

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 semicolon.

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

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

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

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

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

25 MR. MONTGOMERY: No. That still would not

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE ALITO: But --

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

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

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

1 these things and that 2003 was the dark ages.

2 (Laughter.)

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

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

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

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

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

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

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

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

21 Thank you, Your Honor.

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

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

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