No. 123643

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

Plaintiff-Appellee

v.

CONRAD ALLEN MORGER

Defendant-Appellant.

Appeal from the Appellate Court of Illinois,
Fourth Judicial District, No. 4-17-0285

There Heard on Appeal from the Circuit Court of the Eleventh Judicial Circuit,
McLean County, Illinois No. 12-CF-1330
The Honorable Scott D. Drazewski, Judge Presiding

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, INC. AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANT-APPELLANT CONRAD ALLEN MORGER

Rebecca K. Glenberg
Roger Baldwin Foundation of the American Civil Liberties Union of Illinois, Inc.
180 North Michigan Avenue, Suite 2300
Chicago, Illinois 60601
Telephone: (312) 201-9740
rglenberg@aclu-il.org

Esha Bhandari
American Civil Liberties Union Foundation
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2500
ebhandari@aclu.org

Clifford W. Berlow
Samantha M. Glass
Andrew P. Walker*
Jenner & Block LLP
353 North Clark Street
Chicago, Illinois 60654
Telephone: (312) 222-9350
cberlow@jenner.com
**Admitted only in New York; not admitted in Illinois. Practicing under the supervision of the partnership of Jenner & Block LLP.*

Counsel for Amici Curiae

E-FILED
12/18/2018 12:02 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

INTERESTS OF THE *AMICI*

The American Civil Liberties Union of Illinois, Inc. is the state affiliate of the nationwide American Civil Liberties Union, a nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the U.S. Constitution.

The American Civil Liberties Union has been at the forefront of protecting First Amendment rights nationally and in Illinois. In the nearly 100 years since its founding, the ACLU has frequently appeared before courts throughout the country in First Amendment cases, both as direct counsel and as *amicus curiae*. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. American Library Ass'n*, 539 U.S. 194 (2003); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *People v. Clark*, 2014 IL 115776; *People v. Melongo*, 2014 IL 114852. The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

SUMMARY OF ARGUMENT

Probation Condition Number 5 forbids Mr. Morger from accessing or using any social networking website.[1] *People v. Morger*, 2018 IL App (4th) 170285, ¶¶ 33-34, *appeal allowed*, 108 N.E.3d 817 (Ill. 2018) (Table). This Court should strike it

[1] This brief uses the term social media or social media platforms interchangeably with social networking websites to capture the spectrum of sites that fall within Probation Condition Number 5's definition. Additionally, access to the relevant social networking sites depends upon being able to use a device capable of accessing the internet, which is restricted by Probation Condition Number 8, which Mr. Morger has not challenged in this appeal.

down because it violates Mr. Morger's First Amendment rights. Notwithstanding Mr. Morger's status as a probationer, this case is controlled by *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Because the State has not advanced—and cannot advance—a compelling justification that survives the scrutiny required by *Packingham*, the Condition is unconstitutional. It does not serve any compelling governmental interest and is not tailored to advance whatever interest the State may claim to have in preventing Mr. Morger from accessing all social media sites, regardless of content or circumstance.

It is difficult to overstate how onerous such a social media restriction truly is, particularly for a formerly incarcerated person who seeks to reintegrate into society. Today, social networking sites like Twitter, LinkedIn, Instagram, and Facebook—all of which fit underneath the umbrella term of "social media" sites—serve as perhaps the most important gathering spaces for reading about news and current events, communicating with family, friends, professional contacts, or elected officials, finding employment or educational opportunities, and pursuing religious or political associations. As the U.S. Supreme Court recently stated, social media sites have become the "modern public square." *Packingham*, 137 S. Ct. at 1737. The wholesale foreclosure of access to that important medium thus is rightly subject to the most exacting scrutiny.

A prohibition on Mr. Morger's ability to access all forms of social media cannot withstand that scrutiny. Even more than a means of communication and expression, social networking sites serve as the primary channels for Americans

to gather information. The preservation of the free flow of speech, and of the ability to receive information and ideas, is a fundamental part of the First Amendment. Such a flow of ideas allows for the free expression of every individual in the community, including both the speaker and the hearer. A prophylactic, categorical restriction on such speech must, if viable at all, at least be tailored narrowly and justified rigorously. This Probation Condition clearly does not satisfy these requirements.

A decision upholding a categorical prohibition on all access to social media websites would have far-ranging implications for First Amendment rights. Such a decision would be a profound departure from core constitutional principles. Because there is no basis for this Court to take such a drastic jurisprudential step, it should reverse the decision of the Illinois Appellate Court.

ARGUMENT

I. Because The Internet Is The "Modern Public Square," Mr. Morger's Probation Condition Denies Him Access To A Vital Part Of Society.

In modern life, social media websites form one of "the most important places (in a spatial sense) for the exchange of views." *Packingham*, 137 S. Ct. at 1735. Facebook is a prominent example. Facebook is used by 68% of adults in the United States and more than two billion people worldwide. *See* Press Release, Facebook, Facebook Reports Second Quarter 2018 Results (July 25, 2018), https://investor.fb.com/investor-news/press-release-details/2018/Facebook-Reports-Second-Quarter-2018-Results/default.aspx; John Gramlich, *8 Facts about Americans and Facebook*, Pew Research Center (Oct. 24, 2018),

http://www.pewresearch.org/fact-tank/2018/10/24/facts-about-americans-and-facebook/. If all of Facebook's users formed a country, it would be the largest country in the world. *See* Conrad Hackett, *Which 7 countries hold half the world's population?* Pew Research Center (July 11, 2018), http://www.pewresearch.org/fact-tank/2018/07/11/world-population-day/ (noting that China, the largest country in the world by population, has a population of 1.42 billion).

Given their ubiquity, sites like Twitter, LinkedIn, YouTube, Instagram, and Facebook "offer[] a 'relatively unlimited, low-cost capacity for communication of all kinds.'" *Packingham*, 137 S. Ct. at 1735 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)). That includes core political speech and petitions to government officials. Twitter, for example, allows users to directly engage with their elected representatives. For instance, while mayor of Newark, now-Senator Cory Booker used his Twitter account to respond to requests from constituents during a blizzard, including sending plows where needed. Sean Gregory, *Cory Booker: The Mayor of Twitter and Blizzard Superhero*, Time, Dec. 29, 2010, http://content.time.com/time/nation/article/0,8599,2039945,00.html. Almost every Member of Congress, and Governors in all 50 states, have Twitter accounts. *Packingham*, 137 S. Ct. at 1735. Twitter is perhaps the single most prominent mode of communication used by the current President of the United States. *See e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 552-53 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1691 (2d Cir. June

5, 2018) (noting all of the ways in which the President uses his Twitter account, including for official government business); *see also* James M. LoPiano, Note, *Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account*, 28 Fordham Intell. Prop. Media & Ent. L.J. 511, 513 (2018). And "hashtags" on Twitter have served as a tool to facilitate grassroots movements like #BlackLivesMatter and #MeToo, allowing users to express their support for (or opposition to) such movements. *See* LoPiano, *supra*, at 519.

Put simply, social media has "ingrained itself into the very fabric of American politics." LoPiano, at 520. Political expression and associational activities that in an earlier era might have been served by writing a newspaper editorial or holding up a sign now occur online and with a broader reach. An Instagram user can express his or her view about a political candidate in an upcoming election. Twitter or Facebook users can debate religion or politics with friends, neighbors, and other users. *Packingham*, 137 S. Ct. at 1735. Social media platforms also serve as a key source of news for the American public. Approximately 68% of American adults now obtain news from social media. *See* Katerina Eva Matsa, *News Use Across Social Media Platforms 2018*, Pew Research Center (Sept. 10, 2018), http://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/. Approximately 21% of Americans use YouTube to obtain news, with almost half of American adults—43%—accessing news via Facebook. *Id.*

Speech on social media also can be an integral part of religious practice. It is not uncommon for Instagram users to share Bible passages or quotes from the Quran. A YouTube user might choose to practice his religion by watching a weekly sermon, just as others might attend weekly mass at church. *See e.g.*, *Manning v. Powers*, 281 F. Supp. 3d 953, 957, 966-67 (C.D. Cal. 2017) (granting preliminary injunction enjoining officials from enforcing parole condition that barred parolee's access to social media where parolee was minister who, among other things, posted videos of his sermons on social media sites in order to deliver his message to those who are unable to attend in person); Matson Coxe, *Here Is the Church, Where Is the Steeple:* Foundation of Human Understanding v. United States, 89 N.C. L. Rev. 1248, 1264-65 (2011) (explaining how religious followers use the internet, and in recent years social media including video streaming services, to share their beliefs and churches use those services to broadcast sermons to thousands of people). Even Pope Francis sends out Twitter messages to his more than 40 million followers, which are not available other than through his chosen social networking site. *Pope Francis reaches 40 million followers on Twitter*, Catholic Herald (Oct. 11, 2017), https://catholicherald.co.uk/news/2017/10/11/pope-francis-reaches-40-million-followers-on-twitter/.

Social media platforms are also fora for artistic expression. Just as one might hang up a picture or pass out a flyer on the street, photographers post their photographs on Instagram, and poets share snippets of their work via various platforms. Dancers post videos of their performances on Instagram and YouTube,

reaching an audience wider than a theater's capacity. Musicians share songs and music videos on YouTube. Social media sites "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737.

The import of social media in modern life goes even further, by serving a key function for economic opportunity. By way of example, the popular social networking site LinkedIn serves as a professional networking tool meant to help users search for connections and develop their professional network. Users on LinkedIn can also look for work or advertise for employees. *Id.* at 1735. Other job posting social networking websites provide a similar service. *See e.g.*, Aaron Smith, *Searching for Work in the Digital Era*, Pew Research Center (Nov. 19, 2015), http://www.pewinternet.org/2015/11/19/searching-for-work-in-the-digital-era/ (noting that "a substantial number" of Americans use social media platforms to look for work); Sarah Halzack, *LinkedIn has changed the way businesses hunt talent*, Wash. Post, Aug. 4, 2013 (77% of employees use social media networks to recruit candidates); Rhymer Rigby, *Glassdoor takes clear aim at LinkedIn*, Financial Times, Feb. 3, 2016 (pointing to Glassdoor as a networking site similar to LinkedIn). These functions are particularly critical for formerly incarcerated people who are seeking to reintegrate into society.

In short, social media platforms are a "necessary part of modern interaction." Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 Pace L. Rev. 366, 366 (2014). Social media platforms allow individuals to express and develop their

political views, to facilitate the practice of their religion, to express themselves artistically, and to develop professionally and find work. Probation Condition 5, however, categorically excludes Mr. Morger from all of this. It stops Mr. Morger from accessing Twitter, which means he is prevented from receiving political information directly from the President of the United States and religious information directly from the Pope. It bars Mr. Morger from communicating with his friends and neighbors via Facebook, despite that medium's important role in facilitating civic engagement. It denies Mr. Morger access to YouTube and Instagram, including its religious, political, artistic, and educational content. And it precludes Mr. Morger from using LinkedIn—and other similar job-search networking sites—thereby inhibiting his ability to obtain employment.

Given that one of the main goals of probation, as explained by this Court, is to allow Mr. Morger to re-enter society, blanket restrictions on social media access serve no good purpose, let alone one that passes constitutional muster. *People v. Meyer*, 176 Ill. 2d 372, 379 (1997) ("[T]he purpose of probation is to benefit society by restoring a defendant to useful citizenship, rather than allowing a defendant to become a burden as an habitual offender."). Mr. Morger has been cut off from "the modern public square" at the very moment he is seeking to reintegrate into society. *See Packingham*, 137 S. Ct. at 1737. Forbidding his engagement in every aspect of modern life that occurs on social media does nothing to restore Mr. Morger to useful citizenship.

II. The Probation Condition Conflicts With Decades Of First Amendment Doctrine.

A. The Probation Condition Violates Mr. Morger's First Amendment Rights To Receive Information And Ideas.

The Court in *Packingham* stated that 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*." *Packingham*, 137 S. Ct. at 1735 (emphasis added). In including the right to "listen" within its statement of First Amendment principles, the Court drew upon its long history of reading the First Amendment to protect the right to "'receive information and ideas.'" *See, e.g.*, *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982) (plurality) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)).

Accordingly, in a "variety of contexts," the U.S. Supreme Court has found that the right to receive information and ideas is sacrosanct. *Pico*, 457 U.S. at 867. The Court has held that an individual has the right to listen to speeches given by union organizers, *Thomas v. Collins*, 323 U.S. 516, 534 (1945), to receive political or religious pamphlets, *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), and to receive information regarding product pricing information, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

The free receipt of information and ideas thus is fundamental to the broader scheme of First Amendment protection. For one, "the right to receive ideas

follows ineluctably from the *sender's* First Amendment right to send them." *Pico*, 457 U.S. at 867. The First Amendment not only protects the rights of individual speakers, but also the right to be heard, a right that requires "the free flow of ideas" between speakers *and* hearers. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."). Furthermore, the right to receive information is "a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Pico*, 457 U.S. at 867. The Court has noted that even the free flow of *commercial* information is generally protected by the First Amendment, in part because the free flow of information is necessary for "the formation of intelligent opinions . . . ." *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

When measured against these principles, Probation Condition 5 is plainly improper because it impermissibly restricts Mr. Morger's "'well established . . . right to receive information and ideas.'" *See Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (citation omitted). As noted in Part I, social media platforms not only are important fora for First Amendment expression—they are perhaps the *central* fora for speech within modern society. Social media platforms are the loci for the "free flow of ideas and opinions on matters of public interest and concern" referenced by the Supreme Court years ago in *Hustler*, 485 U.S. at 50. In today's United States, where many communities lack a physical town hall or central

square, social media platforms are the primary fora for receiving updates tailored to a niche interest, guidance from the keyboard of the Pope or other religious leaders, news from the President, or neighbors' opinions regarding the location of a new traffic light. Probation Condition 5 cuts off Mr. Morger—and any other probationer for whom the condition is imposed—from this "free flow of ideas."

This Probation Condition stands against the benefits to society and to the individual that the First Amendment seeks to preserve. A restriction on the "free flow" of ideas hurts *every* citizen's pursuit of self-expression. *Hustler*, 485 U.S. at 50. A politician hoping to drum up grassroots enthusiasm may not be able to convince Mr. Morger to lend support. An advocate loses the ability to convince Mr. Morger of a cause's justice. An artist seeking self-expression loses a validating audience member. And Mr. Morger loses the opportunity to know what his community—whether local, national, or global—is discussing and debating.

B. Broad, Prophylactic Prohibitions On Speech Are Disfavored.

The Supreme Court has stated that prophylactic measures that target antecedent behavior rather than subsequent harm are subject to "exacting First Amendment scrutiny" and that "'[b]road prophylactic rules in the area of free expression are suspect.'" *See, e.g.*, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798, 801 (1988) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). To "withstand" such scrutiny, "[i]t is not enough to show that the Government's ends are compelling . . . ." *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Rather, the government must show that a statute is

"carefully tailored to achieve those [compelling] ends." *See id.* Accordingly, the Supreme Court has repeatedly struck down such prophylactic provisions that restrict free speech. *See, e.g.*, *Sable Commc'ns*, 492 U.S. at 126-127 (striking down restriction on "dial-a-porn" phone lines); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (striking down restriction on charitable solicitation); *NAACP v. Button*, 371 U.S. 415, 439-440 (1963) (striking down prohibition on solicitation by NAACP and public interest lawyers); *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (striking down anti-pamphlet law).

Probation Condition 5 is just such a prophylactic prohibition. Mr. Morger cannot access a large swath of the most critical parts of the internet. The Supreme Court has made clear that a compelling justification must exist for such regulations, *see supra*, an approach that is particularly relevant for restrictions as draconian as these. None exists. The State has not shown that a restriction as broad as this is carefully tailored to achieve any compelling ends. It cannot be the case that the State has a compelling need to deny Mr. Morger the ability to follow the President's Twitter feed or the Pope's Twitter feed, to search for a job via LinkedIn, or to browse a family member's photos on Facebook or Instagram. Such an overbroad restriction signals that the condition that prevents him from doing so is not at all "carefully tailored" to target his crimes or the prevention of future crimes. *Sable Commc'ns*, 492 U.S. at 126. Probation Condition 5 cannot survive any scrutiny, let alone the exacting scrutiny required by Supreme Court precedent. *Riley*, 487 U.S. at 798, 801. To the extent the State has any compelling

interest in restricting Mr. Morger from certain speech, such as, for example, communicating with minors through the internet, it can impose narrowly tailored probation conditions that target only that speech.

C. If The Court Upholds Mr. Morger's Probation Condition, It Would Have Far-Ranging Implications For First Amendment Rights.

The Supreme Court has never upheld restrictions as far-reaching as a total ban on social media access. Like the restrictions at issue in *Packingham*, which, but for Mr. Morger's status as a probationer, were nearly identical to Probation Condition 5 here, these restrictions "enact[] a prohibition unprecedented in the scope of First Amendment speech . . . ." *Packingham*, 137 S. Ct. at 1737. Just like the state of North Carolina, the state of Illinois here seeks with "one broad stroke [to] bar[] 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." *Id.*

The fact that Mr. Morger is on probation does not mitigate the severe damage to his rights caused by this Probation Condition. His status will not blunt the far-reaching precedent that a decision upholding this Probation Condition would create. As previously discussed, the internet serves as a vital forum within contemporary society. *See also id.* (stating that social media platforms "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard"). The Supreme Court has been clear, however, that

the First Amendment applies no matter how novel the channel of communication may be. *See Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears.") (citation omitted). It therefore follows that, just as those on probation do not lose all rights to communicate and receive ideas, they cannot be prohibited from exercising those rights simply because they do so online.

Furthermore, the Supreme Court has acknowledged First Amendment rights require protection even for socially disfavored speakers, as it did in the *Packingham* decision, which concerned the rights of individuals who were registered sex offenders. *See Packingham*, 137 S. Ct. at 1737. The Supreme Court has held that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment Rights." *Id.* Although the government in this case and the courts below have attempted to limit the reach of this statement, the Supreme Court's reasoning in *Packingham* applies with no less force here. A decision in this case holding otherwise would be a break with this powerful precedent.

A decision that upholds Probation Condition Number 5 would blur the clear, bright-line rule that such prophylactic restrictions on protected speech must be subject to exacting scrutiny, muddy the waters of Constitutional protection, and open the door for lawmakers in this state to test what other classes of individuals

may have their rights so restricted. Even if the consequences of such resulting experimentation were at first incremental, a decision upholding the Probation Condition here would represent a clear erosion of constitutional liberty. Over time, Illinoisans might find that when the line protecting First Amendment rights is deemed negotiable, the rights to speech and the free exchange of ideas become debatable in previously unthinkable ways. This Court should speak in defense of the First Amendment and hold that Mr. Morger cannot be subject to Probation Condition Number 5.

CONCLUSION

For the foregoing reasons, *amici curiae* the American Civil Liberties Union of Illinois, Inc. and the American Civil Liberties Union urge this Court to hold that Probation Condition Number 5 violates the First Amendment and to reverse the judgment of the court below.

Dated: December 6, 2018

Respectfully Submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, INC. AND THE AMERICAN CIVIL LIBERTIES UNION

s/ Clifford W. Berlow
One of Their Attorneys

Clifford W. Berlow
Samantha M. Glass
Andrew P. Walker*
Jenner & Block LLP
353 North Clark Street
Chicago, Illinois 60654
Telephone: (312) 222-9350
cberlow@jenner.com
**Admitted only in New York; not admitted in Illinois. Practicing under the supervision of the partnership of Jenner & Block LLP.*

Rebecca K. Glenberg
Roger Baldwin Foundation of the American Civil Liberties Union of Illinois, Inc.
180 North Michigan Avenue, Suite 2300
Chicago, Illinois 60601
Telephone: (312) 201-9740
rglenberg@aclu-il.org

Esha Bhandari
American Civil Liberties Union Foundation
125 Broad Street, Floor 18
New York, New York 10004
Telephone: (212) 549-2500
ebhandari@aclu.org

RULE 341(c) CERTIFICATE OF COMPLIANCE

I, Clifford W. Berlow, an attorney, certify that this brief conforms to the requirements of Supreme Court Rules 345(b) and 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 16 pages.

Dated: December 6, 2018

s/ Clifford W. Berlow
Clifford W. Berlow

E-FILED
12/18/2018 12:02 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK