No. _____

In the

Supreme Court of the United States

JAMES CODY MCMAHON
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

_____

On Petition for a Writ of Certiorari to
The Louisiana Second Circuit Court of Appeal

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

Is Louisiana's statute that prohibits child-sex-offender registrants from using social media meaningfully distinguishable from the North Carolina statute that this Court struck down in 2017 as violative of the First Amendment right to free speech?

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The published opinion of the Louisiana Second Circuit Court of Appeal is appended to this Petition as Appendix A and is reported at 18-236 (La. App. 2 Cir. 9/21/22), 349 So. 3d 654. The Louisiana Supreme Court's order and judgment denying discretionary review is reported at 22-K-01585 (La. 1/23/23), 354 So. 3d 4, and is attached as Appendix B.

Jurisdiction

The Louisiana Supreme Court denied review on January 25, 2023. This Petition is filed within 90 days of that ruling. Accordingly, this Court has jurisdiction to review the judgment below. SUP. CT. R. 13(1); 28 U.S.C. § 1257.

Authorities Involved

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

Louisiana Revised Statute § 14: 91.5 provides:

A. The following shall constitute unlawful use of a social networking website:

(1) The intentional use of a social networking website by a person who is required to register as a sex offender and who was convicted of R.S. 14:81 (indecent behavior with juveniles), R.S. 14:81.1 (pornography involving juveniles), R.S. 14:81.3 (computer-aided solicitation of a minor), or R.S. 14:283 (video voyeurism) or was convicted of a sex offense as defined in R.S. 15:541 in which the victim of the sex offense was a minor.

(2) The provisions of this Section shall also apply to any person convicted for an offense under the laws of another state, or military, territorial, foreign, tribal, or federal law which is equivalent to the offenses provided for in Paragraph (1) of this Subsection, unless the tribal court or foreign conviction was not obtained with sufficient safeguards for fundamental fairness and due process for the accused as provided by the federal guidelines adopted pursuant to the Adam Walsh Child Protection and Safety Act of 2006.1

B. For purposes of this Section:

(1) “Minor” means a person under the age of eighteen years.

(2)(a) “Social networking website” means an Internet website, the primary purpose of which is facilitating social interaction with other users of the website and has all of the following capabilities:

(i) Allows users to create web pages or profiles about themselves that are available to the general public or to any other users.

(ii) Offers a mechanism for communication among users.

(b) “Social networking website” shall not include any of the following:

(i) An Internet website that provides only one of the following services: photo-sharing, electronic mail, or instant messaging.

(ii) An Internet website the primary purpose of which is the facilitation of commercial transactions involving goods or services between its members or visitors.

(iii) An Internet website the primary purpose of which is the dissemination of news.

(iv) An Internet website of a governmental entity.

(3) “Use” shall mean to create a profile on a social networking website or to contact or attempt to contact other users of the social networking website.

C. (1) Whoever commits the crime of unlawful use of a social networking website shall, upon a first conviction, be fined not more than ten thousand dollars and shall be imprisoned with hard labor for not more than ten years without benefit of parole, probation, or suspension of sentence.

(2) Whoever commits the crime of unlawful use of a social networking website, upon a second or subsequent conviction, shall be fined not more than twenty thousand dollars and shall be imprisoned with hard labor for not less than five years nor more than twenty years without benefit of parole, probation, or suspension of sentence.

Statement of the Case

After law enforcement officers in Ouachita Parish, Louisiana, discovered that James Cody McMahon had been using Facebook, Snapchat, Twitter, and Instagram, the State charged him with violating LA. STAT. ANN. § 14:91.5, which makes it a felony for a registered child-sex offender to "use" a social networking website. McMahon was required to register as a sex offender in light of a prior conviction for indecent behavior with a juvenile, a violation of LA. STAT. ANN. § 14:81. Following a jury verdict, the court sentenced him to three years in prison.

On appeal, McMahon argued that § 14:91.5 is unconstitutional because it impermissibly restricts lawful speech in violation of the First Amendment. McMahon relied on this Court's decision in *Packingham v. North Carolina*,[1] which struck down a similar statute in North Carolina.[2] The Louisiana Second Circuit Court of Appeal rejected this argument, finding the North Carolina statute distinguishable. The Louisiana Supreme Court denied discretionary review, notwithstanding that six years earlier, another state circuit court, albeit in a yet-to-be reported decision, had found the statute unconstitutional upon concluding that there is "no material difference between the North Carolina statute at issue in *Packingham* and [§ 14:91.5]."[3]

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[1] 582 U.S. 98 (2017).

[2] N.C. GEN. STAT. ANN. § 14-202.5.

[3] *Louisiana v. Mabens*, 16-0975 (La. App. 4 Cir. 7/5/17), 2017 WL 11714140, *6.

Reason for Granting the Petition

This Court's decision in *Packingham* striking down North Carolina's statute restricting registered sex offenders from gaining access to social media websites compels the finding that Louisiana's similar statute is unconstitutional.

In 2017, this Court in *Packingham* struck down as unconstitutional a North Carolina law that made it a felony for a registered sex offender to access a commercial social networking website.[4] As McMahon has argued in these proceedings, Louisiana's felony statute prohibiting child-sex-offender registrants from using social networking websites suffers the same infirmities identified by this Court in *Packingham* in the North Carolina statute. The court of appeal, however, disagreed, discerning three features of the Louisiana statute that it believed distinguishes it from North Carolina's statute, so as to render the Louisiana statute sufficiently tailored to pass constitutional muster. As discussed below, none of those features saves the statute from constitutional infirmity.

The court of appeal first noted that while the North Carolina statute applies to all registered sex offenders, Louisiana's statute applies only to a subset of registered sex offenders, specifically, the (very large) subset of persons whose sex offenses were committed against minors (or who committed the crime of video voyeurism regardless of the victim's age).[5] But nothing in this Court's analysis in *Packingham* suggests that the statute's overbreadth related to the inclusion of sex offenders whose crimes did not involve children, and notably, the defendant in that case was convicted of "taking indecent liberties with a child." Rather, this Court addressed all of its concerns to the breadth of the prohibited activities, not to the number or nature of offenses subject to the prohibition.

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[4] 582 U.S. at 108-09.

[5] *Infra*. p. A9. *See* LA. STAT. ANN. §§ 14:91.5(A)(1); 15:541(24), (25), 15:542.

The court of appeal next noted that the Louisiana statute has two website exclusions not contained in the North Carolina statute. Thus, a registrant is not prohibited from using an Internet website the primary purpose of which is the dissemination of news or is the Internet website of a governmental entity.[6] But as this Court made clear in *Packingham*, whatever the scope of prohibited Internet websites covered by the North Carolina statute, it was "enough to assume that the law applies . . . to social networking sites 'as commonly understood'—that is, websites like Facebook, LinkedIn, and Twitter."[7] Unquestionably, Louisiana's statute applies to each of these commonly understood social networking websites.

Finally, the court of appeal found it significant that while the North Carolina statute prevented *access* to social networking websites, Louisiana's statute "only prevents *use*," which is defined as "to create a profile on a social networking website or to contact or attempt to contact other users of the social networking website."[8] In other words, in Louisiana it is not illegal for a sex offender registrant to passively *view* content on a social media website as long as his presence is unknown and unknowable to others, to the extent that that is even possible. In finding this distinction meaningful, the court of appeal goes far out of its way to ignore this Court's many unambiguous references to the registrant's right to actively participate in social media fora, that is, to engage and speak with others and not merely eavesdrop while being careful to remain hidden in the shadows of cyberspace.

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[6] *Infra*. p. A10 (citing § 14:91.5(B)(2)(a)(iii) & (iv)).

[7] 582 U.S. at 106.

[8] *Infra*. p. A10-11 (citing § 14:91.5(B)(3)).

Indeed, this Court begins its analysis of the North Carolina statute by making clear that constitutional freedom of speech refers to the right to make speech, not merely to listen to someone else's speech:

> A fundamental principle of the First Amendment is that all persons have access to places where they can ***speak*** and listen, and then, after reflection, ***speak*** and listen once more. The Court has sought to protect the ***right to speak*** in this spatial context. . . . . While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the ***exchange of views***, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. . . . . On Facebook, for example, users can ***debate*** religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, ***advertise*** for employees, or review tips on entrepreneurship. And on Twitter, users can ***petition*** their elected representatives and otherwise ***engage with them*** in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. . . . In short, social media users employ these websites to ***engage*** in a wide array of protected First Amendment activity on topics "as diverse as human thought."[9]

This Court then explained that the infirmity in the North Carolina statute included its prohibiting of sex offenders from engaging in speech with others:

> Social media allows users to gain access to information and ***communicate with one another*** about it on any subject that might come to mind. . . . 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***."[10]

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[9] 582 U.S. at 104-05 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868, 870 (1997)) (emphasis added).

[10] *Id.* at 107 (quoting *Reno*, 521 U.S. at 870) (emphasis added).

Under the plain language of § 14:91.5, prohibited sex offenders in Louisiana are no more free from prosecution to make their voices heard on social media then were their North Carolina counterparts before this Court declared the North Carolina statute unconstitutional in *Packingham*. No meaningful distinctions between the two statutes exist so as to permit the Louisiana statute to survive constitutional scrutiny.

Conclusion

This Court should grant certiorari to review this case, if only to issue a summary order declaring § 14:91.5 unconstitutional for the reasons stated in *Packingham*.

Respectfully submitted,

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