

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO CRUZ ALDAPE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Case No.: 83622

**MOTION OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA AND
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE FOR LEAVE TO
FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT**

Pursuant to Rule 29(c) of the Nevada Rules of Appellate Procedure, the American Civil Liberties Union of Nevada and Nevada Attorneys for Criminal Justice hereby move for leave to file a brief as amici curiae in support of appellant. The proposed brief is being submitted with this motion.

INTERESTS OF THE AMICUS CURIAE

The American Civil Liberties Union of Nevada Foundation, Inc. (ACLU of Nevada), is a domestic nonprofit corporation. ACLU of Nevada is the Nevada affiliate of the American Civil Liberties Union, a national nonprofit, non-partisan organization with nearly 500,000 members nationwide and over 4,000 in the State of Nevada, dedicated to defending the Bill of Rights embodied in the United States

Constitution. The ACLU of Nevada works to defend and advance the civil liberties and civil rights of all Nevadans.

Nevada Attorneys for Criminal Justice is a statewide nonprofit organization of criminal defense lawyers in Nevada. Nevada Attorneys for Criminal Justice has an interest in this case because its members often represent clients who receive probation or who are being considered for revocation of probation.

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

The proposed amici believe that their input will aid the Court in resolving the issues at hand in this matter.

Accordingly, the proposed amici request that the Court grant their motion to file an amicus brief in support of appellant.

DATED this 26th day of April 2022.

Respectfully submitted:

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Appeal from Order Denying Motion
Objecting to Unconstitutional Conditions of Probation

**BRIEF OF AMICI CURIAE ACLU OF NEVADA AND NEVADA
ATTORNEYS FOR CRIMINAL JUSTICE
IN SUPPORT OF APPELLANT**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a) must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

American Civil Liberties Union of Nevada Foundation, Inc., is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership in it. This amicus curiae is represented by Christopher Peterson, Esq., of ACLU of Nevada.

Nevada Attorneys for Criminal Justice, Inc., is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership in it. This amicus curiae is represented by Randolph M. Fiedler, Esq., of Nevada Attorneys for Criminal Justice.

No other law firms have appeared for the amici in this case or are expected to appear for the amici in this Court.

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Virginia v. Black, 538 U.S. 343 (2003)1

Washington State Grange v. Washington State Republican Party, 552 U.S. 442,
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Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433 F.3d 1199 (9th
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Statutes

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Other Authorities

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Aleks Krotoski, *What Effect Has the Internet Had on Religion?*, THE GUARDIAN
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Andrew Perring & Sara Atske, *About Three-in-Ten U.S. Adults Say They Are
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BRENDA E. BRASHER, GIVE ME THAT ONLINE RELIGION (2001).....8

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RELIGION ONLINE: FINDING FAITH ON THE INTERNET (Lorne L. Dawson & Douglas E. Cowan eds., 2004).....	8

Richard Hernandez, *Online Job Search: The New Normal*, U.S. BUREAU LAB. STATS. (Feb. 2017).....13

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Shefali Dahiya, Lila N. Rokanas, Surabhi Singh, Melissa Yang & Jon. M. Peha, *Lessons from Internet Use and Performance During COVID-19*, 11 J. INFO. POL’Y 202, 208 (2021).....11

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STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) of Nevada is a state affiliate of the national ACLU, a nonprofit, nonpartisan organization that has been our nation's guardian of liberty for over 100 years. The ACLU works to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. Protecting freedom of expression is a core tenet of the ACLU's work, and the ACLU has frequently appeared before the Supreme Court and Ninth Circuit in free speech cases, both as direct counsel and as *amicus curiae*.¹ Because the First Amendment rights of a Nevada citizen are at stake in this case, its proper resolution is of particular interest to the ACLU of Nevada and its members.

Nevada Attorneys for Criminal Justice is a state-wide nonprofit organization of criminal defense lawyers in Nevada. Nevada Attorneys for Criminal Justice has an interest in this case because our members often represent clients who receive probation or who are being considered for revocation of probation.

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¹ See, e.g., *Elonis v. United States*, 575 U.S. 723 (2015); *Virginia v. Black*, 538 U.S. 343 (2003); *United States v. Hansen*, No. 17-10548, 2022 WL 424827 (9th Cir. 2022); *Koala v. Khosla*, 931 F.3d 887 (9th Cir. 2019); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006).

SUMMARY OF THE ARGUMENT

Freedom of speech is “the matrix, the indispensable condition, of nearly every other form of freedom.”² For most of the First Amendment’s history, it was debated what forum was most important for exercising this right, but today, “the answer is clear”: it is “cyberspace,” the “vast democratic forums of the Internet,” that are most vital to the current exercise of free speech.³

However, NRS 176A.410(1)(q) prohibits an individual on probation for a “sexual offense” from “possess[ing] any electronic device capable of accessing the Internet” and “access[ing] the Internet through any such device or any other means.” By prohibiting access to and use of the Internet, NRS 176A.410(1)(q) bars all participation in the most essential forum for First Amendment activity. More specifically, Nevada’s comprehensive bar on all expression, interaction, information-gathering, and other speech that takes place on the Internet is unconstitutional for two reasons.

First, NRS 176A.410(1)(q)’s ban is overbroad regarding the content that it bars access to. In the modern world, particularly after the onset of COVID-19, almost every social activity is online—from applying to jobs and connecting with friends and family on social media to checking store business hours, the news, or the

² *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

³ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

directions to an interview. The Internet is well known as a forum for the speech most protected under the First Amendment: political speech, such as engaging in discussions of presidential candidates, and religious speech, such as attending online church services. Yet all Internet use is prohibited for the individuals to whom NRS 176A.410(1)(q) applies.

Second, NRS 176A.410(1)(q) is overbroad in its application to all individuals on probation convicted of a “sex offense.” This category includes crimes that lack any sexual component and many offenses unrelated to Internet access. Combined with its total ban on Internet use and access, NRS 176A.410(1)(q)’s applicability to Nevadans guilty of crimes broadly defined as “sexual offenses” renders the statute substantially overbroad. The United States Supreme Court unequivocally recognized a right to Internet access in connection to the First Amendment in *Packingham*, and the Ninth Circuit has consistently struck down Internet use bans less restrictive than that prescribed in NRS 176A.410(1)(q). Individuals on probation still have First Amendment rights, and NRS 176A.410(1)(q)’s broad sweep cannot stand under the careful review required for probation conditions that infringe upon fundamental rights. This court should reverse the judgment below and affirm, as the Supreme Court did in *Packingham*, that the Constitution does not permit such sweeping prohibitions on access to the Internet considering that such access is essential to today’s First Amendment landscape.

ARGUMENT

A statute is overbroad under the First Amendment where “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁴ The overbreadth doctrine guards against imprecise criminal laws whose extensive scope may chill legitimate, protected expression.⁵ NRS 176A.410(1)(q)’s blanket prohibition on all Internet speech necessarily sweeps in the most protected kinds of speech, and chills—in fact, eradicates—the staggering amount of legitimate, protected expression that takes place on the Internet.

That NRS 176A.410(1)(q) only applies to individuals on probation cannot excuse this overbreadth. Though courts recognize that probationers’ constitutional rights may be affected by their “present status ‘on a continuum of possible punishments,’” probation demands fewer and less restrictive limits on individuals’ constitutional rights than both parole and incarceration,⁶ and conditions of probation that infringe upon fundamental rights must be “reviewed carefully.”⁷ Since the prohibitions enshrined in NRS 176A.410(1)(q) must be applied under law to qualifying individuals whose underlying offense was unrelated to digital devices or

⁴ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

⁵ See, e.g., *New York v. Ferber*, 458 U.S. 747, 768–69 (1982) (“[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.”).

⁶ *Doe v. Harris*, 772 F.3d 563, 570–71 (9th Cir. 2014) (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)).

⁷ *United States v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007).

Internet access, including the defendant in this case, the statute violates the First Amendment because it fails to tailor the conditions of probation to the circumstances of the particular defendant.

I. NRS 176A.410(1)(q) violates the Free Speech Clause of the First Amendment because its prohibition on all Internet use is overbroad.

The Supreme Court has unequivocally found that individuals have a First Amendment right to access the Internet due to the Internet’s role as a forum for speech. In *Packingham v. North Carolina*, a case evaluating restrictions less onerous than those imposed by NRS 176A.410(1)(q), the Court explicitly declared that “to foreclose access to social media altogether is to prevent [a] user from engaging in the legitimate exercise of First Amendment rights,” and ultimately held that “the State may not enact [a] complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.”⁸ In so holding, the Court recognized the enormous importance of rulings related to the Internet, emphasizing that “the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for [Internet] access.”⁹ And although a First Amendment right to the Internet was not declared without reservation until 2017, the United States Supreme Court understood the significance of the Internet to the First Amendment much earlier, realizing as early as 1997 that the “vast

⁸ 137 S. Ct. 1730, 1737, 1738 (2017).

⁹ *Id.* at 1732.

democratic forums of the Internet,” produced content “as diverse as human thought,”¹⁰ and lower courts had likewise acknowledged the vital importance of the Internet to First Amendment rights years prior to *Packingham*.¹¹ The *Packingham* Court harkened back to its earlier revelation when it declared the Internet as *the* most important forum for speech:

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet.¹²

The Court’s decision in *Packingham* explicitly protecting the Internet as a vital forum for speech is unsurprising considering that the Internet is not only the most important forum for speech but an integral part of the lives of most Americans.¹³

¹⁰ 521 U.S. 844, 868, 870 (1997).

¹¹ See, e.g., *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (calling the Internet “an important medium of communication, commerce, and information-gathering”); *United States v. Peterson*, 248 F.3d 79, 83 (2nd Cir. 2001) (“Internet access ha[s] become virtually indispensable in the modern world of communications and information gathering.”).

¹² 137 S. Ct. 1730, 1735 (2017).

¹³ See *United States v. LaCoste*, 821 F.3d 1187, 1191 (9th Cir. 2016) (“Use of the Internet is vital for a wide range of routine activities in today’s world Cutting off all access to the Internet constrains a defendant’s freedom in ways that make it difficult to participate fully in society and the economy.”). The United Nations General Assembly has even declared the Internet a human right and emphasized the importance of the Internet to freedom of expression. Without Internet access, it claims, other human rights cannot be adequately realized. See Human Rights Council Res. Doc. A/HRC/32/L.20 (June 27, 2016); Human Rights Council, Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/17/27 (May 6, 2011).

An overwhelming 93% of Americans use the Internet with 85% going online daily.¹⁴ While individual activities on the internet vary, it is indisputable that much of the speech most protected by the First Amendment now occurs online. The Internet has become a necessary arena for public debate and action on political and social issues, areas that fall in the heart of the First Amendment’s protection.¹⁵ Political discussions and movements have shifted online as the Internet has become the “dominant political tool of this century.”¹⁶

A 2020 study from the University of Haifa measured how deprivation of Internet access debilitates the ability to participate in civic life and concluded that “Internet deprivation substantially negates civic participation for political expression and association.”¹⁷ Notably, the study also undercut the notion that “since people managed to engage in political activity before the invention of the Internet, the effect of its deprivation should be minimal.”¹⁸ Rather, it discovered that Internet deprivation is *near fatal* to an individual’s political expression because “the mass

¹⁴ See Andrew Perring & Sara Atske, *About Three-in-Ten U.S. Adults Say They Are ‘Almost Constantly’ Online*, PEW RSCH. CTR. (Mar. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online>.

¹⁵ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasizing the importance of free speech to citizens’ political duties).

¹⁶ James Andrew Lewis, *A Short Discussion of the Internet’s Effects on Politics*, CTR. FOR STRATEGIC & INT’L STUDS. (Jan. 29, 2021), <https://www.csis.org/analysis/short-discussion-internets-effect-politics>; see also Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 COUNCIL FOREIGN RELS. 28 (2011) (“[S]ocial media have become coordinating tools for nearly all of the world’s political movements.”).

¹⁷ See Ryan Shandler, Michael L. Gross & Daphna Canetti, *Can You Engage in Political Activity Without Internet Access? The Social Effects of Internet Deprivation*, 18 POL. STUDS. REV. 620, 627 (2020).

¹⁸ *Id.*

adoption of digital means of political participation has in many ways supplanted analogue methods, many of which are no longer accessible.”¹⁹ One need only look to the presidency of Donald Trump and the political activity surrounding the death of George Floyd for recent examples of how influential the Internet is as a forum for political speech.

Religious speech, another of the First Amendment’s most protected subjects,²⁰ has similarly moved online. Not only do social networks have “active and close-knit communities of religious followers of all creeds,” but the Internet has facilitated the creation of “different interpretations and articulations of religions,” creating new religious communities and even new faiths.²¹ Scholars have emphasized the role of the Internet as a forum for religious speech for quite some time, using how Catholic youth to connect online, how Buddhists share meditation practices, and even how some faiths create virtual shrines as examples.²² There are even organizations dedicated to protecting the Internet as a forum for religious speech such as Faithful Internet, founded in 2015, which promotes Internet freedom and access as “essential for religious and spiritual life, interfaith cooperation, and

¹⁹ *Id.*

²⁰ See, e.g., *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“Indeed, in Anglo–American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.”).

²¹ Aleks Krotoski, *What Effect Has the Internet Had on Religion?*, THE GUARDIAN (Apr. 16, 2011), <https://www.theguardian.com/technology/2011/apr/17/untangling-web-aleks-krotoski-religion>.

²² See generally HEIDI CAMPBELL, WHEN RELIGION MEETS NEW MEDIA (2010); RELIGION ONLINE: FINDING FAITH ON THE INTERNET (Lorne L. Dawson & Douglas E. Cowan eds., 2004); BRENDA E. BRASHER, GIVE ME THAT ONLINE RELIGION (2001).

faith-inspired service in America.”²³ Its website is replete with testimonials from individuals subscribing to a wide variety of faiths who use the Internet in various ways, including to communicate with members of their church, recruit volunteers for their church’s charity efforts, and share stories about faith communities

.²⁴ One testimonial comes from Brian McLaren, named by Time magazine in 2015 as one of the most influential Evangelicals in America, who summarized the current landscape of religion and Internet use: “People of faith are connecting, creating, praying, and organizing online. The open Internet has become essential for 21st century religious and spiritual life.”²⁵

But the Internet is not only the most important forum for “speech” in the most traditional sense of the word; it is a vital arena for information-gathering, another activity protected under the First Amendment.²⁶ 86% of adults in America receive their news from a smartphone, computer, or tablet “often” or “sometimes.”²⁷ This percentage is higher than the population who get news from television, the next most

²³ See *About*, FAITHFUL INTERNET, <https://faithfulinternet.org/why-this-matters-to-you>.

²⁴ See *Testimonials*, FAITHFUL INTERNET, <https://faithfulinternet.org/featured-testimonials>; see also Valarie Kaur & Cheryl Leanza, *5 Reasons the Future of Faith Depends on the Open Internet*, SOJOURNERS (June 12, 2015), <https://sojo.net/articles/5-reasons-future-faith-depends-open-internet>.

²⁵ Kaur & Leanza, *supra* note 24.

²⁶ See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567–70 (2011) (rejecting argument against full First Amendment protection where state law regulated “access to information”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (First Amendment protects the “right to receive information”).

²⁷ Elisa Shearer, *More Than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>.

popular news source,²⁸ and it is likely to grow as the population ages since the Internet is the dominant choice for news for individuals ages 18-29 and 30-49, with 71% of those 18 to 29 and 67% of those 30 to 49 getting news from a digital device “often.”²⁹ Moreover, information-gathering necessarily encompasses political and religious speech and reaches far beyond daily news sources. Access to the most up-to-date information—political, religious, or otherwise—requires access to the Internet.

If there were any doubts remaining regarding the Internet’s importance as a forum for First Amendment activity, the COVID-19 pandemic put them to rest. In a recent study, 90% of Americans reported that the Internet has been essential or important to them during the pandemic, and 40% reported using technology or the Internet in ways that were new or different to them.³⁰ In-person forums that existed before the pandemic, such as schools and universities, parks, houses of worship, and libraries, shut down in compliance with government-ordered mandates, leaving

²⁸ *Id.* Notably, many televisions have Internet access capabilities and would presumably be prohibited under NRS 176A.410(1)(q). See Federica Laricchia, *Share of Smart TVs in U.S. Households During April 2017-2020*, STATISTA (Feb. 14, 2022), <https://www.statista.com/statistics/782217/smart-tv-share-by-oem-in-the-us> (“Apart from providing users the viewing experience a more traditional TV set can offer, smart TVs also enable access to the internet and connection with other devices. Smart TV technology is becoming an increasingly popular feature of modern television sets: in 2020, over 70% of individuals in the U.S. had household access to a smart TV.”).

²⁹ Shearer, *supra* note 27.

³⁰ Colleen McClain, Emily A. Vogels, Andrew Perrin, Stella Sechopoulos & Lee Rainie, *The Internet and the Pandemic*, PEW RSCH. CTR. (Sept. 1, 2021), <https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic>. See also The United Nation has noted that COVID-19 increased the urgency to bridge the “digital divide.” See *Coronavirus Reveals Need to Bridge the Digital Divide*, UNITED NATIONS CONF. TRADE & DEV. (Apr. 6, 2020), <https://unctad.org/news/coronavirus-reveals-need-bridge-digital-divide>.

many individuals without Internet access cut off from on-demand information-gathering. The number of unique visitors to job search sites increased by 40%.³¹ The number of visits to more general news sites increased by 26%.³² The pandemic either changed the way people exercised their freedom of speech or accelerated ongoing trends, and many forums will never return to fully in-person operations.

Looking closer to home, Nevada has explicitly recognized how important the Internet is to its citizens and their free speech rights. In 2009, pursuant to the U.S. Department of Commerce's State Broadband Initiative grant, the Nevada Broadband Task Force was created to identify and remove barriers to broadband access in unserved and underserved areas of Nevada.³³ In 2018, 85.9% of Nevada households had a broadband Internet subscription, which placed Nevada seventeenth out of the fifty states,³⁴ yet the Nevada government has since taken additional measures to further improve broadband Internet access for Nevadans. In 2021, the U.S. Department of the Treasury awarded \$135.6 million in American Rescue Plan Act money to expand and upgrade broadband internet service in Nevada.³⁵ As sitting Senator for the State of Nevada Jacky Rosen observed, the COVID-19 pandemic

³¹ See Shefali Dahiya, Lila N. Rokanas, Surabhi Singh, Melissa Yang & Jon. M. Peha, *Lessons from Internet Use and Performance During COVID-19*, 11 J. INFO. POL'Y 202, 208 (2021).

³² *Id.* at 209.

³³ *Broadband Task Force*, CONNECT NEVADA, <https://www.connectnv.org/BBTaskForce>.

³⁴ *Id.*

³⁵ *Treasury Awards \$135.6M to Expand Broadband Service in Nevada*, N. NEV. BUS. WKLY. (Sept. 13, 2021), <https://www.nnbw.com/news/2021/sep/13/treasury-awards-1356m-expand-broadband-service-nev>.

further amplified Nevada’s Internet needs, making high-speed Internet a necessity for “conduct[ing] business, seek[ing] healthcare and pursu[ing] an education.”³⁶ The Task Force agreed.³⁷

Finally, Internet access for Nevadan probationers is important because probationers here, unlikely many other states, are a part of our political community. In 2019, the Nevada legislature restored voting rights to individuals on probation, passing Assembly Bill 431 to help formerly incarcerated individuals transition back into society and embrace civic engagement.³⁸ To fully exercise this right, probationers must be allowed access to the Internet considering that forum’s special place as the preeminent forum for political activity and information in our current era.

Yet even with the Internet’s preeminence as a forum for First Amendment activity clearly established, NRS 176A.410(1)(q) bars access to the entirety of the forum to whom it applies. NRS 176A.410(1)(q)’s reach is virtually boundless, even more so than the social media ban struck down in *Packingham*. And as previously discussed, “access” necessarily includes a myriad of interactions: using another

³⁶ *Id.*

³⁷ See *What Is Broadband and Why Is It Important?*, NEV. GOVERNOR’S OFF. OF SCI. INNOVATION & TECH., <https://osit.nv.gov/Broadband/Broadband> (“Better broadband means better opportunities for Nevada However, residents cannot fully participate in the digital economy without access to affordable broadband and the ability to use it.”).

³⁸ See Hugh Jackson, *Nevada Restores Voting Rights to Formerly Incarcerated*, NEVADA CURRENT (May 29, 2019), <https://www.nevadacurrent.com/blog/nevada-restores-voting-rights-to-formerly-incarcerated>; see also NRS 293.543.

individual's phone for a few seconds, checking store business hours, looking for jobs online, looking up news, listening to music on Spotify, watching a how-to video on YouTube, viewing oral arguments of the Nevada Supreme Court, and every other online action. It would be impossible to attempt to name every website or functionality that exists on the Internet, but the following highlight a few of the most glaring First Amendment concerns.

NRS 176A.410(1)(q) prohibits access to podcasts, audiobooks, videos, and all other educational and informational material available on the Internet. Individuals are also unable to access job searching tools and websites, even though probation agreements almost always require individuals to obtain employment³⁹ and online searching is undoubtedly the most popular method of job hunting and applying.⁴⁰ Perhaps more egregiously for First Amendment purposes, NRS 176A.410(1)(q) prohibits access to all social media and any other online platform used to communicate and interact with others. This includes email, iMessage (Apple users' default method of texting), Zoom, FaceTime, Skype, Microsoft Teams. This includes news sites including the websites for the Las Vegas Review-Journal, the Reno Gazette-Journal, the Nevada Current, and the Nevada Independent, and their

³⁹ See *Standard Conditions of Supervision*, U.S. PROBATION OFF. DIST. OF NEV., <https://www.nvp.uscourts.gov/supervision/general/standard-conditions-supervision> (“You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so.”).

⁴⁰ In 2017, the U.S. Bureau of Labor Statistics reported that, unsurprisingly, online searching was the most popular method of job hunting. Richard Hernandez, *Online Job Search: The New Normal*, U.S. BUREAU LAB. STATS. (Feb. 2017), <https://www.bls.gov/opub/mlr/2017/beyond-bls/online-job-search-the-new-normal.htm>.

associated message boards. This includes social media platforms such as Facebook, YouTube, Instagram, LinkedIn, Twitter, and many more. Social media has been a “necessary part of modern interaction”⁴¹ for quite some time and allows not only free speech between individuals but collaboration with larger groups of people that would not be possible without the Internet. The extent and diversity of First Amendment activity that takes place on these platforms is limitless.⁴²

NRS 176A.410(1)(q) also prohibits the possession of any device capable of accessing the Internet. In doing so, the statute prohibits all “smart” devices, sometimes known as IoT (Internet of Things) devices.⁴³ In 2021, 85% of Americans owned a smartphone, 75% a desktop or laptop computer, and about 50% a tablet computer.⁴⁴ Possession of any of these devices is prohibited under NRS 176A.410(1)(q). In 2020, over 70% of individuals in the U.S. had household access to a smart television, another device prohibited under the statute.⁴⁵ Other examples include smart microwaves, smartwatches, fitness trackers, smart refrigerators, smart fire alarms, and smart security systems; but this list barely scratches the surface of

⁴¹ Daniel Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366, 366 (2014).

⁴² Justice Kennedy in *Packingham* lists just a few examples of the protected speech that occurs on social media websites. “On Facebook . . . users can debate religion and politics with their friends On Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose.” 137 S. Ct. 1730, 1735–36 (2017).

⁴³ The Internet of Things is “the concept of connecting any device to the Internet and to other connected devices,” and “includes an extraordinary number of objects of all shapes and sizes.” Jen Clark, *What Is the Internet of Things?*, IBM (Nov. 17, 2016), <https://www.ibm.com/blogs/internet-of-things/what-is-the-iot>.

⁴⁴ *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile>.

⁴⁵ Laricchia, *supra* note 28.

devices capable of accessing the Internet, 100% of which are prohibited under NRS 176A.⁴⁶

Packingham makes clear that even a prohibition on accessing *parts* of the Internet will be struck down as overbroad if a substantial number of the prohibition’s applications are unconstitutional. If, as *Packingham* holds, “[t]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights,”⁴⁷ then foreclosing access to the entirety of the Internet must violate the First Amendment. NRS 176A’s prohibition on accessing the entire Internet is overbroad and, as such, involves a greater deprivation of liberty than is necessary to achieve any legitimate goal of probation.

II. NRS 176A.410(1)(q) violates the Free Speech Clause of the First Amendment because it applies to individuals convicted of crimes with no sexual component and crimes unrelated to Internet Access.

Even if NRS 176.410(1)(q) was not overbroad due to the content it barred access to, it would be overbroad due to its mandatory application to all individuals convicted of “sexual offenses,” whether or not those offenses were committed using the Internet. The lack of a rational link between the statute’s blanket ban and the cases it must be blindly applied to that have no connection to the Internet, including

⁴⁶ 18 Most Popular IoT Devices in 2022, SOFTWARE TESTING HELP (Apr. 3, 2022), <https://www.softwaretestinghelp.com/iot-devices>.

⁴⁷ 137 S. Ct. 1730, 1737 (2017).

the case currently before the court, necessarily renders NRS 176A.410(1)(q) overbroad.

Though thousands of individuals are subject to NRS 176A.410(1)(q)'s Internet ban,⁴⁸ the statute contains no language limiting its application to offenses that involved Internet use. None of the "sexual offenses" listed in NRS 179D.097(1) specify or require Internet use, and there is no rational basis to impose a blanket ban when NRS 176A.410(1)(q) applies to offenses are no more likely to be aided by Internet access than others to which the ban does not apply.

Courts have consistently struck down Internet access bans that failed to establish a reasonable link between a defendant's criminal conduct and the condition of probation at issue. Though not binding on this Court, a series of Ninth Circuit cases illustrate NRS 176A.410(1)(q)'s overbreadth in this regard.

First, in *United States v. Sales*, the Ninth Circuit struck down a condition of probation nearly identical to that imposed under NRS 176A.410(q)(1), finding that the condition violated the First Amendment.⁴⁹ There the court held that a condition requiring a parolee to seek and obtain approval from his probation officer before using a device capable of accessing the Internet resulted in a far greater deprivation

⁴⁸ Nevada had 7,332 registered sex offenders as of May 2021. *See How Many Registered Sex Offenders Are There in Your State?*, SAFEHOME.ORG (Aug. 24, 2021), <https://www.safehome.org/data/registered-sex-offender-stats>.

⁴⁹ 476 F.3d 732, 734 (9th Cir. 2007) ("The defendant shall use only those computers and computer-related devices, screen user names, passwords, email accounts, and internet service providers (ISPs), as approved by the Probation Officer.").

of liberty than was reasonably necessary to serve the goals of preventing recidivism, protecting the public, and promoting rehabilitation.⁵⁰ And in contrast to many of the individuals subject to NRS 176A.410(1)(q)'s ban, the defendant in *Sales* actually used a computer in the commission of his offense; Furthermore, unlike the individuals subject to NRS 176A.410(1)(q), Sales was on parole, not probation, meaning that his First Amendment rights were subject to more restriction than an individual that NRS 176A.410(1)(q) would apply to.⁵¹

Second, in *United States v. Barsumyan*, the Ninth Circuit again struck down a restriction on all computer use as a condition of a parolee's supervised release, admittedly without referencing the First Amendment.⁵² However, when the Ninth Circuit later cited *Barsumyan* in *Doe v. Harris*, it the computer use ban imposed in *Barsumyan* had been struck because it "unreasonably burdened" the parolee's First Amendment rights.⁵³

Finally, in *United States v. LaCoste* the Ninth Circuit struck down yet another total ban on a probationer's Internet use as overbroad under the First Amendment.⁵⁴ Notably, the court pointed out that permitting a defendant to get permission to access

⁵⁰ *Id.* at 736.

⁵¹ *Id.* Probation demands fewer and less restrictive limits on individuals' constitutional rights than parole. *Doe v. Harris*, 772 F.3d 563, 570–71 (9th Cir. 2014) (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)).

⁵² 517 F.3d 1154, 1157, 1161–62 (9th Cir. 2008) ("The defendant shall not access or possess any computer or computer-related devices in any manner, or for any purpose, unless approved in advance by the Probation Officer.").

⁵³ 772 F.3d 563, 571 (9th Cir. 2014).

⁵⁴ 821 F.3d 1187, 1192 (9th Cir. 2016).

the Internet or a certain device from his probation officer when he was otherwise banned did *not* make the restriction constitutional.⁵⁵ Citing *Sales*, the court noted that “[w]hen a total ban on Internet access cannot be justified, as is the case here, we have held that a proviso for probation-officer approval does not cure the problem.”⁵⁶ Thus, similar language in NRS 176A allowing for officer approval cannot make NRS 176A.410(1)(q) constitutional.

This line of cases, from 2007 to 2016, provides persuasive precedent illustrating one circuit’s commitment to upholding First Amendment rights to the Internet even before the Supreme Court decided *Packingham*. The judgment of the Clark County District Court should be reversed and NRS 176A.410(1)(q) found unconstitutional pursuant to the First Amendment of the United States Constitution.

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⁵⁵ *Id.*

⁵⁶ *Id.*

CONCLUSION

Based upon the above, this Court should find the provisions of NRS 176A.410(1)(q) to be unconstitutional and reverse the holding of the lower court.

DATED this 26th day of April 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amici brief, and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e), which requires that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Century Schoolbook.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of April 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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