No. 26A

IN THE

# Supreme Court of the United States

SAMUEL MARVIN KUYKENDALL,

*Applicant,*

*v.*

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO CHIEF JUSTICE JOHN G. ROBERTS, JR.**

## APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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November 13, 2026

## APPLICATION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Samuel Marvin Kuykendall respectfully requests a sixty-day extension of time, up to and including February 1, 2027, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of Virginia in *Commonwealth* v. *Kuykendall*, 934 S.E.2d 199 (Va. 2026).

1. The Supreme Court of Virginia issued its decision on September 3, 2026. App., *infra*, 1a. No petition for rehearing was filed, so unless extended, the time to file a petition for a writ of certiorari will expire on December 2, 2026. This application is being filed more than ten days before that date. See Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257(a).

2. In 2010, Mr. Kuykendall was convicted of aggravated sexual battery of a minor, in violation of Va. Code Ann. § 18.2-67.3. App., *infra*, 1a. A portion of his prison sentence was suspended on the condition that he comply with "all the rules and requirements set by the Probation Officer," which included a standard list of "special instructions" for sex offenders. *Id.* at 1a-2a. Instruction 6 prohibited him from using "any form of social networking." *Id.* at 2a. Instruction 7 barred him from using any other "internet services" without his probation officer's "prior approval." *Ibid.* If he obtained approval, Mr. Kuykendall was required to install monitoring software and list his probation officer as an "accountability partner." *Ibid.* Mr.

Kuykendall's underlying offense did not involve any internet or computer use. *Id*. at 4a.

3. After Mr. Kuykendall's release, the trial court revoked his suspended sentence, in part because he used the internet without permission or monitoring. App., *infra*, 4a-5a. The court rejected his argument that the restrictions violated the First Amendment. *Id*. at 4a. The Court of Appeals of Virginia reversed in relevant part. Applying this Court's decision in *Packingham* v. *North Carolina*, 582 U.S. 98 (2017), which struck down on First Amendment grounds a North Carolina law prohibiting registered sex offenders from accessing social-networking websites, the appellate court held that nothing in the record showed that the restrictions were "narrowly tailored to serve a rehabilitative or public safety purpose." App., *infra*, 5a.

4. On September 3, 2026, the Supreme Court of Virginia reversed. The court rejected "as too sweeping the unqualified proposition that '*Packingham* applies to conditions of probation.'" App., *infra*, 7a. It reasoned that Packingham "was a free man," whereas Mr. Kuykendall "was still under the incarcerating power of the state." *Id*. at 8a. The court acknowledged that the First Amendment "plays a role in setting boundaries for probation conditions," *id*. at 11a, but it rejected the Court of Appeals's holding that restrictions on internet use must be narrowly tailored. Instead, it held that internet restrictions are constitutional "if they judiciously contribute to the rehabilitation of the criminal and seek to protect the public from the likelihood that he will commit the same or similar crimes." *Id*. at 11a-12a. Applying that standard,

the court upheld the probation conditions banning Mr. Kuykendall's use of the internet. *Id.* at 14a.

5. The decision below warrants review because it conflicts with decisions of at least four state courts of last resort on the First Amendment standard governing internet restrictions imposed as conditions of post-conviction supervision. The Supreme Courts of Illinois, Nevada, West Virginia, and Washington hold that, under *Packingham*, such restrictions must be narrowly tailored. See *People* v. *Morger*, 160 N.E.3d 53, 68-69 (Ill. 2019); *Aldape* v. *State*, 535 P.3d 1184, 1191 (Nev. 2023); *Mutter* v. *Ross*, 811 S.E.2d 866, 872 (W. Va. 2018); *State* v. *Johnson*, 487 P.3d 893, 895-896 (Wash. 2021). As noted above, the Supreme Court of Virginia rejected that requirement, holding instead that internet restrictions are constitutional "if they judiciously contribute to the rehabilitation of the criminal and seek to protect the public." App., *infra*, 6a, 11a-12a. And the Supreme Court of Virginia's approach is not an isolated one. It drew on federal decisions holding that *Packingham* does not apply to supervised release. *Id.* at 6a-7a; see Pet. at i, *Rodriguez* v. *United States*, petition for cert. pending, No. 26-5458 (filed Aug. 21, 2026) (describing the split among lower courts "over whether *Packingham* is limited to internet restrictions imposed on defendants who have fully completed their sentences"). And intermediate appellate courts in other states have likewise held that *Packingham* does not govern conditions of post-conviction supervision. See, *e.g.*, *Alford* v. *State*, 279 So. 3d 752, 754-756 (Fla. Dist. Ct. App. 2019); *People* v. *Landis*, 497 P.3d 39, 44-45 (Colo. App.

2021); *State* v. *King*, 950 N.W.2d 891, 902 (Wis. Ct. App. 2020). The conflict is entrenched and will not resolve itself without this Court's review.

6. The question presented is both recurring and important. As this Court has recognized, "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from [use of the internet] for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Packingham*, 582 U.S. at 108. Conditions restricting internet and social-media use are common terms of supervision for people convicted of sex offenses. Many states, including Virginia, impose them through standardized forms on every person convicted of a sex offense, regardless of whether the underlying offense involved use of the internet. As things stand now, the First Amendment rights of a person under community supervision differ depending on the jurisdiction in which the person was convicted.

7. Good cause exists for an extension. The University of North Carolina School of Law Supreme Court Clinic was recently asked to act as counsel in preparing the petition. Because the Clinic was not counsel for applicant below, it requires additional time to review the record and prepare the petition. The Clinic also has several other matters pending in this Court. It is preparing an amicus brief in *Missionaries of Saint John the Baptist, Inc.* v. *Frederic*, cert. granted, No. 25-1131 (Oct. 1, 2026), due December 23, 2026, and a petition for a writ of certiorari to review the Fifth Circuit's decision in *Gorbunov* v. *Blanche*, 2026 WL 3034382 (Oct. 9, 2026), due January 7, 2027. It also anticipates needing to prepare a reply in support of the

petition seeking review of the Fourth Circuit's decision in *Williams* v. *Charleston County Sheriff's Office*, petition for cert. pending, No. 26-624 (filed Nov. 9, 2026). Moreover, the Clinic's law students participate in preparing these filings, and the current due date falls within the law school's final examination period, which runs from November 30 through December 11, 2026. In addition, Richard A. Simpson, the Clinic's director and applicant's counsel of record, has additional commitments in private practice that affect his ability to complete the petition by December 2, 2026. Through his affiliation with Wiley Rein LLP, he is responsible (among other things) for a reply brief in *Swiss Re Corporate Solutions* v. *Under Armour, Inc.*, No. 26-2094 (4th Cir. docketed Aug. 12, 2026), due November 27, 2026, and for an oral argument, to be scheduled during the December Term, in *Amerra Capital Management, LLC* v. *Berkshire Hathaway Specialty Insurance Co,* No. 2026-01495 (N.Y. App. Div.).

8. For these reasons, applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari up to and including February 1, 2027.

Respectfully submitted.

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November 13, 2026

# APPENDIX

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PRESENT: Powell, C.J., Kelsey, McCullough, Chafin, Russell, and Mann, JJ., and Mims, S.J.

COMMONWEALTH OF VIRGINIA

v. Record No. 250701

SAMUEL MARVIN KUYKENDALL

OPINION BY
JUSTICE D. ARTHUR KELSEY
SEPTEMBER 3, 2026

FROM THE COURT OF APPEALS OF VIRGINIA

Samuel Marvin Kuykendall committed aggravated sexual battery of a 10-year-old girl. The trial court convicted him and suspended a portion of his prison sentence on the condition that he follow the requirements of his probation. The Court of Appeals held that one of those requirements imposed a "total ban" or, if not that, a "near-total ban" on Kuykendall's use of the internet in violation of the First Amendment of the U.S. Constitution. *Kuykendall v. Commonwealth*, 85 Va. App. 118, 123, 133-34 & n.6 (2025). We disagree and reverse.

I.

In 2010, Kuykendall was found guilty of violating Code § 18.2-67.3 for the aggravated sexual battery of a 10-year-old victim, a Tier III offense under Code § 9.1-902. The trial court sentenced him to 20 years of incarceration with 5 years and 1 month suspended. The suspended term was expressly conditioned on his "good behavior" and compliance "with all the rules and requirements set by the Probation Officer." J.A. at 5.

Kuykendall's probation officer testified that sex offenders "have a certain number of other conditions or other special instructions to go along with the eleven standard conditions of probation." *Id.* at 47. The standard list of special instructions includes a prohibition on having any "contact with anyone under the age of 18," *id.* at 35 (Instruction 4), except for "supervised" contact "approved" by a probation officer, *id.* (Instruction 5). The list also requires a probationer to submit to "electronic monitoring" of his location if required to do so by his probation officer

or any application, statute, regulation, or procedure. *Id.* (Instruction 10). Concerning the use of the internet, the sex offender instructions forbid a probationer from using "any form of social networking, including but not limited to Facebook, MySpace, etc." *Id.* (Instruction 6). The next instruction, however, authorizes a probationer to "utilize internet services" if he obtains the "prior approval" of his probation officer. *Id.* (Instruction 7). "If approval is obtained," two conditions would apply: (1) the probationer must "install monitoring software" and (2) his probation officer "must be listed as an accountability partner." *Id.*[1]

Kuykendall began supervised probation after being released from prison on December 27, 2022. Two weeks later, on January 9, 2023, his probation officer filed a major violation report ("MVR-1") stating that Kuykendall failed to comply with various probation conditions and sex offender special instructions. The MVR-1 indicated that Kuykendall had tested positive for methamphetamines at his probation check-in and had tested positive for amphetamines and buprenorphine on the day that he had been released from incarceration. The MVR-1 also stated that Kuykendall had an active Facebook account, had used Facebook Messenger, had accessed pornography and dating websites, and that he had used his phone as an internet hotspot at his residence.

In August 2023, Kuykendall pleaded guilty to two felony charges for failing to register his Facebook accounts with the Sex Offender and Crimes Against Minors Registry pursuant to Code § 18.2-472.1. *See id.* at 58. The trial court sentenced him to 5 years with 4 years and 5 months suspended and 2 years of supervised probation upon release.

[1] Other requirements include attending sex offender treatment, having no contact with the juvenile victim or her guardian, avoiding places where children congregate, and not viewing sexually explicit materials. *See* J.A. at 35-36.

Based upon these developments, the trial court found that Kuykendall had violated the terms of his probation for aggravated sexual battery. The court revoked Kuykendall's suspended sentence and imposed 3 months in jail, resuspending the remaining 4 years and 10 months. The court ordered Kuykendall's sentence to run consecutively with his sentence for failure to register as a sex offender. The revocation order stated that upon release "the defendant shall be continued on probation on the same terms and conditions as contained in the previous sentencing order." *Id.* at 26. Kuykendall did not appeal or otherwise challenge the revocation order, nor did he challenge any of the probation conditions or special requirements.

Kuykendall was again released from incarceration on September 27, 2023, and began another round of supervised probation for his prior aggravated sexual battery and for his new failure-to-register offenses. Three months after probation began, Kuykendall's probation officer filed another major violation report ("MVR-2"), indicating that Kuykendall had "failed to make a satisfactory adjustment to active supervised probation" and that he had violated Conditions 6 and 8 and Special Instructions 3, 7, and 10. *Id.* at 28-29.

MVR-2 also indicated that Kuykendall had "admitted to having been active on the internet and [to] having an active Facebook account" without permission. *Id.* at 29.[2] He also had an internet modem with active internet in his home without permission from his probation

[2] Kuykendall did not object to the admission of MVR-2 into the evidentiary record of the circuit court. *See* J.A. at 56-57. In his testimony, however, Kuykendall disclaimed making this statement, *see id.* at 60, 63, and argues on appeal that we should credit his denial, *see* Appellee's Br. at 8. We decline to do so. Virginia appellate courts "presume — even in the absence of specific factual findings — that the trial court resolved all factual ambiguities or inconsistencies in the evidence in favor of the prevailing party and gave that party the benefit of all reasonably debatable inferences from the evidence." *Hill v. Commonwealth*, 297 Va. 804, 808 (2019); *see also United States v. Voelker*, 489 F.3d 139, 144 (3d Cir. 2007) (holding an unexplained restriction on supervised release should be affirmed when an appellate court "on [its] own" could "ascertain any viable basis for the restriction in the record" before the trial court) (alteration and citation omitted)).

officer. In addition, Kuykendall was non-compliant with his GPS monitoring requirement. He tested positive for methamphetamines in October and November of 2023 and admitted to his probation officer that his December 2023 test would also be positive. His probation officer submitted a referral for Kuykendall to be evaluated for substance-abuse treatment, but Kuykendall never reported for the evaluation.

The trial court held a second revocation hearing. Kuykendall conceded that he had "registered" a Facebook account but said that he had only used the internet while "looking for a job." *Id.* at 60. His probation officer, Kuykendall explained, expressly "approve[d]" his "internet access" for this limited purpose. *Id.* at 60-61. Kuykendall also admitted that during this time frame he had continued to use illegal drugs and had failed to comply with the required GPS monitoring.

In closing arguments, Kuykendall's counsel asserted for the first time that the probation requirements for sex offenders violated Kuykendall's free-speech rights protected by the First Amendment of the U.S. Constitution. Because Kuykendall's original sex offense (aggravated sexual battery of a 10-year-old girl) did not involve the use of the internet or a computer, counsel argued that the court had no authority to impair Kuykendall's use of the internet while on probation.

The trial court disagreed. "[T]he nature of [his] offense" was important, the court observed. *Id.* at 70. Equally important was that Kuykendall "would be allowed to have the internet if it were approved" by his probation officer and "if [he] installed the rapid-eye special [monitoring] programs." *Id.* After considering all the evidence, the court held that Kuykendall had violated multiple probation requirements by (i) using the internet without permission or monitoring, (ii) failing to charge or wear his GPS unit, (iii) using illegal drugs, and (iv) failing to

attend required substance-abuse counseling. The court revoked Kuykendall's suspended sentence, imposing 1 year and 3 months of his sentence and again resuspending the remaining 7 years and 12 months.

Kuykendall appealed his revocation sentence to the Court of Appeals. On the only issue now before us, the Court of Appeals held that "Kuykendall's internet restrictions are unduly broad under the First Amendment because nothing in the current record suggests the conditions are narrowly tailored to serve a rehabilitative or public safety purpose." *Kuykendall*, 85 Va. App. at 132. The conditions failed the "narrowly tailored" test, the Court of Appeals found, because they unconstitutionally imposed a "total ban," *id.* at 132-33, or, if not that, a "near-total ban," *id.* at 123, on Kuykendall's use of the internet.[3]

In reaching this conclusion, the Court of Appeals viewed *Packingham v. North Carolina*, 582 U.S. 98 (2017), as the "foundational case" applying First Amendment principles to the context of Kuykendall's probation.[4] *Kuykendall*, 85 Va. App. at 130. The Court of Appeals then examined the evidentiary record and found that "the circuit court failed to articulate a justification for how the internet restriction would serve any rehabilitative or public safety purpose — nor is there any evidence in the record the court could have silently credited." *Id.* at 133.

[3] The Court of Appeals, however, rejected Kuykendall's argument "that his failure to attend substance abuse counseling constituted a failure to follow the instructions of his probation officer and, therefore, the circuit court erred by finding that he violated a non-technical condition of probation." *Kuykendall*, 85 Va. App. at 127. We refused Kuykendall's assignment of error challenging this ruling.

[4] Kuykendall did not raise on appeal any free-speech challenge under Article I, Section 12 of the Constitution of Virginia. We thus offer no opinion on its potential application, if any, to the facts of this case.

II.

A.

Our disagreement with the Court of Appeals begins with treating the United States Supreme Court's decision in *Packingham* as legally indistinguishable from Kuykendall's case. After being convicted of a sex crime, Packingham served the entirety of his penitentiary sentence. Packingham was later arrested and convicted under a different criminal statute that prohibited registered sex offenders from accessing social networking websites. At the time of this offense, he was not on probation or post-release supervision. Violations of this felony statute resulted in a wholly new criminal sentence on a wholly new crime. Packingham's violative use of the internet was a single Facebook entry commenting on a recent, favorable traffic court experience. 582 U.S. at 102-03.

The particularly "troubling fact," *Packingham* observed, was that the unqualified statutory prohibition of internet use applied to "persons who *already have served their sentence* and are no longer subject to the supervision of the criminal justice system," *id.* at 107 (emphasis added), and it was equally "unsettling to suggest that only a limited set of websites can be used even by persons who have *completed their sentences*," *id.* at 108 (emphasis added). For this and other reasons, the Court warned in *Packingham* that "this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue." *Id.* at 107.

*Packingham* offers limited guidance on the application of First Amendment principles to internet-use restrictions imposed as probation conditions to an unserved, suspended sentence. The "driving concern" of *Packingham*, the Fifth Circuit explained, "was the imposition of a severe restriction on persons who had served their sentences and were no longer subject to the supervision of the criminal justice system." *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018). The D.C. Circuit similarly observed that *Packingham* does not plainly apply to a

supervised-release condition because such a condition "is not a post-custodial restriction of the sort imposed on Packingham." *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017). The Second Circuit also noted in *United States v. Browder*, that "*Packingham* is not directly on point" for several reasons, including that the internet ban at issue "extended beyond the completion of a sentence." 866 F.3d 504, 511 n.26 (2d Cir. 2017), *cert. denied*, 583 U.S. 1075 (2018). "Nothing in *Packingham*," the Eleventh Circuit agreed, "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. Bobal*, 981 F.3d 971, 977-78 (11th Cir. 2020) (citation omitted).[5]

In concert with these views, we reject as too sweeping the unqualified proposition that "*Packingham* applies to conditions of probation." *Kuykendall*, 85 Va. App. at 131. *Packingham* nowhere says as much, nor is this premise reasonably implied. Instead, *Packingham* tailored free-speech principles to the liberty interests of a convict who had fully served his sentence and

[5] *See also United States v. Perrin*, 926 F.3d 1044, 1049 (8th Cir. 2019) (distinguishing *Packingham* as applying a statute to an individual having completed his sentence rather than one on a term of supervised release); *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019) ("Because supervised release is part of a defendant's sentence, *Packingham* does not render a district court's restriction on access to the internet during a term of supervised release plain error."); *United States v. Eaglin*, 913 F.3d 88, 95-96 (2d Cir. 2019) ("The restriction that Eaglin challenges here, in contrast [to *Packingham*], was imposed as a condition of supervised release that applies to Eaglin alone and for a limited albeit lengthy duration. Certain 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."); *United States v. Antczak*, 753 F. App'x 705, 715 (11th Cir. 2018) (unpublished) (per curiam) ("Put differently, unlike the condition imposed on Antczak for his past behavior, the statute at issue in *Packingham* was prospective: rather than simply punishing a past crime, the statute there made it a new felony for a person to use all social-media outlets, even though that person had had all impingements upon his constitutional rights lifted by fully serving the prior sentence."); 6 Wayne R. LaFave et al., Criminal Procedure § 26.9(b), at 1735-37 (5th ed. 2025) (noting that *Packingham* "addressed a separate criminal offense and not conditions of release for defendants convicted of sex offenses").

had been unconditionally released from actual or constructive custody. That context is far different from a convict who has not fully served his penitentiary sentence and remains subject to a battery of conditions limiting his freedom during any suspended portion of it.

This contextual distinction carries great weight. Packingham and Kuykendall have only one thing in common — they were both convicted of sex crimes. What distinguishes them, however, is just about everything else. Packingham was a free man, having fully served his sentence for the underlying crime. In sharp contrast, Kuykendall was still under the incarcerating power of the state until his sentence has been fully and unconditionally served. Given the disparate facts and their dissimilar legal contexts, the full panoply of First Amendment freedoms granted to the former cannot apply to the latter. In our opinion, a convict given a form of conditional liberty pursuant to a suspended sentence can be subject to limitations on his liberty that could not be constitutionally imposed on a person wholly free from the imposition of incarceration imposed by a prior criminal conviction.

B.

Virginia law provides a rich tradition validating this premise. As we have said many times, "[c]riminal sentencing decisions are among the most difficult judgment calls trial judges face. The sometimes conflicting penological goals involved in such decisions defy precise measurements." *Du v. Commonwealth*, 292 Va. 555, 563 (2016). "The same can be said for the constituent aspects of the trial court's sentencing decisions, such as those regarding the suspension of active sentences and the imposition of a term of probation." *Id.*

In Virginia, indeterminate sentencing decisions presuppose a "baseline" term of incarceration driven higher or lower by "case-specific mitigating or aggravating factors." *Commonwealth v. Jackson*, 304 Va. 515, 530 (2025). This sentencing model has an element of

grace embedded in its formulation.[6] The modern idea of suspending an active term of incarceration evolved from the English common-law practice of granting a "reprieve," which involved the "withdrawing of a sentence for an interval of time, whereby the execution is suspended." 2 William Blackstone, Commentaries *394-95. *See generally* 2 Matthew Hale, The History of the Pleas of the Crown 412-13 (1st Am. ed. 1847). The judicial power of suspension was historically used in narrow situations "as for instance, in order to give time for motions for new trial, writs of error, or to determine the precise sentence to be imposed." *Richardson v. Commonwealth*, 131 Va. 802, 808 (1921).

Beginning in 1918, Virginia statutes began conferring broader power of suspension to sentencing courts. *See Dyke v. Commonwealth*, 193 Va. 478, 480 (1952) (citing 1918 Acts ch. 349, at 528). The justification for doing so was a humane but calculated gamble on the possibility that extending grace to the criminal would rehabilitate his character and reduce the risk of recidivism:

> The Commonwealth, in the administration of the criminal law, desires the reformation of the criminal, and in the promotion of that purpose authorizes the probation of certain criminals and the suspension of the imposition or execution of their sentences, so that they may not be deprived of their liberty and the power to earn their subsistence, or be morally corrupted by association with hardened criminals frequently found in the jails, but may take their places and perform some useful work in the community.

*Richardson*, 131 Va. at 809-10.

[6] If a sentence falls "within the lawful boundaries of applicable sentencing statutes and constitutional limitations," appellate courts rely on the "sound discretion of trial judges" to determine the length of incarceration, any period of suspension, and the conditions of probation, if any. *Du*, 292 Va. at 563; *see Jackson*, 304 Va. at 530-31. "In an indeterminate sentencing model 'not subject to established criteria, except for the statutory framework that set its outer limits,' an appellate court simply has no principled 'standards it could invoke to determine whether a particular sentence was excessive in length or otherwise inappropriate.'" *Du*, 292 Va. at 563 (quoting 6 Wayne R. LaFave et al., Criminal Procedure § 26.3(g), at 945 (4th ed. 2015)).

For over a century, Virginia courts have anchored the power of suspension on a single rationale: "When a trial judge suspends a sentence, . . . he does not make a contract with the accused, but only extends to him the opportunity which the State affords him to repent and reform." *Id.* at 810. It is not a matter of right. "It is the free gift of the Commonwealth, and not a contract to relieve him from the punishment which fits his crime." *Id*. This sentencing philosophy thus presupposes that the underlying term of incarceration — whether or not overlayed by a period of suspension — should truly be a "punishment that fits the crime," *Richardson*, 131 Va. at 810, and thus wholly just if ordered to be served in full. The role of suspension is not to reduce an unjust sentence to a just sentence. It is rather a "benevolent effort" to "reform" the convict by offering "a mercy which is free" and a "gift" to incentivize the reformation of the criminal into a law-abiding member of society. *Id.* This is why Virginia courts consistently describe a sentence suspension (with or without express probation conditions) as a judicial "act of grace," *Hannah v. Commonwealth*, 303 Va. 106, 119 (2024).[7]

[7] *See, e.g.*, *Burnham v. Commonwealth*, 298 Va. 109, 115 (2019) ("free gift" (citation omitted)); *Rease v. Commonwealth*, 227 Va. 289, 295 (1984) ("act of grace"); *Coffey v. Commonwealth*, 209 Va. 760, 762 (1969) ("grace"); *Berry v. Commonwealth*, 200 Va. 495, 498 (1959) ("matter of grace" (citation omitted)); *Richardson*, 131 Va. at 810 ("matter of grace"); *Manley v. Commonwealth*, 86 Va. App. 308, 316 (2025) ("act of grace" (citation omitted)); *Barrow v. Commonwealth*, 81 Va. App. 535, 546 (2024) (same); *Cisneros v. Commonwealth*, 82 Va. App. 147, 167-68 (2024) (same); *Hamilton v. Commonwealth*, 79 Va. App. 699, 705 (2024) (same); *Burford v. Commonwealth*, 78 Va. App. 170, 186 (2023) (same); *Green v. Commonwealth*, 75 Va. App. 69, 77 (2022) (same); *Fazili v. Commonwealth*, 71 Va. App. 239, 252 (2019) (same); *Garibaldi v. Commonwealth*, 71 Va. App. 64, 69 (2019) (same); *Hunter v. Commonwealth*, 56 Va. App. 582, 587 (2010) (same); *Price v. Commonwealth*, 51 Va. App. 443, 448 (2008) (same); *Pierce v. Commonwealth*, 48 Va. App. 660, 667 (2006) (same); *Allison v. Commonwealth*, 40 Va. App. 407, 411-12 (2003) (same); *Alsberry v. Commonwealth*, 39 Va. App. 314, 320 (2002) (same); *Singleton v. Commonwealth*, 11 Va. App. 575, 579 (1991) ("grace" (citation omitted)). Earlier United States Supreme Court opinions expressed the idea in similar terms. *See, e.g.*, *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935) ("act of grace"); *Burns v. United States*, 287 U.S. 216, 220 (1932) ("period of grace," which is a "privilege" not a "right").

C.

Kuykendall's prison sentence, if it had been imposed in full, would have been just punishment for his crime. And had the sentence not been suspended, his incarceration would have severely limited if not eliminated his use of the internet. *See, e.g.*, Virginia Dep't of Corr., Operating Procedure 310.3: Inmate/Probationer/Parolee Access to Information Technology, at 5-6 (July 1, 2024). *See generally Turner v. Safley*, 482 U.S. 78, 89 (1987) (affirming that prison regulations impinging on inmates' First Amendment rights are valid when "reasonably related to legitimate penological interests"). The question we must answer — one unasked in *Packingham* — is whether Kuykendall's conditional freedom during a suspended portion of his sentence gave him First Amendment rights in excess of those he would have enjoyed while incarcerated. The answer clearly must be yes, but to what extent?

This inquiry must take into account that the grace extended to Kuykendall was also meant to be a mercy to the public at large. The hope that he would use his conditional liberty to reform his ways and to "perform some useful work in the community," *Richardson*, 131 Va. at 810, was not meant to be a mere exercise in self-help. It was intended to protect the public from Kuykendall when he reenters society upon completion of his sentence. The "grace" of his suspended sentence, therefore, is gracious to the public only if it successfully reduces the risk of his recidivism. The rehabilitation goal could only be achieved by probation conditions that got to the core of the problem: Kuykendall's desire and willingness to commit aggravated sexual battery of a young child.

We fully accept that the First Amendment plays a role in setting boundaries for probation conditions on suspended sentences. Many courts after *Packingham* agree but have found it difficult to articulate with specificity the constitutional limits. In our view, the best synthesis of these cases recognizes that limitations on internet use are consistent with the First Amendment if

they judiciously contribute to the rehabilitation of the criminal and seek to protect the public from the likelihood that he will commit the same or similar crimes upon obtaining his freedom when his sentence expires. *Cf. United States v. Negrón-Cruz*, 153 F.4th 90, 106-07 (1st Cir. 2025) (accepting that a supervised release condition may intrude "upon a constitutionally protected right" but holding that "even if it does, we will vacate a condition only if we determine that, 'on a given set of facts, a particular restriction' on a defendant's liberty 'is clearly unnecessary'" (citations omitted)); *United States v. Perrin*, 926 F.3d 1044, 1050 (8th Cir. 2019) (holding that a "special condition" of supervised release passed First Amendment scrutiny because it did "not involve a greater deprivation of liberty than is reasonably necessary").

These are not speculative concerns, particularly in this case. Recidivism concerns are "heightened when, as here, a probationer is a sex offender." *Du*, 292 Va. at 565 n.6 (quoting *Murry v. Commonwealth*, 288 Va. 117, 127 (2014)). "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 33 (2002) (plurality opinion); *see also United States v. Kebodeaux*, 570 U.S. 387, 395-96 (2013). In his *Packingham* concurrence, Justice Alito repeated these concerns:

> The State's interest in protecting children from recidivist sex offenders plainly applies to Internet use. Several factors make the Internet a powerful tool for the would-be child abuser. . . . [T]he Internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children. . . . Such uses of the Internet are already well documented, both in research and in reported decisions.
>
> Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the Internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

*Packingham*, 582 U.S. at 111-13 (Alito, J., concurring) (footnotes omitted).

In this case, the probation officer recommended that the sentencing court require Kuykendall (a Tier III child sex offender) to comply with the standard probation conditions applicable to violent sex offenders. Those conditions did not, as the Court of Appeals suggested, impose a total ban or near-total ban on internet use. Reading the conditions harmoniously, the trial court correctly held that Kuykendall "would be allowed to have the internet if it were approved" by his probation officer and "if [he] installed the rapid-eye special [monitoring] programs." J.A. at 70. At most, these conditions merely forbid Kuykendall from accessing "social networking" sites (such as "Facebook, MySpace, etc.") or any other "internet service" without first seeking and obtaining "prior approval" from his probation officer and installing monitoring software. *See id.* at 35 (Instructions 6 and 7). It was not a total ban or a near-total ban. It was a conditional ban.

At his most recent revocation hearing, Kuykendall understood and confirmed the conditional nature of the internet ban when he testified that he had received approval for "internet access" to "look for a job." *Id.* at 60-61. At no time during his supervised probation, however, did Kuykendall ask for or receive permission to access pornography, dating websites, or any other social media sites. And even if he had been granted permission, he violated the requirement to install "monitoring software" and list his probation officer as an "accountability partner." *Id.* at 35. Compounding these concerns, Kuykendall had also violated probation by committing new felony offenses for failing to register his internet accounts with the Virginia State Police in violation of Code § 18.2-472.1. Many, if not all, of these violations occurred while Kuykendall was taking illegal drugs (methamphetamines, amphetamines, and buprenorphine) and refusing to participate in substance-abuse treatment.

In our opinion, the trial court's probation requirements were judiciously crafted to incentivize Kuykendall to reclaim his opportunity to lead a good life and by doing so protect the public (particularly young children) from the risk that he would repeat the crimes of his past. We know of no binding precedent that condemns as unconstitutional the trial court's requirement that Kuykendall obtain permission to use the internet during the conditional freedom of his suspended sentence. The only contrary precedent proffered as binding, *Packingham*, involved a free man who had fully served his sentence — not a convict who has been given a grace period in which to prove that he is capable and willing to return to society a better man.

III.

In sum, the trial court did not violate the First Amendment by revoking and resuspending a portion of Kuykendall's suspended sentence. The probation requirements governing Kuykendall's use of the internet were judiciously crafted to contribute to his rehabilitation and to protect the public from the likelihood that he would commit the same or similar crimes upon obtaining his freedom on the expiration of his ultimate sentence.

*Reversed and final judgment.*