No. _____

IN THE

Supreme Court of the United States

JONATHAN WELLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–1740 (2017), this Court enunciated that the internet is now the main forum for First Amendment activity. While the government has a very strong interest in preventing the victimization of children online, only a fraction of the internet can be utilized for victimizing children and many uses of the internet, which are increasingly crucial to participation in society, pose no real risk of victimization. Thus, any restrictions placed on citizens' use of the internet that are meant to protect children must be narrowly tailored to the websites and online activities that could actually facilitate the victimization of children. Based on these principles, the Court struck down a North Carolina statute that banned past sex offenders from accessing commercial social networking sites.

The question presented is: Whether the same First Amendment principles in *Packingham* apply to sex offenders on supervised release and prohibit untailored bans on internet use during the period of supervision?

RELATED CASES

- *United States v. Wells*, No. 3:18-CR-00567, U.S. District Court for the Northern District of California. Judgment entered Dec. 11, 2019.

- *United States v. Wells*, No. 19-10451, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Mar. 22, 2022.

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INTRODUCTION

In a published decision, the Ninth Circuit upheld a condition of supervised release that prohibits Jonathan Wells from accessing the internet during his five-year term unless he receives prior permission from his probation officer. The court acknowledged that the ban is total, as imposed, because there is no guarantee as to whether and when any permission will be granted. The Ninth Circuit rejected Mr. Wells's argument that the principles in *Packingham* apply to citizens on supervised release, based on the general concept that persons on supervised release have diminished liberty interests. However, Congress itself mandated that conditions of supervised release can impose no greater deprivation of liberty than is reasonably necessary for rehabilitation and protection of the public. Thus, the same type of tailoring required by the Court in *Packingham* is required in the context of supervised release: any restrictions on internet use must be tailored to the websites and activities that pose an *actual* risk of unlawful conduct.

The Court should take review because the Ninth Circuit's decision is incompatible with the First Amendment principles articulated in *Packingham*. Further, the Court should take review because the circuits are split as to whether *Packingham* applies in the context of supervised release. The Second, Third, and Fourth Circuits have held that the same First Amendment principles in *Packingham* readily apply, while the Fifth and Eighth Circuits, like the Ninth, have declined to apply *Packingham*, based on the distinction that persons on supervised release have diminished liberty interests.

Finally, this case presents an ideal vehicle to resolve the application of these First Amendment principles to persons on supervised release. The issue was raised in the district court and court of appeal, and squarely addressed by both. The issue is material to Mr. Wells's case because the internet ban imposed upon him, which will go into effect when he is released in July 2025, is impermissible under the principles set forth in *Packingham*.

OPINIONS BELOW

The Ninth Circuit's published opinion (App. 1a–31a) is reported at 29 F.4th 580 (9th Cir. 2022). The district court's oral pronouncement and written judgment (App. 33a–49a) are not published in the Federal Supplement.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit issued judgment on March 22, 2022. App. 1a. The government sought a petition for panel rehearing on a different issue, which the court denied on May 16, 2022. App. 32a. This petition was filed within 90 days of the denial of rehearing and thus is timely under Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in relevant part that the government "shall make no law * * * abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

1. Jonathan Wells will be 53 years old when he is placed on supervised release in July 2025. Presentence Report (PSR) at 3. He plans to live with his mother, who is in declining health and needs his help with everyday activities. PSR at 17–18. Before the instant offense, Mr. Wells had never been arrested or charged with a crime. PSR at 15–16. The charges in this case arose out of a law enforcement operation that detected Mr. Wells's IP address as being used to receive child pornography. PSR at 4–5. Officers executed a search at Mr. Wells's home and found child pornography on a laptop computer. *Id.* Mr. Wells was cooperative and forthcoming with the officers who conducted the search. PSR at 4–7. He admitted to downloading and possessing child pornography and told officers where they could find an additional computer with child pornography. *Id.* Mr. Wells himself is the victim of a sex offense: in the second grade, he was sexually assaulted by an older boy in the school bathroom. PSR at 6.

2. On November 27, 2018, the government filed a one-count information charging Mr. Wells with receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2). CA ER 134. Mr. Wells was not alleged to have contacted any minors, shared or redistributed the images, or engaged in any online community where child pornography is shared. *See id.* Mr. Wells pled guilty. CA ER 112, 125. Probation recommended a sentence of 71 months, citing Mr. Wells's remorse and acceptance of responsibility. PSR Sentencing Recommendation at 2.

As part of the plea agreement, Mr. Wells had agreed not to use any file-sharing software or networks without the consent of his probation officer and to permit suspicionless searches of his electronic devices and their data at any time. CA ER 128–29. But probation recommended several additional computer and internet conditions, including the one at issue here that prohibits internet access unless a probation officer approves of it. PSR Sentencing Recommendation at 4.

Mr. Wells objected that the internet ban violates his First Amendment rights and conflicts with this Court's decision in *Packingham*. CA ER 106. He noted that the ban would require him to seek his probation officer's approval for even the most innocuous uses of the internet: checking the weather, ordering an Uber, or reading the news online. *Id*. Mr. Wells argued that any internet restriction imposed by the district court should be tailored to address his offense conduct while allowing him to do "'everyday tasks that have migrated to the internet.'" CA ER 106 (citation omitted).

3. At sentencing, the district court imposed the internet ban over Mr. Wells's objection and cited to pre-*Packingham* Ninth Circuit decisions that allowed the court to "bar all internet use in child pornography cases." App. 44a–46a. The condition imposed here requires that Mr. Wells "not access the Internet at any location (including employment) without prior approval of the probation officer." App. 37a, 46a. The court imposed several other internet-related conditions that apply if and when the probation officer grants some form of internet access: Mr. Wells must enroll in the probation office's Computer and Internet Monitoring Program; install

monitoring hardware or software as directed by the probation officer; allow unannounced examinations of computer equipment to ensure compliance; not use any data encryption techniques or programs; and not access file-sharing networks without consent of the probation officer. App. 37a. The Computer and Internet Monitoring Program has 29 additional clauses governing internet use and access, if and when permission for some use is granted. CA Dkt. 29 (Request for Judicial Notice) at 16–18. The Program has the capability to block an individual's internet access completely; block access to certain websites or allow access to certain websites; monitor all internet and computer use; monitor keystrokes; and capture text messages, photos, videos, and calls. *Id.* at p. 24. Mr. Wells did not contest the propriety of any of these terms.

4. On appeal, Mr. Wells challenged the internet ban as a violation of his First Amendment rights and as an unconstitutional delegation of judicial authority to the probation officer. App. 15a–16a. The Ninth Circuit upheld the district court's imposition of the internet ban and delegation of authority to the probation officer. App. 20a–26a. The court reasoned that, while the condition "no doubt infringes on Wells's right to free speech," App. at 21a, it was imposed "for purposes of rehabilitation and to insure the protection of the public, . . . particularly children," and "a defendant's free speech rights may be infringed to effectively address [his] sexual deviance problem." App. 22a (internal quotation marks and citations omitted).

The Ninth Circuit rejected Mr. Wells's argument that the reasoning in *Packingham* applies to conditions of supervised release that restrict internet use.

App. 21a–22a n.5. The court distinguished *Packingham* as involving "'persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system,'" rather than persons like Mr. Wells who are "currently subject to the supervision of the criminal justice system." App. 21a–22a n.5 (citation omitted).

Additionally, the Ninth Circuit rejected Mr. Wells's delegation challenge. The court reasoned that as long as the district judge decided *whether* Mr. Wells could have internet access—specifically, that Mr. Wells *may not* have access—the decision about "*when* it may be appropriate to allow an exception" could be delegated to the probation officer. App. 25a (emphasis added). According to the Ninth Circuit, the probation officer "is in the best position to determine when a use of computer devices or internet service is appropriate for Wells," if at all. App. 26a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Published Ninth Circuit Decision Conflicts With this Court's First Amendment Analysis in *Packingham v. North Carolina*

While *Packingham* arose in the context of past sex offenders, the Court's analysis rests on universal propositions that apply with equal force to sex offenders on supervised release. *Packingham*, 137 S. Ct. at 1733, 1735–1738. First, the internet is now the most important forum for First Amendment activity, *id.* at 1735 (majority opinion), or at least one of the main forums, *id.* at 1743 (Alito, J., concurring). Second, only a fraction of the internet can be utilized for victimizing children, and many uses of the internet that are increasingly crucial to participation in society pose no real risk of victimization. *Id.* at 1737 (majority), 1742–1743

(concurrence). Third, although the government has a very strong interest in preventing the victimization of children, especially online, its interest does not extend to preventing uses of the internet that poses no real risk. *Packingham*, 137 S. Ct. at 1736–1738 (majority), 1739–1744 (concurrence).

Based on these propositions, internet restrictions must be tailored to uses of the internet that could actually facilitate the victimization of children. *Packingham*, 137 S. Ct. at 1737 (majority), 1741–1743 (concurrence). Placing innocuous websites "categorically off limits from . . . sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the [government]'s goal of protecting children from recidivist sex offenders." *Id*. at 1743 (concurrence).

The same principles from *Packingham* apply to Mr. Wells. The internet is the main forum for his First Amendment activity. Only a fraction of the internet can be utilized for accessing child pornography, and many uses of the internet that are crucial to his participation in society pose no real risk of accessing pornography. And although the sentencing court has a very strong interest in preventing Mr. Wells from accessing child pornography on the internet, that interest does not extend to preventing uses of the internet that poses no real risk.

While people on supervised release have diminished liberty interests, the First Amendment and all other constitutional rights still apply to them. Congress has mandated that any condition of supervised release must "involve *no greater deprivation of liberty than is reasonably necessary*" for protection of the public and for

rehabilitation. 18 U.S.C. § 3583(d) (emphasis added). This test is similar to the intermediate scrutiny test applied in *Packingham*, which requires that a law "'must not burden substantially more speech than necessary.'" *Packingham*, 137 S. Ct. at 1736 (citation omitted). Under both tests, restrictions on First Amendment rights must be reasonably tailored to the government's legitimate interests.

Here, there is no tailoring of the First Amendment restrictions on Mr. Wells. He is banned from using the internet unless and until his probation officer approves of a particular use. The ban is far greater than in *Packingham*, where the state law banned only social media sites—and still failed the tailoring test by prohibiting access to numerous sites that posed no real threat. 137 S. Ct. at 1737–1738 (majority), 1740–1743 (concurrence). Here, the internet ban undeniably fails the tailoring test: it has no tailoring at all.

The possibility that a probation officer may grant *some* internet access, *at some time* during the term of supervision, does not satisfy the tailoring requirement and thereby save the condition. Under the governing statute, courts lack the authority to impose conditions of supervised release that involve a "greater deprivation of liberty than is reasonably necessary." 18 U.S.C. § 3583(d). Thus, the condition must be reasonably tailored when it is imposed. Here, the tailoring is theoretical and uncertain. The probation officer has sole discretion over whether, when, and how to make exceptions to the total ban. *See* App. 25a ("The requirement for the approval of the probation officer gives the flexibility to allow for *some exceptions to the total ban*

on computers and internet access *if* the probation office deems the use safe and without risk of obtaining child pornography." (emphasis added)).

Moreover, the internet ban actually frustrates the rehabilitative goals of supervised release. "Congress intended supervised release to assist individuals in their transition to community life." *United States v. Johnson*, 529 U.S. 53, 59 (2000). The ban cuts off Mr. Wells from everyday activities that continue to migrate online, and sometimes *must* be done online. These activities include finding and applying for job openings, reading the news, checking the bus schedule, meeting with a tele-therapist, and reserving a book at the library. The internet is the primary source for receiving information these days, which is just as protected under the First Amendment as engaging in speech. *Board of Education v. Pico*, 457 U.S. 853, 866 (1982) (the First Amendment protects "public access to discussion, debate, and the dissemination of information and ideas").

Finally, the district court has robust technology to ensure that permitted internet use does not turn into unlawful activity. For example, the Northern District of California's monitoring system can track all online activity, detect a user's keystrokes, block specific websites and applications, and perform many other functions that keep users away from prohibited activity online. CA Dkt. 29 at 16–18, 24. Mr. Wells did not object to participating in the monitoring program, if he is permitted internet access. *See* App. 37a (special condition #4). With this technology, a total ban on internet use is unnecessary to prevent unlawful activity online.

Nonetheless, the Ninth Circuit concluded that the government's interest in protecting children justified a total internet ban. App. 22a–23a, 25a. Because this conclusion directly conflicts with the Court's reasoning in *Packingham*, the Court should grant review.

II. The Circuits Have Split Over Whether *Packingham* Applies in the Supervised Release Context

The Court should also grant review because the circuits are split over whether *Packingham* applies to the supervised release context and, correspondingly, whether internet bans are permissible for defendants on supervised release. The Second, Third, and Fourth Circuits have held that the same First Amendment principles enunciated in *Packingham* readily apply. *United States v. Eaglin*, 913 F.3d 88, 95–99 (2d Cir. 2019); *United States v. Holena*, 906 F.3d 288, 294–295 (3d Cir. 2018); *United States v. Ellis*, 984 F.3d 1092, 1104–1105 (4th Cir. 2021). However, the Fifth and Eighth Circuits, like the Ninth, have declined to apply *Packingham*, based largely on the distinction that persons on supervised release have diminished liberty interests. *United States v. Halverson*, 897 F.3d 645, 657–658 (5th Cir. 2018); *United States v. Perrin*, 926 F.3d 1044, 1049 (8th Cir. 2019). Finally, the D.C. Circuit has addressed *Packingham*'s application in the supervised release context on plain error review and held that, under that particular standard, *Packingham* is not controlling. *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017). This circuit split represents a radical disagreement about courts' power to infringe on the First Amendment rights of persons on supervised release, and results in vastly different outcomes for

defendants, based on the circuit in which they were convicted rather than the risk that their use of the internet might actually pose.

The Second Circuit has read *Packingham* as "establish[ing] that, in modern society, citizens have a First Amendment right to access the Internet." *Eaglin*, 913 F.3d at 96. In some cases, restrictions that would be unconstitutional for free citizens are permissible when imposed on citizens on supervised release. *Id.* But any restrictions on constitutional rights still must be tailored to the goals of supervision. *Id.* at 97. And a total internet ban is not reasonably related to the goals of supervision, nor is it reasonably necessary to effectuate those goals. *Id.*

Using the analysis in *Packingham*, the Second Circuit reasoned that a total internet ban sweeps far broader than necessary because it prevents "'common-place computer uses such as doing any research, getting a weather forecast, or reading a newspaper online'—activities that raise no obvious risk of criminal activity." *Eaglin*, 913 F.3d at 96 (citation omitted); see also *Packingham*, 137 S. Ct. at 1737 (majority), 1742–1743 (concurrence). Moreover, an internet ban impairs a defendant's rehabilitation by cutting off "avenues for seeking employment, banking, accessing government resources, reading about current events, and educating oneself." *Eaglin*, 913 F.3d at 98. Internet monitoring—instead of a ban—"would adequately protect the public from [a defendant's] potential misuse of the Internet while imposing a more reasonable burden on [the defendant's] First Amendment interest in accessing the Internet." *Id.* "In 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." *Eaglin*, 913 F.3d at 97 (internal quotation marks and citations omitted).

The Third Circuit likewise expressed that "[u]nder *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster." *Holena*, 906 F.3d at 295. A blanket restriction is "the antithesis of [the] narrowly tailored" requirement. *Id*. at 292 (internal quotation marks and citation omitted). "To protect the public, a sentencing judge may restrict a convicted defendant's use of computers and the internet." *Id*. 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 district court might tailor online restrictions to prevent the use of "social media, chat rooms, peer-to-peer file-sharing services, and any site where [the defendant] could interact with a child," but the court cannot prevent "everyday tasks that have migrated to the internet, like shopping, or searching for jobs or housing." *Id*. at 293–294. "In crafting [the] restrictions, the District Court should also consider the availability and efficacy of filtering and monitoring software." *Id*. at 294.

The Fourth Circuit agreed that "[a] complete ban on internet access is a particularly broad restriction that imposes a massive deprivation of liberty[,]" and "[g]iven the breadth of such a condition, and the vast liberty it deprives, it will rarely be the 'least restrictive alternative.'" *Ellis*, 984 F.3d at 1104 (citation omitted). A district court can fashion precise restrictions and impose monitoring and inspections

to address concerns while allowing lawful activity. *Ellis*, 984 F.3d at 1104. Further, because "the internet is likely to be vital to [a defendant's] reentry to society, including for securing housing and employment," banning all access is contrary to rehabilitation. *Id*. at 1105.

On the other hand, the Fifth and Eighth Circuits, like the Ninth, have rejected the application of *Packingham* in the context of supervised release. The Fifth Circuit described *Packingham*'s holding as "limited" to people who had completed their sentences and "inapplicable" to the supervised release context. *Halverson*, 897 F.3d at 657–658. Similarly, the Eighth Circuit rejected the application of *Packingham* on the principle that "'[d]efendants on supervised release enjoy less freedom than those who have finished serving their sentences.'" *Perrin*, 926 F.3d at 1049 (citation omitted). And like the Ninth Circuit here, the Eighth Circuit relied on the discretion of the probation officer to ensure appropriate tailoring of the ban. *Id*. at 1049–1050. Although the ban was absolute as imposed, the court made the unstated assumption that the probation officer would grant appropriate access and, based on that assumption, denied that the ban created "'a greater deprivation of liberty than is reasonably necessary.'" *Id*. at 1050 (citation omitted).

The D.C. Circuit has also declined to apply *Packingham* in the context of supervised release, but centered its decision on the nature of plain error review. *Rock*, 863 F.3d at 831. The court noted that it had upheld analogous internet bans prior to *Packingham*, and because *Packingham* arose in a post-custodial context, and not supervised release, any error was not "plain." *Id*.

Given the deep and irreconcilable split on whether internet bans are permissible in the context of supervised release, and the core First Amendment rights at stake for defendants, this Court should grant the petition and bring clarity and uniformity to the lower courts.

III. This Case Is an Ideal Vehicle to Address Whether the First Amendment Protects Citizens' Access to the Internet on Supervised Release

This case presents an ideal vehicle to resolve whether *Packingham* applies in the context of supervised release and, as a result, whether internet bans are permissible in that context. First, the issue was squarely and fully addressed below: Mr. Wells raised the application of *Packingham* before the district court and the Ninth Circuit, and both courts refused to apply the reasoning to the supervised release context. App. 21a–23a & n.5; Wells CA Br. 20–29; Gov. CA Br. 17–21, 30–37; Wells CA Reply Br. 14–19; CA ER 106. The Ninth Circuit specifically stated that Mr. Wells's reliance on *Packingham* was "misguided" because *Packingham* involved restrictions on people who were "'no longer subject to the supervision of the criminal justice system'" and not someone "currently subject to [such] supervision." App. 21a–22a n.5 (citation omitted).

Second, the application of *Packingham* is material to Mr. Wells's case. If the First Amendment principles in *Packingham* apply, a total internet ban cannot stand because it imposes a far greater deprivation of liberty than is reasonably necessary for rehabilitation and protection of the public. Mr. Wells will be released in July 2025 and will serve his five-year term of supervised release until July 2030. His day-to-day involvement in society, and his ability to successfully reintegrate,

will depend largely on whether he is allowed to have internet access for lawful and common activities, such as reading the news online, checking job listings and the weather, and sending emails to family, friends, and colleagues.

CONCLUSION

The petition for a writ of certiorari should be granted for the Court to clarify *Packingham*'s application in the context of supervised release and to resolve the irreconcilable split on this fundamental First Amendment issue.

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