Public Protection Registry to "access" any "commercial social networking Web site" that he "knows" does not restrict membership to adults. N.C. Gen. Stat. § 14-202.5(a).

a. Social networking websites are diverse and varied. But generally speaking, they enable large numbers of users to connect with one another, to form groups along common interests, and to share "information, opinions, and other content." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1356 (D.C. Cir. 2014). These websites allow users to mutually agree to connect as "friends" (Facebook, Snapchat, Myspace), "followers" (Twitter, Instagram, Pinterest), "subscribers" (YouTube), and "connections" (LinkedIn).

b. These sites continue to grow in relevance, functionality, and popularity. For example, 62% of American adults get news from such sites. Jeffrey Gottfried & Elisa Shearer, Pew Res. Ctr., *News Use Across Social Media Platforms 2016* (May 26, 2016), http://pewrsr.ch/27TOfhz. Every day, more than half of American adults log onto that site. Shannon Greenwood et al., Pew Res. Ctr., *Social Media Update 2016* (Nov. 11, 2016), http://pewrsr.ch/2fIeTTY. And more than 90% of Facebook's U.S. users are adults. Statista, *Distribution of Facebook Users in the United States* (Jan. 2016), http://bit.ly/2hgnPnE. These sites are aggressively adding features and services, such as instant messaging, live broadcasting, virtual marketplaces, emergency notifications, and specialized platforms for political candidates and government officials. *See, e.g.*, Ryan Holmes, *5 Big Changes Coming to Social Media in 2016*, Observer (Jan. 20, 2016), http://bit.ly/1OGVRrI; *Elections*, Facebook, https://politics.fb.com.

Billions of people worldwide now use these sites. YouTube alone has more than one billion monthly active users. Facebook, which had approximately 100

million users when Section 202.5 was enacted in 2008, had grown to 1.59 billion users when the petition for certiorari was filed. Statista, *Numbers of Monthly Active Facebook Users Worldwide As of 3rd Quarter 2016* (2016), http://bit.ly/2daz7Yr. While the petition was pending, almost 200 million more users joined the site. *Id.*

c. On every site, users can determine what information is shared and with whom. On Facebook, for example, users are able to designate which information may be viewed by family, "friends," friends of friends, all Facebook users, or the public at large. Minors, however, have long been subject to significantly more restrictive rules regarding what content they can share with other users. Facebook—which prohibits those under thirteen from creating accounts—implements default settings that segment users by age: Adults cannot see the profile information of minors who are outside their network. *See* Berkman Ctr. for Internet & Soc'y, *Enhancing Child Safety and Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States* app. E, Facebook Submission 2-3 (2008) ["*Enhancing Child Safety*"].

More stringent restrictions are imposed on users between the ages of thirteen and sixteen. *See, e.g.*, *Enhancing Child Safety* app. E, Viacom Submission 1-2 (Viacom, which operates numerous sites, prohibits users under sixteen from making their profiles "public" to adult users.). These sites have also developed sophisticated automated systems that operate continuously to detect "anomalous behavior"

and "unusual patterns"—for instance, "users whose friend requests are ignored at a high rate" or "adult users who are contacting an inordinate number of minors." *Id.*, Facebook Submission 2.

2. The General Assembly enacted Section 202.5 in 2008 as part of a concerted effort to make North Carolina "one of the toughest states, if not the toughest" in its treatment of those on the State's registry. Whitney Woodward, *NC Senate, House Approve "Jessica's Law,"* Associated Press (July 17, 2008).

a. An initial version of Section 202.5 would have increased existing penalties for exploiting a minor or soliciting a minor "by computer"—criminal laws that apply to registrants and nonregistrants alike. *See* S.B. 132–2d ed., 2007 Gen. Assemb., Reg. Sess. §§ 2-4, 6 (N.C. 2007). That draft also would have imposed obligations on website operators to ensure that minors obtain adult permission before establishing accounts and to afford parents access to their child's page "at all times." *See id.* § 8. But the General Assembly abandoned these proposals in favor of one imposing punishment on registrants. That measure was unanimously approved by both houses. *Senate Bill 132: Protect Children from Sexual Predators Act*, N.C. Gen. Assemb. (July 18, 2008), http://bit.ly/2hgvhis.

b. Section 202.5 applies to the approximately 20,000 individuals on North Carolina's registry. *See* N.C. Gen. Stat. § 14-202.5(a); *Offender Statistics*, N.C. Dep't Pub. Safety, http://sexoffender.ncsbi.gov/stats.aspx. When initially enacted, North Carolina's registration law focused on providing law enforcement and the public with up-to-date,

searchable identification and residency information about residents previously convicted of certain sexual and other offenses. *See* N.C. Dep't of Justice, Law Enf't Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* 1 (Sept. 2014) ["*Registry Overview*"].

Today, North Carolina uses the registry for purposes beyond providing information. It has enacted multiple restrictions—backed by criminal punishment—that deprive registrants of the ability "to move where they wish and to live and work as other citizens," *Smith v. Doe*, 538 U.S. 84, 101 (2003). *See Registry Overview*, *supra*, at 11-17; *see, e.g.*, N.C. Gen. Stat. § 14-208.18. *But see Does v. Cooper*, No. 16-6026, 2016 WL 6994223, at *9 (4th Cir. Nov. 30, 2016) (holding prior version of premises restriction unconstitutional).

Section 202.5 applies not only to individuals determined to "suffer from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses," N.C. Gen. Stat. § 14-208.6(6) ("sexually violent predator"),[1] but also to registrants whose reporting obligations derive from convictions for nonsexual offenses and offenses not involving minors, *see id.* § 14-208.6(1m), (5). It also extends to individuals convicted in another state for any offense that would require registration in that state. *See id.* § 14-208.6(4)(b). The criminal

[1] This designation triggers a lifetime registration requirement and continuous satellite-based monitoring. N.C. Gen. Stat. § 14-208.40 et seq. Petitioner does not fall in this category, and it has never been claimed that he could.

prohibition applies for the entire duration of the registration requirement—thirty years or life, depending on the reportable offense. *Id.* §§ 14-208.6A, 208.23.

Although there is considerable dispute about the reach of the statute's "commercial social networking Web site" definition, *see infra* 45-46, the State has prosecuted over 1,000 cases under Section 202.5. *See* John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek (May 29, 2013), http://bit.ly/2hb0cNj (reporting 1,136 charges under Section 202.5 between 2009 and 2012). Registrants have been charged for accessing Facebook, YouTube, Google+, Instagram, MySpace, and Skype.[2]

3. At the time petitioner posted on Facebook in 2010, he was not incarcerated, on probation, or on post-release supervision. His reportable offense was a 2002 conviction, when he was a 21-year-old college student, on a single count of taking indecent liberties with a minor. *See* Judgment, *State v. Packingham*, No. 02CRS-008475 (N.C. Super. Ct., Cabarrus Cty. Sept. 16, 2002) ["*2002 Judgment*"].

The court in that case had imposed the lowest allowable sentence, ten- to twelve-months, which it

---

[2] *See, e.g.*, *Crime Briefs: Websites*, News Rep., Feb. 1, 2016, at 4A (YouTube and Google+); *Burlington Sex Offender Charged with Using Social Networking Website*, Times-News (Nov. 17, 2015), http://bit.ly/2gdBrzB (Instagram); Pet. App. 55a (petitioner's co-movant indicted for accessing MySpace); Indictment, *State v. Davis*, No. 11CRS-053996 (N.C. Super. Ct., Halifax Cty. Jan. 9, 2012) (Skype).

then suspended, imposing twenty-four months' supervised probation. *2002 Judgment.* During the probationary period, petitioner was subject to mandatory conditions requiring that he register, submit to warrantless searches—including of his "computer or other electronic [devices]," N.C. Gen. Stat. § 15A-1343(b2)(9), refrain from illegal substance use, and avoid contact with the victim. *2002 Judgment.* The sentencing court chose to impose no additional conditions. *Id.*; *see* N.C. Gen. Stat. § 15A-1343(b2)(6) (authorizing further conditions as needed). Petitioner's period of supervised probation expired four years before the General Assembly enacted Section 202.5.

4. In April 2010, Durham Police Corporal Brian Schnee logged into his personal Facebook account to see if any registrants happened to be on that website. J.A. 11-12. He had heard reports of an arrest in another county under Section 202.5, which had "piqued [his] curiosity." *Id.* 11. During his search, Corporal Schnee came across petitioner's Facebook post. *Id.* 63-64. He obtained via warrant extensive records from Facebook. *Id.* 64-66. He then arrested petitioner and executed a warrant to search petitioner's home, seizing his computer, thumb drives, and Polaroid camera. *Id.* 66; Trial Tr. 161. Petitioner was indicted for violating Section 202.5.

5. a. Petitioner moved to dismiss the indictment on the ground that Section 202.5 violates the First Amendment.[3] During the hearing on that motion, the

---

[3] The motion to dismiss was heard and decided jointly with one filed by Christian Martin Johnson, who had been arrested

court admitted into evidence exhibits showing that Section 202.5 proscribes access to numerous websites, including Facebook, Twitter, MySpace, bettycrocker.com, Godtube.com, medhelp.org, orkut, scout.com, and Amazon. J.A. 123-35.

At the hearing, defense counsel examined Corporal Schnee as to his understanding of the statute. He testified that he was not sure which sites Section 202.5 covered. J.A. 77-78. Indeed, if asked by "folks out on the street" who want to access a website but are concerned that it might be prohibited, he would recommend, "don't do it." *Id.* 78. "The best way for . . . somebody not to get in trouble is to not do something." *Id.*

The trial court denied the motion to dismiss, emphasizing that it was the legislature's responsibility to weigh "disparate interests and to forge a workable compromise." Pet. App. 60a (quoting *State v. Bryant*, 614 S.E.2d 479, 486 (N.C. 2005)). The court concluded that the "balance" Section 202.5 strikes, between "activities of sex offenders" and "protection of minors," was constitutionally permissible. *Id.* 64a.

Petitioner stood trial. The State never alleged that petitioner engaged in illicit activity on Facebook or any other website. The only evidence of "access"

---

by Corporal Schnee for accessing MySpace and whose case was pending before the same judge. Pet. App. 55a. Johnson testified at the Motions Hearing that he lost his job as an information technology contractor because his work required him to use websites that Section 202.5 forbade him from accessing. J.A. 117-20. The charges against Johnson were eventually dismissed.

presented was a print-out of the one "God is Good!" post. *See* J.A. 136. During the State's closing argument, the prosecutor told jurors:

> [Y]ou may not like the law, because the law could [have] sa[id], defendant having been convicted [a] sexual offender . . . cannot have specific contact on Facebook with minor children, or it could [have] sa[id] that the access to Facebook can't say specific things that might entrap, and it doesn't. It doesn't. . . . [E]ven if you don't agree with it, even if you don't like it, . . . the law says he cannot access a social networking site.

Trial Tr. 253-54. The jury convicted petitioner of criminal "access." He received a prison sentence, which the court suspended. *Id.* 289.

b. The North Carolina Court of Appeals overturned petitioner's conviction, unanimously holding that Section 202.5 violates the First Amendment, both on its face and as applied.

The court of appeals highlighted the similarities between Section 202.5 and other states' "social media bans," which various federal courts had held unconstitutional. *See* Pet. App. 43a-46a (citing *Doe v. Prosecutor*, 705 F.3d 694, 699 (7th Cir. 2013); *Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1112 (D. Neb. 2012)). Like those laws, the court of appeals explained, Section 202.5 has an undeniably legitimate purpose—protecting minors from sexual abuse—and does not suppress expression based on its subject or viewpoint. *See id.* 42a. But also like those laws, the court held, Section 202.5 impermissibly

"prohibit[s] an enormous amount of expressive activity on the internet," *id.* 46a, including much that is "unrelated to online communication with minors," *id.* 51a (explaining Section 202.5 "could be interpreted to ban registered sex offenders from . . . conducting a 'Google' search, [or] purchasing items on Amazon.com").

c. The State sought review in the North Carolina Supreme Court, pointing to a feature of Section 202.5 it claimed the appellate court overlooked. *See* Pet. Discretionary Review 10-11 (No. BL-4). While other states' laws sought to prevent registrants from using social networking sites on the "theory that actual speech" with minors for improper purposes was the danger, North Carolina's measure aimed to prevent "information *gathering*," which could enable malefactors to target young people for criminal purposes. *Id.*

The State Supreme Court, over vigorous dissent, reversed, thereby reinstating petitioner's conviction. It held Section 202.5 to be "constitutional in all respects." Pet. App. 2a. The court first concluded that the law should be analyzed as a "limitation on conduct" rather than a speech restriction, because it prohibits registrants from "accessing" proscribed websites. *Id.* 9a. Accordingly, the court pronounced the burdens on their ability "to engage in speech on the Internet" to be "incidental." *Id.* 12a. The court then accepted the State's asserted interest in "prevent[ing] registered sex offenders" from "harvest[ing] information" as "unrelated to the suppression of free speech." *Id.* 13a-14a.

Citing the First Amendment test applicable to content-neutral time, place, or manner regulations,

Ward v. Rock Against Racism, 491 U.S. 781 (1989), the North Carolina Supreme Court pronounced Section 202.5 "sufficiently narrowly drawn," Pet. App. 16a, because it is "not substantially broader than necessary to achieve the government's interest," *id.* 15a (quoting *Ward*, 491 U.S. at 800). Although the law "could have been drafted even more narrowly," the court emphasized, it fell short of "imposing a blanket prohibition against Internet use." *Id.* 15a-16a. While "numerous well-known Web sites" may be foreclosed, *id.* 16a, the court continued, Section 202.5 "leaves open ample alternative[s]," *id.* 19a. For example, though registrants' accessing nytimes.com could give rise to prosecution, they "may [still] follow current events on WRAL.com," the local NBC affiliate's website. *Id.* 17a. For similar reasons, the statute did not fail as overbroad: Registrants "are prohibited from accessing only those Web sites where they could actually gather information about minors to target," but are otherwise "free to use the Internet." *Id.* 25a.

Justices Hudson and Beasley dissented, concluding that Section 202.5 is unconstitutional both on its face and as applied to convict petitioner. Invoking "basic principles of freedom of speech," Pet. App. 29a (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011)), the dissent explained that Section 202.5 "regulates First Amendment-protected activity" directly—not incidentally, *id.* And it does so with "alarming breadth," *id.* 34a (quoting *United States v. Stevens*, 559 U.S. 460, 474 (2010)), by "completely barr[ing]" a class of citizens "from communicating with others through many widely utilized commercial networking sites," *id.* 28a,

including "Facebook, Google+, LinkedIn, Instagram, Reddit, MySpace," and many sites not "normally thought of as 'social networking' sites" as well, such as FoodNetwork.com, nytimes.com, and "North Carolina's own News & Observer," *id.* 33a. Whether or not Section 202.5 warranted strict First Amendment scrutiny was of no moment. Because North Carolina's law burdens so much "more speech than necessary," *id.* 34a (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014)), it "c[ould] not survive" review even under less demanding standards, *id.*

SUMMARY OF ARGUMENT

The law North Carolina enforced against petitioner is an unusually "stark example of speech suppression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Section 202.5 imposes criminal punishment for activity fully protected under the First Amendment. The statute requires no proof that by accessing a website, the person caused or intended any harm. Rather, the law imposes punishment because access *could* facilitate harm if undertaken by someone with a criminal purpose.

I. Almost everything that happens on social networking websites is protected First Amendment activity. In fact, today, many Americans exercise their rights to express themselves, associate, and learn important information more on these sites than anywhere else.

Yet the North Carolina Supreme Court held that Section 202.5's burdens on Free Speech were merely incidental because punishment attaches to the "conduct" of accessing these websites. That is a non-

starter. As the Court has recognized, the safeguards of the First Amendment may not be evaded by regulating some *non*-speech attribute of protected activity. A law that prohibits the "act" of reading a newspaper—or gathering information from it—is a direct regulation of speech. Indeed, for all of the State's emphasis on the distinct issue of "gathering information," it never alleged that petitioner gathered any, let alone did so for improper purposes.

That Section 202.5 imposes its burdens on a subset of the State's populace—one defined by registry status is a First Amendment vice, not a virtue. It is hard to imagine that a government would impose, or a court would uphold, a similarly sweeping, criminal ban directed at any other group of people. And the First Amendment does not tolerate a different rule based on the fact of prior conviction. This Court recently held that declaring "Thank God for Dead Soldiers" outside a servicemember's funeral is entitled to full First Amendment protection. *Snyder v. Phelps*, 562 U.S. 443, 448, 460-61 (2011). Petitioner's right to affirm that "God is Good!" to his family and friends is no less worth protecting, his 2002 guilty plea notwithstanding.

II. Section 202.5 violates foundational First Amendment principles. The earliest cases enforcing the First Amendment rejected the notion that government may punish speech that causes no harm and was not meant to cause harm if doing so would reduce the likelihood that crime will occur. And the Constitution forbids punishing First Amendment activity that is void of criminality in itself on the theory that the right exercised *could be* abused by someone else. That some door-to-door solicitors might

be burglars in disguise, for instance, cannot support punishing solicitation.

These principles hold true in cases where, as here, the government's crime prevention interest is undeniably strong. Indeed, the Court's First Amendment doctrine was forged in such cases. Under our constitutional system, guilt is personal. Petitioner's speech was not itself criminal or part of a criminal transaction the State may punish. His conviction, therefore, may not stand.

III. The North Carolina Supreme Court was wrong to assume that Section 202.5 should be reviewed with less rigorous First Amendment scrutiny. Section 202.5 is not conduct regulation. Neither is it like any law this Court has considered, let alone upheld, under the test applicable to content-neutral time, place, or manner regulations.

But when a law is as plainly deficient as this one is, the level of scrutiny applied does not make a difference. Even treating Section 202.5 as if it were a garden-variety time, place, or manner regulation cannot save it. It is not narrowly tailored; it does not leave open ample alternative channels for the First Amendment activities it burdens; and it does not directly or effectively further the government's interest.

The essence of the narrow tailoring requirement is that a law may not pursue its purposes by proscribing a substantial quantity of speech that does not involve the targeted evil. Section 202.5 punishes vast amounts of protected activity to reach the minuscule fraction that implicates the government's purpose. Indeed, the statute prohibits the speech of

too many people, for too long, over websites the State acknowledges do not implicate its concerns.

As with any law that is so grossly overinclusive, there are many less restrictive alternatives to Section 202.5's boil-the-ocean approach. The most obvious would be a law making it a crime to access websites for nefarious purposes. This alternative, like others, would have the cardinal virtue of not convicting individuals for exercising their First Amendment rights. It would also apply to *everyone* who behaved culpably. Indeed, the prosecutor in this case acknowledged that the legislature "could have" enacted a number of alternatives that focused only on blameworthy access, but it did not do so.

Nor can it credibly be said that Section 202.5 leaves open ample alternative channels. The statute excludes registrants from the central platforms where, today, any North Carolinian can interact with his elected representatives, obtain a free online education, and find gainful employment. As a practical matter, the patchwork of alternatives the North Carolina Supreme Court proffered is insufficient.

For all the speech it burdens, Section 202.5 pursues its avowed objective in ways that are oddly indirect and ineffectual. For example, the statute's key criterion—the creation of personal profiles—is part of what experts say makes these sites safer and differentiates them from anonymous chat sites, which attract risk-taking adolescents and would-be offenders. Under Section 202.5, law enforcement will likely identify only those who post publicly while those who gather information surreptitiously will evade detection. The law does not attempt to address

online exploitation by nonregistrants, who account for the vast majority of such offenses.

IV. Petitioner's conviction was plainly unconstitutional. Indeed Section 202.5 cannot be constitutionally applied under any circumstance. Even if such a case could be imagines, the law would still warrant facial invalidation as substantially overbroad. Petitioner is one of more than 1,000 North Carolinians who have been charged with an offense that criminalizes speech without any proof of harm or criminal intent. And he is one of approximately 20,000 State residents whom Section 202.5 relegates to a lower tier of Free Speech rights. This, "[t]he First Amendment does not permit." *Virginia v. Black*, 538 U.S. 343, 367 (2003) (plurality opinion).

ARGUMENT

I. Section 202.5's Prohibition on Accessing Social Networking Websites Punishes Core First Amendment Activity.

A. The Statute Imposes Serious Burdens on Quintessential First Amendment Activity.

Practically everything that happens on social networking websites—everything Section 202.5 punishes—is fully-protected, core First Amendment activity. Every hour of every day, millions of users rely on these sites to:

- Exercise their religion, *see, e.g.*, Pew Res. Ctr., *Religion and Electronic Media* (Nov. 6, 2014), http://pewrsr.ch/1tPEmyx; Tierney McAfee, *Tweets Be with You: Pope Francis' Top 10 Greatest Twitter Moments*, People (Sept. 19, 2015), http://bit.ly/2fYImgT;

- Petition their public servants, *see, e.g.*, Anjali Mullany, *Sore-Backed Newark Mayor Cory Booker Uses Twitter to Rescue Citizens, Dig Out Cars, Deliver Diapers*, N.Y. Daily News (Dec. 28, 2010), http://nydn.us/2hbp9rA;
- Peaceably assemble, *see generally* John D. Inazu, *Virtual Assembly*, 98 Cornell L. Rev. 1093 (2013);
- Associate with like-minded individuals, *see, e.g.*, Nolan Feeney, *Facebook's New Photo Filter Lets You Show Solidarity with Paris*, TIME (Nov. 14, 2015), http://ti.me/1HQ6W6w;
- Express themselves through music and art, *see, e.g.*, Mekado Murphy, *An Everyman Goes from YouTube to Journey*, N.Y. Times (Apr. 27, 2012), http://nyti.ms/10cZ61Y;
- Gather public information, *see, e.g.*, Gottfried & Shearer, *supra*;
- And watch cat videos, *see, e.g.*, Abigail Tucker, *How Cats Evolved to Win the Internet*, N.Y. Times (Oct. 15, 2016), http://nyti.ms/2e7mv2W.

"[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

The very reasons we have a First Amendment affirm the importance of including social networking sites within its protections. This Court has affirmed that the Freedom of Speech is a "fundamental personal right[] and libert[y]." *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939). The First Amendment creates space for "intellectual individualism" and "freedom to differ," *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943), even when differences "invite dispute," *Texas v. Johnson*, 491 U.S. 397, 408 (1989). But the First Amendment guarantees "more than self-expression; it is [also] the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Thus, the Court has recognized that the First Amendment serves "to assure [the] unfettered interchange of ideas for the bringing about of political and social change[]." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The character and ubiquity of social networking sites have significantly affected the way individuals exercise their First Amendment freedoms. Any individual can do so with a click from any place, at any time. In a single day, for instance, a person might seek spiritual guidance from a verse on his pastor's Twitter feed. He could display a family photo on Instagram wishing a sibling in another city happy birthday. He might post in the "COWBOYS FANS ONLY!" Facebook group to celebrate a historic season with fellow fans. He could embark on a new career by searching LinkedIn for job openings. He might check Twitter to learn where a local food truck can be found for lunch. He could submit debate questions to

political candidates over YouTube or Facebook. *See, e.g.*, Paul J. Gough, *CNN's YouTube Debate Draws Impressive Ratings*, Reuters (July 25, 2007), http://reut.rs/2eAzk9e. Or he could communicate directly with the President of the United States on Twitter.

"[I]t is a prized American privilege to speak one's mind." *Bridges v. California*, 314 U.S. 252, 270 (1941). And today, Americans speak their minds—and engage in vast swaths of other First Amendment activity—primarily on social networking sites. For registrants in North Carolina, however, Section 202.5 makes doing so a felony.

B. Section 202.5 Directly Regulates the Freedom of Speech—Not Conduct.

The linchpin of the North Carolina Supreme Court's decision was its assumption that because Section 202.5 punishes "accessing" social networking websites, the law could be analyzed as "a regulation of conduct." Pet. App. 6a. Thus, the court held the burdens the law imposes on First Amendment activity are "only incidental[]." *Id.* 9a. That premise is seriously wrong as a matter of common sense and constitutional principle.

1. Time and again, this Court has held that the strictures of the First Amendment may not be evaded by ostensibly regulating some physical aspect of protected activity. The Court has emphasized the importance—for both the coherence of First Amendment doctrine and the "preserv[ation] of freedom"—of enforcing these "vital distinctions between words and deeds, between ideas and conduct." *Ashcroft v. Free Speech Coalition*, 535 U.S.

234, 253 (2002); *see also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006).

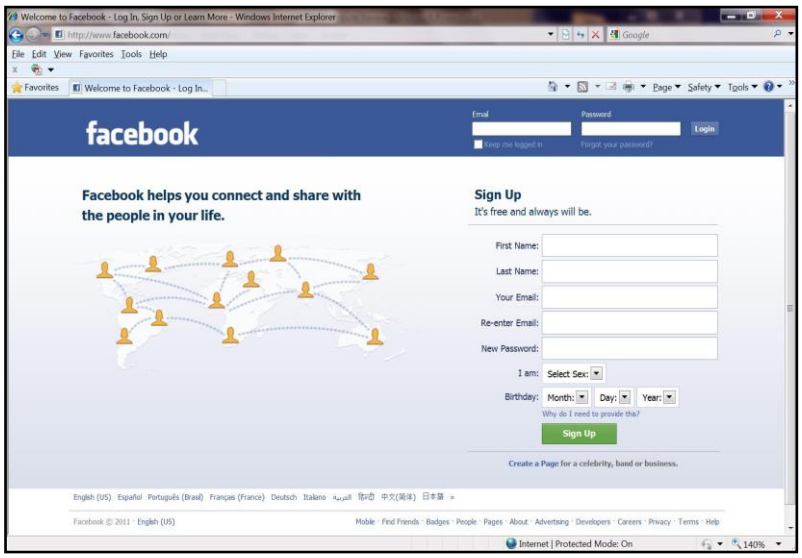
A law that forbids publication of magazines, for instance, does not become more tolerable by prohibiting the conduct of "purchasing or using ink." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011). And a law forbidding reading the New York Times would not become conduct regulation if it authorized punishment for physically picking up—or accessing—that newspaper. Accordingly, the Court has held that laws prohibiting activities such as picketing, *Frisby v. Schultz*, 487 U.S. 474, 488 (1988), solicitation, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002), and leafleting, *Schneider*, 308 U.S. at 164, are speech—not conduct—restrictions.

So too here. What goes for the New York Times goes for nytimes.com—and for all the social networking websites at the core of Section 202.5's proscription. A law that aims to prevent constitutionally protected expression does not become "conduct" regulation, nor do its burdens on speech become "incidental," by making "access" to the means of communication the trigger for criminal liability.

To be sure, a legislature could have reasons unrelated to speech suppression for limiting the conduct of accessing websites—just as a government might have non-speech reasons for regulating the burning of a flag or draft card. *See Johnson*, 491 U.S. at 412-13 n.8; *United States v. O'Brien*, 391 U.S. 367, 375 (1968). For example, the government could regulate access to prevent a fragile governmental website from being inundated by users or to fairly

apportion bandwidth among soldiers stationed at a remote base.

But that is not what Section 202.5 does. By the State's own reckoning, the harms with which Section 202.5 is concerned do not involve access in itself, but rather the activities that accessing social networking websites enable. *See* BIO 27; Pet. App. 15a. Indeed, the State could not credibly claim otherwise. The conduct the statute makes criminal is complete when a person arrives at an innocuous landing page:



Mo. to Dismiss Hr'g, Defense Ex. 1 at 138; *see* J.A. 38-39.

The evils against which the statute is directed—abuse of these sites to facilitate harm to minors—are criminal in their own right. *See, e.g.*, *Free Speech Coalition*, 535 U.S. at 251-52; N.C. Gen. Stat. § 14-202.3. But a law that aims to restrict abuses of the Freedom of Speech by preventing speech from

occurring is not an indirect regulation. *See Near v. Minnesota*, 283 U.S. 697, 722-23 (1931).

2. Even the North Carolina Supreme Court recognized as "apparent to any who access them" that the prohibited websites "provide . . . a means of communication." Pet. App. 9a. But it then embraced respondent's argument that the State's concern—about a would-be assailant's ability could also collect information to "facilitate [improper] contact"—is an interest unrelated to suppressing speech. *Id.* 13a

Decades of precedent are to the contrary. In decisions beginning with *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965), through *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976), and *Sorrell*, 564 U.S. at 577 (2011), the Court has made clear that receiving and "gathering" information are activities fully and independently protected under the First Amendment, not conduct that may be freely regulated and punished. When a citizen reads about the President's budget proposals in a public library, she is engaged in activity protected under the Free Speech Clause, even though she may never utter a word and even though the librarian would shush her if she did. When she gathers the same information by accessing Twitter or Facebook, her research does not become conduct.

What is true for the right to communicate information holds for the right to gather information. The fact that reporting on a celebrity's travel schedule might increase the risk of her being attacked does not support prohibiting a newspaper from publishing the story. Nor does it justify a law punishing readers for accessing that information

because a deranged fan might also read it and use the information to do her harm. Accessing available information and doing so for pernicious purposes are different things. *See Free Speech Coalition*, 535 U.S. at 251 ("There are many things innocent in themselves . . . that might be used for immoral purposes.").

Unlike that hypothetical law, Section 202.5's prohibition is not limited to accessing particular information from one particular source. It prohibits and punishes accessing a vast array of important websites without regard to what information—if any—the defendant gathers.

Indeed, in this case, the State never alleged that petitioner gathered information at all. The entirety of the charge giving rise to his felony conviction was that he used a medium on which another person, one who harbored criminal intent, might find useful information.

C. That Section 202.5 Targets Speech of Registrants Does Not Place the Statute Beyond the First Amendment.

It is hard to imagine that a law anything like Section 202.5 would have been enacted, let alone upheld as conduct regulation, had it targeted any subset of the State's population other than persons on the registry. In fact, when the North Carolina Supreme Court confronted a First Amendment challenge to the State's generally applicable "cyberstalking" statute, it took a very different view. In that case, the court recognized that "[p]osting information on the Internet—whatever the subject matter—can constitute speech as surely as stapling

flyers to bulletin boards." *State v. Bishop*, 787 S.E.2d 814, 817 (N.C. 2016). And it held "[s]uch communication does not lose protection merely because it involves the 'act' of posting information online," explaining that "much speech requires an 'act' of some variety." *Id.* at 818. To the extent North Carolina's General Assembly and its courts believed that registrants' online activity warrants diminished First Amendment protection, this Court's precedents instruct otherwise.

1. The Court has steadfastly "decline[d] to carve out from the First Amendment" new "categories of speech" deemed unprotected. *United States v. Stevens*, 559 U.S. 460, 472 (2010). The notion that new categories of *speakers* may be made "stranger[s]" to the First Amendment, *see Romer v. Evans*, 517 U.S. 620, 635 (1996), is as "startling and dangerous" as the one *Stevens* rejected, 559 U.S. at 470.

Free Speech rights are not mere "interests" subject to legislative balancing, *see* 559 U.S. at 471-72, nor do "they derive from the beneficence of the state," *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). These rights are "fundamental" and "personal." *Schneider*, 308 U.S. at 161. A law forbidding the expression that *Cohen v. California*, 403 U.S. 15 (1971), held protected, but which permitted jackets that said "Down with the Draft!" would itself be a serious First Amendment violation. *See id.* at 26. But much more grave would be a law that forbade all people named Cohen from speaking on the subject of conscription. A state has no power to deprive any "person or class"—including those subject to registration under North Carolina law—"of the right to use speech to strive to establish worth,

standing, and respect for the speaker's voice." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340-41 (2010).

2. That the class singled out for disadvantage by Section 202.5 is defined by past criminal convictions cannot render this bedrock principle inoperative. More than eighty years ago, this Court settled that the "constitutional freedom[s]" of the First Amendment may not be forfeited on account of prior "derelictions." *Near*, 283 U.S. at 720. Indeed, *Near* invalidated a law that withheld First Amendment rights based on prior abuses of those same rights. *Id.*

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), the Court vindicated the First Amendment rights of convicted persons, including some still incarcerated, to commercially publish accounts of their crimes. *Id.* at 108, 123. In striking down New York's "Son of Sam" law, the Court understood that some of those narratives would be offensive and would cause victims "anguish" through "reliving their victimization." *Id.* at 118. But the Court also recognized the various works of enduring value the law would have burdened. *Id.* at 121-22.

Accordingly, whatever restrictions are permissible when subjecting a person to government supervision pursuant to a lawful sentence, petitioner and other registrants, who are "no longer on the 'continuum' of state-imposed punishments," *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (citing *Samson v. California*, 547 U.S. 843, 848 (2006)), are entitled to "the full protection of the First Amendment," *id.* at 572. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974) (Even while incarcerated, "a

prison inmate retains those First Amendment rights . . . not inconsistent with his status as a prisoner or with the legitimate penological objectives.").

A person who has completed his term of criminal supervision and fully regained his liberty may not be subject to warrantless searches merely because he was once convicted of an offense. *Cf. Samson*, 547 U.S. at 848. (Here, for example, North Carolina's requirement that petitioner submit to suspicionless searches lasted only during supervised probation. *2002 Judgment*, *supra*.) And it would be unprecedented and wholly anomalous to treat the "inalienable" right of Free Speech to be subject to life-long or decades-long post-release diminishment. Petitioner's First Amendment rights were abridged when Section 202.5 took effect in 2009, a half-decade *after* he completed his sentence. His rights continue to dwindle as more websites meet the broad statutory definition. *See infra* 56-57.

3. Nor can the General Assembly's belief that registrants, as a group, pose a higher likelihood of future offending than other residents supply the predicate for this unprecedented First Amendment regime. The ordinance invalidated in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which permitted labor picketers to demonstrate but barred all others, was justified on the ground that "nonlabor picketing is more prone to produce violence." *Id.* at 100. In rejecting the City's defense, the Court held that the First Amendment requires government to make "[p]redictions about imminent disruption . . . on an individualized basis, not by means of broad classifications." *Id.* at 100-01.

Persons on North Carolina's registry are highly heterogeneous in many respects. (Many were not even convicted of a sexual offense or one involving children or the use of computers.) But they do share one common characteristic: Almost all registrants—unlike the protesters in *Mosley*—have already been subject to assessment "on an individualized basis" during their time under State criminal justice supervision. They also remain subject to close, ongoing law enforcement monitoring. That makes restrictions imposed based on statistical generalizations especially unwarranted. *See Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997) (upholding statute that "narrow[ed] the class of persons eligible for confinement to those who are unable to control their dangerousness").

II. North Carolina May Not Criminally Punish First Amendment Activity That Neither Causes Harm Nor Was Intended to Cause Harm.

Section 202.5 imposes criminal punishment for First Amendment activities that do not cause any harm and are not undertaken for criminal purposes. The thesis of the statute, accepted by the court below—that combatting serious criminal harm can justify any preventative measures, including speech suppression—is one the Court confronted and rejected in its earliest cases enforcing the First Amendment. This Court has made clear that the government may not criminally punish First Amendment activities based on the potential that someone will abuse those rights. Section 202.5 represents "a dramatic departure from" this "constitutional tradition." *Watchtower Bible & Tract*

Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002).

1. The First Amendment does not permit the government to breach the "vital distinction[]" between protected speech and criminal "deeds." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). Thus, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court overturned the defendant's conviction for speaking at a meeting of a group that sought to overthrow the government by force. *Id.* at 357, 361-62. The Court announced a categorical rule that "participation in a peaceable assembly and a lawful public discussion" may not be "the basis for a criminal charge." *Id.* at 365; *accord Herndon v. Lowry*, 301 U.S. 242, 259-60 (1937). While Free Speech rights can be abused for criminal purposes, the Constitution permits "legislative intervention" only to "deal[] with the[ir] abuse." *De Jonge*, 299 U.S. at 364-65.

The Court has similarly rejected speech suppression measures based on the *possibility* that speech rights will be abused. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court struck down a ban on door-to-door canvassing. *Id.* at 149. The law's premise was indistinguishable from the one animating Section 202.5: "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises." *Id.* at 144.

These early First Amendment cases establish basic principles restricting criminal punishment to persons proven to have acted with both "an evil-doing hand" and "an evil-meaning mind" apply with

maximal force when protected speech is targeted. *See Morissette v. United States*, 342 U.S. 246, 251-52 (1952). Early decisions such as *De Jonge* and *Herndon*, like later ones addressing the power to punish "incitements," demand proof of "clear and present danger." The defendant's own activity must itself be "[1] directed to inciting or producing [2] imminent lawless action and [3] [be] likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). *See Bridges v. California*, 314 U.S. 252, 263 (1941) ("[T]he substantive evil must be extremely serious and the degree of imminence extremely high.").

These rules apply even "where the substantive evil sought to be prevented by the restriction is 'destruction of life or property.'" *Bridges*, 314 U.S. at 262 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940)). In such cases, the First Amendment maintains stringent limits on the power to punish: When activity protected by the First Amendment is neither criminal in itself, *see R. A. V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (recognizing that "a law against treason . . . is violated by telling the enemy the Nation's defense secrets"), nor an "integral part" of a criminal transaction, *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), it may be punished only upon proof of both personal culpability and a direct and immediate connection to the harm.

2. Those principles are not relics of a bygone constitutional era. In *Free Speech Coalition*, this Court considered a federal statute prohibiting possessing and distributing "virtual child pornography": images that depict minors engaging in

sexually explicit conduct—including intercourse, bestiality, masturbation, or masochistic abuse, 18 U.S.C. § 2256(2) (2000)—but in fact were computer-generated or involved adult actors, 535 U.S. at 239-41.

In enacting that law, Congress had conducted extensive hearings and made detailed legislative findings that possession of virtual child pornography would contribute to and facilitate actual sexual abuse, by increasing pedophiles' "appetites" for contact with children and by enabling them to more effectively accomplish their criminal ends by overcoming a young victim's resistance. 535 U.S. at 241-42, 245. Congress further found that the government would have difficulty convicting those guilty of possessing actual child pornography because the virtual depictions were effectively indistinguishable. *Id.* at 242.

This Court recognized the "repugnan[ce]" of the behavior against which the measure was directed: "the sexual abuse of a child." 535 U.S. at 244. And the Court accepted Congress's judgment that virtual child pornography could be used by "subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the[ir] impulses." *Id.* at 245.

But these congressional findings could not justify the law. The Court first identified the constitutional difference between virtual and actual child pornography, the possession of which is beyond First Amendment protection, *see Osborne v. Ohio*, 495 U.S. 103, 111 (1990). Actual child pornography, by recording abuse, is "intrinsically related" to the crime of sexually abusing children. *Free Speech Coalition*,

535 U.S. at 249 (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)). Virtual child pornography "records no crime." *Id.* at 250.

Without disturbing Congress's findings concerning the potential to facilitate sexual abuse, the Court emphasized that such offenses would "not necessarily follow from the speech, but [would] depend[] upon some unquantified potential for subsequent criminal acts." 535 U.S. at 250. Nor could pedophiles' ability to use virtual pornography to solicit minors suffice. *Id.* Virtual child pornography, the Court explained, is like "many [other] things innocent in themselves . . . that might be used for immoral purposes," and the possession of which may not be criminalized on that basis. *Id.* at 251-52.

Accordingly, the Court held, the First Amendment directs the government to punish those adults who actually abuse minors or who actually provide children inappropriate but constitutionally protected material in an attempt to solicit them. 535 U.S. at 251-52. As for the argument that the prohibition should be upheld based on the increased difficulty of convicting individuals who possessed actual child pornography, the Court explained that would "turn[] the First Amendment upside down." *Id.* at 255.

3. Section 202.5 flouts these core First Amendment prohibitions. The statute does not limit punishment to speech (or gathering information) that is criminal in itself or integral to the crime that concerned the General Assembly. The crime it creates involves "no attempt, incitement, solicitation, or conspiracy." 535 U.S. at 253. Nor does it require proof that the registrant accessed a website for any

nefarious purpose; the offense is complete with access alone. Indeed, as petitioner's case shows, even compelling proof that a registrant *did not* access a site for an illicit reason is of no moment under Section 202.5. *Cf. id.* at 255-56 (discussing the possibility that "an affirmative defense [could] save a statute from First Amendment challenge"); *United States v. Stevens*, 559 U.S. 460, 477-80 (2010) (acknowledging, but finding insufficient, an exemption for depictions of unlawful animal cruelty that have "serious" value).[4]

This law is an even more thorough affront to First Amendment principles than the one invalidated in *Free Speech Coalition*. The First Amendment activity in *Free Speech Coalition* was surely lower on "the hierarchy of First Amendment values," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)), than the wide range of First Amendment activity prohibited by Section 202.5, which, as this case shows, includes praising God and reporting on judicial proceedings.[5] And the risk *Free Speech*

---

[4] To be sure, Section 202.5 requires that an offending registrant "know" that minors can "become members" on the social networking site. But like the mens rea requirement held inadequate in *Elonis v. United States*, 135 S. Ct. 2001 (2015), whether a registrant knows that minors use the same social networking website is not "the crucial element separating legal innocence from wrongful conduct," *id.* at 2011 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)), namely an intent to cause them harm.

[5] Recent decisions of this Court have held the First Amendment protects similarly low-rung speech. *See, e.g.*,

Coalition held constitutionally insufficient (that pedophiles might put virtual pornography to predatory use) is surely far more substantial than the "unquantified potential for subsequent criminal acts" here, 535 U.S. at 250—that of a registrant's accessing a societally important website to cause harm.

But the principle is the same: North Carolina "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" 535 U.S. at 253 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)). That is exactly what the decision in this case did. It allowed the State to punish petitioner's access—activity that was "void of criminality," *Herndon*, 301 U.S. at 261—on the ground that somebody "*could* actually gather information about minors," Pet. App. 25a (emphasis added).

III. Section 202.5 Fails Any Form of First Amendment Scrutiny.

Section 202.5 is so "obvious and flagrant" a violation of the First Amendment, *Mills v. Alabama*, 384 U.S. 214, 219 (1966), that there is no real need for scrutiny under this Court's modern tests to

---

United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012) (falsely claiming to have won the Medal of Honor); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 789 (2011) (virtually raping and dismembering women on video games sold to minors); *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (picketing outside a servicemember's funeral with signs reading "You're Going to Hell"); *Stevens*, 559 U.S. at 465 (videos depicting animal cruelty, including ones showing women crushing puppies to death with high-heeled shoes).

perceive its defects. Nor, as the Justices dissenting below explained, is it necessary to resolve definitively which tier to assign it to. *See* Pet App. 34a; *see, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002). Even if reviewed under the First Amendment test applicable to garden-variety time, place, or manner regulations, Section 202.5 fails dramatically.

The court below was wrong to assume less rigorous First Amendment scrutiny was appropriate. But it was able to pronounce Section 202.5 "constitutional in all respects" only by adopting a version of the time, place, and manner test that was intermediate in theory, but supine in fact.

A. Section 202.5 Warrants Close Judicial Scrutiny.

In deciding how closely to scrutinize the statute, the court below assumed that Section 202.5 should be analyzed as a conduct-regulating law that imposes incidental burdens, *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), or as a content-neutral time, place, or manner restriction, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See* Pet. App. 12a.

Section 202.5 is neither. The North Carolina Supreme Court's decision to review Section 202.5 under the relatively forgiving *O'Brien* test cannot be defended. Section 202.5 is unconcerned with *any* "nonspeech element." *O'Brien*, 391 U.S. at 376. It prohibits access *only* as a means of preventing constitutionally-protected expression and information-gathering over the proscribed websites.

See supra 21-25.[6] Nor is Section 202.5 properly analyzed under the *Ward* test. It is unlike any law this Court has considered as a time, place, or manner restriction. It is speech suppression, pure and simple.

1. The regulations this Court's cases have analyzed under the time, place, and manner test have operated on a limited scope. In *Ward*, the Court upheld a regulation governing how sound would be amplified in a performance venue in a public park. 491 U.S. at 803. The requirements were imposed on all users of the facility and only after previous noise control measures had been tried and failed. *Id.* at 785-87. And in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the Court struck down a Massachusetts law that imposed regulations only in a thirty-five-foot zone surrounding abortion clinics. *Id.* at 2526, 2541.

Section 202.5's prohibition on accessing social networking sites is incomparably larger and more indiscriminate. If New York barred musicians from performing in the entire State or if Massachusetts made it a crime to protest in any city with an abortion clinic, those hypothetical measures would still be, by orders of magnitude, *more* "surgical[ly] precis[e]" than North Carolina's law here, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 798 (1994) (Scalia, J., concurring in judgment in part and dissenting in part). Section 202.5 is continental, indeed global, in scope: YouTube has more than

---

[6] Respondent does not appear to disagree. Confronted with petitioner's comprehensive showing at the certiorari stage that the *O'Brien* test cannot apply, the State's response was simply, that "is an interesting question." BIO 21.

1 billion members; Facebook is fast approaching 2 billion; and hundreds of millions of others log on regularly to Twitter, LinkedIn, Instagram, and Google+. *See* Facebook, *Facebook Q3 2016 Results* 5 (Nov. 2, 2016), http://bit.ly/2hhzVKE; *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1109-11 (D. Neb. 2012).

2. Moreover, the North Carolina Supreme Court's analogy to *Ward* ignores the *reason* for this Court's greater solicitude for time, place, or manner regulations: The job of governance—including the responsibility to administer public fora in which Free Speech is welcome—necessitates regulations that impose some burden on First Amendment activity. "[T]wo parades cannot march on the same street simultaneously." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (citing *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941)). And though public streets, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague v. CIO*, 307 U.S. 496, 515 (1939) (plurality opinion), a "demonstration . . . on a large street during rush hour might put an intolerable burden on the essential flow of traffic," *Grayned*, 408 U.S. at 115-16 (citing *Cox v. Louisiana*, 379 U.S. 536, 554 (1965)).

This focus on even-handed administration of public spaces to prevent actually incompatible activities is the *sine qua non* of time, place, or manner regulations. For example, government may ban demonstrations outside a school during the school day when they "materially disrupt[] classwork." *See Grayned*, 408 U.S. at 118 (quoting

Tinker v. *Des Moines Sch. Dist.*, 393 U.S. 503, 513 (1969)).

This concern is not implicated by social networking sites because one person's accessing a site is not in any way incompatible with another's. There can be two parades on Twitter at the same time—or two hundred. Scarcity is not an issue. For example, sixty *hours* of video content are uploaded to YouTube every minute. YouTube, *One Hour Per Second*, http://www.onehourpersecond.com. These sites permit users to read, watch, and experience only what they want—and only from the sources they choose to hear from. And the only people able to view the user's own content or profile information are those with whom the user has chosen to share that information.

This is even truer with respect to non-adults who establish accounts on social networking websites. In response to federal regulations restricting website operators' collection of certain information from minors younger than thirteen, *see* Children's Online Privacy Protection Rule, 16 C.F.R. § 312, most sites bar those children from creating accounts altogether. *But see* ConnectSafely, *A Parent's Guide to Snapchat*, http://bit.ly/1b3oA5Y (describing Snapchat app for children called "SnapKidz," which does not allow users to add friends or share information at all). Leading sites have prohibited users under sixteen from sharing information with adults outside their networks. *See supra* 5. Accordingly, the fact that the statute "limits" its criminal penalty to *sites* that permit minors (that is, not even to minors' personal pages) does not make petitioner's accessing

Facebook any more "materially disrupt[ive]" in any way.

3. The decision below ignored a further reason not to afford Section 202.5 the benefit of the *Ward* rule. This Court does not treat measures like Section 202.5 that disfavor the speech of a subset of speakers as content-neutral time, place, or manner restrictions. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the regulation prohibiting camping applied to anyone who sought to use Lafayette Park and the Washington Mall. *Id.* at 290-92, 297. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the law prohibiting picketing at residences applied to all residential picketers. *Id.* at 477. And in *Ward*, the noise regulation applied to all who performed at the public bandshell. 491 U.S. at 787.

To be sure, an even-handed noise regulation could burden rock musicians more than chamber musicians, but "an incidental effect on some speakers [and] not others" does not render the time, place, and manner framework inoperative. *Ward*, 491 U.S. at 791. By contrast, the Court has consistently rejected laws—like Section 202.5—that facially "discriminat[e] among different users of the same medium for expression," *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court refused to uphold as a valid time, place, or manner restriction a municipality's "ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.'" *Id.* at 429. It did so even though the City's aesthetic concerns would have supported an even-handed ban—and even though the selective ban did not reflect "animus toward the ideas

contained within respondents' publications." *Id.*; *accord Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193-94 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

These decisions recognize that when the government targets certain speakers, it "commit[s] a constitutional wrong" that is distinct and "[q]uite apart from" the type of content-based regulation the Constitution forbids. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Broad speech suppression, "convenien[t]" in many circumstances, is much more likely to be "the path of least resistance" when only a subset of speakers is disadvantaged. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014); *see Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.").

4. The North Carolina Supreme Court's remaining—and only explicit—reason for subjecting Section 202.5 to less rigorous scrutiny also fails. The decision highlighted that the law is "content neutral," Pet. App. 11a-12a, in that petitioner would have been punished whether he said "God is good" or "God is dead," and it was not motivated by disapproval of the opinions or ideas he might express. But this Court has made clear that the limitations the First

Amendment imposes go beyond a prohibition on government-enforced orthodoxy. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (A statute can violate the First Amendment even if it does not evince "an[y] improper censorial motive." (quoting *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)). Regardless of their intent, "[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

Moreover, this law achieves its "content neutrality" in a constitutionally unsavory way: by punishing access categorically, before registrants have an opportunity to speak. In *Near v. Minnesota*, 283 U.S. 697 (1931), the State enacted a gag law on newspapers previously found to have published "malicious, scandalous and defamatory" speech. *Id.* at 701-02. It was hardly a First Amendment virtue that the law did not specifically bar further libelous speech, but instead chose to prevent those newspapers from publishing altogether. *See id.* at 722-23; *accord Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring in judgment) ("A free society prefers to punish the few who abuse the rights of speech *after* they break the law than to throttle them and all others beforehand." (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)). And the measure struck down in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987)—which prohibited all "First Amendment activities" inside an airport, *id.* at 574—did not become less suspect because it did not single out particular content. The vast and

indiscriminate character of Section 202.5's prohibition is likewise reason for vigilant, not diminished, First Amendment scrutiny.

B. Section 202.5 Cannot Survive Even Garden-Variety Intermediate Scrutiny.

Even if Section 202.5 were to be analyzed under the test that governs time, place, or manner regulations, it could not survive scrutiny. Under the Court's precedents, such a law may be upheld only if it is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Ward*, 491 U.S. at 791. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540.

Section 202.5 fails each prong. The statute burdens a vast amount of protected and high-value speech that is unrelated to the evil the State seeks to address. The General Assembly failed to employ means of achieving North Carolina's interest that burden far less speech. And the alternative channels it leaves open are manifestly inadequate. Finally, it does not effectively further the State's interest.

The North Carolina Supreme Court could hold otherwise only by flipping the *Ward* test on its head: by ignoring wholesale the harms that Section 202.5 poses to First Amendment activities, declining to consider any less restrictive means that the State could employ to achieve its purpose, and excusing the State's far-reaching ban because it fell short of

"impos[ing] a blanket prohibition against Internet use." Pet. App. 15a.

1. Section 202.5 Burdens Far More Speech Than Is Necessary.

a. The very "essence of [the] narrow tailoring" requirement is that a law pursue its purposes without "significantly restricting a substantial quantity of speech that does not create the . . . evils" at which it is directed. *Ward*, 491 U.S. at 799 n.7. Accordingly, the Court has long held that laws completely banning an entire medium of communication are invalid unless "each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. For instance, a law prohibiting handbilling in a city may not be upheld as a narrowly tailored anti-littering law, because not every pamphlet is litter. *See Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939); *see also Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (similar); *Martin v. City of Struthers*, 319 U.S. 141, 148-49 (1943) (door-to-door solicitation). In contrast, a law banning all signs on utility poles *can* be upheld because every sign implicates the government's aesthetic interest. *See Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 808, 810 (1984); *see also Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 969 (1984) (distinguishing "between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in").

Section 202.5 regulates "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. In

quantitative terms, the vast majority of the activity that Section 202.5 punishes does not implicate the evil that animates the statute: causing harm to minors online. *See* Pet. App. 13a. As the Seventh Circuit recognized with respect to a similar law, "illicit communication" with, and illicit information-gathering about, website users under eighteen surely "comprise[] a minuscule subset of the universe of social network activity" that the statute burdens. *Doe v. Prosecutor*, 705 F.3d 694, 699 (7th Cir. 2013); *accord Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1111 (D. Neb. 2012) ("No reasonable person could deny that fact.").

b. Indeed, even if Section 202.5 punished accessing only one social networking website—say, Twitter—and even if it applied only to a subset of registrants whom the State determined pose a high risk of improper Internet use, the statute *still* would not be sufficiently tailored. Under this Court's precedents, a law is not "narrowly tailor[ed]" if the "substantive evil" it aims to prevent is only a "possible byproduct of the activity" it proscribes. *See Frisby*, 487 U.S. at 485-86 (quoting *Taxpayers for Vincent*, 466 U.S. at 810).

But there is no dispute that Section 202.5 prohibits speech on many more sites than that. Its reach extends not only to every site colloquially understood to be a "social networking website," but also many others, such as bettycrocker.com, that undeniably satisfy the broad statutory definition. *See supra* 10.

In practical effect, Section 202.5 burdens a significant quantum of First Amendment activity that even the State itself has acknowledged is not

"necessary to further [its] legitimate interests." *Ward*, 491 U.S. at 799. Although the State denied any need to prohibit access to nytimes.com, *see* BIO 30-31, that site falls within the statutory definition. And the North Carolina Supreme Court assumed that it does. *See supra* 13. At the very least, having read the opinion below, no registrant seeking to avoid punishment would visit that site. *See United States v. Williams*, 553 U.S. 285, 304 (2008) (holding that burdens on speech include those resulting from "unclear" applications). Indeed, that is what the arresting officer here would advise. *See* J.A. 78 ("The best way for . . . somebody not to get in trouble is to not do something.").[7]

c. In drafting Section 202.5, the General Assembly made no effort to avoid burdening the First Amendment activity of registrants, whom the State—through its own courts and probation authorities—has determined do not require further supervision. The statute also does not identify particular "offenders who pose a factually based risk to children through the use or threatened use of the banned sites or services." *Nebraska*, 898 F. Supp. 2d at 1111. Rather, the statute's proscription attaches based solely on an individual's reportable conviction—

---

[7] In its Brief in Opposition, respondent insisted that nytimes.com is excluded because it falls outside the "natural meaning" of a "social networking Web site." BIO 31. But the "natural meaning" of a term is irrelevant when the statute itself supplies a definition. *See Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935). No "average man," *id.*, would consider Skype a social networking website. Yet North Carolina has prosecuted a registrant for accessing that site. *See supra* 8 n.2.

including decades-old offenses, sexual offenses not involving minors or the use of the Internet, and ones that would not even trigger registration if committed in North Carolina.

In view of Section 202.5's vast and unnecessary breadth—criminalizing all access, to all social networking websites, by all registrants, for any purpose, for many years—the North Carolina Supreme Court's concession that there are "some areas" in which "the statute could have been drafted even more narrowly" is a severe understatement. Pet. App. 15a-16a.

2. There Are a Multitude of Less Speech-Restrictive Options.

Nor can the State satisfy its obligation to "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it" or even that it "considered different methods" that would burden far less protected speech. *McCullen*, 134 S. Ct. at 2539. To be sure, this Court's time, place, or manner cases do not limit governments to the *least* restrictive means of achieving their purposes. *Id.* at 2535. But the same decisions teach that the existence of genuine, *less* restrictive alternatives highlight just how poorly tailored a law is. *See id.* at 2537-40.

a. The "obvious method[] of preventing" sexual abuse of minors and gathering of information for that purpose is "the punishment of those who actually" do those deplorable things. *Schneider*, 308 U.S. at 162. Indeed, before passing the law now codified as Section 202.5, the General Assembly had before it, but did not enact, provisions that would have

increased penalties for exploiting or soliciting minors. *See* S.B. 132–2d ed., 2007 Gen. Assemb., Reg. Sess. §§ 2-4, 6 (N.C. 2007); *see also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach . . . do not provide sufficient deterrence, perhaps those sanctions should be made more severe.").

There is no question that North Carolina can and does harshly punish anyone who sexually abuses a minor. *See, e.g.*, N.C. Gen. Stat. § 14-190.6 et seq.; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("Congress may pass valid laws to protect children from abuse, and it has."). Nor is there any doubt that a law criminalizing the gathering of information on social networking sites (or elsewhere on the Internet) for the purpose of targeting minors would be constitutional. Such a law would track the approach of existing North Carolina laws, which punish computer activities—including "access," N.C. Gen. Stat. § 14-458.1—"for the purpose of" causing harm, *id.* § 14-196.3(b)(2). In fact, such behavior may already be punishable: North Carolina could prosecute as criminal attempts "harvest[ing] information to facilitate contact with potential victims," BIO 11. *See, e.g.*, *State v. Ellis*, 657 S.E.2d 51, 55 (N.C. Ct. App. 2008); *accord* N.C. Gen. Stat. § 14-2.5.[8]

---

[8] To the extent North Carolina is concerned with solicitation of minors online, the State already has a law proscribing such behavior. *See* N.C. Gen. Stat. § 14-202.3;

Such measures would apply to everyone—including the many non-registrants who perpetrate these repugnant and "most serious crime[s]." *Free Speech Coalition*, 535 U.S. at 244; *see infra* 58 (discussing findings that registrants account for a small percentage of Internet-enabled crimes against minors). North Carolina has never enacted such a generally applicable, anti-harvesting law.

b. The General Assembly could have enacted a variety of other statutes that distinguish between wrongful and innocent accessing of websites. In fact, the prosecutor in this case, recognizing jurors' potential discomfort with Section 202.5's breadth, hypothesized a statute punishing "specific contact on Facebook with minor children," and one punishing "access[ing] Facebook [to] say specific things that might entrap children." Trial Tr. 253-54. Under either of the prosecutor's hypothetical statutes, petitioner would have been acquitted.

c. The General Assembly alternatively could have enacted a rule of construction or an affirmative defense providing that registrants like petitioner, who did not access a website for an illicit purpose, have committed no crime. For example, North Carolina's criminal prohibition on "cyberstalking" includes a specific directive that the law may not be "appl[ied] to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others."

---

accord McCullen, 134 S. Ct. at 2537-38 & n.7 (pointing to other laws in Massachusetts furthering the interest asserted).

N.C. Gen. Stat. § 14-196.3(e). *See also Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring) (suggesting that "a more complete affirmative defense could save a statute's constitutionality").

To be sure, relying on an affirmative defense would—perhaps unconstitutionally—put the burden on the speaker to "prove, on pain of felony conviction," that his speech was protected. 535 U.S. at 255. But at the very least, this alternative would provide some means for those whose access was entirely blameless to avoid a felony conviction.

d. In its initial defense of the law in this Court, the State emphasized that government should not be required to wait until criminal harm is complete before taking action. *See* BIO 28. But laws punishing attempts and solicitation are themselves "preventative measures," *id.*, and there are many other such measures that can be taken consistently with the First Amendment.

Law enforcement agencies across the country make use of undercover operations to identify and prosecute individuals who pose a serious threat to minors online. *See, e.g.*, Noah Fromson, *28 Accused Sexual Predators Arrested in Sting Operation*, KPRC (July 5, 2016), http://bit.ly/2hnaeZB. To the extent the State has special concerns about particular persons on the registry, effective monitoring and investigation are especially practicable. Law enforcement knows where each registrant lives and works at any given time, and what their "online identifier[s]" are. *See* N.C. Gen. Stat. § 14-208.7(b)(7); 42 U.S.C. § 16901 et seq.; *see also id.* § 16915b.

Moreover, experts who have seriously examined the problem of online exploitation have identified specific educational and preventative measures taken by parents, schools, mental health professionals, teenage users themselves, and social networking site operators that are effective. *See Enhancing Child Safety*, *supra*, at 4-6; *see also infra* 59-60. In fact, initial drafts of Section 202.5 would have required website operators to ensure that teenage account holders obtained adult permission before establishing accounts and to afford their parents ongoing access. *See* S.B. 132–2d ed., 2007 Gen. Assemb., Reg. Sess. § 8 (N.C. 2007). North Carolina failed to enact that provision.

e. The State already imposes standard restrictions for registrants on supervised probation, *see* N.C. Gen. Stat. § 15A-1343(b2), and post-release supervision, *see id.* § 1368.4(b1). Every registrant under either program must "[s]ubmit at reasonable times to . . . warrantless searches of the[ir] . . . computer or other electronic [devices]." *Id.* §§ 15A-1343(b2)(9), 1368.4(b1)(8); *see Samson v. California*, 547 U.S. 843, 857 (2006). At sentencing, further restrictions, tailored to the offender's circumstances, may also be imposed. *See* N.C. Gen. Stat. §§ 15A-1343(b2)(6), 1368.4(c).

North Carolina courts have imposed limited-duration conditions. *See, e.g.*, *State v. Johnston*, 473 S.E.2d 25, 33 (N.C. Ct. App. 1996) (banning working in establishments that sell sexually explicit material). Federal courts exercising similar authority have approved conditions that include pre-approval of Internet use, *see United States v. Zinn*, 321 F.3d 1084, 1092-93 (11th Cir. 2003); mandatory

installation of filtering software, *see United States v. Holm*, 326 F.3d 872, 879 (7th Cir. 2003); and restricted access to a narrow set of websites, *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003).

When imposing these conditions, courts have recognized that even persons under active criminal justice supervision retain First Amendment rights, and that much of what they would do over the Internet is benign, personally important, and constitutionally protected—like earning a living and communicating with their families. But when such provisions "result[] in a far greater deprivation of [the defendant]'s liberty than [i]s reasonably necessary," courts have invalidated them. *United States v. Sales*, 476 F.3d 732, 736 (9th Cir. 2007); *see United States v. Peterson*, 248 F.3d 79, 83-84 (2d Cir. 2001) (same).

Here, given the opportunity to evaluate petitioner's individual circumstances, the sentencing court in the 2002 case declined to impose any such Internet or computer restrictions during his period of probation. *See 2002 Judgment*, *supra*. Nor did the State, at any point during the course of his probation, seek to impose any further restraints. *Id.* And just as the State has never pointed to anything inculpatory in the documents it obtained from Facebook, or from any random search of petitioner's Internet-enabled devices during his probation period.

f. To the extent there are individuals for whom the State believes post-sentence restrictions are genuinely necessary, North Carolina might adopt a regime like the one this Court approved in *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997). The State could identify persons—presumably a subset of those it

already subjects to life-time twenty-four-hour satellite monitoring, *see* N.C. Gen. Stat. §§ 14-208.40(a)(1), 208.41(a)—whose proven lack of volitional control makes post-sentence First Amendment restrictions truly necessary. *See Hendricks*, 521 U.S. at 360 (upholding post-sentence confinement of offender who could not "control the urge" to molest children). North Carolina might require suspicionless hard drive searches, installation of filtering software, preapproval to visit particular sites, or even outright bans on particular websites. But these restrictions, like the ones in *Hendricks*, would have to be individually and regularly reviewed. *Id.* at 363-64.

g. Unlike the majority of states, which have never seen the need to impose restrictions on registrants' website activities, a handful have enacted measures similar to, but still less burdensome than, Section 202.5. Many of them have come under constitutional scrutiny. For example, Louisiana has a law requiring registrants to include in their social networking profiles details such as their crime of conviction, status as a "sex offender or child predator," and residential address. La. Stat. Ann. § 15:542.1(D)(1). Nebraska had a law banning access for registrants whose underlying crime involved computers, the Internet, or a minor victim. *See Nebraska*, 898 F. Supp. 2d at 1094; *see also Doe v. Harris*, 772 F.3d 563, 579-81 (9th Cir. 2014) (enjoining California law allowing public disclosure of Internet identifiers).

That these alternatives may not "pass constitutional muster" does not preclude considering them under the *Ward* analysis. *See McCullen*, 134 S.

Ct. at 2538 n.8 ("We do not 'give [our] approval' to this or any of the other alternatives we discuss." (alteration in original)). The fact that significantly less restrictive alternatives are *themselves* constitutionally doubtful highlights why Section 202.5's more speech-suppressive approach cannot be characterized as narrowly tailored.

3. Section 202.5 Leaves Open No Realistic Alternative Channels.

This Court has held that a genuine time, place, or manner regulation—even one "narrowly tailored to serve a significant governmental interest"—is still invalid unless it also leaves open "ample alternative channels" in which to pursue the burdened First Amendment activities. *Ward*, 491 U.S. at 791. But Section 202.5 fails this prong because it forecloses a "means of communication that is both unique and important." *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994).

a. In *Ladue*, this Court struck down a municipal ban on lawn signs based on the inadequacy of alternative channels. 512 U.S. at 56. *Ladue* highlighted that such signs comprise an important avenue for "political, religious, [and] personal messages." *Id.* at 54. The Court recognized that lawn signs can "react to a local happening or express a view on a controversial issue," both of which "reflect and animate change in the life of a community." *Id.* And the medium Ladue's ordinance foreclosed was one that historically has afforded citizens an "unusually cheap and convenient" means of expression. *Id.* at 57.

Today, everything that could happen on the lawns of Ladue can also happen online. As explained above, social networking websites play an extraordinarily "important part in political campaigns." 512 U.S. at 55; *see supra* 20-21. No medium of expression is as "cheap and convenient" as the ones at issue in this case. A 140-character tweet or a 10-second "snap," like a yard sign, "may not afford . . . opportunities for conveying complex ideas." 512 U.S. at 55. But as petitioner's case demonstrates, they undoubtedly permit users to post religious and personal messages, and "react to a local happening." Sometimes, they "animate change" on a global scale. *See Nebraska*, 898 F. Supp. 2d at 1117-18 (discussing Twitter's role in the 2011 Arab Spring). But even someone interested in the "life of [the] community" of Ladue, Missouri, might now turn to a Facebook page. *See Ladue, Missouri*, Facebook, http://bit.ly/2hjEB5F.

b. It is increasingly the case that important First Amendment activity occurs exclusively over the websites Section 202.5 makes a felony for registrants to access. There are truly no alternatives. President Obama convened a "town hall" about jobs and the economy where citizens could ask questions only by tweeting at the official White House account. Katelyn Sabochik, *President Obama @ Twitter Townhall*, White House (July 7, 2011), http://bit.ly/2h942Hh. There was no other way to participate. In the aftermath of natural disasters and terror attacks, Facebook's algorithms automatically trigger "Safety Check," a service that allows users in the crisis zone to notify all their family and friends at once: "I'm Safe." Cade Metz, *How Facebook Is Transforming Disaster Response*, WIRED (Nov. 10, 2016),

http://bit.ly/2fA7NSu. The Khan Academy offers college-level academic instruction free of charge to "anyone anywhere," exclusively over its YouTube channel. Michael Noer, *One Man, One Computer, 10 Million Students: How Khan Academy Is Reinventing Education*, Forbes (Nov. 2, 2012), http://bit.ly/2hnda8B. And PBS now airs mini-documentaries "exclusively on the NowThis channel" on Snapchat. Todd Spangler, *First Snapchat-Native Documentary Films to Launch from PBS Series POV*, Variety (Oct. 20, 2016), http://bit.ly/2e5S4KX.

c. The North Carolina Supreme Court's effort to describe "alternatives" to the medium Section 202.5 forecloses only demonstrates how "important and distinct" social networking sites really are. *Ladue*, 512 U.S. at 55. The court suggested that some combination of services such as email, phone calls, text messages, traditional mail, and websites such as pauladeen.com and WRAL.com, would be a constitutionally adequate substitute. Pet. App. 16a-18a.

Even taken on its own terms, that suggestion misunderstands the First Amendment. A law that prohibited access to nytimes.com alone should not be upheld on the ground that some of the same "current events," Pet. App. 17a, are covered on WRAL.com. *Cf. Schneider*, 308 U.S. at 163.

That pixelated approach misses a larger point. Far from merely providing a platform for communicating discrete bits of information, what these websites offer is access to vast networks of other users, enabling interaction with friends, relatives, and groups of fellow users who share common interests or affiliations. Social networking

sites are unique because of the people who join them, the sheer number of users, the staggering diversity of information and opinion located at the edges of the network, and the First Amendment activities they enable.

d. The North Carolina Supreme Court concluded that Section 202.5's saving grace was that it did not ban access to the entire Internet. Pet. App. 15a-16a. Yet from the beginning, Section 202.5 has swept in many sites the average Internet user would not describe as "social networking" websites. *See supra* 10. And every day, formerly "static" websites incorporate features enabling social interaction among users, thereby placing them within the statute's criminal prohibition. Increasingly, social functionality is "embedded in commonly used technological platforms and products and in day-to-day activities related to work, community life, and entertainment." Andrew J. Harris, *Regulating Sex Offenders in the Web 2.0 Era, Part II*, 13 Sex Offender L. Rep. 81, 94 (2012). To the extent that the statutory status of other websites is in doubt, *see supra* 46 n.7, those sites cannot fairly be counted as "alternatives" Section 202.5 has "le[ft] open."

4. Section 202.5 Does Not Directly or Effectively Further the State's Interest.

For all the burdens Section 202.5 places on First Amendment activity, the statute does not further the State's important interest in a "direct and effective way." *Ward*, 491 U.S. at 800.

a. North Carolina cannot carry its burden of showing that Section 202.5 "will in fact alleviate" the

harms against which it is directed "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Despite the State's emphasis on the problem of stealth "information-gathering" and the need for preventative measures, Section 202.5 is, by design and in effect, unlikely to substantially address the harm. A study of arrests of "online predators" conducted by the University of New Hampshire Crimes Against Children Research Center and supported by the U.S. Department of Justice, determined that 96% of those arrested for solicitation of a minor online were *not* on their state's registry. Janice Wolak et al., Univ. N.H. Crimes Against Child. Res. Ctr., *Trends in Arrests of "Online Predators"* 2 (2009).

Indeed, the only prophylaxis Section 202.5 offers is the deterrent effect that any criminal punishment provides. It stands to reason that those who truly seek to abuse website access for nefarious "harvesting" will take care to refrain from posting publicly. And the only way police officers are able to detect "access" is by doing what the arresting officer did in this case—logging into a personal Facebook account and scanning that website as any other user would to see who is actively posting.

b. Section 202.5's "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011).

The General Assembly exempted single-purpose sites that provide chat room, instant messaging, or photo sharing capabilities. *See* N.C. Gen. Stat. § 14-202.5(c)(1). But chat rooms have long been recognized

as being at the center of online predation. *See* Steven Reinberg, *Social Networking Sites Safer than IM or Chat Rooms*, Wash. Post (Feb. 1, 2008), http://wapo.st/2gb5ghb; *see, e.g.*, *State v. Fraley*, 688 S.E.2d 778, 780-81 (N.C. Ct. App. 2010) (one of many convictions in North Carolina involving illicit chat room activity). Exempting photo-sharing sites is equally strange. North Carolina allows registrants convicted of child pornography offenses to access these sites, notwithstanding their usefulness for circulating such material. *See Holm*, 326 F.3d at 873-74; *Zinn*, 321 F.3d at 1086. And the State has never explained why the crime of access should depend on how or whether the operator "derives revenue," N.C. Gen. Stat. § 14-202.5(b)(1). *Cf. Discovery Network, Inc.*, 507 U.S. at 425-26.

c. The sites that the General Assembly does target are ones that experts who study online exploitation have found raise the least concern, while those which pose serious risk to minors fall outside Section 202.5's definition.

These experts emphasize that social networking website operators "have taken many proactive steps" to prevent their sites from being used by those who seek to do harm to minors. Harris, *supra*, at 92. These operators provide mechanisms for reporting suspicious or unwelcome contact and processes "that flag suspicious interactions among users based on algorithms developed via actual transcripts of interactions that involved substantiated online solicitation." *Id.* 92-93. Not to mention that every click and scroll on these sites "leaves an indelible trail of evidence." *Id.* 93.

The very features that place websites within Section 202.5's ambit—like creation of an "online identity"—also make them "inhospitable environment[s] for would-be offenders." Harris, *supra*, at 93. By contrast, sites that permit anonymous chat activity and do not require an account or any personal information, such as Chatroulette, pose far greater danger. *Id.* "[W]ithin seconds of entering these sites, users can be engaged in text discussions or video chats with complete strangers with no login needed" and, therefore, no trail of evidence. *Id.* Those sites, experts emphasize, "appeal directly to adolescents' natural inclination toward risk-taking behavior." *Id.* For the "motivated offender," an anonymous chat site is more attractive than a social networking one, "where the risks of detection are much greater" and users interact overwhelmingly with people they already know. *Id.*

d. Finally, the State suggested—in an attempt to downplay the breadth of Section 202.5 at the certiorari stage—that a registrant would not violate the statute by "hav[ing] a friend post a message on Facebook" on his behalf. BIO 35. If that is what the law means, petitioner now stands convicted for the crime of not having a *friend* post "God is Good!" in his name. And a registrant intent on "harvesting information" about teenage account holders for nefarious purposes would be home free if he is able to persuade a non-registrant friend to access the website and print out the material for him.

IV. This Court Must Reverse Petitioner's Conviction and Strike Down Section 202.5.

At a bare minimum, Section 202.5 may not constitutionally be applied to petitioner. For all the reasons stated above, petitioner's conviction does not survive any plausibly applicable First Amendment test. But Section 202.5 is also unconstitutional on its face: it cannot survive either a "typical facial attack" or an overbreadth challenge, *United States v. Stevens*, 559 U.S. 460, 472-73 (2010).

1. There is no circumstance under which Section 202.5 could support a valid criminal conviction. *See Stevens*, 559 U.S. at 472 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). By criminalizing access without requiring any proof of wrongful intent or actual harm, the law may fairly be said to have *no* legitimate sweep. "The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise." *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984).

The government could not prosecute a burglar for violating a law banning door-to-door solicitation, even if his modus operandi was to pose as a solicitor. *See Martin v. City of Struthers*, 319 U.S. 141, 144 (1943). Nor may the government convict a person under a blanket ban on possessing virtual child pornography, even if he used such material to solicit a minor. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002). Thus, even if Corporal Schnee arrested a registrant who, unlike petitioner, accessed a social networking website to gather information with the

intent to initiate contact with a minor, a prosecution for mere "access" would still be unconstitutional.

2. Section 202.5 is facially unconstitutional for a second reason: It is substantially overbroad. A statute "may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). If Section 202.5 has any legitimate sweep, it is minuscule. This case implicates the concern that gave rise to this doctrine: This "broadly" written criminal statute has "such a deterrent effect on free expression that [it] should be subject to [immediate] challenge." *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).

Section 202.5 is far broader than the criminal prohibitions pronounced "alarming[ly]" broad in *Stevens*. 559 U.S. at 474. All that the statute in that case prohibited were "depiction[s] of animal cruelty" that independently violated federal or state law and had no "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* at 464-65.

Here, Section 202.5 directly criminalizes all lawful, innocent, and protected First Amendment activities on the proscribed websites. It is more than "substantially overbroad." It is "breathtaking[ly]" so. *Hill v. Colorado*, 530 U.S. 703, 755 (2000) (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, the decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

Glenn Gerding
Appellate Defender
OFFICE OF THE
APPELLATE DEFENDER
123 West Main Street
Suite 500
Durham, NC 27701

David T. Goldberg
Counsel of Record
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 498-8229
dgoldberg@law.stanford.edu

December 15, 2016