NO:

IN THE
SUPREME COURT OF THE UNITED STATES

TOMMY FINDLEY

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court is required to apply controlling state law in determining whether facts omitted from a warrant application vitiate probable cause, where the inclusion of those facts would have precluded issuance of the warrant in the jurisdiction where the warrant was obtained.

2. Whether the Court should resolve the circuit split between the Eighth and Eleventh Circuits on one side, and the Second and Third Circuits on the other, regarding whether the First Amendment right to access the Internet recognized in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), applies to persons on supervised release.

INTERESTED PARTIES AND RELATED PROECEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

The following proceedings directly relate to the case before the Court:

- *United States v. Findley*, 9:17-cr-80226-RLR-1 (S.D. Fla. Sept. 28, 2018).
- *United States v. Findley*, No. 18-14204, 806 F. App'x 966 (11th Cir. May 22, 2020), *reh'g denied* (11th Cir. July 28, 2020).

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Tommy Findley respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-14204 in that court on May 22, 2020, *United States v. Findley,* 806 F. App'x 966 (11th Cir. May 22, 2020), *reh'g denied* (11th Cir. July 28, 2020), which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Findley,* 806 F. App'x 966 (11th Cir. May 22, 2020), *reh'g denied* (11th Cir. July 28, 2020), is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case under 18 U.S.C. § 3231 because the petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on May 22, 2020. The Court of Appeals extended the time for filing a petition for rehearing; a timely petition was filed and denied by the panel on July 28, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3, Fed. R. App. P. 26(a)(1)(C), and the Court's March 19, 2020 Order, extending the deadline "to file any petition for certiorari to ... to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing."[1]

[1] *See* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf (accessed Dec. 28, 2020).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 U.S.C. § 3583(d) states, in relevant part:

The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate....

STATEMENT OF THE CASE

Statement of Facts and Course of Proceedings in the District Court

On November 24, 2017, Tommy Findley's 17-year old daughter, "N.F.", reported to the Boynton Beach, Florida Police Department that approximately three months earlier, she found some pictures of Mr. Findley engaging in sexual acts with his teenage step-daughter, "T.B." (*See* DE 20-1).[2] N.F. reported seeing pictures and videos of Mr. Findley "kissing [T.B.] while ... having her change into underwear and having her lay on the bed ... those types of sexual activity." (DE 20-1 at 4). T.B. had recently turned 18, but appeared to be around 15 or 16 years old in the videos. (DE 20-1 at 5).

N.F. told Detective Cynthia Rivera that she had been in New Jersey for approximately 3 weeks. Prior to that time, she had lived in Mr. Findley's home in Florida. N.F. told Detective Rivera that she left Florida after a fight with her father. N.F. stated that Mr. Findley was drunk, and that he got her on the ground and started strangling and choking her with such force that she could not breathe, until someone came upstairs and pulled him off of her. N.F. tried to call someone after she got up, but Mr. Findley took her phone and smashed it on the floor. (DE 21-1 at 9). Because T.B. had since turned 18, N.F. told Rivera that there were no minors living in the home. (DE 20-1 at 3-4).

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[2] Citations to the record are designated herein by reference to the Docket Entry number ("DE") followed by the page number.

Detective Rivera contacted Detective Bobby Edwards from the Morristown, New Jersey Police Department, who conducted a in-person interview of N.F. (DE 17-1 at 11; DE 21-1). N.F. told Detective Edwards that she learned that her father was engaging in sexual conduct with his step-daughter, because approximately three months earlier, she had "found pictures and videos on his hard drive" (DE 21-1 at 5). This time N.F. described T.B. as having appeared to be about 16 or 17 in the videos. N.F. stated that T.B. did not appear to be in distress. "She had an attitude, a little attitude, but when he told her to smile, she did it jokingly." (DE 21-1 at 7-8).

N.F. told Detective Edwards that, during an argument with Mr. Findley, she had shown the picture on her phone to T.B.'s mother, Mr. Findley's wife. Afterwards, "they called [T.B.] in the room to talk about it." (DE 21-1 at 14). N.F. also told Detective Edwards about the fight that prompted her to leave Florida. (DE 21-1 at 18). The New Jersey interview concluded at 7:08 p.m.

Three hours later, at 10:12 p.m., Boynton Beach Detective Charles Ramos swore an affidavit for a warrant to search Mr. Findley's home. (DE 17-1 at 13). Prior to doing so, Ramos spoke to Detective Rivera and listened to the interview she had conducted. (DE 159 at 31). Ramos also spoke with Detective Edwards, but did not listen to the recording of his interview. (DE 159 at 21). Ramos made no effort to corroborate N.F.'s allegations or learn "any other information" about either Mr. Findley or N.F. (DE 159 at 32).

The first several pages of the warrant affidavit contained boilerplate allegations regarding items that Ramos expected to find in the home, his experience

in child pornography investigations, and the need to seize electronic media for purposes of forensic investigation. (DE 17:1 at 10). Particularized allegations related to offense appear on page 11, and consist of the following:

> 1. On 11-24-17 at approximately 1215 hrs Detective Rivera was dispatched to the Boynton Beach Police Department in reference to taking a telephonic report of a sexual abuse of a child. Detective Rivera spoke with [N.F] who stated that approximately 3 months ago she was in her father's house [Tommy Findley] at [the home address] Boynton Beach FL 33436 using her father's computer when she saw naked pictures and videos of her father with her step sister [T.B.].
>
> 2. [N.F.] stated that several of the pictures were of [T.B] partially naked and fully naked. [N.F.] stated that [T.B.] was 16 or 17 years old in the pictures. [N.F.] stated that there were videos on the computer of [T.B.] giving her father Tommy Findley oral sex.
>
> 3. [N.F.] stated that she snapped a picture with her cell phone of one of the videos and showed it to [T.B.]. [N.F.] stated that [T.B.] did not want to speak to her about it.
>
> 4. Detective Rivera got in touch with Morris Town [sic] Police Department in New Jersey Bobby Edwards who did a formal taped interview with [N.F] at the police department.
>
> 5. Your Affiant spoke with Detective Edwards and he stated that [N.F.] that approximately three months ago she found videos and pictures of her dad Tommy Findley having sex with her underage step sister [T.B.] on her father's computer at [the home address].
>
> 6. Detective Edwards told Your Affiant that [N.F.] stated that the computer is in her father's bedroom and it is a HP laptop computer. [N.F.] stated that there was two [sic] external hard drives attached to the computer. One of the hard drives is black with a silver circle and the other external hard drive is silver in color.
>
> 7. Detective Edwards told Your Affiant that [N.F.] stated that she told several other people about the incident. One of the persons being Dennis Rumph and the other person being her cousin Wesley Findley.

> 8. Detective Edwards told Your Affiant that [N.F.] stated that she confronted her step sister [T.B] about the photo and sex at a later date. [N.K.] showed [T.B.] the photo that she took and [T.B.] stated that "the sex only happened once with Tommy Findley and she was drunk."
>
> [N.F.] stated that [T.B] was sixteen (16) years old at the time of the sex and photo. Boynton Beach Police Department's records management system shows [T.B.] date of birth is 09-[XX]-99.

(DE 17-1 at 11-12).

At 11:02 p.m., the warrant was electronically signed by Judge Marni Bryson of Florida's Fifteenth Judicial Circuit. (DE 159 at 41). The warrant was executed at 11:55 p.m. that same night. The search recovered *inter alia*, a computer from Mr. Findley's bedroom and two external hard drives secreted in the trunk of his car. (DE 159 at 34-6). The images and videos which became the subject of this prosecution were found thereon.

The Indictment & Motion to Suppress

Mr. Findley was named in a two-count indictment returned by a federal grand jury sitting in the Southern District of Florida. Count 1 of the indictment charged that Mr. Findley "did employ, use, persuade, induce, entice, and coerce" a minor, T.B., to engage in sexually explicit conduct for the purpose of producing visual depictions of the same, in violation of 18 U.S.C. §§ 2251(a) and (e). (DE 7 at 1). Count 2 charged

Mr. Findley with knowingly possessing child pornography in violation of Title 18, U.S.C. § 2252(a)(4)(B) & (b)(2). (DE 7 at 2).[3]

Mr. Findley moved to suppress the evidence found during the search, arguing that the allegations in the warrant affidavit were stale and that "the affidavit ... deliberately omits material facts, including those that would likely have caused a neutral and detached Magistrate to not find probable cause had they been provided." (DE 17 at 3). Relevant to the question presented herein, Mr. Findley alleged that the affidavit should have disclosed that "the defendant's estranged daughter ... bore her father ill will as a result of having had a violent argument with her father of her playing loud music. This argument escalated into a physical altercation which caused her to leave Boynton Beach and move to her mother's home in New Jersey." (DE 17 at 3).

A hearing was held before a United States Magistrate Judge. (DE 159). During his testimony, Detective Ramos initially denied knowing that "NF had ill will and an estranged relationship toward Mr. Findley," but later admitted that N.F. mentioned it during her phone call with Detective Rivera, and he chose not to disclose it. (DE 159 at 38). Ramos testified that he not think it affected probable cause (DE159 at 38).

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[3] The indictment contained a scrivener's error in the caption of Count 2, which improperly identified the charge as a violation of "18 U.S.C. § 2252A(a)(5), (b)(2)." (DE 7 at 2).

The magistrate judge took the matter under advisement, and subsequently issued a Report and Recommendation ("R&R"), in which the magistrate recommended that the motion be denied. The magistrate judge rejected Mr. Findley's argument that there had been a *Franks v. Delaware* 438 U.S. 154 (1978) violation. The magistrate judge found that Ramos was aware of, but omitted from the warrant affidavit, the following facts:

> (1) NF had a violent altercation with Defendant which led her to leave Florida and move back with her mother in New Jersey; (2) NF waited two and a half to three months after finding the photographs before she returned to live in her mother's house in New Jersey; (3) NF stated during the two interviews with law enforcement that the victim had told her the sexual conduct with the Defendant had only occurred one time when the victim was drunk; (4) NF had told the victim's mother (and Defendant's wife) about the sexual misconduct and had shown her the photograph on NF's phone; and (5) the photo on NF's phone no longer existed or that the phone containing the image had been destroyed or damaged.

(DE 48 at 12).

The magistrate judge concluded that only omission that "could possibly come close even to being material," was the violent altercation between Mr. Findley and N.F. (DE 48 at 12). However, the magistrate did not view this as "material to her credibility or to a finding of probable cause" because "if Detective Ramos had included this information in his affidavit, it could have arguably been viewed as corroborative of NF's allegations that her father was abusive to NF's step-sister and to NF." (DE 48 at 12-13). The magistrate determined that the search warrant was facially valid and that the "officers acted in good faith by promptly investigating serious allegations of

sexual abuse and child pornography and obtaining a search warrant within 12 hours of NF's initial complaint to law enforcement." (DE 48 at 14).

Mr. Findley filed written objections to the R&R, in which he argued, *inter alia*, "that the police are required to do more than just take a statement from a person who is load with credibility problems and present it to a judge to obtain a warrant. The very least the officers could have done is include all the information in the warrant." (DE 51 at 4). Mr. Findley argued that the police deliberately and recklessly withheld information in obtaining the warrant, and therefore the good faith exception should not apply. (DE 51 at 6). The district court summarily adopted the R&R the following day. (DE 152 at 3-5; DE 56).

Mr. Findley was convicted after a jury trial. He was sentenced to 324 months' imprisonment on Count 1, concurrent with a 120-month term of imprisonment on Count 2. The district court also imposed concurrent 120-month terms of supervised release. Notwithstanding the absence of any evidence that the Internet was used in the offense, the court imposed a special condition of supervised release prohibiting Mr. Findley from "possessing or using a computer that contains an internal, external, or wireless modem without the prior approval of the Court." (DE125:4). No objection was lodged to the condition of supervised release.[4]

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[4] The judgment repeats the scrivener's error in the indictment, and mistakenly indicates that the statute of conviction for Count 2 was: "18 U.S.C. § 2252A(a)(5), (b)(2)." (DE125:1).

The Opinion Below

Mr. Findley appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit. After oral argument, which focused on the validity of the search warrant, the Eleventh Circuit issued the following *per curiam* opinion:

> Tommy R. Findley appeals his convictions and sentences for production of child pornography, in violation of 18 U.S.C. § 2251(a) and (e), and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). On appeal, Findley argues that the district court (1) failed to clearly indicate that it conducted a de novo review of the suppression-hearing evidence before denying his motion to suppress; (2) improperly denied his motion to suppress; (3) constructively amended both counts of the indictment; (4) imposed an unreasonable sentence; and (5) erred by restricting his use of a computer with a modem as a condition of supervised release.
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> After considering the parties' briefs, the record on appeal, and with the benefit of oral argument, we find no reversible error. Accordingly, we affirm Findley's convictions and sentences.

United States v. Findley, 806 F. App'x 966 (11th Cir. May 22, 2020), *reh'g denied* (11th Cir. July 28, 2020).

REASONS FOR GRANTING THE WRIT

I.

This Court should resolve whether a federal court is required to apply controlling state law in determining whether facts omitted from a warrant application vitiate probable cause, where the inclusion of those facts would have precluded issuance of the warrant in the jurisdiction where the warrant was obtained.

This case involves the "chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (citation omitted). "The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." *Franks v. Delaware*, 438 U.S. 154, 164 (1978). Here, however, Florida law enforcement officers searched Mr. Findley's home based on a warrant signed by a Florida judge who lacked knowledge of facts that would have precluded issuance of the warrant, without further corroboration, as a matter of clearly-established controlling law. State law enforcement officers should not be permitted to so easily skirt the "neutral and disinterested magistrate" requirement, merely by handing off the fruits of their misbegotten labors to federal authorities for prosecution. This case thus presents an important question of federal law warranting the Court's review. *See* S. Ct. Rule 10(c).

"Under Florida law, information supplied by an informant who is not an 'ordinary citizen' but has an interest in the investigation must 'be independently corroborated to support probable cause.'" *See Case v. Eslinger*, 555 F.3d 1317 (11th Cir. 2009) (citing *Dial v. Florida*, 798 So.2d 880, 883 (Fla. 4th Dist. Ct. App. 2001). *Dial* was issued by Florida's Fourth District Court of Appeal – which governs the jurisdiction where the warrant was issued[5] – and bears a striking resemblance to the case *sub judice.*

In *Dial*, the defendant's thirteen year-old "daughter or stepdaughter" approached the police and told the officers that her father had physically abused her. She then told the officers that her father was counterfeiting money and storing marijuana for sale in their home. *Dial*, 798 So.2d at 881. The officers attempted to have the girl obtain physical evidence, but the attempt failed. *See id.* at 882. The warrant affidavit neglected to mention the failed attempt at corroboration. The appellate court found it "[m]ore important," however, that "the affidavit failed to mention that the 'confidential informant' had a familial relationship with appellant and that she had first reported child abuse." *Id.* at 882. Such an informant could not be considered an "unquestionably honest" disinterested citizen, but was one whose "reliability needed to be verified or corroborated by facts contained in the affidavit" in order to establish probable cause. *Id.* at 883.

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[5]Boynton Beach is located within Palm Beach County, Florida, and is thus governed by Florida's Fourth District Court of Appeal. *See* https://www.4dca.org/About-the-Court/History-of-the-Court (visited April 15, 2019).

> "[A]s appellant points out, while the affidavit included the informant's basis of knowledge, it contained no facts or circumstances regarding the informant's veracity. The information, though detailed, nonetheless came from an individual whose reliability was previously untested and whose credibility could not be presumed. Indeed, the facts in this case show that the informant/daughter was not a 'citizen informant,' entitled to a presumption of credibility. Thus, the information she supplied to the police needed to be independently corroborated to support probable cause.

Dial, 798 So.2d at 882-83 (citing *Illinois v. Gates*, 462 U.S. 213, 233-34 (1983)).

The *Dial* Court cited *Roper v. Florida*, 588 So.2d 330 (Fla. 5th DCA 1991), which held that a warrant was invalid where the affidavit failed to establish that the informant, who had recently ended a relationship with the accused, was a disinterested citizen whose credibility could be presumed. "Nothing in the affidavit indicates Jennifer's motivation for making the report except the cryptically put information that she had just ended a relationship with Roper. This fact does not show that she is disinterested in the matter. If anything, it might tend to show the opposite—a possibly vindictive motivation." *Id*. at 332. "Since the affidavit did not demonstrate that Jennifer was an ordinary citizen reporting a crime, she must be classified as an informant whose veracity, reliability, and basis of knowledge must be shown by facts contained in the affidavit." *Id.* The affidavit was so clearly lacking, moreover, that the court held that "an officer would not 'manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id*. at 333-34 (citing, *e.g., United States v. Leon*, 468 U.S. 897, 923 (1984)).

In a footnote, the court noted "that the affidavit did not reveal to the judge issuing the warrant the fact that Jennifer appeared in the police station in the early morning hours with the report that Roper had been beating her." *Id*. at 334 n.1. "Had the judge been aware of the circumstances surrounding Jennifer's appearance at the police station, the judge might have concluded that she was other than disinterested." *Id.* at 334 n.1 (citation omitted).

These precedents make clear that Mr. Findley's suppression motion would have been decided differently in his case had been brought in state, rather than federal court. The warrant affidavit failed to establish that N.F. was a disinterested "citizen informant" entitled to a presumption of reliability under Florida law. Moreover, Detective Ramos knew, and failed to disclose, that N.F. had moved out of Mr. Findley's home after the violent altercation. Under the clearly-established law of the State of Florida, these facts alone were sufficient to require corroboration before acting on N.F.'s account. And Florida law would have preclude a finding of good faith on this record.

Mr. Findley recognizes that federal courts are not generally required to apply state law in evaluating probable cause. But the question here is one of ***materiality,*** which by definition looks to the effect of the misstatement or omission on the decision-maker. Here, the decision-maker was a Florida judge, applying Florida law. And, under Florida law, it is undisputable that Findley's fight with N.F. was material.

Law enforcement officers should not able to evade a state's bright-line rules governing the issuance of search warrants, merely by handing their illegally-obtained

evidence over to federal authorities for prosecution. Wherefore, this Court's intervention is needed to answer whether the federal courts should have been required to apply Florida law in determining whether Detective Ramos omitted known, material facts from the warrant affidavit.

II.

The Court should resolve the circuit conflict regarding whether the First Amendment right to access the Internet recognized in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), applies to persons on supervised release.

This case involves an important question of federal constitutional law, on which there is a split of authority among the circuit courts: whether the First Amendment right to access the Internet, recognized in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), applies to persons on supervised release.

In *Packingham*, the Court struck down a North Carolina law that made it a felony for any registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members" as violative of the First Amendment. *Id.* at 1734. The Court assumed the restriction was content-neutral, and subjected it to intermediate scrutiny. *Id*. "In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" *Id*. (citation omitted). North Carolina's social networking ban was insufficiently tailored to meet that task.

"A fundamental principle of the First Amendment is that all persons have access to places where they can speak, listen, speak, and listen once more." *Id*. Today, the Court recognized, that place is "cyberspace -- the 'vast democratic forums of the Internet.'" *Id*. (citation omitted).

> By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'

Id.

The Court noted that the North Carolina law was "unprecedented in the scope of First Amendment speech it burdens," and found it "instructive that no case or holding of this Court has approved a statute as broad in its reach." *Id*. at 1337-38. Because the law restricted far more speech than was necessary to protect children, the Court found that the statute failed to survive intermediate scrutiny review. *Id*. at 1738

A. The Eighth and Eleventh Circuit have rejected *Packingham's* application to individuals on supervised release.

Although there is no written discussion of the First Amendment issue in Mr. Findley's case, the Eleventh Circuit recently issued a published decision on materially identical facts, resolving the question presented herein. *See United States v. Bobal*, 981 F.3d 971 (11th Cir. 2020).

In *Bobal*, the Eleventh Circuit joined the Eighth, Fifth, and D.C. Circuits in holding that "that, even after *Packingham*, a district court does not commit plain error by imposing a restriction on computer usage as a special condition of supervised release." *Bobal*, 981 F.3d at 977-78 (citing *United States v. Perrin*, 926 F.3d 1044, 1049–50 (8th Cir. 2019); *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018); *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017)). The decisions in *Halverson* and *Rock* may fairly be read to turn on the standard of review. *See Halverson,* 897 F.3d at 658; *Rock*, 863 F.3d at 831. In both *Perrin* and *Bobal*, however, the courts reached beyond the standard of review and rejected the argument on substantive grounds. In doing so, the Eighth and Eleventh Circuits created a direct split with published decisions of the Second and Third Circuits. *See United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019); *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018).

The defendant in *Bobal* was convicted of one count of using a cellular phone in an attempt to "persuade, induce, entice, and coerce a minor to engage in sexual activity," and "one count of committing a felony offense involving a minor after being required to register as a sex offender," in violation of 18 U.S.C. §§ 2422(b) and 2260A. *See Bobal*, 981 F.3d at 974. He was sentenced to 240 months' imprisonment, followed by a lifetime term of supervised release. *See id*. "As a special condition of supervised release, [the district court] ordered that Bobal 'shall not possess or use a computer that contains an internal, external or wireless modem without the prior approval of the Court.'" *Id*.

Mr. Bobal argued that the computer restriction violated his First Amendment rights under *Packingham*. Bobal maintained that *Packingham*'s application was not limited to offenders who had completed their sentences. In support of this argument, Mr. Bobal noted the Court's statement that "the troubling fact that the law imposes severe restrictions on persons who had already served their sentence and are no longer subject to the supervision of the criminal justice system" was "not an issue before the Court." *Packingham,* 137 S. Ct. at 1737.

The Eleventh Circuit disagreed with Bobal's assessment of *Packingham*'s reach, finding that:

> [t]he sentence in question clarified that the Supreme Court decided only whether the North Carolina law violated the First Amendment, not whether the law was unconstitutional for other reasons not raised in the appeal. Nothing in *Packingham* undermines the settled principle that a district court may "impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens" during supervised release. *United States v. Knights*, 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001).

Bobal, 981 F.3d at 977-78. The Eleventh Circuit concluded that "*Packingham* is distinguishable because Bobal's computer restriction does not extend beyond his term of supervised release, it is tailored to his offense, and he can obtain the district court's approval to use a computer for permissible reasons." *Bobal*, 981 F.3d at 973.

Although the issue was raised on plain error grounds, the Eleventh Circuit expressly rejected the Third Circuit's contrary ruling in *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018), which had been decided "under an abuse-of-discretion

standard." *Bobal*, 981 F.3d at 978. According to the Eleventh Circuit, *"Holena* read the opinions in *Packingham* too broadly." *Id*.

> Both the majority opinion and the concurring opinion in *Packingham* agreed that the North Carolina law infringed the First Amendment rights of registered sex offenders, who would be committing an entirely new felony if they accessed certain websites. But neither opinion addressed whether the First Amendment is violated by a special condition of supervised release for a sex offender who is serving a sentence for an offense involving electronic communications sent to a minor.

Bobal, 981 F.3d at 978. The Eleventh Circuit thus affirmed Mr. Bobal's sentence, and rejected the application of *Packingham* to conditions of supervised release.

The Eight Circuit similarly found *Packingham* was inapplicable to the case of a defendant who had been sentenced to a 20-year term of supervised release, with the special condition that he "not possess or use a computer or have access to any online service without the prior approval of the U.S. Probation and Pretrial Services Office," in *Perrin*, 926 F.3d at 1048. "*Packingham*," the court held, was "of no help to Perrin for at least three reasons." *Id.* 1045. First, the defendant in *Perrin*, unlike the petitioner in *Packingham*, had used the internet to contact a minor. *Id*. at 1048. "Second, the statute at issue in *Packingham* prohibited registered sex offenders from accessing commercial social-networking sites, even after 'hav[ing] completed their sentences," whereas the defendant in *Perrin* was still under a criminal justice sanction. *Id.* at 1049. Third, the court found, implausibly, that the restriction in Mr. Perrin's case was less restrictive than the social media ban in *Packingham*, because

the defendant had the option of seeking permission from his probation officer to access those websites. *See id*.[6]

As in *Bobal*, the First Amendment challenge in *Perrin* had been brought under plain error review. The Eighth Circuit nonetheless resolved the substantive question and held that "the special condition at issue does not involve a greater deprivation of liberty than is reasonably necessary." *Perrin*, 926 F.3d at 1050. "Accordingly, the district court did not err, much less plainly err, in imposing the special condition." *Id*.

B. The Second and Third Circuits have held that *Packingham* does apply to individuals on supervised release.

In contrast to these cases, as noted above, in *Holena*, the Third Circuit held that *Packingham's* constitutional holding applies to conditions of supervised release. The defendant in *Holena* "was convicted of using the internet to try to entice a child into having sex." *Holena*, 906 F.3d at 290. In such a case, the Third Circuit recognized that "a sentencing judge may restrict a convicted defendant's use of computers and the internet." *Holena*, 906 F.3d at 290. "But to respect the defendant's constitutional liberties, the judge must tailor those restrictions to the danger posed by the defendant." *Id*.

The court noted that 18 U.S.C. § 3583(a) "places 'real restrictions on the district court's freedom to impose conditions of supervised release.'" *Id*. (alteration and

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[6] As discussed *infra*, the Second Circuit correctly recognized that such a condition is, in fact, far more onerous than the restriction struck down in *Packingham*.

citation omitted). In language mirroring the intermediate scrutiny standard applied in *Packingham*, § 3583 requires that special conditions of supervised release not deprive the defendant of "more liberty 'than is reasonably necessary' to deter crime, protect the public, and rehabilitate the defendant." *Holena*, 906 F.3d at 291 (citing 18 U.S.C. § 3583(d)(2)). *See also Holena*, 906 F.3d at 294 ("Section 3583's tailoring requirement reflects constitutional concerns."). "Conditions that restrict 'fundamental rights must be 'narrowly tailored and ... directly relating to deterring [the defendant] and protecting the public.'" *Id*. (citations omitted). "And a condition is 'not 'narrowly tailored' if it restricts First Amendment freedoms without any resulting benefit to public safety.'" *Id*. (citation omitted).

The Third Circuit agreed that restricting Mr. Holena's access to the Internet was "necessary to protect the public." But the blanket ban imposed in his case was "not tailored to the danger he poses." *Id*. Among other problems with Mr. Holena's supervised release conditions, the court found that the ban "prevent[ed] Holena from accessing anything on the internet – even websites that are unrelated to his crime." *Id*. at 293.

> On this record, we see no justification for stopping Holena from accessing websites where he will probably never encounter a child, like Google Maps or Amazon. The same is true for websites where he cannot interact with others or view explicit materials, like Dictionary.com or this Court's website.

Id. The court thus remanded the case for a more narrow tailoring of Mr. Holena's release conditions, and instructed the district court to "take care not to restrict

Holena's First Amendment rights more than reasonably necessary or appropriate to protect the public." *Id.*

The Second Circuit similarly recognized *Packingham*'s application to supervised release conditions in *United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019). There, the court reversed a supervised release condition banning a defendant's access to the Internet and adult pornography, because the record was insufficient to justify the restriction. 913 F.3d at 95. Importantly, the Second Circuit rejected the government's position that "Eaglin has no constitutional right to access the Internet," finding it "outdated and in conflict with recent Supreme Court precedent." *Id.* ("The Supreme Court forcefully identified such a right in *Packingham v. North Carolina*, ... and it suggested as much in *Riley v. California*, --- U.S. ---, 134 S. Ct. 2473, 2478, 189 L.Ed.2d 430 (2014).").

The Second Circuit recognized that "[t]he restriction in *Packingham* created a permanent restriction in the form of a criminal statute applicable to all registered sex offenders," and noted that "[c]ertain severe restrictions may be unconstitutional when cast as a broadly-applicable criminal prohibition, but permissible when imposed on an individual as a condition of supervised release." *Eaglin*, 913 F.3d at 95-96. In the Second Circuit's view, however, "*Packingham* nevertheless establishes that, in modern society, citizens have a First Amendment right to access the Internet." *Id.* at 96. The court expressly held that "Eaglin has a First Amendment right to be able to email, blog, and discuss the issues of the day on the Internet while he is on supervised release." *Id.*

Moreover, the Second Circuit, unlike the Eleventh and Eighth Circuits in *Bobal* and *Perrin*, recognized that the special condition of supervised release imposed therein was "broader in its terms, if not in its application, than that struck down in *Packingham*." *Id.* at 96. "Whereas the *Packingham* statute banned access only to certain social networking sites where minors may be present, such as Facebook and Twitter, the condition imposed on Eaglin prohibits his access to *all* websites." "Because the District Court adopted the condition on the government's recommendation for a complete Internet ban and required specific permission from the court for any desired instances of internet access," the Second Circuit "underst[oo]d the condition effectively to operate as a total Internet ban." *Eaglin*, 913 F.3d at 95 n.7.

The Second Circuit held that, "as emphasized by *Packingham's* recognition of a First Amendment right to access certain social networking websites, the imposition of a total Internet ban as a condition of supervised release inflicts a severe deprivation of liberty." *Eaglin*, 913 F.3d at 97. The Second Circuit thus joined the Third in holding that, "[i]n only highly unusual circumstances will a total Internet ban imposed as a condition of supervised release be substantively reasonable and not amount to a "'greater deprivation of liberty than is reasonably necessary' to implement the statutory purposes of sentencing.'" *Id.* (citations omitted). *See also Holena*, 906 F.3d at 295 ("Under *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster.").

C. The Court should clarify that persons on supervised release retain the First Amendment right to access the Internet.

As the Court recognized in *Packingham*, the importance of the Internet to individuals attempting to reintegrate into society, cannot be overstated. "Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Packingham*, 137 S. Ct. at 1737.

In addressing *Packingham*'s application to supervised release, however, courts on both sides of the divide have cited *United States v. Knights*, 534 U.S. 112 (2001), for the proposition that district courts may "impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens" during supervised release. *See Bobal*, 981 F.3dat 977. *See also Rock*, 863 F.3d at 831; *Holena*, 905 F.3d at 294. But *Knights* – which turned on the "reasonableness" inquiry unique to the Fourth Amendment – does not carry the weight these courts would ascribe to it.

In *Knights*, the Court upheld a condition of probation allowing for warrantless searches of the probationer's home. In the particular search that reached the Court, the officers acted on reasonable suspicion. The Court concluded that the search "was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' ... with the probation search condition being a salient circumstance." *Knights*, 534 U.S. at 118 (internal citation omitted). One aspect of that

"salient circumstance," was that the probationer was informed of the search condition and thus had a diminished expectation of privacy. *See id.* at 119-120. But *Knights* does not hold that persons on probation – let alone supervised release – have a diminished interest in their constitutional rights in general, or their First Amendment rights in particular. *Cf. United States v. Haymond*, 139 S. Ct. 2369, 2383 (2019) (referring to individuals on supervised release as "persons out in the world who retain the core attributes of liberty").

There is no doubt that a court may impose narrowly tailored restrictions on an offender's First Amendment rights, in order to prevent the commission of future crimes and safeguard the community. *See Packingham*, 137 S. Ct. at 1737 ("Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."). But no circumstances justified the wholesale ban of access to the Internet imposed in this case.

The Eleventh Circuit misinterpreted this Court's precedents, and contributed to an existing circuit split on an important issue of federal constitutional law, by failing to recognize Mr. Findley's First Amendment right to access the Internet while on supervised release. Wherefore, he respectfully asks the Court to grant review.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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