**RECORD NO. 19-4466**

In The

# United States Court of Appeals

For The Fourth Circuit

## UNITED STATES OF AMERICA,

***Plaintiff – Appellee*,**

**v.**

## MARYSA RENEE COMER,

***Defendant – Appellant.***

## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT CHARLOTTE

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## BRIEF OF APPELLANT

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## INTRODUCTION

Marysa Renee Comer challenges the standard condition for sex offense cases imposed by district courts in the Western District of North Carolina banning the use of any social networking accounts absent permission from the probation officer. The ban is unconstitutionally vague and overbroad. Also, in an issue of first impression in this Circuit, Ms. Comer challenges the social networking ban as an unconstitutional infringement on her fundamental liberty interest of a right to privacy. Finally, the ban must be vacated because the district court delegated its authority to the probation officer to define the condition's nature and scope.

Ms. Comer also challenges the courtroom practice in the Western District of North Carolina that permits the U.S. Probation Officer to sit at counsel table with the government during revocation hearings and to consult with the United States Attorney during the government's questioning of witnesses and argument before the court. This procedure infringes upon Ms. Comer's right to due process and violates the separation of powers doctrine.

## STATEMENT OF JURISDICTION

The United States District Court for the Western District of North Carolina had jurisdiction to modify the terms of Ms. Comer's supervised release under 18 U.S.C. § 3583(e) and 18 U.S.C. § 3231. The District Court orally pronounced imposition of the modified terms on June 18, 2019 and entered a final judgment on

June 25, 2019. JA 112. Ms. Comer filed a timely notice of appeal on June 26, 2019. JA 117. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## STATEMENT OF ISSUES

I. Did the district court abuse its discretion when it modified Ms. Comer's conditions of supervised release to include a complete ban on social media/social networking?

II. When probation officers act as an arm of the executive branch—rather than the judicial branch—during revocation hearings, does that practice violate the separation of powers doctrine and a defendant's right to due process?

## STATEMENT OF THE CASE

Ms. Comer was 20 years old when she was arrested with David Delay, who was 32 years her senior, for multiple counts of sex trafficking and related offenses. JA 124, 121. Their relationship began on the internet in 2014, when Ms. Comer was only 19 years old. JA 124.

According to the Presentence Report, Delay was the "mastermind of the conspiracy." JA 123. His conduct involved "recruit[ing] and engag[ing] young females into prostitution as early as 2009 under the auspices that he was a television, film, and/or music producer and was producing a documentary for HBO about escorting." *Id.* Delay promised the women—some of whom were minors—millions of dollars upon completion of the documentary. *Id.* In the meantime, the women were required to sign contracts and turn over the proceeds of their prostituting to Delay to

purportedly fund the documentary. *Id.* Delay preyed upon most of the women—including Ms. Comer—through dating websites. *Id.*

Ms. Comer was recruited by Delay in March 2014, and she moved from North Carolina to Washington to be with him. JA 124-5. Delay taught her how to solicit work as a prostitute through online websites such as backdoor.com. *Id.* After some time working as a prostitute, Ms. Comer transitioned into an active role in Delay's scam, by recruiting other women through online dating websites. *Id.* One of the victims also accused Ms. Comer of using Facebook to attempt to control her, by posting sexually embarrassing photos of her for friends and family to see.

None of the women recruited by Ms. Comer were minors.

*Ms. Comer and Delay are arrested and charged.*

Police executed a search warrant on Delay and Ms. Comer's home on December 19, 2014. JA 124. The government filed a complaint against Ms. Comer and Delay in in the Western District of Washington in April 2015, and the Grand Jury indicted them in May 2015. *Id.* A later superseding indictment charged Ms. Comer with: conspiracy to engage in sex trafficking by force, fraud, and coercion (Cts. 1, 3, 4, 5); conspiracy to transport females for prostitution (Ct. 6); transportation for the purpose of prostitution (Cts. 7, 9, 11, 13); and transportation for the purpose of prostitution through coercion and enticement (Cts. 8, 10, 12, 14). JA 24. Ms. Comer pled guilty to Count 1 of the Indictment, conspiracy to engage in sex trafficking by force, fraud, and coercion. JA 1. Counts 3-14 were dismissed. *Id.* She was sentenced to

36 months' imprisonment and a 5-year term of supervised release. JA 34. As part of her supervised release, the district court in Washington imposed a condition requiring Ms. Comer to permit "ongoing monitoring of his/her computer(s), hardware, and software, and any/and all electronic devices" by probation. JA 39.

*The court modifies Ms. Comer's term of supervised release.*

In July 2018, the district court for the Western District of North Carolina accepted jurisdiction of Ms. Comer's supervised release from the Western District of Washington. JA 23. Later that same month, Ms. Comer agreed to Probation's request to modify her supervision conditions to include GPS location monitoring for 12 months. JA 63.

On February 1, 2019, Probation petitioned the court for a warrant for Ms. Comer's arrest, alleging she had violated the conditions of her supervision and that her probation should be revoked. JA 149. In particular, Ms. Comer was charged with (1) unauthorized communication/interaction with a felon when Probation discovered communications between Ms. Comer and persons using and selling cocaine via Facebook on an unauthorized smartphone; (2) unauthorized computer access, when Probation discovered an unauthorized smartphone; (3) failure to comply with computer monitoring, when Probation discovered an unmonitored smartphone and Ms. Comer failed to make a payment to a computer-monitoring company; (4) unauthorized communication/ interaction with a felon when Probation discovered

Ms. Comer met a man on Facebook who allegedly sold drugs and was on bond for financial crimes; and (5) failure to comply with mental health treatment for three missed appointments. JA 149-50.

The court held a hearing on Probation's petition on June 18, 2019— more than four months after Ms. Comer was arrested and detained. At the hearing, Ms. Comer admitted violations 2, 3, and 5. JA 64. The probation officer (who sat at government counsel's table and conferred with government counsel throughout the hearing) and the government offered evidence on the remaining violations. JA 64. Upon the request of Probation and the government, the court imposed three new conditions of supervision for Ms. Comer:

> 1. All conditions previously imposed by the Western District of Washington shall remain in effect.
>
> 2. The defendant shall not have any social networking accounts without approval of the U.S. Probation Officer.[1]
>
> 3. The defendant shall submit to curfew, with location monitoring technology, for a period of twelve months and comply with its requirements as directed. For the first six months, the defendant is restricted to the defendant's residence between 10:00 p.m. and a time determined by the U.S. Probation Officer. If defendant successfully abides by this condition for the first six months, the defendant's curfew will begin at 11:00 p.m. for the remaining period of curfew. The defendant shall maintain a telephone at the defendant's place of residence without any "call forwarding," "Caller ID services," "call waiting," dial-up computer modems, 1-

[1] This condition is found verbatim in Condition 13, *In re: Standard Sex Offender Conditions of Probation and Supervised Release*, Order 316 MC 221, District Court for the Western District of North Carolina, filed December 8, 2016.

> 800 long distance call block, fax machine, voice over internet protocol (VOIP), burglar alarm or three-way calling service.

JA 115.

Probation described the social networking ban as merely the "special condition in North Carolina for social networking." JA 99-100. Probation explained the condition as:

> any social networking restriction without – with the approval of the probation officer. I would not keep [Ms. Comer] from reading the news or anything like that. It would be specific to these dating apps where she's meeting other women or recruiting other women. It would be very specific to what her charge was and the conduct that she is doing while on probation. I'm not going to keep her from reading the news. I'm not going to keep her from going on LinkedIn to make herself, you know, better for the job world out there. It would just be very specific to what the issues on her supervision would be, Facebook, Tinder, any of those other dating apps like that.

JA 99-100. Defense counsel objected to social media condition, arguing the condition was overbroad and imposed a "greater deprivation of liberty than necessary." JA 98, 102-3. Defense counsel also argued that the social media condition was "essentially still an impermissible delegation of" the court's authority to the probation officer. JA 103.

The court rejected defense counsel's argument and concluded the condition was necessary because Ms. Comer was "putting drug dealers together with drug users

and that's – that's against the law." JA 102. The court acknowledged it did not have "any evidence she's trafficking again." JA 102.[2]

The district court entered its judgment on the revocation of probation or supervised release on June 25, 2019. JA 115. Ms. Comer filed a timely notice of appeal. JA 117.

## SUMMARY OF ARGUMENT

The district court failed to apply the relevant constitutional and statutory requirements when it imposed a social networking ban as a special condition of Ms. Comer's supervised release. This Court should vacate the condition for several reasons.

First, the social networking ban contains vague language that does not provide Ms. Comer with fair notice of what behavior is actually restricted.

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[2] The court also made the following record hoping for guidance from this Court:

> I'm going to do [the social networking/internet condition] as they've got it in there. You can appeal it and they can go up and, you know, we can just start appealing all of these things and do it. I think it's a great thing to do. You all just need to go ahead and do it and we'll find out what the authority—what authority we have, so just go ahead and do it.
> You can appeal all the way up – best thing to do is just put them in prison for a while and then there's no dating app and stuff you have to worry about.
>
> Go ahead.

JA 103.

Second, the ban violates Ms. Comer's constitutional right to privacy because it intrudes into the exercise of her liberty to control her personal, intimate relationships. The social networking ban forecloses Ms. Comer's ability to engage in lawful dating, much of which now occurs in social networking forums. Where the district court acknowledged it had no evidence that Ms. Comer was using social networking sites to engage in trafficking while on supervised release, the imposition of this ban violates her rights to due process and equal protection.

Third, the ban is overbroad because it involves a greater deprivation of liberty than reasonably necessary to deter Ms. Comer from committing other crimes. It is not narrowly tailored, and it permits Probation unfettered and long-term discretion to restrict Ms. Comer from social networking accounts.

Fourth, the ban impermissibly delegates to Probation the authority to determine the scope and nature of the social networking condition. Because Ms. Comer's freedom (or lack thereof) to use any social networking site is a component of her punishment, the ultimate decision on that issue rests with the district court and may not be delegated to a probation officer.

Finally, Ms. Comer challenges the practice in the Western District of North Carolina of permitting the U.S. Probation office to sit at counsel table and consult with the Assistant United States Attorney (AUSA) during revocation hearings. The probation officer is not an employee of the AUSA's office but is instead an employee of the court. Permitting the probation officer to align with the government violates

Ms. Comer's constitutional right to due process and the separation of power doctrine. Ms. Comer asks this Court to remand for a fair hearing and to issue a directive to the district court to cease this practice.

Because the conditions run afoul of the Constitution, 18 U.S.C. § 3583(d), and the Guidelines, they must be vacated.

## ARGUMENT

### I. Standard of Review

This Court reviews a district court's order imposing a condition of supervised release for an "abuse of discretion." *United States v. Worley*, 685 F.3d 404, 407 (4th Cir. 2012). A court abuses its discretion if its decision "is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010) (internal citations and quotations omitted).

For a special or discretionary condition of supervised release, the condition must be reasonably related to three factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) protecting the public from further crimes; and (3) providing the defendant with needed medical care or other correctional treatment. *United States v. Armel*, 585 F.3d 182, 186 (4th Cir. 2009) (citing 18 U.S.C. § 3583(d)). Special conditions must also involve no greater deprivation of liberty than reasonably necessary to achieve these factors. *Armel*, 585 F.3d at 186; 18 U.S.C. § 3583(d)(2); U.S.S.G. § 5D1.3(b).

## II. The district court abused its discretion when it imposed the social networking condition, in violation of the Constitution, statutes, and the Guidelines.

The social media special condition is invalid. First, the phrase "*any* social networking accounts," is unconstitutionally vague, because it does not provide Ms. Comer notice of the nature of the ban. Second, the ban violates Ms. Comer's constitutional right to privacy, because it intrudes into the exercise of her liberty to control her personal, intimate relationships. Third, the ban is overbroad because it involves a greater deprivation of liberty than reasonably necessary to deter Ms. Comer from committing other crimes. Finally, the ban impermissibly delegates to Probation the authority to determine what social networking websites and apps Ms. Comer may utilize.

### A. The social networking condition is unconstitutionally vague.

"A condition of supervised release is unconstitutionally vague if it would not afford a person of reasonable intelligence with sufficient notice as to the conduct prohibited." *United States v. Schave*, 186 F.3d 839, 843 (7th Cir. 1999); *see also United States v. Versher*, 629 F.App'x. 528, 530 (4th Cir. 2015) (citing with favor *United States v. Schave*)); *United States v. Simmons*, 343 F.3d 72, 81 (2d Cir. 2003) ("Due Process requires that the conditions of supervised release ... give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.") (internal citations and quotations omitted); *United States v. Gallo*, 20 F.3d 7, 11 (1st Cir. 1994) (applying the Fourth Amendment to probation revocation proceedings and

noting that "[f]air warning of conduct that may result in revocation is an integral part of due process in such situations."). A condition violates due process if "[wo]men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Green*, 618 F.3d 120, 122-3 (2d Cir. 2010) (quotation and citation omitted).

Other circuits have vacated vague supervised release conditions that included language such as: "support his or her dependents and *meet other family responsibilities*"; "work *regularly* at a lawful occupation"; "notify third parties of *risks* that may be occasioned by [his] criminal record or *personal history* or *characteristics*"[3]; "associate with any person convicted of a felony, unless granted permission to do so by the probation officer"[4]; and "any use of alcohol that adversely affects [the] defendant's employment, relationships, or ability to comply with the conditions of supervision."[5]

Here, the social networking condition is hopelessly vague. The term "social networking" is not defined and provides Ms. Comer with no notice as to the prohibited conduct. Does it include social media sites as well? For example, does Ms. Comer violate the condition if she saves recipes to a shared board that allows for comments on Allrecipes.com? Does she violate the condition if she listens to music

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[3] *United States v. Evans*, 883 F.3d 1154, 1162 (9th Cir. 2018) (vagueness challenge in italics).

[4] *United States v. Thompson*, 777 F.3d 368, 376-7 (7th Cir. 2015).

[5] *United States v. Sandidge*, 863 F.3d 755, 758-9 (7th Cir. 2017).

on Spotify.com, because it has a feature enabling her to follow and share music with others? What if she gets her news on Twitter? Does that violate her condition? The condition is unclear as written. Rather, a person of normal intelligence must "guess at its meaning," because reasonable people "differ as to its application." *Green*, 618 F.3d at 122-3. The inherent vagueness in North Carolina's standard social networking condition leaves Ms. Comer "in the untenable position of 'discover[ing] the meaning of [her] supervised release condition only under continual threat of imprisonment, in sequential hearings before the court." *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002) (citing *United States v. Loy*, 237 F.3d 251, 263 (3d Cir. 2001)).

A simple internet search reveals that a social networking site is different than a social media site, although people often confuse the two, and some sites combine elements of both.[6] The techopedia.com site explains that "[a] social networking site is any site that has a public or semi-public profile page, including dating sites, fan sites and so on. A social media site has profiles and connections, combined with the tools to easily share online content of all types."[7] Indeed, some sites and apps, such as Facebook, Twitter, and Pinterest, are considered both social media and social

[6]https://www.techopedia.com/definition/4956/social-networking-site-sns (last visited Sept. 11, 2019).

[7]https://www.techopedia.com/definition/4956/social-networking-site-sns (last visited Sept. 11, 2019).

networking sites.[8] And a simple Google search for "dating and social media" returns a multitude of articles that use the terms "social media" and "social networking" interchangeably.[9] Neither the court nor Probation defined what a "social networking" site might be. A person of common intelligence would be hard-pressed to easily identify whether a website is a social media site, a social networking site, or something else.

The district court provided no guidance to Ms. Comer to assist her in understanding the conditions of her supervised release, other than telling her that Probation must approve a particular site or app. (Ms. Comer challenges the court's improper delegation of its Article III authority in subsection II(D), *infra*.) And Probation further muddled the issue at the hearing. The district judge asked about the social networking condition, and the probation officer advised that she would not prohibit Ms. Comer from reading the news or accessing LinkedIn, but she would prohibit Ms. Comer from accessing "dating" sites such as Facebook and Tinder. JA 99. Yet many consider LinkedIn a social networking site,[10] while others do not

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[8] Fauzia Burk, Huffington Post (updated Dec. 2, 2013), *Social Media vs. Social Networking*, https://www.huffpost.com/entry/social-media-vs-social-ne_b_4017305.

[9] *See generally* Lauren Suval, *Dating and the Impact of Social Media*, (updated July 8, 2018), https://psychcentral.com/blog/dating-and-the-impact-of-social-media/.

[10] Geoffrey Martine Mutalemwa, Linkedin (Jan. 6, 2016), *LinkedIn: A Social Networking Site for Business People and Professionals to Connect*, https://www.linkedin.com/pulse/linkedin-social-networking-site-business-people-mutalemwa/.

necessarily consider Facebook a dating site.[11] The Supreme Court, for example, characterized Facebook as a site in which "users can debate religion and politics with their friends and neighbors or share vacation photos." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

The social networking condition, as written, provides Ms. Comer with no understanding of its "meaning" or "application." And as a result, the condition is not "sufficiently clear to inform [her] of what conduct will result in [her] being returned to prison." *Green*, 618 F.3d at 122. Ms. Comer has simply no way of knowing whether she is only banned from dating sites, what a dating site is, or what a social networking site or app is. The condition is unconstitutional and it must be vacated.

### B. Under the required "careful review," the social networking ban impermissibly infringes upon Ms. Comer's fundamental liberty interests.

The lower court's imposition of a ban on social networking infringes upon Ms. Comer's fundamental liberty interests. Courts have recognized that "[a] person, even if convicted of a crime, retains h[er] humanity. [Sh]e also retains h[er] right to substantive due process, even if it is sharply diminished in many respects." *United*

[11] Facebook itself is both a social media and social networking platform. Fauzia Burk, Huffington Post (updated Dec. 2, 2013), Social Media vs. Social Networking, https://www.huffpost.com/entry/social-media-vs-social-ne_b_4017305. Within the main app, Facebook created a Facebook Dating feature in September 2019. Bernhard Lang, Wired (Sept. 5, 2019), *Facebook Dating Is Now Available in the US. Here's How It Works.*

*States v. McLaurin*, 731 F.3d 258, 261 (2d Cir. 2013) (citing *United States v. Myers*, 426 F.3d 117, 125–26 & n. 8 (2d Cir.2005)).

Contrary to other supervised release conditions that must only be "reasonably related" to sentencing factors, 18 U.S.C. § 3583(d)(1), a supervised release condition that implicates a fundamental liberty interest is "subject to careful review." *United States v. Ritter*, 118 F.3d 502, 504 (6th Cir. 1997). Conditions that infringe upon a constitutional right will be upheld only when they are "directly related to advancing the [defendant's] rehabilitation and to protecting the public from recidivism." *United States v. Wilinski*, 173 F.App'x. 275, 277 (4th Cir. 2006) (unpublished) (quoting *Ritter*, 118 F.3d at 505) (alteration in original).

The Supreme Court recognized that individuals are "free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). This extends to the private conduct of an individual to engage in consensual, sexual intimacy. *Id.* at 578. And states may not treat married people differently than unmarried people, because to do so violates the Equal Protection Clause of the Fourteenth Amendment. *Einstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a law on equal protection grounds that permitted married people to obtain contraception but prohibiting the distribution of contraceptives to unmarried people).

"A ban on associating with a 'life partner' implicates a particularly significant liberty interest." *United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012) (quoting

*United States v. Napulou*, 593 F.3d 1041, 1047 (9th Cir. 2010)); *see cf. Myer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (guaranteed liberty interests include, among other rights, the right to "engage in any of the common occupations of life, … to marry, establish a home and bring up children …"); *United States v. Worley*, 685 F.3d 404 (4th Cir. 2012) (vacating a conviction that prohibited the defendant from visiting his son and from "forming any romantic interest or sexual relationship" with another, as a violation of his constitutional liberties). The ways in which a person finds a life partner has evolved significantly over the last decade in this country.

"Nowadays, people use computers for an even wider range of uses including online banking, entertainment, socializing, and accessing healthcare."[12] More than three quarters of Americans go online daily and 26% report they are "online almost constantly."[13] The impact on dating and marriage, in particular, is pronounced. In 2012, research suggested that in today's world, it is "more likely that a single adult American will find their future mate online than in a bar, work, or school."[14] Upon

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[12] Camille Ryan, *Computer and Internet Use in the United States: 2016*, U.S. Census Bureau at 1 (Aug. 2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf.

[13] Andrew Perrin & Jinjing Jiang, About a quarter of U.S. Adults say they are 'almost constantly' online Pew Research Center (Mar. 14, 2018), http://www.pewresearch.org/fact-tank/2018/03/14/about-a-quarter-of-americans-report-going-online-almost-constantly/.

[14] Matthew Altenberg, *Playing the Mysterious Game of Online Love: Examining an Emerging Trend of Limiting 230 Liability of the Communications Decency Act and the Effects on E-Dating Websites*, 32 Pace L. Rev. 922, 922 (2012) (citations omitted); *see also* Michael J. Rosenfeld and Rebuen J. Thomas, *Searching for a Mate: The Rise of the Internet as a Social*

"careful review," it is clear that in Ms. Comer's case, the district court violated her constitutional right to due process and equal protection of the law when it imposed the social networking ban. The social networking ban infringes upon her liberty interest to locate and associate with a romantic partner.

In assessing this challenge to the condition, this Court first determines if the condition advances the defendant's rehabilitation and curbs recidivism. *Wilinski*, 173 Fed. App'x. at 277; *see also* 18 U.S.C. § 3583(d) (citing U.S.C. § 3553(a)(1), (a)(2)(B)-(D)). At Ms. Comer's revocation hearing, the probation officer said she wished to keep Ms. Comer off social networking sites such as "Facebook, Tinder, any of those other *dating apps* like that."[15] JA 99-100 (emphasis added). After listening to the officer's description of the intended social networking ban, the court announced it would impose the ban because of Ms. Comer's "conduct." JA 104. When the government attempted to clarify if the court imposed the condition based on Ms. Comer's crime or conduct while on supervised release, the court made clear it imposed the ban because Ms. Comer used "social media to contact people to commit other crimes" involving the obtaining of drugs while on supervised release. JA 104. Yet the only site Ms. Comer abused while on release was Facebook. The district court

*Intermediary*, 77 American Sociological Review 523 (study indicated that in 2009, more than 20% of heterosexual couples and nearly 70% of homosexual couples met their partners online).

[15] As noted above, it is questionable whether a reasonable person would consider Facebook as primarily a dating app.

acknowledged it had no evidence that Ms. Comer engaged in sex trafficking or any related offenses while on supervision. JA 104. And there is no evidence that while on supervision Ms. Comer misused any sites or apps that are exclusively considered "dating" sites. The court could have easily crafted a condition that represented a much smaller deprivation of Ms. Comer's right to privacy and to her fundamental liberty interest to seek a life partner. A restriction solely of Ms. Comer's access to Facebook, for example, would have satisfied the constitutional factors in this case. But the court did not take the necessary steps to protect Ms. Comer's liberty interests.

Ms. Comer does not object, for example, to any and all computer monitoring as a condition of supervised release. She submits that—for purposes of this appeal—the already-imposed general condition that her electronic devices be subject to monitoring at any time is a less restrictive alternative to the social networking ban. *See* JA 38 (special condition 2); *see also United States v. Sales*, 476 F.3d 732, 734 (9th Cir. 2007) ("[a] computer monitoring condition in some form may be reasonable[,]" but generally requiring "installation of search and/or monitoring software" was overbroad and remand needed for "further tailoring and clarification.")

In addition, the liberty intrusion is not reasonably necessary to protect the public from Ms. Comer. As noted above, Ms. Comer is already subject to a computer monitoring condition. JA 38 (special condition 2). Probation successfully utilized that condition when it searched Ms. Comer's home and electronics in July and December of 2018. JA 71-5. Probation determined—based upon the sweeps of Ms. Comer's

property and subsequent interviews—that she violated her supervised release conditions through her use of Facebook (among other violations). JA 72-3. The long-term ban preventing Ms. Comer from accessing any social networking sites is not reasonably necessary, in light of the computer monitoring condition already in place, the fact that it was successfully employed in 2018, and the proposed addition of a limited condition prohibiting Ms. Comer from using Facebook.

The absence of any limiting principle to Ms. Comer's supervised release condition violates the requirement that computer-usage conditions must be narrowly tailored to address the particular recidivism risk posed by a defendant's crime. *See e.g, United States v. West*, 829 F.3d 1013, 1021 (8th Cir. 2016) (vacating overbroad condition that prohibited creating any website, because it failed to tailor the restriction to fit the defendant's crime for aiding and abetting tax evasion); *United States v. Shiraz*, __ F.App'x. __, 2019 WL 3801478, *3 (vacating an overbroad computer restriction, because the court failed to explain why lesser alternatives were ineffective and because the verbage in the condition lacked "any tailoring.") An internet ban on all social networking sites should be tailored to guard against particular conduct. The ban here prevents Ms. Comer from accessing an integral part of human life.[16]

[16] Maryam Mohsin, Oberlo, oberlo.com/blog/social-media-marketing-statistics (Mar. 7, 2019) (noting there are 3.2 billion social media users every day, or 42% of the world's population. In addition, 90.4% of millennials use social media daily.)

### C. The social networking condition requires a greater deprivation of liberty than is reasonably necessary.

In conducting its "careful review" of a condition that infringes upon a constitutional right, the courts must also determine whether the condition involves a "greater deprivation of liberty than is reasonably necessary." *McLaurin*, 731 F.3d 261-2 (citing U.S.S.G. § 3D.2(b) and 18 U.S.C. § 3583(d)(2)). Here, too, the condition exceeds the bounds permitted by the courts.

"[I]nternet bans are 'draconian.'" *United States v. Holena*, 906 F.3d 288, 292 (3d Cir. 2018). The social networking condition ordered by the district court in this case constitutes a blanket ban on all social networking sites and apps: "The defendant *shall not have any* social networking sites without the approval of the U.S. Probation Officer." JA 115. Courts treat such prior approval conditions as effective bans. *United States v. Ramos*, 763 F.3d 45, 61 (1st Cir. 2014) (rejecting argument that prior approval was "a conditional limitation" and analyzing as a ban under the § 3583(d) factors); *United States v. Peterson*, 248 F.3d 79, 83-84 (2d Cir. 2001) (requiring probation's prior approval to use commercial computer services effectively "banned items"); *United States v. Heckman*, 592 F.3d 400, 405 (3d Cir. 2010) (prior approval to access internet was "a conditional ban[,]" i.e. a ban subject to exceptions approved by the Probation Office). This condition is not narrowly tailored. Instead, it demands a greater deprivation of liberty than is reasonably necessary.

The condition involves a significant liberty intrusion. As the Supreme Court noted, and as outlined in more detail above in section II(B), there has been a titanic shift in our culture for the "exchange of views" from the public square to Cyberspace, or the "vast democratic forums of the internet." *Packingham*, 137 S.Ct. at 1735. Social media, in particular, "offers 'relatively unlimited, low-cost capacity for communication of all kinds.'" *Id.* at 1735 (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)).

A blanket ban on access to any and all social networking sites entails a significant intrusion into Ms. Comer's privacy. As argued in Subsection II(A), because of the vague nature of the condition it is difficult to assess which sites or apps are prohibited for Ms. Comer. And the overbreadth of the condition restricts her from more sites than necessary to meet her supervision goals. A ban on all "social networking," for instance, could prevent Ms. Comer from joining popular sites such as Pinterest (online idea pinboard), Instagram & Flickr (photos), Flixter (movies), SoundCloud or Spotify (music), Tumblr (social blogging), YouTube (video content), Skype (enables voice and video calls, both socially and professionally), Yelp (local business review), Twitter (microblogging), LinkedIn (business and professional networking), Google + (a one-stop shop billed as a Facebook competitor), etc., all of

which implicate Ms. Comer's First Amendment right to free speech.[17] This condition permits Probation to control Ms. Comer's access to certain news sources; sites or apps that rate movies or that allow her to listen to music; sites or apps that enable sharing her favorite recipe or crafting ideas; and important professional development sites and apps such as LinkedIn and Skype or Zoom, which are used for video interviews.[18] Such an overbroad ban interferes with the § 3583(d) and § 3553(a)(2)(D) factor that a condition must also provide the defendant with other needed correctional treatment. However, the social networking ban, "with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1737. The ban is overbroad because it encompasses all social networking sites, is continuous, and lasts for the duration of Ms. Comer's five-year period of supervised release.

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[17] *See* https://makeawebsitehub.com/social-media-sites/ *65+ social networking sites you need to know about* (last visited Sept. 11, 2019); *List of social networking websites*, https://en.wikipedia.org/wiki/List_of_social_networking_websites (last visited Sept. 11, 2019); Elisa Moreau, *The Top Social Networking Sites People Are Using*, (June 24, 2019), https://www.lifewire.com/top-social-networking-sites-people-are-using-3486554.

[18] The Probation Officer advised the court she would not restrict Ms. Comer from accessing LinkedIn. JA 99. However, there is nothing in the court's judgment that would enforce that statement, nor are there protections in place that would ensure Ms. Comer's access to other job search sites. JA 115. *See also* subsection IV, *infra*.

Absent the limiting condition, the sheer overbreadth of the social networking condition violates Ms. Comer's constitutional rights under the First Amendment, and it runs afoul of the Guidelines and § 3583(d). The condition must be vacated.

### D. The district violated Article III when it delegated to Probation the authority to determine what websites and apps constitute social networking.

Imposing supervised release conditions "is a core judicial function." *United States v. Miller*, 77 F.3d 71, 77 (4th Cir. 1996). Such core judicial functions cannot be delegated to a probation officer; doing so violates Article III of the Constitution. *United States v. Johnson*, 48 F.3d 806, 808-09 (4th Cir. 1995); *see also United States v. Myers*, 426 F.3d 117, 130 (2d Cir. 2005) (applicability of special condition is non-delegable).

"[C]ourts may use nonjudicial officers, such as probation officers, to support judicial functions, as long as a judicial officer retains and exercises ultimate responsibility." *Miller*, 77 F.3d at 77. To determine whether a delegation is proper, appellate courts "distinguish[ ] between those delegations that 'merely task the probation officer with performing ministerial acts or support services related to punishment imposed, and those that allow the officer to decide the nature and extent of the defendant's punishment.'" *United States v. Schrode*, 839 F.3d 545, 555 (7th Cir. 2016) (quoting *United States v. Mike*, 632 F.3d 686, 695 (10th Cir. 2011)). If a court determines "whether a defendant must abide by a condition, and how[,]" it can then "delegate to the probation officer the details of where and when the condition will be

satisfied." *United States v. Stephens*, 424 F.3d 876, 880 (9th Cir. 2005) (emphasis in original).

The courts must provide some guidance on the nature and scope of the imposed condition. In *United States v. Voelker*, for example, the Third Circuit determined that the imposition of a condition prohibiting any contact with minor children without the consent of probation was an improper delegation to Probation under Article III. 489 F.3d 139, 154 (3d Cir. 2007). The Court noted the condition permitted Probation to become "the sole authority" for determining if the defendant could have contact with any minor, including his own children. Such delegation constituted an impermissibly "unbridled delegation of authority." *Id.*

Similarly here, the district court delegated to Probation the authority to determine whether and how Ms. Comer can access "social networking" sites. The court allowed Probation unfettered discretion to set the parameters—including the breadth—of the condition. The court offered no explanations or definitions to set the scope of the condition. Instead, the court asked Probation to dictate the confines of the condition and permitted the probation officer to explain what she would and would not allow Ms. Comer to do. JA 99-100. The court did not provide any guidance, for instance, to determine if Ms. Comer is permitted to post photos of her family or pets on Instagram. The court did not advise Probation whether any job search sites could be utilized. The court did not define "social networking accounts."

It did not indicate if it agreed with Probation that any "dating" site or app is considered a social networking account.

The harm caused by the delegation of the Court's authority to Probation is even more pronounced in this case, where the condition itself is vague and overbroad (*see* subsections II(A) and (B)), and where the condition implicates significant liberty interests. (*See* subsections II(A)-(C)). Such delegation improperly permits Probation "to make the decision to restrict a defendant's significant liberty interest." *United States v. Cabral,* 926 F.3d 687, 698, 692-3 (10th Cir. 2019) (vacating a condition that permitted the probation officer to "decide the scope of the" condition, "thereby delegating the power to [Probation] 'to decide the nature or extent of [the defendant's] punishment.")

In short, the court improperly delegated to Probation the "whether" and "how" of the condition. The court therefore failed to "retain[ ] and exercise[ ] ultimate responsibility" over the condition of supervised release and instead improperly delegated its role to Probation. *Miller*, 77 F.3d at 77. *Cf. United States v. Dawkins*, 202 F.3d 711, 717 (4th Cir. 2000) (court retained ultimate responsibility over setting payment schedule by directing probation to take certain factors into account and notify the Court of any changes that needed to be made to payment schedule). The condition must be vacated as a result.

## III. Permitting the probation officer to sit at counsel table with the government and assist it during the revocation hearing violated Ms. Comer's constitutional rights.

Under the separation of powers doctrine and the Due Process Clause of the Constitution, a probation officer impermissibly acts as an agent of the executive branch when she sits and consults with the United States Attorney's office during a sentencing hearing or probation revocation hearing. Here, Ms. Comer was denied her rights to due process and to the separation of powers when the probation officer acted as both an arm of the court and as an arm of the executive branch during the revocation hearing.

A defendant on supervised release is protected by the separation of powers doctrine. *Bond v. United States*, 564 U.S. 211, 223 (2011) ("Individuals who suffer otherwise justiciable injury may object" to violations of the separation of powers.); *see also NLRB v. Canning*, 134 S. Ct. 2550, 2559-60 (2014) ("the separation of powers can serve to safeguard individual liberty.") The Courts' authority, of course, is governed by the separation of powers doctrine in Article III of the United States Constitution. The United States Probation Officer, who prepares the revocation petition, acts as an agent of the federal courts. 18 U.S.C. §§ 3602, 3603; *United States v. Johnson*, 935 F.2d 47, 49 (4th Cir. 1991). The probation officer is a "neutral, information-gathering agent of the court, not an agent of the prosecution." *Id.* at 49-50 (citing *United States v. Jackson*, 886 F.2d 838, 844 (7th Cir. 1989)). And "a probation officer is not supposed to take an adversarial role in a sentencing or revocation hearing." *United States v. White*,

868 F.3d 598, 604 (7th Cir. 2017) (citation omitted). Rather, "the bottom line is that probation officers must gain defense counsel's trust, and defense counsel must not view probation officers as surrogate prosecutors." *United States v. Turner*, 203 F.3d 1010, 1014 (7th Cir. 2000) (quoting J. Vincent Romero, *The Relationship Between Defense Counsel and the Probation Officer Under the Guidelines*, 2 Fed. Sentencing Rep. 312, 314 (1999)).

A defendant on supervised release is also entitled to due process at a revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *United States v. Ferguson*, 752 F.3d 613, 616 (4th Cir. 2014). In addition, "due process requires the full disclosure of all facts on which the probation officer's sentencing recommendation relies." *United States v. Peterson*, 711 F.3d 770, 778 (7th Cir. 2013).

Here, trial counsel objected to the probation officer sitting at the table with the prosecutor and whispering with the prosecutor throughout the hearing. JA 87. Counsel noted "I am not privy to the same information probation is currently adding to the prosecutor because they don't sit at our table." JA 87. For example, the following information was revealed by the government on direct examination of the probation officer, but the information was not included or charged in the violation petition:

- That "Josh" had disabilities that Ms. Comer was trying to exploit (JA 68-9), and that Ms. Comer was aware of those disabilities (JA 74-5);
- That Ms. Comer had CBD marijuana buds in a pipe (JA 70);

- That Ms. Comer had identification belonging to another woman (JA 70);
- That Ms. Comer's written statement was purportedly not the same as what she told the probation officer (JA 75).

Ms. Comer was deprived of her rights to due process when the probation officer provided the government with information without sharing that information with the defense, both before and during the hearing. In addition, the probation officer breached her constitutionally-mandated neutral role as an arm of the judiciary when she collaborated with the executive branch's prosecutor while excluding the defense and withholding information. In essence, the probation officer became the second prosecutor in the courtroom against Ms. Comer.

Ms. Comer asks this Court to vacate her revocation judgment and remand to the district court with instructions to conduct a revocation hearing in which the probation officer acts as a neutral arm of the judiciary. Ms. Comer also asks this Court to issue a directive to the courts in the Western District of North Carolina to take affirmative steps to avoid the appearance of impropriety in future cases. The Seventh Circuit has offered suggested guidance:

> [We] nevertheless suggest to district judges, U.S. Attorneys, and probation officers that steps be taken to prevent the perception that probation officers are "surrogate prosecutors." It may be that a separate, small table be placed to one side inside the rail where the probation officer is equally available to the district judge and to other parties as needed.

*United States v. Turner*, 203 F.3d 1010, 1014 (7th Cir. 2000) (concluding officer's presence at government table did not violate the constitution where defendant did not make specific allegations of adverse agency, but suggesting steps take steps to avoid the future appearance of impropriety). Ms. Comer respectfully asks this Court to issue similar guidance to the courts in its jurisdiction.

## CONCLUSION

For all the reasons discussed in this brief, this Court should vacate Ms. Comer's new conditions of supervised release and remand this matter to the district court for a new revocation hearing.

## REQUEST FOR ORAL ARGUMENT

Ms. Comer respectfully requests oral argument. And because she presents an issue of first impression, she believes argument would aid the court in deciding the legal issues presented on appeal.

Dated this 14th day of November, 2019.

Respectfully submitted,

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Dated: November 14, 2019

/s/ Megan C. Hoffman
*Counsel for Appellant*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 14th day of November, 2019, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 14th day of November, 2019, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Sealed Volume of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

/s/ Megan C. Hoffman
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