No. 15-1194

In the Supreme Court of the United States

LESTER GERARD PACKINGHAM, PETITIONER

v.

STATE OF NORTH CAROLINA

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

REPLY BRIEF FOR PETITIONER

JOHN P. ELWOOD
Vinson & Elkins LLP
1455 Pennsylvania Ave., NW., Suite 600
Washington, DC 20004

GLENN GERDING
Counsel of Record
Office of the Appellate Defender
123 W. Main St., Suite 500
Durham, NC 27701
(919) 354-7210
glenn.gerding@nccourts.org

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903

DAVID T. GOLDBERG
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013

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REPLY BRIEF FOR PETITIONER

The reason North Carolina's law has (so far) been "little copied" (Opp.13) is that it is, as the three federal courts to consider similar measures have concluded, patently unconstitutional.

Section 202.5 escaped that fate—and petitioner's felony conviction stands—because the state Supreme Court, unmoved by the Free Speech rights of the citizens whom the law targets (the State here refers to them as "predators"), failed to subject the measure to *any* meaningful First Amendment scrutiny. The court pronounced the measure a "*conduct* regulation" and then invented its own "narrow tailoring" test, that, unlike this Court's, disregards the quantum of protected activity needlessly restricted and instead rewards the government if "it could have been worse."

The Brief in Opposition does not seriously defend that decision—indeed it obliquely concedes the lynchpin error of holding that Section 202.5's burdens are "incidental." Nor does the State supply the constitutionally-mandated analysis the court failed to perform. Rather, it endeavors to dress these glaring defects in drab garb, proclaiming the state Supreme Court's flight from bedrock First Amendment principles a mere "application error" and manufacturing "prudential" reasons against intervention "at this moment." Opp.20.

These generic assurances fail. The decision did not "state," Opp.22, let alone apply, what *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989), described as the "essence of the narrow tailoring" analysis. And the case-specific features the State highlights are not "flaws": A person prosecuted for First Amendment

activities that "clearly" violate an unconstitutional law is ideally situated to assert its invalidity; and the "behavior," Opp.23, that made petitioner a felon under Section 202.5—expressing delight at avoiding a traffic ticket on a website that also has teenage members—requires no "excuse." *Id.*

Intervention is warranted not merely to achieve interpretive uniformity but to restore bedrock protections that this statute and decision have stripped away. The need is "pressing," Opp.20, because North Carolina continues to prosecute citizens (well over 1,000) for First Amendment activities outside the State's power to proscribe.

I. The Statute Is Fundamentally Unconstitutional

The State (Opp.26) faults petitioner for "ignor[ing]" Section 202.5's "animating purpose" and for highlighting that his offense consisted of posting "Thank you Jesus," when, the State says, he was convicted for accessing the type of website that would "enable[]" a "predator[]" to "gather information" about teenage account holders, Opp.29, which could then be used to make contact and ultimately commit assault.

1. But it is the State that "misses the point." *Id.* The petition neither misunderstood nor denied the importance of the interests advanced. See, *e.g.*, Pet.7, 13, 19, 20, 24, 27 (acknowledging "lurking" and "harvesting information" justification); *id.*21 (recognizing that government could criminalize "'gathering information' about minors for criminal purposes"). And under the First Amendment, petitioner's benign "post" is centrally relevant—not as evidence of governmental hostility to his "words," but

rather as proof of the disconnect between what the statute makes criminal and the "evils" targeted. (The State, which searched petitioner's computer and Facebook records, Tr. 139, 142, *never* alleged nefarious "harvesting" or communication of any kind).

2. As petitioner explained, the premise of Section 202.5—and the State's defense here—that the "government may * * * prohibit speech" that is harmless in itself "because it increases the chance an unlawful act will be committed 'at some indefinite future time,'" *Hess* v. *Indiana,* 414 U.S. 105, 108 (1973), is one "settled First Amendment jurisprudence" (Opp.20) condemns. See *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 250 (2002) (striking down law for punishing "speech that record[ed] no crime and create[d] no victims").

The bedrock principle that Section 202.5 defies has been enforced in cases involving statutes aimed at preventing violent revolution, see *De Jonge* v. *Oregon*, 299 U.S. 353, 364-365 (1937), imminent lawless action, *Hess*, and fraud. Indeed, when this Court recognized that "[t]he prospect of crime * * * does not justify laws suppressing protected speech" and that there "are many things innocent in themselves * * * that [may not] be prohibited because they can be misused," for "immoral purposes," *Ashcroft*, 535 U.S. at 251, the "crime[]" it referred to was *sexual abuse of children*, and the "innocent" "thing[]" was "virtual" child pornography. The government's defense of that law, which included evidence that the expression proscribed "can lead to actual instances of child abuse," was rejected because "[t]he harm does not necessarily follow from the speech, [and] depends

upon some unquantified potential for subsequent criminal acts." *Id.* at 250.

So too here. Indeed, Section 202.5 is not, as the State suggests, only a *little* unconstitutional. The breadth and character of First Amendment activity the law impermissibly punishes place it far beyond other measures held facially unconstitutional. The *innocent* speech vindicated in *United States* v. *Stevens*, 559 U.S. 460 (2010), *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011), and *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012), was, respectively: depictions of animal cruelty, violent video games sold to minors, and lies about military valor. *This* law suppresses, *inter alia*, vast swaths of political, artistic, and religious communication and association and prevents access to important information unavailable from any other source. And it denies *the public* the opportunity to hear from, inform, and argue with those the law targets.

II. The Decision Defied This Court's Heightened Scrutiny Precedents

The State offers no defense of the keystone ruling below, that Section 202.5 is "conduct regulation," and its effort to cordon off that error as harmless fails. The error was intertwined with another equally important one, *not* disavowed here—failure to accept that "information gathering" is fully protected under the First Amendment (though, as with expression, abuses may be punished). See Pet.16. And the petition did not accept (Opp.2) that less-than-strict First Amendment scrutiny is appropriate; it maintained, like the dissenting Justices below, that Section 202.5 is so plainly unconstitutional as to make differences between the top "tiers" immaterial. See

McCutcheon v. *Federal Election Comm'n*, 134 S. Ct. 1434, 1446 (2014).

3.. But the state Supreme Court assuredly *did not* "properly state," Opp.22, let alone perform the scrutiny *Ward* prescribed. The decision nowhere mentioned what that opinion said is "*the essence*" of a reviewing court's First Amendment responsibility: to determine whether the challenged statute pursues its purpose "*without * * * significantly restricting a substantial quantity of speech that does not create the * * * evils*" at which it is directed. 491 U.S. at 799 (emphasis added). Accord *Frisby* v. *Schultz*, 487 U.S. 474, 485-486 (1988) (ban not "narrowly tailored" if "substantive evils" are only a "possible byproduct of the activity [proscribed]") (quoting *Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

The State also steers clear of that inquiry, hewing to the court's upside-down "tailoring" approach. And for understandable reasons: the "evils" Section 202.5 seeks to address are, on the State's own reckoning, only a "possible byproduct" of forbidden "accessing"; and, as courts that have *actually* applied this settled standard have concluded, laws like Section 202.5 punish vast quantities of protected activity "completely unrelated [to]" contacting (or gathering information) about minors. *Doe* v. *Nebraska*, 898 F. Supp. 2d 1086, 1111 (2012).

Section 202.5 bears no resemblance to the "preventative measures" upheld in the cases the State cites (Opp.28). The measure *Ward* approved restricted the challengers' activities only insofar as necessary for other park-goers' quiet enjoyment. No teenage internet user is harmed when a registrant shares good news with his Facebook "friends" or

follows the White House Twitter feed. Section 202.5 is as "tailored" as a "buffer zone" barring individuals from all New York City out of concern they might play loud music in Central Park.

4. Nor does the Opposition remedy the decision's failure to investigate more sensitive means of achieving the law's purposes—the overriding theme of this Court's intermediate scrutiny decision in *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2537-2540 (2014)—saying only that government should not be limited to measures operating after "damage is already done," Opp.28. But petitioner recognized that "nothing confines the State to punishing completed misconduct," Pet.21, identifying multiple, less burdensome *preventative* measures. *Id.*

a. The State is most tellingly silent about the alternative this Court's case law most strongly supports: inclusion of an offense element that "separate[es] legal innocence from wrongful conduct," *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015). As in *Elonis*, accessing a social networking website to "communicat[e] [or learn] *something*" is not, on the State's description, "what makes the conduct 'wrongful.'" 135 S. Ct. at 2011. Indeed, a more focused law would address malevolent "information gathering" by persons with no previous registrable conviction.

b. The State ventures no explanation for the legislature's *deletion* of a provision imposing obligations on site operators and teenage users' parents, see Pet.3, except that such measures aren't 100% effective. But self-protective measures, however imperfect, play an important role in First Amendment analysis, see *Reno* v. *ACLU,* 521 U.S.

844, 877 (1997). (The agreements the State touts, see Opp.23 & n.6, mandate privacy settings preventing under-16 users' profile information from being viewable by adults).

5. The State's claims about still-open "channels of communication" fundamentally misunderstand what the First Amendment protects and Section 202.5 burdens. See Law Prof. Amicus Br. 4-12.

a. It may be true (Opp.36 n.10) that the court proffered pauladeen.com only as a rejoinder to petitioner's assertion of exclusion from foodnetwork.com. But neither the decision below nor the State has offered *any* alternative to the sites—including Facebook, Twitter, LinkedIn, and YouTube—at the statute's core. Those sites, unlike, *e.g.*, email blasts (Opp.35), provide "channels" for activities—including interacting across family, social, professional, and interest networks and obtaining news, information, and entertainment content—no less protected under the First Amendment than person-to-person communication or simply speaking one's piece. If "[b]anning access to Facebook cannot be compared to" the prohibition invalidated in *Ladue* v. *Gilleo*, 512 U.S. 43 (1994), Opp.37, that is because expression through yard signs, as important as it remains, plays a much *narrower* role in the Nation's public discourse than do the activities that occur daily on the sites Section 202.5 proscribes.

b. The State, unable to identify any plausible substitute for these dominant social media sites, belabors a tertiary point—whether sites like nytimes.com are proscribed. The State insists they are not banned—because they do not provide user profiles that "link[] to other personal Web pages," a

"hallmark" of a "social networking site," that appears in the statutory definition, with the "conjunctive 'and,' rather than 'or.'" Opp.30, 31 & n.8.

The state Supreme Court did not adopt that construction; it assumed that the prohibition *does* apply to the New York Times. And the "natural" meaning (Opp. 31) of a term is irrelevant when the statute itself supplies a definition. See *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935). The State's "textual" argument is just wrong: In *this* provision, "and" connects enumerated characteristics introduced by "*such as* * * *," meaning that *no one* is required, let alone all. See *Donovan* v. *Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981).

c. In its waning pages, the Opposition asserts, remarkably, that petitioner would not have run afoul of Section 202.5 had he asked a friend to access Facebook, post his "God is great" comment, "and directly attribute the message to [petitioner]." Opp.35. This late-breaking "alternative" unravels the State's principal arguments: If that means of expression is outside Section 202.5's ambit, then, a registrant presumably may have a friend gather and print profile information about members of a high school cheerleading squad—even while North Carolina continues to punish as felons persons accessing sites themselves for no other purpose than to follow current events.

III. This Court's Intervention Is Needed

Much of the Opposition is devoted to deflecting the lower court decisions petitioner cites, including the ("only three" Opp.13) federal court decisions to consider—and invalidate—state social media bans.

The State assures that all are "distinguishable," *id.*; some conflict only with this decision's *"reasoning," id.*; and others exhibit "tension" *id.*20, not "meaningful conflict." *Id.*2. From this—and the fact that Section 202.5 is "little copied," the State invites the Court to conclude there is "no pressing need for * * * intervention" "for the moment." *Id.*20.

1. As the petition explained, however, the need here derives first from stark conflicts with *this Court's* foundational precedents, see S. Ct. R. 10(c), and the intolerable First Amendment consequences of permitting the decision to stand, regardless whether other jurisdictions follow suit. See *Near* v. *Minnesota*, 283 U.S. 697, 707 (1931) (statute, while "unusual, if not unique" "raise[d] questions of grave importance transcending the local interests involved in the particular action").

2. The state statute here has far graver real-world significance than federal ones this Court's has recently reviewed. Section 202.5 remains aggressively enforced—in more than 1,000 felony prosecutions—and relegates to second-rate speech rights tens of thousands of citizens under no criminal justice supervision. Compare Br. Opp., *United States* v. *Alvarez,* No. 11-210, at 14-15 (statute enforced fewer than 50 times); Br. Opp., *United States* v. *Stevens* No. 08-769, at 8 (no "[]other ruling by any court addressing [provision's] constitutionality"); cf. Pet. for Cert., *Schwarzenegger* v. *Video Software Dealers Ass'n*, No. 08-1488, at 5 n.1 (acknowledging absence of conflict).

3. The Opposition's hair-splitting distinctions do not withstand scrutiny in any event. The other social media bans were not "far broader," Opp.14; the

statute in *Doe* v. *Nebraska*, unlike this one, did not criminalize "[m]erely accessing a site to read * * * content on a page," 898 F. Supp. 2d at 1114. And the grounds for invalidation in *Marion County* had nothing to do with the fact that "chat rooms" were covered. Rather, Indiana's law failed because, like this one, it criminalized vast amounts of speech unrelated to the State's interest. See 705 F.3d at 699.

Though *Doe* v. *Nebraska* was a district court decision, see Opp.16, it was the unusual one where a State did not even appeal a facial invalidation. And while the Opposition (at 15) trumpets language in *Marion County* declining to prejudge rationales not before that court, the decision expressed constitutional doubts about the hypothetical, prophylactic approach, see 705 F.3d at 701 & n.6. Indiana (presumably no less concerned about its teenagers' safety than North Carolina) responded accordingly: It replaced its sweeping law with one requiring parolees to submit to searches of their internet devices. See Ind. Code § 11-8-8-8.

IV. Petitioner's Case Is A Strong Vehicle

None of the sundry case-specific "flaws" (Opp.22) the Opposition throws up obscures that petitioner's case is a highly suitable "vehicle" for deciding Section 202.5's constitutionality.

1. The State first highlights that Facebook.com is "clearly covered" by Section 202.5 meaning, it says, that the statute's unconstitutional vagueness will "not excuse [petitioner's] behavior." Opp.22,23. But petitioner's principal claim is not that Section 202.5 proscribes Facebook with insufficient clarity, rather that the "behavior" underlying his conviction—using

that site without malevolent intent and causing no harm—is not *proscribable*. See *De Jonge*, 299 U.S. at 365 ("[P]eaceable assembly for lawful discussion cannot be made a crime."). No "prudential" rule prevents persons who "clearly" violate unconstitutional laws from challenging them. The fact that petitioner's conviction was not infected with *all* this law's defects—and that neither his guilt nor his constitutional claim turns on how the statute's many imprecise terms are construed—makes this a better candidate for review.

2. The State's attempt to conjure a "prudential" objection from account registration "responsibilities" on the Facebook website (Opp.23) is the reddest of herrings. The quoted language (or the 2010 version, if there was one) had no role in petitioner's conviction or the decision upholding it. Section 202.5 does not purport to impose punishment for breaching contractual "terms of use," and the State has never disputed that accessing sites welcoming registrants as users (including, apparently, Twitter and YouTube) is prohibited.

Plainly, the government's power does not extend to punishing all activity "unlawful" under a private contract. *Facebook* may impose restrictions, enforceable through account deactivation that no State could. See Pet.25 (noting restrictions on "sensational," and "disrespectful" material); cf. *Elonis*, 135 S. Ct. at 2013 (vacating conviction for hate-filled Facebook speech); *Bouie* v. *City of Columbia*, 378 U.S. 347, 358 (1964) ("It is one thing to say that a person remaining on another's land after being told to leave may be * * * sued in a civil action,

and quite another to say he may be convicted and punished as a criminal").

What the State (Opp.24) finds "strange"—that the Constitution restrains punishment of speech that a person has no "independent lawful right to make"—is the longstanding First Amendment rule. *R.A.V.* v. *Saint Paul*, 505 U.S. 377 (1992), overturned a conviction for uttering unprotected "fighting words," and *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam), reversed a conviction for leafleting on a military base, though "[i]t was never doubted that a military commander [could] generally restrict access." *City of Lakewood* v. *Plain Dealer Pub. Co.*, 486 U.S. 750, 766 (1988).

3. The Opposition's welter of confusing—and confused—arguments about petitioner's facial challenge fare no better. Whether petitioner's conviction is reversed because Section 202.5 is unconstitutional facially or as-applied to cases like his is of modest import; the anti-desecration law in *Texas* v. *Johnson*, 491 U.S. 397 (1989), was held invalid only "as applied" to expressive flag burning (the Court reserved whether a conviction for dragging the flag out of laziness could stand, *id.* at 404). And though Section 202.5 *is* manifestly overbroad, irrespective of uncertainties as to particular websites or offender categories, petitioner's facial challenge *does not* require that doctrine's "strong medicine." Far from conceding that he falls within Section 202.5's "plainly legitimate sweep," petitioner's central claim is that convictions for "accessing" Facebook and foodnetwork.com are equally impermissible (at least absent proof, which *the statute does not require*, of wrongful intent or actual harm). "[I]n all its

applications [Section 202.5] * * * operates on a fundamentally mistaken premise." *Sec'y of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984).

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted.

JOHN P. ELWOOD
Vinson & Elkins LLP
1455 Pennsylvania Ave., NW., Suite 600
Washington, DC 20004

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Counsel Of Record
Office of the Appellate Defender
123 W. Main St., Suite 500
Durham, NC 27701
(919) 354-7210
glenn.gerding@nccourts.org

DANIEL R. ORTIZ
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