

No. COA No. 24-561

TWENTY-THIRD DISTRICT

 NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA,
 Plaintiff-Appellee,

v.

SHANNON EDWARD GAULT,
 Defendant-Appellant.

From SURRY COUNTY
 No. 23CRS213728

**BRIEF FOR AMICI CURIAE THE AMERICAN CIVIL LIBERTIES
 UNION OF NORTH CAROLINA, THE AMERICAN CIVIL LIBERTIES
 UNION, THE ELECTRONIC FRONTIER FOUNDATION, AND THE
 FIRST AMENDMENT CLINIC OF THE DUKE UNIVERSITY SCHOOL
 OF LAW**

TABLE OF CONTENTS

STATEMENTS OF INTEREST 2

ISSUES TO BE ADDRESSED 3

POSITION OF AMICI CURIAE 4

INTRODUCTION 5

ARGUMENT 6

I. The Probation Condition Violates the First Amendment and Section I, Article 14 of the North Carolina Constitution. 7

 A. The Probation Condition hinders Mr. Gault’s ability to function in society and conflicts with binding precedent in *Packingham*..... 7

 B. The Probation Condition deprives Mr. Gault of access to the “Modern Public Square.” 10

 C. The Probation Condition deprives Mr. Gault of the ability to receive information. 14

 D. Broad, prophylactic restrictions on speech are disfavored..... 15

II. The Probation Condition Violates Due Process and Deprives Mr. Gault of the Fruits of His Labor..... 16

 A. The Probation Condition is impermissibly vague because a probationer could unknowingly violate it. 16

 B. The internet ban makes it impossible to make a living, violating the North Carolina constitution. 18

CONCLUSION..... 19

CERTIFICATE OF COMPLIANCE WITH WORD COUNT 22

CERTIFICATE OF SERVICE..... 23

TABLE OF AUTHORITIES

Cases

<i>ACLU of N. Carolina v. Stein</i> , No. 1:23CV302, 2024 WL 3203185 (M.D.N.C. June 26, 2024),.....	2
<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004).....	2
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002).....	13
<i>Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico</i> , 457 U.S. 853 (1982).....	4, 14
<i>Holmes v. Moore</i> , 384 N.C. 426 (2023).....	19
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988).....	14
<i>Kinsley v. Ace Speedway Racing, Ltd.</i> , 284 N.C. App. 665 (2022),.....	18
<i>Kinsley v. Ace Speedway Racing, Ltd.</i> , No. 280PA22, 2024 WL 3909391 (N.C. Aug. 23, 2024).....	2, 18
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965).....	14
<i>Manning v. Caldwell for City of Roanoke</i> , 930 F.3d 264 (4th Cir. 2019)..	16, 17
<i>Manning v. Powers</i> , 281 F. Supp. 3d 953 (C.D. Cal. 2017).....	12
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943).....	14
<i>McCullen v. Coakley</i> , 573 U.S. 464 (2014).....	13
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	18
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	16
<i>Packingham v. North Carolina</i> , 582 U.S. 98 (2017).....	2
<i>Reno v. American Civil Liberties Union</i> , 521 U.S. 844 (1997).....	10
<i>Riley v. National Fed’n of the Blind of N.C., Inc.</i> , 487 U.S. 781 (1988).....	5, 15
<i>Roller v. Allen</i> , 245 N.C. 516 (1957).....	18
<i>Sable Commc’ns of Cal., Inc. v. F.C.C.</i> , 492 U.S. 115 (1989).....	15
<i>Schneider v. Town of Irvington</i> , 308 U.S. 147 (1939).....	16
<i>Sherrill v. Amerada Hess Corp.</i> , 130 N.C. App. 711 (1998).....	15

<i>State v. Blackmon</i> , 507 S.E.2d 42 (N.C. App. 1998).....	16
<i>State v. Blackmon</i> , 130 N.C. App. 692 (1998).....	5
<i>State v. Lambert</i> , 146 N.C. App. 360 (2001).....	19
<i>State v. Shackelford</i> , 264 N.C. App. 542 (2019)	7
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	14
<i>Truax v. Raich</i> , 239 U.S. 33 (1915).....	18
<i>United States v. Eaglin</i> , 913 F.3d 88 (2d Cir. 2019)	10
<i>United States v. Ellis</i> , 984 F.3d 1092 (4th Cir. 2021)	9, 10
<i>United States v. Holm</i> , 326 F.3d 872 (7th Cir. 2003).....	10
<i>United States v. Voelker</i> , 489 F.3d 139 (3rd Cir. 2007).....	10
<i>Village of Schaumburg v. Citizens for a Better Env't</i> , 444 U.S. 620 (1980)....	15
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	15

Constitutional Provisions

N.C. Const. art. I, § 1	5, 18
N.C. Const. art. I, § 14.....	6, 14
N.C. Const. art. I, § 19.....	19
U.S. Const. amend I.....	passim
U.S. Const. amend. XIV.....	5,16, 18

Other Authorities

Aaron Smith, <i>Government Online</i> , Pew Research Center (April 27, 2010) https://www.pewresearch.org/internet/2010/04/27/government-online/	9
Aaron Smith, <i>The internet and job seeking</i> , Pew Research (November 19, 2015), https://www.pewresearch.org/internet/2015/11/19/1-the-internet-and-job-seeking/	8

Colleen McClain, et al., <i>How Americans Navigate Politics on TikTok, X, Facebook and Instagram</i> , Pew Research Center, (June 12, 2024) https://www.pewresearch.org/internet/2024/06/12/how-americans-navigate-politics-on-tiktok-x-facebook-and-instagram/	11
Defendant-Appellant’s Brief.....	15
James M. LoPiano, Note, <i>Public Fora Purpose: Analyzing Viewpoint Discrimination on the President’s Twitter Account</i> , 28 Fordham Intell. Prop. Media & Ent. L.J. 511 (2018).....	11, 12
Jeffrey Gottfried, <i>Americans’ Social Media Use</i> , Pew Research Center (January 31, 2024).....	11
John Egan, <i>ATMs (Automated Teller Machines): What Are They?</i> , Forbes Advisor, https://www.forbes.com/advisor/banking/atm-automated-teller-machine/	17
Josh Stein @JoshStein_, X, https://x.com/JoshStein_	11
Mark Robinson @markrobinsonNC, X, https://x.com/markrobinsonnc	11
Matson Coxe, <i>Here Is the Church, Where Is the Steeple: Foundation of Human Understanding v. United States</i> , 89 N.C. L. Rev. 1248 (2011).....	12
<i>Online Religious Services Appeal to Many Americans, but Going in Person Remains More Popular</i> , Pew Research Center (June 2, 2023), https://www.pewresearch.org/religion/2023/06/02/americans-experiences-with-virtual-religious-services/	12
Pew Research Center, <i>The Congressional Social Media Landscape</i> , n.5 (July 16, 2020), https://www.pewresearch.org/internet/2020/07/16/1-the-congressional-social-media-landscape	11
Pope Francis, @Pontifex, X, https://x.com/Pontifex	12
Renée Lynn Midrack, <i>What is a Smart Refrigerator</i> , LifeWire (July 24, 2021), https://www.lifewire.com/smart-refrigerator-4158327	18

Rob Gabriele, <i>2024 Home Security Statistics</i> , SafeHome.org (August 8, 2024), https://www.safehome.org/data/home-security-statistics/#:~:text=One%20of%20the%20most%20popular,video%20doorbells%20in%20their%20homes , Statista Market Insights, <i>Security – United States</i> , Statista (lasted updated March 2024), https://www.statista.com/outlook/cmo/smart-home/security/united-states#revenue	17
Tanya Albert Henry, <i>74% of physicians work in practices that offer telehealth</i> , American Medical Association (December 20, 2023), https://www.ama-assn.org/practice-management/digital/74-physicians-work-practices-offer-telehealth	9
<i>US digital banking users will surpass 200 million in 2022</i> , Business Insider (May 10, 2021) https://www.businessinsider.com/current-state-of-online-banking-industry	8
<i>Virtual Care</i> , UNC Health, https://www.unchealth.org/care-services/virtual-care	9

No. COA No. 24-561

TWENTY-THIRD DISTRICT

 NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA,
 Plaintiff-Appellee,

v.

SHANNON EDWARD GAULT,
 Defendant-Appellant.

From SURRY COUNTY
 No. 23CRS213728

**BRIEF FOR AMICI CURIAE THE AMERICAN CIVIL LIBERTIES
 UNION OF NORTH CAROLINA, THE AMERICAN CIVIL LIBERTIES
 UNION, THE ELECTRONIC FRONTIER FOUNDATION, AND THE
 FIRST AMENDMENT CLINIC OF THE DUKE UNIVERSITY SCHOOL
 OF LAW**

STATEMENTS OF INTEREST

Amicus American Civil Liberties Union of North Carolina (ACLU-NC) is a non-profit organization that regularly defends the First Amendment and due process rights of North Carolinians, including those involved in the criminal legal system. ACLU-NC has over 22,000 members statewide dedicated to preserving these rights.

ACLU-NC is an affiliate of amicus American Civil Liberties Union (ACLU). Both are at the forefront of protecting First Amendment rights in North Carolina and across the country, as amicus curiae and direct counsel. *See, e.g., Packingham v. North Carolina*, 582 U.S. 98 (2017) (amicus), *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *ACLU of N. Carolina v. Stein*, No. 1:23CV302, 2024 WL 3203185 at *13 (M.D.N.C. June 26, 2024), *Kinsley v. Ace Speedway Racing, Ltd.*, No. 280PA22, 2024 WL 3909391 (N.C. Aug. 23, 2024). The resolution of this case is therefore a matter of substantial interest to ACLU, ACLU-NC, and their members.¹

Recognizing the internet's power as a tool of democratization, the Electronic Frontier Foundation (EFF) has, for over 30 years, worked on behalf of its over 30,000 dues-paying members to protect the rights of users to

¹ No person or entity other than the amici curiae helped write the brief or contributed money for its preparation.

transmit and receive information online. EFF has filed amicus briefs in similar cases involving the rights of probationers and registered sex offenders to freely access the internet, including in *Packingham v. North Carolina*, 582 U.S. 98 (2017), in which the United State Supreme Court cited EFF's amicus brief in its majority opinion. *Id.* at 104.

The First Amendment Clinic at Duke Law School engages in research, scholarship, and *pro bono* legal representation in matters that implicate the First Amendment. Amicus has written many briefs about the intersection of criminal law and free speech and draws on a wealth of expertise and knowledge relating to matters relevant to this case.

ISSUES TO BE ADDRESSED

Amici address the following questions:

1. Whether a total internet and social media ban, imposed as a condition of probation, violates the First Amendment to the United States Constitution and Article I, Section 14 of the North Carolina Constitution because it prohibits lawful speech, fails intermediate scrutiny, interferes with the right to receive information, and is a broad, prophylactic restriction on speech.
2. Whether a total internet and social media ban, imposed as a condition of probation, violates the due process provisions of the Fourteenth

Amendment to the United States Constitution and Article I, Sections 1 and 19 of the North Carolina Constitution because (a) it is so vague that a probationer may unwittingly violate it, and (b) it deprives probationers of the opportunity to enjoy the fruits of their own labor by making it nearly impossible to engage in lawful economic activity, including employment.

POSITION OF AMICI CURIAE

Amici file this brief in support of Mr. Gault’s petition for a writ of certiorari requesting reversal of the trial court’s judgment imposing a total internet and social media ban on Mr. Gault as a condition of probation (“the Probation Condition”). First, amici show that the First Amendment protects access to the internet and social media, and the Probation Condition fails intermediate scrutiny because it burdens “substantially more speech than is necessary to further the government's legitimate interests.” *Packingham v. North Carolina*, 582 U.S. 98, 106 (2017). The Condition impermissibly restricts the right to receive information, which is “a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). And it is a broad, prophylactic restriction,

which “in the area of free expression [is] suspect.” *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 798, 801 (1988) (quotations omitted).

Second, amici demonstrate that the Probation Condition does not satisfy the due process guarantees of the United States and North Carolina constitutions because it does not give a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *State v. Blackmon*, 130 N.C. App. 692, 700 (1998) (quotations omitted). The ubiquity and invisibility of the internet in daily life makes the Probation Condition nearly impossible to adhere to, as many innocuous acts could inadvertently result in internet access. The state constitution also protects the right of citizens to enjoy “the fruits of their own labor.” N.C. Const. art. I, § 1. The Condition deprives Mr. Gault of this right by severely restricting his ability to be gainfully employed.

INTRODUCTION

It is virtually impossible to function in our modern world without internet access. The internet provides an indispensable means of communication between friends and family, access to jobs and finances, and access to health care, education or vocational training. And social media is the “modern public square,” where political, religious, and artistic expression and information is shared freely. *Packingham* 582 U.S. 98, 107 (2017).

This Court should hold that internet and social media bans as a condition of probation violate the First and Fourteenth Amendments to the United States Constitution and Sections 1, 14, and 19 of Article I of the North Carolina Constitution.

ARGUMENT

Mr. Gault pled guilty to violating the conditions of his release by failing to register online identifiers related to multiple Snapchat accounts. (R pp 13-16). The Surry County Superior Court ordered that he have “no internet access or access to any social media” as a condition of his probation. (T p 12). This Probation Condition infringes on Mr. Gault’s First Amendment rights by denying him the ability to participate in and hear speech he is constitutionally entitled to. It also violates his state and federal due process rights because it is impermissibly vague and infringes on his right to make a living. This Court should find that such sweeping bans on internet and social media access are unconstitutional and reverse the trial court’s judgment as to the sentence of probation.

I. The Probation Condition Violates the First Amendment and Section I, Article 14 of the North Carolina Constitution.²

Because internet use is inextricable from modern life, the Probation Condition severely curtails a probationers' ability to get and keep a job, practice their faith, access essential services, and stay informed on public issues. It also denies probationers access to the "modern public square" that is social media, and violates their right to receive information. Such broad, prophylactic restrictions on speech are presumptively unconstitutional.

A. The Probation Condition hinders Mr. Gault's ability to function in society and conflicts with binding precedent in *Packingham*.

In *Packingham v. North Carolina*, the Supreme Court considered a North Carolina statute making it a felony for a registered sex offender to access a social networking site "where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." 582 U.S. at 101, 109. The Court determined the social media ban was unconstitutional as it was "a prohibition unprecedented in the scope of First Amendment speech it burdens." *Id.* at 107.

² North Carolina appellate courts have held that "the free speech protections contained in the federal and North Carolina constitutions are parallel," and, at minimum, equivalent. *State v. Shackelford*, 264 N.C. App. 542 (2019).

Packingham compels the same finding here. In both cases, the state's ostensible interest was preventing sex offenders from using the internet or social media to re-offend. But the Supreme Court held that the law in *Packingham* swept too broadly. This Probation Condition is broader still, prohibiting all internet access, not just social media frequented by children. The Condition falls with special force on a probationer, who is deprived of internet access just as he aims to reenter society.

The Probation Condition interferes with economic activities, as 75% of adults bank online.³ Ninety percent of jobseekers have looked for jobs online,⁴ and industries from food service to truck driving post their openings online. Jobs often require online applications, and if hired, employees must typically go online to access paystubs, tax documents, and benefits like health insurance.

Medical care is online, too. In 2022, 49.8% of physicians' practices used telehealth to diagnose or treat patients.⁵ UNC Healthcare offers telehealth

³ *US digital banking users will surpass 200 million in 2022*, Business Insider (May 10, 2021) <https://www.businessinsider.com/current-state-of-online-banking-industry>.

⁴ Aaron Smith, *The internet and job seeking*, Pew Research (November 19, 2015), <https://www.pewresearch.org/internet/2015/11/19/1-the-internet-and-job-seeking/>.

⁵ Tanya Albert Henry, *74% of physicians work in practices that offer telehealth*, American Medical Association (December 20, 2023), <https://www.ama-assn.org/practice-management/digital/74-physicians-work-practices-offer-telehealth>.

services and uses MyChart, an online patient portal, to communicate with patients, schedule appointments, and share medical information.⁶

Government services are accessed online. North Carolina provides voter registration, driver's license renewal, and tax filing and payment online. Forty-one percent of Americans have downloaded government forms online and 33% have renewed a driver's license or automobile registration online.⁷ Individuals banned from internet use cannot look up the addresses or hours of their local DMV or courthouse, or the phone number for an IRS hotline. Under a total internet ban, probationers cannot stream music or television, get driving directions, or check the weather.

Because the Probation Condition orders "no internet access," it can be read to bar all the above activities and more. Living under an internet ban is not just inconvenient, it is nearly impossible.

Following *Packingham*, the U.S. Court of Appeals for the Fourth Circuit invalidated a total internet ban in virtually identical circumstances. *United States v. Ellis*, 984 F.3d 1092, 1096 (4th Cir. 2021). In *Ellis*, the court vacated a total ban on internet access imposed as a special condition of release on a man convicted of possessing child pornography because it violated the

⁶ *Virtual Care*, UNC Health, <https://www.unchealth.org/care-services/virtual-care>.

⁷ Aaron Smith, *Government Online*, Pew Research Center (April 27, 2010) <https://www.pewresearch.org/internet/2010/04/27/government-online/>.

probation statute. The court noted that a “complete ban on internet access is a particularly broad restriction that imposes a massive deprivation of liberty.” *Id.* at 1104. Other federal appellate courts agree. *See, e.g., United States v. Eaglin*, 913 F.3d 88, 99 (2d Cir. 2019) (total internet ban as condition of release “severely encroached on his First Amendment rights by depriving him of the opportunity to engage with modern society”); *United States v. Voelker*, 489 F.3d 139, 145 (3rd Cir. 2007) (vacating a lifetime ban on internet access for defendant charged with possession of child pornography). *United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003) (vacating total internet ban as a condition of release for defendant convicted of possession of child pornography).

B. The Probation Condition deprives Mr. Gault of access to the “Modern Public Square.”

Social media websites form one of “the most important places . . . for the exchange of views.” *Packingham*, 582 U.S. at 104. “Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights.” *Id.* at 199.

Sites like Facebook, LinkedIn, and Instagram “offer[] ‘relatively unlimited, low-cost capacity for communication of all kinds.’” *Id.* at 104 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)). Social media use is widespread. In 2024, 68% of adults use Facebook, 93% of

whom use the app to keep up with friends and family.⁸ Fifty-nine percent of X (formerly Twitter) users use the app to keep up with politics, and 65% use it to get news.⁹

Political candidates are generally active on social media, including gubernatorial candidates Josh Stein and Mark Robinson.¹⁰ As of 2020, almost every Member of Congress had an X account.¹¹ Social media hashtags facilitate grassroots movements like #BlackLivesMatter and #MeToo, allowing users to express their support for (or opposition to) such movements. *See* James M. LoPiano, Note, *Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account*, 28 Fordham Intell. Prop. Media & Ent. L.J. 511, 519 (2018). Social media has “ingrained itself into the very fabric of American politics.” *Id.* at 520. Political and associational activities like writing newspaper editorials or holding up a sign on a public street now occur online,

⁸ Jeffrey Gottfried, *Americans' Social Media Use*, Pew Research Center (January 31, 2024) <https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/>.

⁹ Colleen McClain, et al., *How Americans Navigate Politics on TikTok, X, Facebook and Instagram*, Pew Research Center, (June 12, 2024) <https://www.pewresearch.org/internet/2024/06/12/how-americans-navigate-politics-on-tiktok-x-facebook-and-instagram/>.

¹⁰ Josh Stein @JoshStein_, X, https://x.com/JoshStein_; Mark Robinson @markrobinsonNC, X, <https://x.com/markrobinsonnc>.

¹¹ Pew Research Center, *The Congressional Social Media Landscape*, n.5 (July 16, 2020), <https://www.pewresearch.org/internet/2020/07/16/1-the-congressional-social-media-landscape/#fn-26093-5>.

with broader reach. An Instagram user can express their view about a political candidate in an upcoming election. Twitter or Facebook users can debate religion or politics with friends, neighbors, and other users. *Packingham*, 582 U. S. at 104-05.

Social media is an important medium for religious speech. Instagram and YouTube users often share quotes from their religious texts or debate their interpretations. Around 40% of adults regularly watch online religious services.¹² *See also Manning v. Powers*, 281 F. Supp. 3d 953, 957, 966-67 (C.D. Cal. 2017) (enjoining parole condition that barred access to social media where parolee was minister who posted videos of his sermons on social media); Matson Coxe, *Here Is the Church, Where Is the Steeple: Foundation of Human Understanding v. United States*, 89 N.C. L. Rev. 1248, 1264-65 (2011) (explaining how churches and religious followers use the internet and social media to share their beliefs and broadcast sermons). Pope Francis shares his message with 18.5 million followers on X.¹³

¹² *Online Religious Services Appeal to Many Americans, but Going in Person Remains More Popular*, Pew Research Center (June 2, 2023), <https://www.pewresearch.org/religion/2023/06/02/americans-experiences-with-virtual-religious-services/>.

¹³ Pope Francis, @Pontifex, X, <https://x.com/Pontifex>.

Social media platforms are fora for artistic expression, where artists can reach audiences far greater than the number that may fit in a concert hall or an art gallery. Social media is “perhaps the most powerful mechanism[] available to a private citizen to make his or her voice heard.” *Packingham*, 582 U.S. at 107.

By banning all social media use, the Probation Condition prevents the legitimate exercise of First Amendment rights. And, like the statute in *Packingham*, it fails intermediate scrutiny (the least demanding analysis applicable here) because it is not “narrowly tailored to serve a significant governmental interest.” *Id.* at 99 (citing *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). While “the First Amendment permits a State to . . . prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor,” those laws must be specific. 582 U.S. at 107. They must not “burden substantially more speech than is necessary to further the government's legitimate interests.” *Id.* at 106. (quotation omitted). The government has a significant interest here: The sexual abuse of a child is a serious crime, and the state may impose valid laws to protect children. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244-45 (2002). But the Probation Condition is neither necessary nor specific to achieve that purpose. The Probation Condition makes no effort to separate the common, necessary, and benign uses of the internet

from the hazardous ones. Instead of banning the legitimate exercise of First Amendment rights, the trial court may impose tailored restrictions on probationers, like monitoring online activities, to prevent harm to minors.

C. The Probation Condition deprives Mr. Gault of the ability to receive information.

It is a “fundamental principle” of the First Amendment “that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” *Packingham*, 582 U.S. at 104. This right to receive information and ideas “follows ineluctably from the sender’s First Amendment right to send them,” and is “a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982), *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions.”).

The right to receive information manifests as the right to access books at a school library, *Pico*, 457 U.S. at 875, the right to listen to speeches given by union organizers, *Thomas v. Collins*, 323 U.S. 516, 534 (1945), the right to receive political or religious pamphlets, *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965), *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), and the

right to receive product pricing information, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

The Probation Condition infringes on this well-established right. As discussed above, the Condition removes Mr. Gault from the political process, from community engagement, and from the employment and educational pursuits that are required by his probation and essential to his re-integration in society. *See, e.g.*, Defendant-Appellant's Br. at 24-25 (discussing statutory requirements that probationers maintain employment or pursue vocational training).

D. Broad, prophylactic restrictions on speech are disfavored.

Broad, prophylactic restrictions that seek to prevent speech before it occurs are presumptively unconstitutional, *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719 (1998), and subject to "exacting First Amendment scrutiny." *Riley*, 487 U.S. at 798, 801 (1988) (cleaned up). For a rule to withstand such scrutiny, "[i]t is not enough to show that the Government's ends are compelling" *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). The government must also show that a restriction is "carefully tailored to achieve those [compelling] ends." *Id.* The Supreme Court has repeatedly struck down such prophylactic restrictions on free speech. *See, e.g., id.* at 126-127 (striking down restriction on "dial-a-porn" phone lines); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (striking

down restriction on charitable solicitation); *NAACP v. Button*, 371 U.S. 415, 439-440 (1963) (striking down prohibition on solicitation by NAACP and public interest lawyers); *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939) (striking down anti-pamphlet law).

Measured against these principles, the Probation Condition is plainly unconstitutional. There is no justification so compelling that it could support a total ban on internet and social media access.

II. The Probation Condition Violates Due Process and Deprives Mr. Gault of the Fruits of His Labor.

The Probation Condition violates the due process guarantees of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 14 of the state constitution because the internet is so pervasive—and so invisible—that a probationer risks unknowingly violating it. And the Condition creates nearly insurmountable obstacles to employment, depriving the probationer of the right to make a living under those same provisions as well as Article I, Sections 19 of the state constitution.

A. The Probation Condition is impermissibly vague because a probationer could unknowingly violate it.

To survive a vagueness challenge, a law must give a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *State v. Blackmon*, 130 N.C. App. 692, 700 (1998); *see also Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019).

If criminal penalties may result from violations of the rule, “a stricter standard is applied in reviewing the statute for vagueness.” *Manning*, 930 F.3d at 272-73.

Probationers subjected to a total internet ban might inadvertently violate their probation during ordinary, innocuous activities. For example, over 12 million households have internet-connected smart locks, and around 30 million have home security systems that connect to the internet.¹⁴ A probationer could trigger an internet connection by simply opening a door or ringing the bell. Some automated teller machines and credit or debit card payments use an internet connection, so someone withdrawing money or paying for an item cannot always avoid internet access.¹⁵ A probationer risks criminal penalties from opening a refrigerator that connects to the internet to

¹⁴ Rob Gabriele, *2024 Home Security Statistics*, SafeHome.org (August 8, 2024), <https://www.safehome.org/data/home-security-statistics/#:~:text=One%20of%20the%20most%20popular,video%20doorbells%20in%20their%20homes>, Statista Market Insights, *Security – United States*, Statista (lasted updated March 2024), <https://www.statista.com/outlook/cmo/smart-home/security/united-states#revenue>.

¹⁵ John Egan, *ATMs (Automated Teller Machines): What Are They?*, Forbes Advisor, <https://www.forbes.com/advisor/banking/atm-automated-teller-machine/>.

automatically adjust its temperature,¹⁶ from using a tablet to order their meal at a restaurant, or from using the self-checkout at a grocery store.

Given the ubiquity and invisibility of the internet, a person of “ordinary intelligence” may not know how to conform their day-to-day activities to comply with a total internet ban. They risk unknowingly violating their probation while engaging in mundane activities. The Probation Condition therefore violates due process.

B. The internet ban makes it impossible to make a living, violating the North Carolina constitution.

The North Carolina Constitution protects the right of citizens to “enjoy the fruits of their own labor,” N.C. Const. art. I, § 1, to “make a living” without undue government interference. *Kinsley v. Ace Speedway Racing, Ltd.*, 284 N.C. App. 665, 673 (2022), *aff’d* No. 280PA22, 2024 WL 3909391 (N.C. Aug. 23, 2024). The state may not interfere with this “fundamental” right “under the guise of protecting the public.” *Roller v. Allen*, 245 N.C. 516, 519, 859 (1957). The U.S. Supreme Court has similarly recognized that “the right to work for a living . . . is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.” *Truax v. Raich*, 239 U.S. 33, 41 (1915). *See also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)

¹⁶ Renée Lynn Midrack, *What is a Smart Refrigerator*, LifeWire (July 24, 2021), <https://www.lifewire.com/smart-refrigerator-4158327>.

(due process clause protects the right “to engage in any of the common occupations of life”).¹⁷

As discussed in Section I.A *supra*, economic opportunity, including basic access to employment, requires internet access. A probationer’s ability to earn a living is crucial to their re-entry into society, and probation conditions should assist in the defendant’s rehabilitation. *State v. Lambert*, 146 N.C. App. 360, 367 (2001). The Probation Condition hinders this purpose by endangering Mr. Gault’s ability to engage in lawful employment and cutting him off from society. The Condition epitomizes the kind of insurmountable burden on economic freedom that the North Carolina Constitution aims to prevent.

CONCLUSION

This Court should grant Mr. Gault’s petition for a writ of certiorari and hold that total internet and social media bans as a condition of probation are unconstitutional.

Respectfully submitted this the 4th day of September, 2024,

*s/ Amika M. Singh**
NC Bar No. 61111
ACLU of North Carolina
Legal Foundation
P.O. Box 28004

¹⁷ North Carolina’s due process guarantee in Article I, Section 19 of the state constitution “follows the analysis of . . . the corresponding federal clause.” *Holmes v. Moore*, 384 N.C. 426, 467-68 (2023).

Raleigh, NC 27611
(919) 881-0051
asingh@acluofnc.org

** I certify that all the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.*

Kristi L. Graunke
N.C. Bar No. 51216
ACLU of North Carolina
Legal Foundation
P.O. Box 28004
Raleigh, NC 27611
(919) 354-5066
kgraunke@acluofnc.org

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

David Greene
Victoria Noble
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
davidg@eff.org
tori@eff.org
(415) 436-9333

Sarah Ludington
Amanda Martin

First Amendment Clinic
Duke University School of Law
210 Science Drive
Durham, NC 27708
(919) 613-7048
ludington@law.duke.edu
amartin@law.duke.edu

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this brief is less than 3,750 words, as calculated by the word processing software, in accordance with Rule 28(j).

s/ Amika M. Singh
Counsel for amici curiae

CERTIFICATE OF SERVICE

I hereby certify that this Brief of Amici Curiae was this day filed in the North Carolina Court of Appeals using the Court's electronic filing system, which will send notification of this filing to the parties.

I also certify that this Motion has been duly served on the following parties by electronic delivery.

Rana M. Badwan
Assistant Attorney General
North Carolina Department of
Justice
P.O. Box 629
Raleigh, North Carolina 27602
rbadwan@ncdoj.gov

Jason Christopher Yoder
Attorney for Defendant-Appellant
Yoder Law PLLC
P.O. Box 141
Carrboro, NC 27510
Jasonchristopheryoder@gmail.com

This the 4th day of September, 2024.

s/Amika M. Singh
Counsel for amici curiae