No. 123643

IN THE
SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>CONRAD ALLEN MORGER,<br><br>Defendant-Appellant. | ) Appeal from the Appellate Court<br>) of Illinois, Fourth District,<br>) No. 4-17-0285<br>)<br>) There on Appeal from the Circuit<br>) Court for the Eleventh Judicial<br>) Circuit, McLean County, Illinois,<br>) No. 12-CF-1330<br>)<br>) The Honorable<br>) Scott D. Drazewski,<br>) Judge Presiding. |

**BRIEF OF PLAINTIFF-APPELLEE**
**PEOPLE OF THE STATE OF ILLINOIS**

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ORAL ARGUMENT REQUESTED

## POINTS AND AUTHORITIES

## NATURE OF THE ACTION

Defendant was sentenced to four years of probation after being convicted of aggravated criminal sexual abuse and criminal sexual abuse. Due to the sexual nature of his offenses, a mandatory condition of probation prohibited him from using or accessing social networking websites. In the appellate court, defendant unsuccessfully challenged that condition on First Amendment grounds. He renews the challenge here. No issue is raised on the pleadings.

## ISSUE PRESENTED FOR REVIEW

Whether a ban on using or accessing social networking websites while on probation for a sex offense is consistent with a probationer's diminished First Amendment rights and is reasonably related to legitimate probationary goals.

## JURISDICTION

This Court allowed defendant's petition for leave to appeal on September 26, 2018. Jurisdiction lies under Supreme Court Rules 315 and 612(b).

## STATEMENT OF FACTS

Defendant's convictions stem from two acts of sexual abuse he committed against his sister, who is more than five years his junior, when she was between thirteen and fifteen years old. He was convicted of aggravated criminal sexual abuse for touching his sister's breasts for the

purpose of sexual gratification or arousal, 720 ILCS 5/11-1.60(d), and he was convicted of criminal sexual abuse for forcing his sister to touch his penis for the purpose of sexual gratification or arousal, 720 ILCS 5/11-1.50(a)(1). *See* R. Vol. I at C13-C14; R. Vol. XIII at 139-144.[1] Aggravated criminal sexual abuse is a Class 2 felony punishable by three to seven years in prison or up to four years of probation. 720 ILCS 5/11-1.60(g); 730 ILCS 5/5-4.5-35. Defendant's offense of criminal sexual abuse is a Class 4 felony punishable by one to three years in prison or up to thirty months of probation. 720 ILCS 5/11-1.50(d); 730 ILCS 5/5-4.5-45.

At sentencing, the trial court considered a presentence report and a sex offender evaluation that was prepared by a trained clinician for the purpose of assessing defendant's risk of recidivism and his amenability to treatment. R. Vol. II, Envelope 3, at 1. After interviewing defendant, reviewing relevant documents, and performing a series of risk assessment tests, the evaluator concluded that defendant presents "a moderate to high risk to reoffend." *Id.* at 9. Among other things, the evaluator noted defendant's "willingness to lie" and "manipulate others," "lack of remorse" and "empathy," "poor behavioral controls," and "failure to take responsibility for his own actions." *Id.* at 6.

The evaluator found that defendant "likely" could "be safely treated in the community with appropriate supervision," but he urged that defendant be

[1] The record on appeal is cited as "R. Vol. __"; defendant-appellant's opening brief is cited as "Def. Br. __"; and the appendix to defendant's opening brief is cited as "A__."

required to complete a sex offender treatment program and "be prohibited from having any contact with [his sister] or with anyone under . . . 18 years old" and from accessing "pornography or sexually stimulating material." *Id.* at 9. The evaluator stressed that defendant's "failure to follow these rules or other conditions placed on him by the courts should be seen as an increase in risk" and should be met with "further sanctions, including incarceration." *Id.*

The trial court sentenced defendant to 180 days in jail (suspending all but 38 days that defendant had already served in pretrial custody) and four years of probation. R. Vol. I at C58; R. Vol. XV at 25-27. The court's written order imposed several standard conditions of probation and provided that defendant would be subject to additional, sex-offender-specific conditions "as provided by" the probation department. R. Vol. I at C58-59. On appeal, the Fourth District ordered a new sentencing hearing after concluding that the trial court had improperly delegated its authority to the probation department to impose probation conditions. *See People v. Morger*, 2016 IL App (4th) 140321, ¶¶ 54-59.[2]

On remand, the trial court considered a revised presentence report that documented defendant's treatment history since his initial sentencing. *See* R. Vol. II, Envelope 4, Report of Jan. 24, 2017. The report noted that

[2] While defendant's initial appeal was pending, he admitted to violating his probation by failing to register as a sex offender. R. Vol. I at C91, C108. The trial court continued defendant on the same term of probation without modifying its duration or conditions. *Id.* at C108; R. Vol. XVIII at 4-5, 16.

defendant was only "minimally cooperative" with his first treatment provider and was eventually "terminated from the program . . . for fail[ing] to attend treatment sessions and . . . make progress towards his goals of lowering his risk to reoffend." *Id.* at 7 (internal quotation marks omitted). When defendant did attend sessions, he "showed little victim empathy," "displayed negative behavior," and "frustrat[ed] other group members . . . with [his] lack of participation." *Id.* However, defendant later enrolled with a new treatment provider who opined that he was "still amenable to treatment" and remained a candidate "for a community based sentence with supervision." *Id.*

The trial court again imposed four years of probation, retroactive to defendant's initial sentencing date of April 4, 2014. R. Vol. I at C147; R. Vol. V at 15. The court recognized that it was statutorily required to impose several probation conditions based on the nature of defendant's offenses. R. Vol. V at 17. As relevant here, a mandatory condition of probation for any person convicted of certain sex offenses — including criminal sexual abuse and aggravated criminal sexual abuse — is to "refrain from accessing or using a social networking website." 730 ILCS 5/5-6-3(a)(8.9).[3] In addition to

[3] A "social networking website" is defined as "an Internet website containing profile web pages of the members of the website that include the names or nicknames of such members, photographs placed on the profile web pages by such members, or any other personal or personally identifying information about such members and links to other profile web pages on social networking websites of friends or associates of such members that can be accessed by other members or visitors to the website," and which "provides members of or visitors to such website the ability to leave messages or comments on the profile web page that are visible to all or some visitors to

imposing all required conditions, including the social networking ban, the trial court imposed a number of discretionary conditions, including a condition prohibiting defendant from using a computer or other Internet-connected device without his probation officer's prior approval. R. Vol. I at C149-151.

On appeal, defendant argued, as relevant here, that the probation condition prohibiting him from using or accessing social networking websites violates the First Amendment. His argument relied largely on *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), which struck down a statute that barred registered sex offenders — including those who had "completed their sentences" and were "no longer subject to the supervision of the criminal justice system" — from accessing social networking websites. *Id.* at 1733-34, 1737. Defendant acknowledged that he, unlike Packingham, had not completed his sentence and remained subject to probationary supervision. A23. And he recognized that, as a probationer, he was subject to "'reasonable conditions that deprive [him] of some freedoms enjoyed by law-abiding citizens.'" *Id.* (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)). But in his view, probation only "minimal[ly]" diminishes a person's constitutional rights and thus cannot justify a complete ban on using or accessing social networking websites. Brief of Defendant-Appellant, *People v.*

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the profile web page and may also include a form of electronic mail for members of the social networking website." 720 ILCS 5/17-0.5.

*Morger*, No. 4-17-0285, at 23-24. He therefore urged the appellate court to "extend the holding of *Packingham* to probationers." *Id.* at 24.

The appellate court refused that invitation, finding *Packingham* distinguishable in two respects. First, the appellate court stated that "defendant's access to social media [was] not foreclosed *altogether*, as was the case in *Packingham*," because "defendant's probation officer temporarily could lift or modify a [probation] condition" when appropriate. A26-A27 (emphasis in original).[4] Second, the appellate court concluded that *Packingham* was inapt because "defendant ha[d] not yet completed his sentence" and his ban on using or accessing social networking websites would not "'endure for 30 years or more,'" unlike the restriction invalidated in *Packingham*. A27 (quoting *Packingham*, 137 S. Ct at 1734).

Finally, the appellate court held that the probation condition was reasonable. Although defendant did not use social networking websites to facilitate his sexual abuse of his sister, the court concluded that prohibiting him from using or accessing such sites during his probation term was reasonably related to the probationary goals of furthering his rehabilitation and deterring him from sexually abusing other minors. A14-15.

[4] The appellate court appears to have conflated the probation condition that permitted defendant to use a computer or other Internet-connected device with his probation officer's approval, *see* R. Vol. I at C150, with the condition prohibiting defendant from using or accessing social networking websites, which allowed for no override by the probation officer, *see id.* at C149.

## ARGUMENT

### I. A Probation Condition Barring Sex Offenders From Using or Accessing Social Networking Websites Does Not Violate the First Amendment.

Barring probationers convicted of sex offenses from using or accessing social networking websites does not offend the First Amendment.[5] Although *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), struck down a law that made it a felony for registered sex offenders to access social networking websites, that holding does not undermine restrictions on social networking access imposed as a condition of probation. It has long been recognized that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special probation restrictions.'" *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)) (ellipsis and brackets omitted). Legislatures and courts may thus "impose reasonable conditions [on probationers] that deprive [them] of some freedoms enjoyed by law-abiding citizens." *United States v. Knights*, 534 U.S. 112, 119 (2001). A

[5] Because defendant's probation expired on April 4, 2018, this appeal is moot. *See In re Shelby R.*, 2013 IL 114994, ¶ 15. Nevertheless, this Court is likely to find that the mootness doctrine's public interest exception applies due to the "public nature" of the question presented, its "likel[iness]" of "recur[ring]," and the "desirab[ility]" of "an authoritative determination of the question . . . for the future guidance of public officers." *Id.* ¶ 16. Moreover, absent consideration under the public interest exception, the question would likely recur frequently — whenever a sex offender is sentenced to probation — but would often evade this Court's review due to the limited duration of most probationary sentences.

probation condition is valid, even if it affects a probationer's constitutional rights, so long as it is "reasonably related" to fostering the probationer's rehabilitation or protecting the public from his risk of recidivism and is not "overly broad when viewed in the light of the desired goal." *In re J.W.*, 204 Ill.2d 50, 78 (2003) (internal quotation marks omitted). Conditions prohibiting recent sex offenders from accessing or using social networking websites — sites that are likely to present such offenders with the dangerous opportunity and temptation to exploit or abuse additional victims — are narrowly drawn to serve both of these probationary ends.[6]

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[6] Although the "broad wording" of the statute at issue in *Packingham* "might well [have] bar[red] access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com," the Court assumed that the statute applied only to "social networking sites as commonly understood," such as Facebook, Twitter, and LinkedIn. *Packingham*, 137 S. Ct. at 1736-37 (internal quotation marks omitted). There is no colorable argument — and defendant does not suggest otherwise — that Illinois's definition of "social networking website" is broader than the commonly understood definition of that term. Unlike the statutory definition in *Packingham*, which covered websites that, among other things, allow users to create personal profile pages, regardless of whether those pages contain links to the profile pages of other members, *see id.* at 1741 (Alito, J., concurring in the judgment), Illinois's statutory definition applies only to websites "containing profile web pages of the members of the website *that include* the names or nicknames of such members, photographs placed on the profile web pages by such members, or any other personal or personally identifying information about such members *and* links to other profile web pages on social networking websites of friends or associates of such members that can be accessed by other members or visitors to the website." 720 ILCS 5/17-0.5 (emphasis added). In addition, Illinois's statutory definition applies only to those websites that "provide[ ] members of or visitors to such website[s] the ability to leave messages or comments *on the profile web page* that are visible to all or some visitors to the profile web page[.]" *Id.* (emphasis added). This definition cannot fairly be read to

### A. *Packingham* does not apply to probation conditions.

In *Packingham*, the Supreme Court considered a statute that prohibited registered sex offenders from accessing social networking websites that minors could join. 137 S. Ct. at 1733. Applying intermediate scrutiny, the Court held that the statute implicated sex offenders' First Amendment rights and was not narrowly tailored to serve the admittedly substantial governmental interest in protecting children from the dangers posed by sex offenders online. *Id.* at 1736-38. In particular, the Court found it "unsettling" that the statute applied "even [to] persons who ha[d] completed their sentences" and were "no longer subject to the supervision of the criminal justice system." *Id.* at 1737. The Court stressed, however, that its "opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue." *Id.* And nothing in the Court's opinion suggests that it silently upended the well-established principle that probationers may be subject to restrictions on their constitutional rights that would be impermissible if applied to persons who were not under active supervision by the criminal justice system.

"Probation, like incarceration, is a form of criminal sanction." *Griffin*, 483 U.S. at 874 (internal quotation marks omitted). Like parole, it is a "variation on imprisonment of convicted criminals, in which the State accords

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encompass websites such as Amazon.com, Washingtonpost.com, or Webmd.com.

a limited degree of freedom in return for the [probationer's] assurance that he will comply with the often strict terms and conditions of his release." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998) (internal citation and quotation marks omitted); *see Gagnon v. Scarpelli*, 411 U.S. 778, 782 & n.3 (1973) (analogizing probation and parole). It is thus "[i]nherent in the very nature of probation . . . that probationers do not enjoy the absolute liberty to which every citizen is entitled" but are instead subject to "reasonable conditions that deprive [them] of some freedoms enjoyed by law-abiding citizens." *Knights*, 534 U.S. at 119 (internal quotation marks omitted).

This principle applies equally to First Amendment rights. *See Farrell v. Burke*, 449 F.3d 470, 497 (2d Cir. 2006) (Sotomayor, J.) (noting that expressive materials that "receive full First Amendment protection when in the possession of ordinary adults . . . may be regulated in the hands of parolees to a much greater extent" because "the First Amendment rights of parolees are circumscribed"). For instance, in *Commonwealth v. Power*, 650 N.E.2d 87 (Mass. 1995), the Massachusetts high court upheld a probation condition that forbade a probationer from selling the story of her crime — a restriction that the court recognized would violate the First Amendment if applied to the general public. *Id.* at 415-16 (citing *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S 105, 115 (1991)). The restriction was permissible as a probation condition because such conditions are "not subject to the same rigorous First Amendment scrutiny that is employed against a

statute of general applicability," but instead need only be "reasonably related to a valid probation purpose." *Power*, 650 N.E.2d at 417. The Washington Supreme Court applied the same principle in *State v. K.H.–H.*, 374 P.3d 1141 (Wash. 2016). There, the court upheld a probation condition that required a probationer to write a letter of apology to his victim — even though the mandate would have violated the First Amendment's compelled speech doctrine if applied to an ordinary citizen — because a probationer's "constitutional rights are lessened." *Id.* at 1142-43. Decisions "defin[ing] the boundaries of free speech for those not convicted of crimes" were thus "inapplicable." *Id.* at 1143.

These decisions demonstrate why defendant is wrong to argue that *Packingham* "should be applied without limitation even to cases involving probation conditions." Def. Br. 17. To be sure, *Packingham* did not expressly exempt probationers from the scope of its holding, but the Court's silence on an issue that was not before it can hardly be read as an implicit retreat from settled doctrine. After all, "*Packingham* addresse[d] circumstances in which the state ha[d] completely banned much of a sex offender's internet access *after* he ha[d] completed his sentence." *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018) (emphasis in original). The Court's "driving concern," therefore, "was the imposition of a severe restriction on persons who had served their sentences and were no longer subject to the supervision of the criminal justice system." *Id.*; *see also United States v. Carson*, ___ F.3d

___, 2019 WL 2063371, *4 (8th Cir. May 10, 2019) (holding that "*Packingham* does not render a district court's restriction on access to the internet during a term of supervised release plain error" because that decision "invalidated only a *post*-custodial restriction") (emphasis in original); *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017) (holding that Internet restriction imposed as a condition of supervised release was not plain error under *Packingham* because it was "not a post-custodial restriction of the sort imposed on Packingham"). Indeed, prior to *Packingham*, in a decision invalidating an Indiana statute that barred registered sex offenders from using social networking websites, the Seventh Circuit left the door open to similar restrictions as "terms of supervised release," noting that such conditions are valid if they are "reasonably related to the sentencing factors and involve no greater deprivation of liberty than is reasonably necessary." *Doe v. Prosecutor, Marion Cty., Ind.*, 705 F.3d 694, 703 (7th Cir. 2013) (internal quotation marks and brackets omitted).[7]

[7] In *United States v. Holena*, 906 F.3d 288, 295 (3rd Cir. 2018), the court recognized that defendants "on supervised release enjoy less freedom than those who have finished serving their sentences," but nonetheless suggested that supervised release conditions imposing "blanket internet restrictions will rarely be tailored enough to pass constitutional muster" under *Packingham*. *Holena* is distinguishable because the condition at issue there applied to the defendant for life and restricted his use of the entire Internet and all computers or electronic communications devices. *Id.* at 290. That restriction was far more "draconian," *id.* at 292 (internal quotation marks omitted), than the four-year restriction on social networking websites imposed here and was thus unlikely to have been reasonably related to legitimate probationary purposes. For the same reason, the West Virginia Supreme Court's reliance on *Packingham* to strike down a parole condition

Defendant nevertheless contends that *Packingham* should apply to probationers because, in his view, "probation is one of the lightest punishments on a continuum of possible punishments" and thus justifies only "minimal" "diminishment of [a probationer's] constitutional rights." Def. Br. 20. But probation is not a monolith: it is a "set of points" on the punishment continuum that "can . . . be more or less confining depending upon the number and severity of restrictions imposed." *Griffin*, 483 U.S. at 874. Indeed, "as probation has become an increasingly common sentence for those convicted of serious crimes," *id.* at 875, the need to impose more restrictive probation conditions has grown. "[T]he very assumption of the institution of probation," after all, "is that the probationer is more likely than the ordinary citizen to violate the law." *Knights*, 534 U.S. at 120 (internal quotation marks omitted). And that concern is magnified when probation is imposed for a sex offense, as it was here. *See Smith v. Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders"); *People v. Minnis*, 2016 IL 119563, ¶ 41 ("[T]he legislature is entitled to conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism.") (internal quotation marks omitted). As a result, allowing convicted sex offenders to serve probationary sentences presents serious "public safety concerns," *United States v. Kebodeaux*, 570

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banning all computer and Internet use, *see Mutter v. Ross*, 811 S.E.2d 866 (W. Va. 2018), is also distinguishable.

U.S. 387, 395 (2013), including the risk that released offenders may use the Internet, and especially social networking websites, to abuse or exploit vulnerable victims online. *See Packingham*, 137 S. Ct. at 1739 (Alito, J., concurring in the judgment) ("The State's interest in protecting children from recidivist sex offenders plainly applies to internet use.").

For that reason, States are often "willing to extend [probation to sex offenders] only because [they are] able to condition it upon compliance with certain requirements." *Scott*, 524 U.S. at 365. That is precisely what Illinois has done here. By providing that any term of probation imposed for a sex offense must be accompanied by a restriction on the probationer's access to social networking websites, the General Assembly has expressed its "considered judgment," *People v. Goosens*, 2015 IL 118347, ¶ 13, that such a condition is necessary to protect the public from the risk of recidivism posed by a sex offender on probation. *See* 20 ILCS 4026/5 (legislative declaration "that the comprehensive evaluation, treatment, and management of sex offenders who are subject to the supervision of the criminal . . . justice system[ ] . . . is necessary in order to work toward the elimination of recidivism by such offenders"). That "predictive judgment[ ]" is entitled to "substantial deference," *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994), because "the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems," *Minnis*, 2016 IL 119563, ¶ 41. And in light of that legislative judgment, it is likely that the

General Assembly, if foreclosed from imposing a social networking restriction as a mandatory condition of probation for sex offenders, would instead require such offenders to serve their sentences in prison, "which [would] surely [be] more restrictive of speech" than the current solution. *Doe*, 705 F.3d at 703.

### B. The social networking restriction is reasonably related to valid probationary purposes.

Because a probationer does not enjoy the full gamut of First Amendment rights during his term of probation, a condition that restricts him from using or accessing social networking websites is not subject to the intermediate scrutiny test that applied in *Packingham*. Rather, such a condition is valid if it is "reasonably related" to legitimate probationary purposes and is not "overly broad" with respect to those goals. *In re J.W.*, 204 Ill. 2d at 78; *cf. Turner v. Safley*, 482 U.S. 78, 89 (1987) ("a prison regulation [that] impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests"). While this standard requires that a probation condition affecting constitutional rights be "narrowly drawn," *In re J.W.*, 204 Ill. 2d at 78 (internal quotation marks omitted), it does not require a showing that the condition is the least restrictive means available to serve the State's interests.[8] Rather, the existence of "alternative

[8] Even under the more difficult intermediate scrutiny standard, a regulation "need not be the least restrictive or intrusive means of advancing the government's content-neutral interest." *Minnis*, 2016 IL 119563, ¶ 42 (explaining that intermediate scrutiny standard's "narrow-tailoring

means [of achieving the relevant probationary goals] that are less subversive to the probationer's constitutional rights" is simply one factor to "consider" when "assessing the reasonableness of a condition of probation." *Id.* at 79. Other factors to consider are whether the condition "reasonably relates to the rehabilitative purpose" of probation, and whether "the value to the public" from imposing the condition "manifestly outweighs the impairment to the probationer's constitutional rights." *Id.* But in the end, "the overriding concern" when assessing "the propriety of a condition of probation" is the condition's "reasonableness." *Id.* at 78.

The probation system serves the twin goals of fostering a probationer's rehabilitation and protecting the public from the risk of recidivism posed by his release. *See Knights*, 534 U.S. at 119 (describing "the two primary goals of probation" as "rehabilitation and protecting society from future criminal violations"); *People v. Lampitok*, 207 Ill. 2d 231, 250 (2003) (noting that the "probation system serves the purposes of rehabilitating probationers while punishing them and protecting the public from crime"). A probation condition prohibiting convicted sex offenders from using or accessing social networking websites is reasonably related to both of those goals.

"The recidivism rate of probationers is significantly higher than the general crime rate." *Knights*, 534 U.S. at 120. And the "risk of recidivism

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requirement is satisfied so long as the law promotes a substantial government interest that would be achieved less effectively absent the law").

posed by sex offenders," in particular, "is frightening and high." *Smith*, 538 U.S. at 103 (internal quotation marks omitted). Defendant is no exception. After an individualized evaluation, he was deemed "a moderate to high risk to reoffend," R. Vol. II, Envelope 3, at 9, due in part to his "poor behavioral controls," "lack of remorse" and "empathy," and "willingness to lie" and "manipulate others," *id.* at 6. Particularly with respect to probationers, like defendant, who have offended against minors, the State has an overwhelming interest in combatting the threat of recidivism. *See New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). Prohibiting such offenders from using or accessing social networking websites — sites that can be "powerful tool[s] for the would-be child abuser," *Packingham*, 137 S. Ct. at 1739 (Alito, J., concurring in the judgment) — "directly and effectively serves [that] substantial interest." *Minnis*, 2016 IL 119563, ¶ 42. And temporarily restricting sex offenders from sites that could create temptation to reoffend likewise "assure[s] that the probation serves as a period of genuine rehabilitation," *Griffin*, 483 U.S. at 875, that will "benefit society by restoring [the offender] to useful citizenship," *People v. Meyer*, 176 Ill. 2d 372, 379 (1997).[9]

[9] *Amici* suggest that social networking restrictions hinder rather than promote a probationer's rehabilitation. *See* Brief of *Amici Curiae* The American Civil Liberties Union of Illinois, *et al.*, at 8. But "our uncertainty about how rehabilitation is accomplished" necessitates "a very flexible standard," *United States v. Gementera*, 379 F.3d 596, 603 (9th Cir. 2004)

Defendant contends that the social networking restriction is not reasonably related to valid probationary purposes because his offenses "did not involve any use of computers or the internet." Def. Br. 13. But a probation condition need not relate directly to the defendant's underlying offense if it is "imposed for enforcement [purposes] and the protection of the public." *Goosens*, 2015 IL 118347, ¶ 11. Indeed, even when a condition is not mandated or authorized by statute, it may be imposed by the trial court if it reasonably relates *either* "to . . . the nature of the offense *or* . . . the rehabilitation of the defendant." *Id.* ¶ 13 (emphasis added); *see also* 730 ILCS 5/5-6-3(b). As the appellate court concluded, the social networking ban reasonably advances the goals of probation by "deterring defendant from sexually assaulting another minor" via "social networking sites often used by minors." A15.[10]

The probation condition restricting social networking access is also narrowly drawn. For one thing, it applies only during a sex offender's term of probation, which will almost always occur in close temporal proximity to the offense, when the need to deter and rehabilitate the offender is at its zenith,

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(internal quotation marks omitted), that defers to the legislature with respect to such "questions of policy," *Minnis*, 2016 IL 119563, ¶ 40.

[10] Defendant contends that the social networking restriction is overbroad because it is not limited to sites that allow minors to become members. Def. Br. 13. But the only social networking site he mentions as an example of such overbreadth is LinkedIn, which allows minors who are sixteen years of age or older to join. *See* LinkedIn, User Agreement, http://www.linkedin.com/legal/user-agreement.

and which generally will last no more than four years and often will be even shorter than that. *See* 730 ILCS 5/5-4.5-30(d) (probation for Class 1 felony, the most serious class of offense for which probation is authorized, "shall not exceed 4 years"); 730 ILCS 5/5-4.5-40(d) (probation for Class 3 felony "shall not exceed 30 months"). Moreover, unlike the broad computer and/or Internet restrictions rejected in the federal cases cited by defendant, *see* Def. Br. 13-14; *see, e.g.*, *United States v. Albertson*, 645 F.3d 191, 193, 198 (3rd Cir. 2011) (rejecting "wholesale ban on . . . internet use" that was "sweepingly broad"), the social networking ban that applies to defendant is narrowly targeted at the specific types of Internet sites that allow "strangers" to surreptitiously communicate with minors and "eas[ily] access" the vast amounts of "personal information" that they routinely expose. *Packingham*, 137 S. Ct. at 1739 (Alito, J., concurring in the judgment). Defendant's probation condition leaves open ample alternative channels for him to engage in First Amendment activity on the Internet.

Finally, defendant argues that the social networking restriction is "overbroad because [it] does not provide for any exceptions." Def. Br. 14. But "the overriding concern" when "deciding the propriety of a condition of probation" is its "reasonableness." *In re J.W.*, 204 Ill. 2d at 78. Under that flexible standard, no one factor should be dispositive. To be sure, some broad conditions, like those "banishing [an offender] from entering" an entire city, *id.* at 80, or imposing a wholesale ban on computer or Internet use, may be

unreasonable in the absence of exceptions for legitimate activities that present minimal risk of harm. But in such cases, exceptions are required to narrow the restriction so that it reasonably relates to valid probationary purposes. For the reasons discussed above, the social networking restriction here is already narrowly drawn. Exceptions would only serve to render it "less effective[ ]" in achieving the State's compelling ends. *Minnis*, 2016 IL 119563, ¶ 42.

## CONCLUSION

This Court should affirm the appellate court's judgment.

May 29, 2019

Respectfully submitted,

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**RULE 341(c) CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the 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 twenty pages.

/s/ Eric M. Levin
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Assistant Attorney General

## PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 29, 2019, the **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided service of such filing to the email addresses of the persons named below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the **Brief of Plaintiff-Appellee People of the State of Illinois** to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Eric M. Levin
ERIC M. LEVIN
Assistant Attorney General