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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The North Carolina Supreme Court sustained petitioner's conviction under a criminal law, N.C. Gen. Stat. § 14-202.5, that makes it a felony for any person on the State's registry of former sex offenders to "access" a wide array of websites—including Facebook, YouTube, and nytimes.com—that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts. The law—which applies to thousands of people who, like petitioner, have completed all criminal justice supervision—does not require the State to prove that the accused had contact with (or gathered information about) a minor, or intended to do so, or accessed a website for any illicit or improper purpose.

The question presented is:

Whether, under this Court's First Amendment precedents, such a law is permissible, both on its face and as applied to petitioner—who was convicted based on a Facebook "post" in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina (App., *infra*, 1a-35a) is reported at 777 S.E.2d 738. The opinion of the Court of Appeals (App., *infra*, 36a-53a) is reported at 748 S.E.2d 146. The order of the Superior Court (App., *infra*, 54a-65a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 6, 2015. On January 20, 2016, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 21, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." N.C. Gen. Stat. § 14-202.5 is reproduced in the appendix to this petition. App., *infra*, 66a-67a.

STATEMENT

1. Two decades ago, North Carolina, invoking the State's "paramount" interest in protecting the public from sex offenses and the risks of recidivism, enacted a law requiring residents previously convicted of certain sexual and other offenses to provide law enforcement with up-to-date identification and residency information, which is compiled and made

available to the public on a centralized registry. See N.C. Gen. Stat. §§ 14-208.5 *et seq.* (declaring law's "purpose" of assisting law enforcement and the general public by supplying timely and accurate information). See generally N.C. Dep't of Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* ("Registry Overview") 11-12 (Sep. 2014).

As have legislatures elsewhere, the North Carolina General Assembly has amended its laws repeatedly in the past decade, adding to the list of "reportable" offenses; imposing more extensive and longer-lasting reporting obligations and broader dissemination; and providing harsher penalties for violations. The Legislature has also enacted an array of rules regulating where registrants lawfully may work, reside, or "be," *e.g.*, N.C. Gen. Stat. § 14-208.18. See Registry Overview at 11-17. Thus, where it might formerly have been said that persons "subject to [North Carolina's] statute [were] free to move where they wish and to live and work as other citizens, with no supervision," *Smith* v. *Doe*, 538 U.S. 84, 87 (2003), registrants now confront a dense thicket of restrictions, backed by criminal penalties.

2. In 2008, as part of legislation aimed at making North Carolina "one of the toughest states, if not the toughest state," in its dealings with those on its registry, the General Assembly enacted N.C. Gen. Stat. § 14-202.5, restricting registrants' internet use. Whitney Woodward, *State Legislators Approve "Jessica's Law,"* Greensboro News and Record, July 17, 2008.

Although an initial version of the law would have imposed obligations on "social networking website" *operators* to ensure that minors obtain adult permission before establishing accounts and afford parents ongoing access, see S.B. 132 § 8, 2007 Gen. Assemb., Reg. Sess. (N.C. 2007), those provisions ultimately were omitted, in favor of one that makes it a felony for persons on the State's registry to "access" any commercial website that [1] "facilitates the social introduction" of people [2] for, *inter alia*, "purposes of * * * information exchanges"; [3] allows users to create "personal profiles" with a name or picture; and [4] provides them ways to "communicate with other users"—provided the site is "know[n]" to not restrict "member[ship]" to adults. N.C. Gen. Stat. § 14-202.5(a), (b). The measure was approved by unanimous votes in both Houses of the General Assembly. See N.C. Gen. Assemb., 2007-2008 Sess., S. Roll Call 1773 (Jul. 18, 2008); *id.* H. Roll Call 1929 (Jul. 18, 2008).

Section 202.5 applies to every person on the registry, including the large numbers who are neither incarcerated nor under criminal justice supervision;[1] and those whose convictions were for nonsexual reportable offenses, and offenses not involving minors, see, *e.g.*, N.C. Gen. Stat. § 14-208.6(d) (requiring registration by those convicted of disseminating "a photographic image of another person underneath or through the clothing," *id.* § 14-202(e)). The statutory criteria have been understood to sweep in many sites not "normally thought of as

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[1] See *Offender Statistics*, N.C. Dep't of Pub. Safety, http://sexoffender.ncsbi.gov/stats.aspx (last visited Mar. 16, 2016).

'social networking' sites," Pet. App. 33a (Hudson, J., dissenting) (citing foodnetwork.com, nytimes.com, amazon.com, and google.com); see *Crime Briefs*, The News Reporter, Feb. 1, 2016 at 4A (reporting prosecution for accessing YouTube). The prohibition does not extend, however, to websites that provide a *single* "discrete service[]," such as "photo-sharing," "electronic mail," "instant messenger," or a "chat room or message board platform" or to ones that "primar[il]y" enable "commercial transactions involving goods or services between [their] members." N.C. Gen. Stat. § 14-202.5(c)(1), (2).

3. Petitioner Lester Packingham was prosecuted and convicted under Section 202.5 for "accessing" Facebook.com in 2010.

Petitioner's registration arose from his 2002 guilty plea, as a 21-year-old student with no prior criminal record, to a single count of taking indecent liberties with a minor, N.C. Gen. Stat. § 14.202.1. See Cabarrus County Super. Ct., Judgment, No. 02CRS008475 (Sep. 16, 2002) (A.O.C. Form 603), at 1. That conviction resulted in a sentence of 10-12 months, followed by 24 months' supervised release, during which time petitioner was subject to "standard conditions" requiring, *e.g.*, that he register, submit to warrantless searches, refrain from illegal substance use, and avoid contact with the complainant. *Id.* 1-3. Apart from directing that petitioner "remain away from" that young woman during the two-year period, the sentencing court imposed no further "special conditions." *Id.* 2.

In April 2010, a Durham police officer came across petitioner's Facebook account and the following "post":

> Man God is Good! How about I got so much favor they dismiss the ticket before court even started. No fine, No court costs, no nothing spent....Praise be to GOD, WOW! Thanks JESUS!

C.A. Rec. 77. That led the officer to arrest petitioner on charges of violating Section 202.5. (Although authorities obtained a warrant and searched petitioner's home, computer, and thumb drives, the only evidence of "access" presented at his criminal trial was a print-out of this one post. See C.A. Rec. 74-77).

a. Petitioner moved to dismiss the charge on First Amendment grounds. The trial court denied that motion, emphasizing the Legislature's responsibility to weigh "disparate interests and to forge a workable compromise," Pet. App. 60a (quoting *State* v. *Bryant*, 359 N.C. 554, 565 (2005)), and concluding that the "balance" Section 202.5 strikes, between "activities of sex offenders" and "protection of minors," was constitutionally permissible, *id.* 64a. Petitioner stood trial, and a jury convicted him of criminal "access."

b. The North Carolina Court of Appeals overturned petitioner's conviction, unanimously holding Section 202.5 unconstitutional, both on its face and as applied.

The court highlighted similarities between Section 202.5 and "social media bans" of other States that had been held unconstitutional by federal courts. See Pet. App. 44a-46a (citing *Doe* v. *Prosecutor, Marion*

County, 705 F.3d 694 (7th Cir. 2013), *Doe* v. *Jindal*, 853 F. Supp. 2d 596 (M.D. La. 2012), and *Doe* v. *Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012)). Like those laws, the court explained, Section 202.5 has an undeniably legitimate purpose—protecting minors from harm—and is "content neutral," in that it does not suppress expression based on its subject or viewpoint. Pet. App. 42a. But like those laws, the court held, Section 202.5 impermissibly "prohibit[s] an enormous amount of expressive activity on the internet," *id.* 46a, including much that is plainly "unrelated to online communication with minors." *Id.* 51a. See also *ibid.* (explaining that Section 202.5 "could be interpreted to ban registered sex offenders from * * * conducting a 'Google' search [or] purchasing items on Amazon.com").

c. The State sought review from the North Carolina Supreme Court, pointing to a feature of Section 202.5 it claimed the appellate court overlooked: While other States' laws sought to prevent registrants from using social networking sites to "contact" minors for improper purposes, the State urged, North Carolina's measure aimed to prevent "information gathering," which could enable predators to "target" young people for criminal purposes. Pet. Discretionary Review 11-12.

The State Supreme Court granted review, and, over vigorous dissent, held Section 202.5 to be "constitutional in all respects." Pet. App. 2a. The court first held that the law should be analyzed as a "limitation on conduct," rather than a speech restriction, *id.* 9a, because it prohibits registrants from "access[ing]" proscribed websites, *id.*, so that the burdens on their ability "to engage in speech on the

Internet" were "incidental[]." *Id.* 12a. The court then accepted the State's asserted interest in "forestall[ing] illicit lurking and contact" by "prevent[ing] registered sex offenders" from "harvest[ing] information," concluding that these are "unrelated to the suppression of free speech." *Id.* 13a-14a.

The court then held that Section 202.5 is "not substantially broader than necessary to achieve the government's interest." Pet. App. 15a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989)), and therefore "sufficiently narrowly tailored." *Id.* 16a. Although the law "could have been drafted even more narrowly," the court emphasized, it fell well short of "imposing a blanket prohibition against Internet use," *id.* 15a. While "numerous well-known Websites" are foreclosed, the majority continued, Section 202.5 "leaves open ample alternatives," noting that though registrants' "access[ing]" the New York Times website (which does not have an adults-only policy) could give rise to prosecution, they "may [still] follow current events on WRAL.com," the local NBC affiliate's website. *Id.*17a-18a. For similar reasons, the court explained, the statute did not fail as overbroad: Registrants "are prohibited from accessing only those Web sites where they could actually gather information about minors to target" but are otherwise "free to use the Internet." *Id.* 25a.[2]

[2] The court further held that Section 202.5 was constitutional "as applied," noting that petitioner's offense of conviction had involved a minor and describing his use of the name "J.r. Gerrard" on Facebook—along with a photograph of himself and his phone number—rather than his given name, Lester Gerard Packingham, Jr., as "disguis[ing] his identity,"

Justices Hudson and Beasley dissented, concluding that Section 202.5 is unconstitutional both on its face and as applied in convicting petitioner. Invoking "basic principles of freedom of speech," Pet. App. 28a (quoting *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011)), the dissent explained that Section 202.5 "regulates First-Amendment-protected activity," "directly"—not "'incidental[ly]'"—and does so with "alarming breadth," by "completely barr[ing]" a class of citizens "from communicating with others through many widely utilized commercial networking sites." *Ibid.* Whether or not Section 202.5 warranted strict First Amendment scrutiny, the dissent explained, was of no moment; because North Carolina's law "burdens [so much] * * * more speech than necessary," it "c[ould] not survive" review under less demanding standards. *Id.* 34a.

REASONS FOR GRANTING THE PETITION

This Court's review is required to secure compliance with core First Amendment principles that should have restrained North Carolina's legislature and Supreme Court but did not.

The constitutional defects of the law under which petitioner (and more than 1,000 others) was prosecuted are not subtle or "marginal." Pet. App. 25a. Rather, Section 202.5's affronts to First Amendment principle are basic and serious: The statute singles out a subclass of persons, who are subject to criminal punishment based on expressive, associational, and communicative activities at the heart of the First Amendment, without any

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"indicating his awareness that he was indulging in forbidden behavior." Pet. App. 22a.

requirement that their activity caused any harm or was intended to.

As surely as Section 202.5 should never have been enacted, it should not have been upheld by the State's Supreme Court. This Court's decisions establish that the Freedom of Speech guaranteed by the Constitution requires that all laws regulating First Amendment activity—especially laws as far-reaching and strange as this one—be subject to serious judicial scrutiny, including measures enacted for no censorial purpose. And those precedents require that the judiciary hold officials seeking to suppress or punish First Amendment activity to the burden of showing that the government's purposes could not accomplished without speech regulation or through measures that are significantly less burdensome.

The North Carolina Supreme Court's decision here did the opposite. The court first postulated that Section 202.5 should be analyzed as mere "conduct regulation"—a premise not merely unsupported by, but subversive of, governing precedent. Just as all conduct may be said to contain "a kernel of expression," the inverse also holds true; and the edifice of First Amendment review could not long stand if laws prohibiting purchasing ink and paper were reviewed differently from laws forbidding publication of newspapers. Neither the State nor the decision below suggested that "access" to the proscribed websites is in itself of governmental concern, let alone an "evil"—only the activities, expression and gathering information, *i.e.* Speech, that some registrant might engage in.

The State Supreme Court then offered a species of "scrutiny" that could fairly be described as

intermediate in theory, but supine in fact. Its decision pronounced Section 202.5 "narrowly tailored" for one reason—"it could have been worse"—giving the Legislature credit for what it *did not do*, *i.e.*, enact a complete ban on internet use, but never considering whether the sweeping, onerous burdens the law *does impose* are necessary or why the State's concerns about communications with (or "gathering information" about) minors for nefarious purposes could not be pursued through measures—applicable to registrants and non-registrants alike—directly targeting that deplorable *behavior*.

Unsurprisingly, the decision is also irreconcilable with those of numerous federal courts, which have struck down on First Amendment grounds laws essentially indistinguishable from Section 202.5 as well as measures imposing *lesser* (and more carefully targeted) burdens. Those decisions proceed from a premise fundamentally different from the one evidently at work here: that persons who are no longer under criminal justice supervision are entitled to full, not watered-down, First Amendment protections. North Carolina's residents deserve the same.

That the decision below erred so seriously is not, however, reason for *withholding* this Court's review. Section 202.5 is no mere "silly law." See *Griswold* v. *Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). Tens of thousands of people are directly subject to Section 202.5's strictures, and the law is being actively enforced, through criminal prosecutions. The activities it proscribes are not only constitutionally protected but increasingly central to participation in civic, cultural, economic, and

spiritual affairs, and the burdens imposed extend to innumerable others who are denied opportunities to associate and communicate with those whom the law regulates directly.

Finally, the Court's intervention here would prod legislatures nationwide to more conscientiously uphold their responsibilities under the Constitution. Laws that abridge speech selectively—and single out misunderstood and unpopular classes of citizens—occupy an important position in this Court's decisions giving meaning to the First Amendment. And as attested by the ever-growing body of enactments harshly restricting registrants' liberties, it is hard to imagine a class of citizens *less able* than those targeted under Section 202.5 to safeguard their rights through the political process.

I. Both North Carolina's Law and The Decision Upholding It Disregard Constitutional First Principles

The state law under which petitioner was convicted is an alarming departure from our legal tradition and an "obvious and flagrant" violation of the First Amendment, *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).

Section 202.5 targets *only* protected activity; it singles out a discrete and disfavored subset of the populace for far-reaching prohibitions, relegating them to "alternatives" the majority would never accept for itself. The law is prophylactic in a way this Court has long held the First Amendment to condemn: It categorically prevents vast swaths of protected activity, in the belief that some of it may be wrongful. See *Near* v. *Minnesota*, 283 U.S. 697 (1931).

And the legislation's basic theory—that the government's interests in preventing harmful *conduct* may be freely pursued through laws suppressing speech—is likewise one the Court has rejected time and again. "Even where the protection of children is the object, the [First Amendment's] limits on governmental action apply." *Brown*, 131 S. Ct. at 2741.

The measure, moreover, operates through the mechanism of the *criminal* law, authorizing punishment without requiring proof of either "an evil-meaning mind" *or* "an evil-doing hand." *Morissette* v. *United States*, 342 U.S. 246, 251-252 (1952). Under Section 202.5, undisputed proof that the accused *did not* have contact with (or "gather information" about) minors who maintain accounts on a website—or that he accessed the site solely for political or religious purposes—is wholly immaterial.

Indeed, the extent of the law's departure from basic norms may be seen simply by laying the facts of this case alongside those in this Court's First Amendment landmarks. While petitioner was convicted for saying "Thank you Jesus" on an internet site where teenagers (along with one billion adults) may maintain accounts—because *other registrants* might potentially access the site for improper communicative or information-gathering purposes—this Court, in *Brandenberg* v. *Ohio*, 395 U.S. 444 (1969), held the First Amendment to forbid punishment of a defendant whose speech leads to disorder, absent proof his expression is "[1] *directed* to inciting or producing [2] *imminent* lawless action *and* * * * [3] *likely* to produce such action." *Id.* at 447-448 (emphasis added). See also *Virginia* v. *Black*, 538

U.S. 343, 359 (2003) (First Amendment does not permit punishment for "serious[ly] express[ing] an intent to commit an act of unlawful violence to a particular * * * group of individuals," absent proof that the defendant "meant to" put the recipients in fear).[3]

In reaching a contrary result, the decision below spoke the language of this Court's modern First Amendment "tests." But those tests implement principles derived from the foundational precedents: that "regulating speech must be a last—not first—resort," *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), and that "if the Government *could* achieve its interests" without restricting speech, then it "*must* do so." *Id.* at 371 (emphasis added). Those decisions' requirements, on any honest reckoning, only highlight Section 202.5's unconstitutionality.

A. The State Supreme Court's Decision Upholding Section 202.5 as "Conduct Regulation" Is In Fundamental Conflict With This Court's Precedent

The North Carolina Supreme Court did not deny that expressive, communicative, and information-gathering activities over the proscribed internet sites

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[3] The decision below touted the requirement that a defendant be shown to "know[] that the site permits minor children to become members," N.C. Gen. Stat. § 14-202.5(a), as a *mens rea* limitation. Pet. App. 16a. But that provision has limited value in preventing convictions based on inadvertence, see Pet. App. 52a (appellate court's observation that "it is fundamentally impossible to expect [a registrant] * * * to 'know' whether he is banned from a particular Web site prior to 'accessing' it"), and it does nothing to "separat[e] wrongful conduct" from protected expression. *Elonis* v. *United States*, 135 S. Ct. 2001, 2010 (2015).

are fully protected under the Free Speech Clause. See *Reno* v. *ACLU*, 521 U.S. 844, 868-870 (1997). Nor did the court embrace—explicitly—the notion that the Free Speech rights of those targeted by Section 202.5 are, by virtue of their past convictions, diminished to mere "interests," to be freely "compromise[d]" by the Legislature. Cf. Pet. App. 60a (trial court decision). These freedoms, this Court has settled, "flow[] not from the beneficence of the state but from the inalienable rights of the person," *United States* v. *Alvarez*, 132 S. Ct. 2537, 2550 (2012), and are not "lost because * * * of [past] derelictions," *Near*, 283 U.S. at 720 (rejecting State's power to treat as "public nuisance[s]" periodicals that had previously published defamatory statements). See *Doe* v. *Harris*, 772 F.3d 563, 572 (9th Cir. 2014) (Bybee, J.) (affirming that individuals on registry but no longer under criminal justice supervision are entitled to "the full protection of the First Amendment").

The decision's error instead traces to the court's "starting point"—the startling assertion that Section 202.5 should be analyzed as regulating "conduct"—such that its onerous burdens were merely "incidental." Pet. App. 9a. Precedent and common sense condemn that supposition. Wholly unlike laws directed at activity that contains a bare "kernel of expression," Pet. App. 20a (quoting *City of Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989)), or that "combine[s]" "'speech' and 'nonspeech' elements," *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (upholding measure protecting physical integrity of draft cards that applied to burning for protest purposes), Section 202.5 *only* addresses and punishes First Amendment activity—doing so out of concern that communicating

or gathering information on the internet may (in some cases) *lead to* misbehavior.

The decision offered various bases for its premise, suggesting (1) that the *ultimate* purpose of Section 202.5 is to prevent conduct, *i.e.*, criminal maltreatment of minors; (2) that, while "*communication*" on the prohibited sites is constitutionally protected, "gathering information"—the ostensible focus of Section 202.5—is regulable "conduct," see Pet. App. 18a-19a (distinguishing, *e.g.*, *Doe* v. *Marion County*); and (3) that "access[ing]" networking websites is "conduct" distinct from "posting" or "liking" (or reading) another user's post. Each rationale, however, is plainly refuted by this Court's governing precedent.

First, that the legislature's "essential" purpose, Pet. App. 9a, was "to limit conduct," *ibid.* rather than to suppress disfavored ideas, does not convert direct regulation of speech into an "incidental" burden. Many of the laws that this Court has invalidated under the Free Speech Clause were motivated by similar conduct-focused concerns. See, *e.g.*, *Brown*, 131 S. Ct. at 2739 (preventing violent behavior); *Brandenburg*, 395 U.S. at 448-449 (disorder); *Riley* v. *Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790 (1988) (fraud). The government's reason for denying the protest permit in *Forsyth Cnty.* v. *The Nationalist Movement*, 505 U.S. 123 (1992), may have been purely fiscal, but its action was speech regulation.

The North Carolina Supreme Court's assumption of a dispositive First Amendment difference between laws regulating "communication" and "information gathering" is even more plainly untenable. Section

202.5 is in fact essentially similar to the measures struck down in *Marion County*, *Nebraska* and *Jindal*: all would punish registrants who "access" forbidden websites, without regard to whether they do so in order to "gather information" or (as petitioner did) express themselves. But in any event, this Court has long held that gathering information is *itself* fully protected under the Free Speech Clause. Thus, *Sorrell* v. *IMS Health, Inc.*, 131 S. Ct. 2653 (2011), rejected Vermont's plea to spare its statute on the ground that the law "regulate[d] not speech but simply access to information." *Id.* at 2665-2666. In rebuffing that defense, the Court reaffirmed what *Stanley* v. *Georgia*, 394 U.S. 557 (1969), described as "well established" decades ago: that the First Amendment protects the "right to receive information." *Id.* at 564.

The North Carolina Supreme Court's principal rationale, that Section 202.5 should be viewed as less suspect because it is directed at a precursor to First Amendment activity—*i.e.*, "access"—see Pet. App. 9a ("Section 202.5 only incidentally 'burdens the ability * * * to engage in speech *after accessing* those Web sites that fall within the statute's reach"), breaks even more seriously from the rules this Court's decisions establish. As the Court has repeatedly noted, *every* activity protected under the Free Speech Clause is effectuated through or preceded by "conduct" of some sort. But a law prohibiting newspapers "from purchasing or using ink" is constitutionally indistinguishable from one restricting their publication, *Sorrell*, 131 S. Ct. at 2667 (rejecting State's "conduct regulation" argument on this basis); accord *Minneapolis Star & Tribune Co.* v. *Minnesota Com'r of Rev.*, 460 U.S. 575, 582 (1983). And a law

prohibiting a class of people from reading certain newspapers would not be more constitutionally tolerable if the legislature made the "trigger" for criminal punishment the physical act of picking up—"accessing"—the paper.

In fact, neither the State nor the decision below seriously suggested that what Section 202.5 prohibits—"access[ing]" a prohibited website by someone on the registry—is *in itself* harmful. On the contrary, although the majority opinion identified activities other than "communication" that implicate the Legislature's protective purpose and can occur on the proscribed sites—*e.g.*, "lurking" and "harvest[ing] information" for illicit purposes, Pet. App. 13a—petitioner's Facebook post expressing delight at beating a traffic ticket is the first item on an inexhaustible list of instances where "access" neither inflicts nor leads to harm of any sort. This Court has held repeatedly that a categorical prohibition like Section 202.5 may be sustained under the First Amendment only "if *each activity* within the proscription's scope is [itself] an appropriately targeted evil," *Frisby* v. *Schultz,* 487 U.S. 474, 486 (1988)—and not when, as here, "the substantive evil" is "merely a possible byproduct of the activity." *Ibid.* (quoting *Los Angeles City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

The State Supreme Court's decision viewed the fact that Section 202.5 prevents much expression that the government would have no interest in suppressing as indicative of its constitutionally benign character. See Pet. App. 10a-11a (concluding that Section 202.5 is "content neutral" because it prohibits all, rather than some, speech on the

websites). But that logic inverts constitutional first principles: As *Near* v. *Minnesota* teaches, prohibiting *all* expression in order to prevent a harmful subset is not a regulatory approach that the First Amendment encourages. See 283 U.S. at 722.

B. The State Supreme Court's Version of "Heightened Scrutiny" Ignores the Basic Rules Laid Down in This Court's First Amendment Decisions

Even in situations where strict judicial scrutiny is not called for, this Court has held that measures restricting First Amendment activities may be enforced only if shown, *inter alia,* to be "narrowly tailored." *Turner Broad. Sys.* v. *FCC,* 512 U.S. 622, 641 (1994). Accordingly, petitioner's Section 202.5 conviction could not stand unless North Carolina had "show[n]," *McCullen* v. *Coakley*, 134 S. Ct. Ct. 2518, 2539 (2014), (1) that its law "does not * * * burden substantially more [protected activity] than necessary," *Ward,* 491 U.S. at 799—an inquiry that entails examining measures "that could serve its interests just as well," while imposing no (or much fewer) speech burdens, *McCullen,* 134 S. Ct. at 2537; (2) that Section 202.5 "directly advances" a "substantial" governmental interest, *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n,* 447 U.S. 557, 566 (1980); *and* (3) "leave[s] open ample alternative channels." *Ward,* 491 U.S. at 791.[4]

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[4] It is hardly self-evident that Section 202.5—which plainly discriminates among speakers and may not qualify as "content-neutral" under the Court's precedents—should have been subject to anything less than "strict" review. See Pet. App. 30a (Hudson, J., dissenting). But that point need not be argued over because, as the dissent explained, Section 202.5 would fail any

The State Supreme Court recited the language of these decisions. But it then subjected North Carolina's law to a form of "scrutiny" that in fact *omitted* every requirement that this Court's heightened scrutiny precedents have held the First Amendment to impose. Rather than compare the amount of speech Section 202.5 prohibits to the quantum "necessary" to advance the government's objective—or consider whether North Carolina "could achieve its interests [through means that] restrict[] less speech," *Thompson*, 535 U.S. at 372—the State Supreme Court pronounced the law narrowly tailored because it sweeps less broadly *than it might have, i.e.*, not imposing "a blanket prohibition against [registrants'] Internet use," Pet. App. 15a. Indeed, it was only by resort to this upside-down conception of "tailoring"—a "test" that could validate *any* law abridging speech—that the State Supreme Court was able to overlook Section 202.5's glaring defects and pronounce the law constitutional "in all respects." Pet. App. 2a.

1. Even if Section 202.5 applied only to true "social networking" websites such as Facebook, it would be a criminal prohibition of truly "alarming breadth," *United States* v. *Stevens*, 559 U.S. 460, 474 (2010). The activities that were of concern to the Legislature—"harvesting information" about and communicating with minors for nefarious purposes—indisputably "comprise[] a minuscule subset" of "the universe of social network activity," *Marion County*,

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possibly applicable test. See *ibid*. Even a truly "incidental burden" is impermissible if it is not "essential to the furtherance of [the government's important] interest." *O'Brien*, 391 U.S. at 377.

705 F.3d at 699, that Section 202.5 punishes—a "universe" that includes artistic, religious, and political expression, gathering information from government sources, and communication with the other adults. See Ryan Neal, *Facebook Gets Older*, International Bus. Times, Jan. 16, 2014, available at http://goo.gl/U38JpJ (reporting that 170 million of 180 million U.S. Facebook users are 18 or older). See *Reno*, 521 U.S. at 876 (holding that "the governmental interest in protecting children * * * [can]not justify an unnecessarily broad suppression of speech addressed to adults.").

As the dissent highlighted, the law's sweep is still more vast. See Pet. App. 31a-34a. The statute's loosely-drafted definition threatens punishment for accessing sites, such as nytimes.com, that are far removed from the feared "social network" prowling scenario; and the law restricts the rights of registrants whose triggering offense was nonsexual or involved an adult victim (as well as the many others who pose no significant risk of engaging in the particular behavior with which Section 202.5 is concerned), see *id.* 32a; p. 3, *supra.*[5]

2. The court likewise failed even to consider more focused measures the State could take (and has taken) to address the behavior Section 202.5 aims to prevent and deter, let alone require that the State

[5] The opinion below disputed certain examples offered in petitioner's brief and the dissent, but it *did not* deny that Section 202.5 authorizes prosecution for visiting the New York Times website, and the opinion pointedly declined to resolve acknowledged statutory ambiguities. Pet. App. 18a ("leav[ing] for another day what the "know[ledge]" element requires); *id.* 16a (stating that websites with certain characteristics would "not *necessarily* violate the statute") (emphasis added).

"demonstrate that alternative measures * * * would fail to achieve [its] interests," *McCullen*, 134 S. Ct. at 2540. See *id.* ("that the chosen route is easier" is insufficient).

The ordinary way to prevent criminal conduct is to enact, enforce, and strengthen laws forbidding that behavior. See *McCullen*, 134 S. Ct. at 2537; *Schneider* v. *State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."). See also *Riley*, 487 U.S. at 795 (emphasizing, in striking down speech restriction claimed to prevent deception, States' unquestioned power to prosecute fraud). And nothing confines a State to punishing completed misconduct. North Carolina has enacted laws criminalizing "solicitation of [a] child by computer" and "cyberstalking," N.C. Gen. Stat. §§ 14-202.3, 14-196.3; and, to the extent these would not reach the sorts of internet activities the State insisted Section 202.5 prevents (*e.g.*, "lurking" or "gathering information" about minors for criminal purposes), the Legislature could enact a law criminalizing those activities. Or it could revive the provision not enacted in 2008 requiring increased parental oversight of minors' account settings and interactions on these websites. See p. 3, *supra*; *Reno*, 521 U.S. at 877 (invalidating statute, highlighting parents' ability to prevent their children's exposure to inappropriate internet material).

Moreover, for individual registrants incapable of conforming their behavior to the law, see N.C. Gen. Stat. § 14-208.6; *Kansas* v. *Crane*, 534 U.S. 407, 410 (2002), the State presumably could impose focused, more restrictive measures, perhaps prohibiting them

from interacting with (or visiting pages created by) users under age 18—or giving them the option of submitting to special surveillance. Cf. Ind. Code § 11-8-8-8 (requiring that paroled sex offenders who use "internet identifiers" submit to searches of devices).

Indeed, the nature of the problem Section 202.5 addresses affords options absent in other settings. In (unsuccessfully) defending the statute in *Stevens*, the Government argued that the difficulty of identifying persons perpetrating the cruel acts captured on film made prosecuting distributors the "only effective way" of combatting abuse, see 559 U.S. at 492 (Alito, J., dissenting). But here, users' own computers (and website operators' servers) provide detailed and precise information about their online activities and interactions.

3. Nor did the North Carolina Supreme Court seriously address whether this law "direct[ly] and materia[lly]" advances an important State interest. in a direct and material way. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 478 (1995). Section 202.5's design is extraordinarily *in*direct: the law denies access to a broad range of websites to a large class of people to make it more difficult for a tiny subset who *might* gather information that *might* lead to communication with minors that *might* be a precursor to harmful behavior. Whether the law advances North Carolina's undeniably vital interest—protecting minors from internet-enabled predation—"materially" is also doubtful. That interest applies equally to *any* person who would access the internet in order to identify minors for criminal purposes. Yet North Carolina has passed no general criminal law prohibiting that behavior, and Section 202.5 targets

only those on the State's registry (and *all* registrants—regardless of individual circumstances), notwithstanding the reality that persons with no prior sex offense convictions commit the overwhelming majority of such crimes.[6] And the Legislature chose not to enact the proposed provision that would have strengthened parental involvement—but entailed obligations for website operators, whose concerns presumably receive a more careful hearing than do registrants'. See *Greater New Orleans Broad. Ass'n, Inc.* v. *United States.*, 527 U.S. 173, 189-190 (1999) (holding that statute prohibiting airing of advertising for privately-owned casinos failed to advance asserted interest in "alleviating the social costs of casino gambling by limiting demand," when Congress simultaneously encouraged *tribal* casino gambling). And while the Section 202.5(c) exceptions do not, as the decision insisted, mitigate its unconstitutionality, they likely *do* detract from the objectives claimed: The State has never explained, for

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[6] Although any recidivism by a person convicted of a serious crime is a rightful and important governmental concern, empirical evidence refutes widely-held assumptions about dangers posed by registrants. A comprehensive Justice Department study found that recidivism rates for sexual offenders are significantly *lower* than for persons convicted of other crimes, see Patrick A. Langan et al., U.S. Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994*, at 14 (2003), and that persons previously incarcerated for *non*sexual offenses accounted for six times more *sex* crimes than those whose prior conviction was for a sexual offense. *Id.* at 24. Public discussions also often fail to distinguish between the comparatively small subset of registrants who at some point re-offend (including by violating a parole condition) and the truly tiny subpopulation who suffer from "personality disorder[s]" that render them incapable of controlling predatory impulses. See *Kansas* v. *Hendricks*, 521 U.S. 346, 358 (1997).

example, why a person intent on "harvesting information" about minors could not "lurk" in a single-purpose "chat room" site. Cf. Pet. App. 15a (describing such sites as "exclusively devoted to speech").

4. The North Carolina Supreme Court's "scrutiny" of Section 202.5 concluded by contorting the requirement that a law regulating speech leave open "ample" "alternative channels" for the protected activity. *Ward*, 491 U.S. at 791. Reprising the "glass half-full" approach, the court held this requirement met because the internet offers "myriad sites that do not run afoul of the statute," Pet. App. 18a, noting, for example, that registrants may lawfully "follow current events on WRAL.com," even if it is a felony for them to "access" nytimes.com, *id.* 17a, and that other "methods of communication[,]" including "traditional mail[] and phone calls, * * * are unrestricted," *id.* 18a. But this Court's cases instruct that the First Amendment does not allow "the exercise of [a person's] liberty of expression in appropriate places [to be] abridged on the plea that it may be exercised in some other place"—any more than it permits "a statute ban[ning] leaflets on certain subjects as long as individuals are free to publish books," *Reno*, 521 U.S. at 880 (quoting *Schneider*, 308 U.S. at 163). The decision's own example largely refutes its conclusion: people visit the New York Times website not merely to "follow current events," but also to read its opinion and editorial pages and proprietary content, search its archives, and engage with others across the Nation in robust comment sections. See also Google, *Official Blog*, Dec. 16, 2015, available at https://goo.gl/ALvJdU (announcing that upcoming

presidential debate would feature "questions from the YouTube community").

As for true social networking websites, it is essentially definitional that equivalent "alternatives" will not exist: the ideas and information exchanged derive from interactions among the networked users involved. The burdens Section 202.5 imposes, moreover, are cumulative: registrants are indisputably prohibited from two of the top five U.S. websites and arguably from all five, see Alexa, "Top Sites in the United States," www.alexa.com/topsites/countries/us, which account for billions of users far beyond North Carolina's borders. See Facebook Newsroom, "Company Info," available at newsroom.fb.com/company-info/ (Facebook has 1.59 billion monthly users, 84% residing outside U.S. and Canada).[7] And registrants

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[7] In the court below, the State pointed to a "statement of rights and responsibilities" on the Facebook website that it argued did not allow petitioner (and other registrants) to maintain accounts. That web page—which was not part of the case record—has nothing to do with the constitutionality of North Carolina's law. Section 202.5 indisputably applies to sites that *would* otherwise welcome registrants, thereby criminalizing protected speech on private property that the owner *invites*. See *Sorrell*, 131 S. Ct. at 2665 (highlighting significance of fact that statute "imposed a restriction on access to information in private hands"). And even if the cited language created a contractual obligation, neither Section 202.5 nor any other North Carolina law imposes *criminal* punishment for violating private agreements with website operators. (Nor could they: Facebook also bars users from posting material that is "sensational," or "disrespectful," or "show[s] excessive amounts of skin." See "Advertising Policies," www.facebook.com/policies/ads/#prohibitedcontent). Finally, the cited language does not purport to prevent anyone from viewing pages (*i.e.* "gathering information") on the Facebook

must also invest great effort, on pain of criminal prosecution, determining which sites fall on which side of the hazy line separating constitutionally-protected from felonious "access." See *Virginia* v. *Hicks,* 539 U.S. 113, 119 (2003) (when threat of liability induces persons "to abstain from protected speech," they "harm[] not only themselves but society as a whole.").[8]

5. Finally, though the facial invalidity of Section 202.5 is established without resort to the "strong medicine" of First Amendment overbreadth doctrine, see Pet. App. 24a (quoting *New York* v. *Ferber,* 458 U.S. 747, 769 (1982)), the decision below misunderstood controlling precedent on that point also. This case is the antithesis of one where a person whose conduct falls within a law's "plainly legitimate sweep" is nonetheless entitled to relief, on account of the relative "number of [the law's *other*] applications [that] are unconstitutional," *Stevens,* 559 U.S. at 473 (internal citation omitted). Section 202.5 has *no* "legitimate sweep": Though the State presumably *could* enact a prohibition on using—or "accessing"—a networking website for predatory purposes, it has not done so. And if such a law were in force, petitioner,

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site—only from registering an "account." See Facebook, "Terms of Service," www.facebook.com/legal/terms.

[8] The decision below concluded—consistently with this Court's precedent—that petitioner, whose conviction involved accessing Facebook, could not raise a free-standing vagueness challenge based on the statute's enigmatic "social networking website" definition, Pet. App. 27a. But determining his facial challenge entails evaluating the adequacy of "alternative channels," and it is relevant to *that* inquiry that persons subject to Section 202.5 lack notice as to *which* potential alternatives are permissible.

whom no one has alleged improperly sought or "harvested" information when he accessed Facebook.com in 2010, would be outside its ambit. The only support the decision offered for concluding that Section 202.5 goes no more than "marginal[ly]" beyond a "plainly legitimate" core was the opinion's earlier "detailed * * * analysis" of "tailoring," Pet. App. 25a—which, in fact, contains *no* analysis of how much protected activity Section 202.5 sweeps in, highlighting instead how much protected activity the law leaves unpunished. See p. 19, *supra*.[9]

II. The State Supreme Court's Decision Also Conflicts With Decisions of Numerous Lower Courts

Unsurprisingly, given its departures from bedrock principles, the decision below conflicts with those of several federal courts of appeals and is in stark tension with numerous others. In fact, other courts have overturned measures imposing *far less* onerous and sweeping burdens upon internet activities of individuals entitled to *less* robust constitutional protections (*e.g.*, those still subject to supervised release). This stark divergence in the extent of First

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[9] Although this facial challenge should succeed without resort to the overbreadth doctrine's special rules, petitioner presented an overbreadth challenge in all three courts below, and those rules might have relevance in disposing of arguments arising from unusual applications, such as to registrants who are currently incarcerated, who generally do not enjoy the full measure of constitutional protection, see *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), but likely do not have internet access, either.

Amendment protection available from State to State is itself reason for this Court's intervention.

1. Courts of appeals have held, in square conflict with the conclusion below that Section 202.5 should be analyzed as "conduct" regulation, that laws regulating registrants' internet activities "directly and exclusively burden speech." *Harris*, 772 F.3d at 573. Accord *Marion County*, 705 F.3d at 697 (Indiana law banning registrants from accessing "social networking" websites "preclude[d] expression through the medium of social media, [and] also limit[ed their] right to receive information and ideas.") (internal citations omitted). And in *Doe* v. *City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012), the Tenth Circuit had no difficulty seeing that an ordinance banning registrants from public libraries merited scrutiny as a direct regulation, rather than one addressing the "conduct" of entering ("accessing") the library. Indeed, the constitutional right vindicated in that case, "the First Amendment * * * right to receive information," *id.* at 1120, is the very one the decision below treated as unprotected "conduct."

2. The division over basic First Amendment principles is made especially apparent by contrasting the State Supreme Court's decision with the Seventh Circuit's in *Marion County*, which considered—and rejected on First Amendment grounds—a similar "social networking" website ban, applicable to a similar subset of individuals. The Seventh Circuit concluded, in terms that could—and should—have been applied to Section 202.5, that Indiana's law was not narrowly tailored, because the activity the State sought to prevent, internet communications between

predators and minors, "comprise[d] a minuscule subset of the universe of social network activity." 705 F.3d at 699. Indiana's important crime prevention goals, the Seventh Circuit recognized, did "not license the state to restrict far more speech than necessary to target the prospective harm." *Id.* at 701. See also *Doe v. Jindal*, 853 F. Supp. 2d at 605 (holding that statute was not "crafted precisely or narrowly enough—as is required by constitutional standards—to limit the conduct it seeks to proscribe").

The majority opinion below, straining to deny a conflict, reasoned that Section 202.5 is somewhat less sweeping than was Indiana's law and that the Seventh Circuit did not squarely address the "gathering information" rationale advanced in this litigation for Section 202.5. But these efforts are unavailing. The precise contours of the statute did not figure in the *Marion County* decision's First Amendment analysis, which focused on the vast amount of protected activity unnecessarily burdened. (In fact, the Indiana law, like North Carolina's, exempted "electronic mail program[s and] message board[s]," though not "chat rooms," and it only applied to certain registrants. See 705 F.3d at 695-696 & n.1.). And while the Seventh Circuit noted that an alternative justification might be ventured in the future, the court observed that it too might "burden[] a 'substantially broader' than necessary group * * * who will not use the Internet in illicit ways." *Id.* at 701 (citing *Ward*, 491 U.S. at 800).[10]

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[10] In the wake of the Seventh Circuit's decision, Indiana amended its law to provide punishment only for those who violate a *specific term of supervised release* that "prohibits the offender from using a social networking web site * * * to

3. The extent of the North Carolina Supreme Court's deviation is further apparent from appellate decisions addressing (and, with one exception, invalidating) measures requiring registrants to provide their "internet identifiers" to the government. See *Doe* v. *Harris*, 772 F.3d 563; *White* v. *Baker*, 696 F. Supp. 2d 1289 (N.D. Ga. 2010); see also *Doe* v. *Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015) (invalidating law on vagueness grounds), No. 15-36 (6th Cir. argued Jan. 27, 2016); but see *Doe* v. *Shurtleff*, 628 F.3d 1217 (10th Cir. 2010) (upholding a narrower version of such a statute). These laws impose a far less onerous burden than does Section 202.5: They do not purport to prohibit registrants from "accessing" any *site* on the internet, including "social networking" ones, and the laws *allow* registrants to communicate and express themselves pseudonymously, so long as law enforcement is told of their identity. Yet these measures have been held incompatible with the First Amendment, based on their potential to chill the registrants' constitutionally-protected right to speak anonymously. No court that has invalidated such a law, as incompatible with the principle that persons previously convicted but no longer under criminal justice supervision enjoy full First Amendment rights, could possibly approve Section 202.5's sweeping criminal prohibition.[11]

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communicate * * * with a [minor]." Ind. P.L. 247-2013 § 8, codified at Ind. Code § 35-42-4-12 (2014) (emphasis added).

[11] The Tenth Circuit in *Shurtleff* upheld a law the Utah Legislature had amended in response to a district court decision declaring it unconstitutional, 628 F.3d at 1221, and only after

4. The North Carolina Supreme Court's decision is similarly irreconcilable with decisions of numerous federal courts that have rejected as overly burdensome *supervised release conditions* that restrict internet use by those convicted of sex offenses. Such conditions are imposed (1) on persons who—unlike petitioner—are *not* entitled to the full constitutional liberties, see *Samson* v. *California*, 547 U.S. 843, 857 (2006); (2) on an individualized basis, after notice and opportunity to be heard, and (3) for a limited duration, in the immediate aftermath of release from prison. But they nonetheless have been subject to far more serious scrutiny, under what is essentially a "rational basis" standard, than Section 202.5 received from the North Carolina Supreme Court. See 18 U.S.C. § 3583 (requiring conditions be "reasonably related" to, *inter alia*, "the nature and circumstances of the offense" and "the defendant's history and characteristics," and impose "no greater deprivation of liberty than is reasonably necessary").

As the Third Circuit explained in a case overturning a condition imposed on a person convicted of a sex offense, "[w]hen a ban restricts access to material protected by the First Amendment, courts must balance the [§ 3583] considerations against the serious First Amendment concerns endemic in such a restriction." *United States* v. *Thielemann*, 575 F.3d 265, 272-273 (3d Cir. 2009) (internal quotation marks omitted). In *United States* v. *Perraza-Mercado*, 553 F.3d 65 (1st Cir. 2009), the court held that a condition prohibiting the defendant, convicted of knowingly engaging in sexual conduct

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giving the amended version a narrowing construction, *id.* at 1223-1224, to avoid constitutional difficulty.

with a female under the age of twelve, from accessing the internet in his home for fifteen years, amounted to "a greater deprivation of his liberty than [was] reasonably necessary for his rehabilitation." *Id.* at 68-69. The Second Circuit in *United States* v. *Sofsky*, 287 F.3d 122 (2d Cir. 2002), overturned for similar reasons a condition prohibiting the defendant, convicted of receiving child pornography, from accessing a computer, the internet, or a bulletin board system without his probation officer's approval during his three-year supervised release term.

To be sure, several of the invalidated restrictions applied even more broadly than does Section 202.5. But it bears emphasis that most were temporary in duration and imposed on individuals who had committed offenses involving use of the internet. And none *categorically* forbade accessing any website—instead requiring that the defendant either refrain *or* obtain approval, and there is no reason for assuming that permission would have been withheld for a "post" expressing gratitude for a favorable traffic court outcome.

III. This Case Warrants The Court's Intervention

The statute under which petitioner was convicted is significant not only for the extent of its departure from core First Amendment principles but also for its grave and far-reaching real-world consequences. Section 202.5 is no quaint holdover. The law, which regulates more than 21,000 persons, was enacted, unanimously, within the past decade, and it has been enforced through more than 1,000 criminal

prosecutions.[12] Cf. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting) (questioning need to invalidate law that "as a practical matter [was] obviously unenforceable").

Absent this Court's intervention, law-abiding individuals singled out under Section 202.5 will continue to face criminal jeopardy for activities—including expression, association, communication, and receiving information—that not only are at the core of the First Amendment's Free Speech guarantee but that are increasingly central to participation in the Nation's economic, cultural, religious, and political life. See *United States* v. *Peterson*, 248 F.3d 79, 83 (2d Cir. 2001) (describing internet access as "virtually indispensable in the modern world of communications and information gathering.").

The burdens the statute imposes radiate beyond the individuals directly threatened with punishment, abridging the rights of registrants' family members, friends and others sharing their recreational interests, political and religious views, and artistic sensibilities who want to associate and communicate with them. See *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) (affirming that First Amendment "protect[s] the right of the speaker" and the "right of the listener to receive the information sought to be

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[12] See *Offender Statistics, supra* n.1; John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites,* Indyweek, (May 29, 2013) (reporting that 1,136 charges under Section 202.5 between 2009 and 2012). Nationwide, there are nearly 850,000 persons on similar registries. U.S. Dep't of Justice, *Sex Offender Registration and Notification in the United States: Current Case Law and Issues* at 4 n.24 (Dec. 2015).

communicated").

That those burdens are imposed on the class of persons who, by virtue of a prior conviction, are "registered in accordance with Article 27A of Chapter 14 of [North Carolina's] General Statutes," N.C. Gen. Stat. § 14-202.5(a), does not alleviate, but instead heightens, cause for First Amendment concern. More than eight decades ago, the Court settled that Free Speech rights are not "lost" on account of "[past] derelictions," *Near,* 283 U.S. at 720. And although the protections of the First Amendment do not depend on the "value" of communication suppressed—cat videos, political commentary, and celebrations of traffic court victories enjoy equal status, see *Schad* v. *Borough of Mt. Ephraim,* 452 U.S. 61, 65-66 (1981)—people with prior criminal convictions have important things to communicate. See *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 122 (1991) (striking down "Son of Sam" statute, identifying historically significant works that "depict[ed] the [author's] crime").

This Court's First Amendment cases have long condemned "regulations that discriminate based on * * * the identity of the speaker," *Los Angeles Police Dep't* v. *United Reporting Pub. Corp.*, 528 U.S. 32, 47 n.4 (1999) (Stevens, J., dissenting), or burden "a narrow class of disfavored speakers," *Sorrell,* 131 S. Ct. at 2668. See also *Citizens United* v. *Federal Election Comm'n,* 558 U.S. 310, 340 (2010); *Arkansas Writers' Project, Inc.* v. *Ragland,* 481 U.S. 221, 232 (1987). Such selective abridgments arouse heightened concern because of the danger that "the democratic majority" will enact restrictions of a politically marginalized minority that they would

never "accept for themselves." *Cruzan* v. *Dir., Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). Indeed, landmark First Amendment decisions attest to a special role for this Court in safeguarding from State incursion the Free Speech rights of those who are misunderstood or vilified. See, *e.g.*, *West Virginia* v. *Barnette*, 319 U.S. 624 (1943); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

This case calls for such intervention. The dynamic that led members of the North Carolina General Assembly—unanimously—to enact Section 202.5 is one that continues to be replayed in legislatures across the Nation. The "acorn[s]" sown in the early 2000s, when this Court upheld straightforward registration and notification requirements, have yielded not a lone "mighty oak," *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 622 (1986) (Rehnquist, J., dissenting), but a dense thicket of restrictive laws whose undeniable effect and only evident purpose is to make more difficult the lives of persons on sex offender registries. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1073 (2011-2012) (explaining that measures have "spiraled out of control because legislators, eager to please a fearful public, have been given unfettered freedom by a deferential judiciary").

"A State cannot * * * deem a class of persons a stranger to its laws." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996). Nor may a State (or a state court) deem a class of persons a stranger to the protections of the First Amendment. When the government "deprives

the disadvantaged person or class of the right to use speech," it deprives them of their ability "to establish worth, standing, and respect." *Citizens United*, 558 U.S. at 340-341. This Court's review is needed to ensure that state legislatures and state courts, bound to uphold the federal Constitution, act in accordance with those precepts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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