No. 21-7103

IN THE

SUPREME COURT OF THE UNITED STATES

ROGER D. REAM – PETITIONER

VS.

STATE OF FLORIDA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question One

Under the First Amendment, does a person on probation or other form of supervised release have a constitutional right to access the Internet or other computer services for any lawful purpose?

Question Two

Does Packingham v. North Carolina, 137 S.Ct. 1730, 198 L.Ed.2d (2017), apply to persons on probation or other form of supervised release, or only to those "persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system" as held by the State of Florida?

Question Three

Under the Due Process clauses of the Fifth and Fourteenth Amendments, does a person on probation or other form of supervised release have a property right to pursue a lawful occupation, including seeking and/or maintaining such an occupation via the Internet or other computer services?

Question Four

Under the Due Process clauses of the Fifth and Fourteenth Amendments, does a person on probation or other form of supervised release have a liberty right to be free from probation conditions which operate in a "Catch-22" manner to return him to prison?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding on the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Ream v. State, ___ So.3d ___ (Fla. 5th DCA 2021), 5D21-0902, Fifth District Court of Appeal, State of Florida. Judgment entered August 24, 2021, rehearing denied September 30, 2021.

Ream v. State, 314 So.3d 272 (Fla. 5th DCA 2021), 5D20-0434, Fifth District Court of Appeal, State of Florida. Judgment entered March 2, 2021.

Ream v. State, 05-2018-CF-012297-AXXX-XX, Eighteenth Judicial Circuit, Brevard County, Florida. Judgment entered February 15, 2021, and February 24, 2020, respectively.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix ___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[x] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[x] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the state trial court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[x] For cases from **state courts:**

The date on which the highest State Court decided my case was August 24, 2021. A copy of that decision appears at Appendix A.

[x] A timely petition for rehearing was denied on the following date: September 30, 2021, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No. ___A_____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment One

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.

Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Fourteen Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C.S. §3583(d). *See* Appendix D

Florida Statutes

§948.03. Terms and conditions of probation.

(1) The court shall determine the terms and conditions of probation. Conditions specified in this section do not require oral pronouncement at the time of sentencing and may be considered standard conditions of probation. These conditions may include among them the following, that the probationer or offender in community control shall:

(c) Work faithfully at suitable employment insofar as may be possible.

(i) Make payment of the debt due and owing to the state under s. 960.17, subject to modification based on change of circumstances.

§948.30. Additional terms and conditions of probation or community control for certain sex offenses.

(1) Effective for probationers or community controllees whose crime was committed on or after October 1, 1995, and who are placed under supervision for violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, the court must impose the following conditions in addition to all other standard and special conditions imposed:

(c) Active participation in and successful completion of a sex offender treatment program with qualified practitioners specifically trained to treat sex offenders, at the probationer's or community controllee's own expense. If a qualified practitioner is not available within a 50-mile radius of the probationer's or community controllee's residence, the offender shall participate in other appropriate therapy.

(h) Effective for probationers and community controllees whose crime is committed on or after July 1, 2005, a prohibition on accessing the Internet or other computer services until a qualified practitioner in the offender's sex offender treatment program, after a risk assessment is completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services.

Florida Rule of Criminal Procedure 3.800(A). *See* Appendix E

STATEMENT OF THE CASE

The Petitioner was convicted on February 13, 2019 of two counts of Possession of Material Depicting Sexual Conduct by a Child, contrary to s. §827.071.5, Fla. Statutes. For Count One, the Petitioner was sentenced to five (5) years in the Florida Department of Corrections (FDOC), and five (5) years of sex-offender probation for Count Two, to be served consecutively to the prison term of Count One.

On January 26, 2021, the Petitioner filed a Motion to Correct Sentence pursuant to Florida Rule of Criminal Procedure 3.800(a).

In that Motion, the Petitioner raised two issues: (1) that Standard Condition of Probation 30(29), imposed in accordance with section §948.30(1)(h) of the Florida Statutes, was unconstitutional in that it effectively prohibited the Petitioner's Fifth and Fourteenth Amendment Due Process property right to pursue a lawful occupation and his First Amendment right to free speech, citing Packingham v. North Carolina, 137 S.Ct. 1730, 198 L.Ed.2d (2017); and (2) that Special Condition "t, Other" (*see* Appendix C, pg. 13), requiring the Petitioner to receive a psychological evaluation and begin treatment within thirty (30) days of his release from prison, and to pay for any costs incurred, unless said costs were waived by the court, was not reasonable. The Petitioner contended that this special condition, working in tandem with Standard Condition 30(29), created a classic "Catch-22" situation in that Condition 30(29) prohibits the Petitioner from using the Internet to seek employment until a safety plan was "approved and implemented" by his therapist, who would not likely be inclined to do so without payment, which in turn would require the Petitioner to use the Internet to seek employment, which the Petitioner is prohibited from doing.

The Petitioner moved the trial court to either strike Standard Condition 30(29) as unconstitutional, or, if not within its jurisdiction to so do, to certify a question to the District Court concerning the constitutionality of this condition. He further

moved the trial court to strike Special Condition "t, Other" or to waive the costs incurred, as that court had given itself leave to do when it imposed the condition.

On February 15, 2021, the trial court denied the Petitioner's motion, citing Alford v. State, 279 So.3d 752 (Fla. 2d DCA 2019), as its sole authority. The court stated that the Petitioner's claim was the same as appellant Alford made in his direct appeal: that 948.30(1)(h) was unconstitutional under Packingham, *supra*. The trial court then noted that the Alford court distinguished the North Carolina statute struck down in Packingham from section 948.30(1)(h), Fla. Stat., and that Packingham also distinguished between persons who had already completed their sentences and those on probation.

The trial court remained silent concerning the Petitioner's Fifth and Fourteenth Amendment claims, as well as making no comment as to Special Condition "t, Other".

On appeal to Florida's Fifth District Court of Appeal, the Petitioner raised two (2) issues: (1) that the trial court abused its discretion when it failed to address the Petitioner's request to modify or strike Special Condition "t, Other"; and (2) that the trial court erred in basing its decision on a single case which was inapposite to the facts in the Petitioner's case. By failing to read the Petitioner's motion fully and correctly, the trial court read Alford v. State, *supra*, too broadly, misapplying it and ignoring the Petitioner's Fifth and Fourteenth Amendment claims.

On August 24, 2021, the Fifth District Court issued an unelaborated *per curiam* affirmance of the trial court's ruling. The Petitioner filed a timely Motion for Rehearing and Motion for Written Opinion which was denied by the Fifth District on September 30, 2021.

REASONS FOR GRANTING THE PETITION

The questions asked herein appear to be issues of first impression in this Court.

Question One asks whether a person on supervised release has a First Amendment right to access the Internet or other computer services for any lawful purpose. In United States v. Eaglin, 913 F.3d 88 (2d Cir. 2019), the court noted that:

> "[t]he government urges that Eaglin has no constitutional right to access the Internet. We reject that position as outdated and in conflict with recent Supreme Court precedent. The Supreme Court forcefully identified such a right in Packingham v. North Carolina, 137 S.Ct. 1730, 198 L.Ed.2d (2017) and suggested as much in Riley v. California, 573 U.S. 373, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014)." Eaglin, 913 F.3d at 95.
>
> "A complete ban on Internet access is a particularly broad restriction that imposes a massive deprivation of liberty. *Cf.* Packingham v. North Carolina, ___ U.S. ___, 137 S.Ct. 1730, 1737-38, 198 L.Ed.2d 273 (2017) (finding a First Amendment interest in access to social media websites – only a subset of the internet's offerings – as 'the principal sources for knowing current events, checking ads for employment, speaking, listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge')." United States v. Ellis, 984 F.3d 1092, 1104 (4th Cir. 2021).

In Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800 (1974), this Court held that "a prisoner retains First Amendment rights not inconsistent with incarceration." A person on supervised release should theoretically be less restricted than one who is incarcerated. In today's world, the Internet is one of the most important—perhaps the most important—expressions of the First Amendment right to freedom of speech.

In Florida, all persons who are convicted of sexual offenses and are sentenced to probation or community control—both forms of supervised release—are prohibited any access to "the Internet or other computer services until a qualified

practitioner...approves and implements a safety plan for...accessing the Internet or other computer services." *See* s. §948.30(1)(h), Fla. Stat. This process could reasonably require months before a "safety plan" can be implemented. The Florida statute makes no provision for necessary activities such as shopping, searching for employment or housing, or applying for government aid programs.

The statute also prohibits the use of email and applications such as mapping, news and weather information on one's smartphone, as well as even Voice Over Internet Protocol (VOIP) voice-only telephone services such as Vonage, as these are all "computer services."

In McCullen v. Coakley, 134 S.Ct. 2518 189 L.Ed.2d 502, 520 (2014), this Court noted that in order to survive intermediate scrutiny a law must be "narrowly tailored to serve a significant governmental interest." In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." The Florida statute is not narrowly tailored to serve a legitimate interest, but rather arbitrarily burdens all persons on sex-offender probation by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal. Therefore, Question One should be answered in the affirmative, and the Florida statute found unconstitutional as violative of the First Amendment.

Question Two is related to Question One, and an answer in the affirmative is suggested in the judicial decisions cited above: whether Packingham v. North Carolina, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017), applies to persons sentenced to forms of supervised release such as probation. The State of Florida holds that Packingham involved a statute that criminalized future behavior and not a condition of supervision that was part of a sentence to probation or supervised release. *See* Alford v. State, 279 So.3d 752 (Fla. 2d DCA 2019).

The federal district courts of appeal are divided in this issue, which in itself recommends review by this Court. As noted above, the Second Circuit in Eaglin,

supra, and the Fourth Circuit in Ellis, *supra*, both hold that Packingham applies to persons on supervised release, whereas the Fifth and Eleventh Circuits hold that Packingham applies only to "persons who have completed their sentences and are no longer under the jurisdiction of the criminal justice system." *See*, respectively, United States v. Halverson, 897 F.3d 645 (5th Cir. 2018) and United States v. Antezak, 753 Fed Appx. 705 (11th Cir. 2018).

The Eighth Circuit in United States v. Carson, 924 F.3d 467, 473 (8th Cir. 2019) held that Packingham did not apply "[b]ecause supervised release is a part of a defendant's sentence," however, in United States v. Holena, 906 F.3d 288, 294-95 (3d Cir. 2018) and United States v. Morgan, 696 Fed. Appx. 309, 309 (9th Cir. 2017), the respective Circuits upheld the applicability of Packingham.

The States are likewise divided on this issue. In People v. Morger, 2018 IL App (4th) 170285, 422 Ill. Dec 470, 103 N.E. 3d 602, 615 (Ill.Ct.App. 2018), it was held that Packingham did not apply to persons on supervised release, whereas in Jennings v. Commonwealth, No. 2018-CA-000061-MR, 2019 Ky.App. LEXIS 64, 2019 WL 1575570, at *5 (Ky.Ct.App. Apr. 12, 29), Packingham was held to apply and that a probation condition requiring "[n]o access to internet" was "not narrowly tailored to serve a legitimate interest and [was] also unconditionally vague" (first alteration in original).

This conflict between the various federal district courts and between the States begs for resolution by this Court as a question of great public importance.

Question Three concerns whether a person on supervised release has a property right under the Due Process clauses of the Fifth and Fourteenth Amendment to pursue a lawful occupation, including seeking and conducting such an occupation via the Internet.

In Florida, all persons convicted of sexual offenses and sentenced to probation or community control—both forms of supervised release—are prohibited from any access to the Internet or other computed services "until a qualified practitioner in

the offender's sex-offender treatment program, after a risk assessment is, completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services." *See* section 948.30(1)(h), Fla. Stat. (2019). No provision is made to permit a probationer to access the Internet for any lawful purpose, including seeking employment with which to be able to pay the practitioner to perform the risk assessment and implement the safety plan.

Federal law established local American Job Centers (formally called One-Stop Career Centers) in 2014. These centers include the State Employment Office and other agencies charged with assisting the unemployed, such as unemployment compensation and the Supplemental Nutritional Assistance Program (SNAP or "Food Stamps").

In Florida, these centers are called CareerSource. Persons who patronize the physical CareerSource locations are directed to Internet-connected computers, where they are to access all services through Florida's portal website, www.MyFlorida.com. The official State employment site is www.EmployFlorida.com, and the Florida Agency for Workforce Innovation, a State agency, is found at www.FloridaJobs.org. There is no provision for non-computer, non-Internet job searches.

The Florida statute prohibits sex-offender probationers from accessing the Internet for any lawful purpose, including searching for employment, until the risk assessment is completed, and a safety plan is implemented, a process that could easily require months with the therapist. In Florida, as in most States, a probationer is required to "work faithfully at suitable employment" as a condition of probation. *See* s. 948.03(1)(c), Fla. Stat. (2019). Further, such a person is also required to actively participate in and successfully complete a sex-offender treatment program, at the probationer's own expense. See s. 948.30(1)(c), Fla. Stat. (2019). In order to participate in such therapy and pay for it, the probationer needs to find employment, which in Florida effectively requires access to the Internet.

If a person under supervision has a property right to pursue a lawful occupation, the Florida statute violates such a right. Whether a person on supervised release has such a right is an issue which is ripe for resolution by this Court.

The Florida Supreme Court has held that a citizen has a property right under the Fifth and Fourteenth Amendments to pursue a lawful occupation. *See* World's Fair Freaks and Attractions, Inc., et. al. v. Hodges, 267 So.2d 817 (Fla. 1972).

Several of the federal district courts of appeal have rejected such Internet bans, but do not cite Constitutional provisions.

The Third Circuit in United States v. Holena, 906 F.3d 288 (3d Cir. 2018), held that "the court may not prevent Holena from doing everyday tasks that have migrated to the internet, like shopping, or *searching for jobs* or housing. The same is true of his use of websites conveying essential information, like news, maps, traffic or weather." Holena, 906 F.3d at 294 (emphasis added).

Other reasons given for rejecting partial or total Internet bans for persons on supervised release include: "absolute Internet ban was not permissible supervised release condition because ubiquity and importance of Internet to modern world make unconditional ban unreasonable; condition was not narrowly tailored and imposed greater deprivation than was reasonably necessary." (United States v. Duke, 788 F.3d 392 (5th Cir. 2015)). Several circuits cited 18 U.S.C.S. §3583(d), stating that such a condition was a "greater deprivation of liberty than was reasonably necessary to achieve goals referenced in §3583(d)" (United States v. Malenya, 736 F.3d 554 (D.C. Cir. 2013)); and "the imposition of a total Internet ban as a condition of supervised release inflicts a greater deprivation of liberty and a 'greater deprivation of liberty than is reasonably necessary to implement the statutory purposes of sentencing.' [United States v.] Myers, 426 F.3d [117] at 123-24 (2d Cir. 2005)] (quoting 18 U.S.C.S. §3583(d))." United States v. Eaglin, 913 F.3d 88, 97 (2d Cir. 2019). *See* also United States v. White, 244 F.3d 1199 (10th Cir. 2001); United States v. Perazza-Mercado, 553 F.3d 65, 72-74 (1st Cir. 2009); United States v. Holm, 326 F.3d 872, 877 (7th Cir. 2003); United States v. Wiedower, 634 F.3d 490,

495 (8th Cir. 2011); and United States v. LaCoste, 821 F.3d 1187, 1192 (9th Cir. 2016). With the exception of Holm, all these cases contained provisions whereby the defendant could access the Internet, such as with prior approval of the district court or of the defendant's probation officer. As in Holm, which had no such provision, Florida Statute 948.30(1)(h) has no allowance for access to the Internet prior to the implementation of a safety plan by a qualified practitioner.

A person sentenced to any form of supervised release should have the liberty to pursue his property right of a lawful occupation; this Court should define and uphold such right, and find statutes such as Florida's s. 948.30(1)(h) unconstitutional

Question Four asks whether a person sentenced to supervised release has a liberty right under the Due Process clauses of the Fifth and Fourteenth Amendments to be free from probation conditions which operate in a "Catch-22" manner to return such a person to prison.

Florida Statute 948.30(1)(h) prohibits a person sentenced to probation or community control for a sexual offense to access the Internet or other computer services until a "qualified practitioner" "approves and implements a safety plan for accessing the Internet or other computer services.." He is required to actively participate in a sex-offender treatment program with said practitioner at his own expense (§948.30(1)(c), Fla. Stat.)).

Thus, such a probationer or community controllee, especially one just released from prison, is expected to find employment (required by s. 948.03(1)(c), Fla. Stat. 2019), participate in therapy, and have his therapist "approve and implement a safety plan for accessing the Internet" before he can legally search for employment with which to pay the therapist. Such a person violates his probation if he uses the Internet to seek work before receiving permission, but he also violates his probation if he does not participate in a sex-offender therapy program he cannot afford due to being unemployed, and he also violates his probation if he fails to "work faithfully at

suitable employment." In addition, without employment with which to pay his debts to the State, such as court costs, such a probationer again violates his probation. *See* s. 948.03(1)(i), Fla. Stat. (2019).

In the Petitioner's particular case, the trial court exacerbated the situation by imposing Special Condition "t, Other," which sets a thirty-day deadline for him to receive a psychological assessment and begin treatment, and to pay for all costs incurred in the process. *See* Appendix C, pg. 13

The statutory requirements of sex-offender probation in general, and in the Petitioner's case in particular, operate in a damned-if-you-do, damned-if-you-don't, or "Catch-22" manner to make it extraordinarily difficult for a person on probation or community control, especially one freshly released from prison without financial resources or familial support, to successfully complete his term of probation or community control.

Florida District Courts of Appeal have consistently condemned such "gotcha" practices in the courts. *See*, e.g., Bealieu v. State, 697 So.2d 177 (Fla. 5th DCA 1997); Berkman v. Foley, 709 So.2d 628 (Fla. 4th DCA 1998); M-5 Communications, Inc. v. ITA Tele Comms, Inc., 708 So.2d 1039 (Fla. 3d DCA 1998); and Chatmon v. Woodard, 492 So.2d 1115, 1116, n.2 (Fla. 3d DCA 1986).

A right to freedom from such probationary conditions should be defined by this Court as a matter of public importance; this Court should answer the question posed in the affirmative.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: December 15, 2021