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Constitutional Law - Sex Offenses and Free Speech: Constitutionality of Ban on Sex Offenders' Use of Social Media: Impact on States with Similar Restrictions

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CONSTITUTIONAL LAW - SEX OFFENSES AND FREE SPEECH: CONSTITUTIONALITY OF BAN ON SEX OFFENDERS' USE OF SOCIAL MEDIA: IMPACT ON STATES WITH SIMILAR RESTRICTIONS

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

ABSTRACT

In *Packingham v. North Carolina*, the United States Supreme Court *held* that a North Carolina statute, which barred registered sex offenders from accessing a myriad of websites, including social networking websites, impermissibly restricts lawful speech in violation of the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment. The Court illustrated its decision under the Constitution as well as through its precedents. In reaching its decision, the Court noted two main reasons for the statute's impermissibility. First, the statute's broad wording not only restricts access to social media websites, but due to the statute's elements, it encompasses many and varying websites. Second, the Court found that this far reaching restriction on speech is unprecedented in the range of speech that it is abridging; essentially resulting in a total ban on the exercise of First Amendment speech on social networking sites that are imperative to participating in modern society.

I. FACTS

Under North Carolina law, it was a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages on the commercial social networking Web site."[1] North Carolina's statute bans registered sex offenders from Web sites that meet four requirements.[2] First, if the Web site is "operated by a person who derives revenue from membership fees, advertising, or other

1. Packingham v. North Carolina, 137 S. Ct. 1730, 1733 (2017) (quoting N.C. GEN. STAT. ANN. § 14-202.5(a), (e) (West 2015)).

2. *Packingham*, 137 S. Ct. at 1733 (quoting § 14-202.5(b)).

sources related to the operation of the Web site."[3] Second, if it "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges."[4] Third, if it "[a]llows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site."[5] And fourth, if it "[p]rovides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger."[6]

In 2002, Petitioner, Lester Gerard Packingham, a 21-year-old student, had sex with a 13-year-old girl.[7] Subsequently, Packingham was charged and pleaded guilty to "taking indecent liberties with a child."[8] Under North Carolina law, Packingham's crime qualified as "an offense against a minor," which carried with it the requirement to register as a sex offender – "a status that can endure for 30 years or more."[9]

In 2010, after having a parking ticket dismissed, Packingham posted an exclamatory status to his Facebook account, stating:

> Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent……Praise be to GOD, WOW! Thanks JESUS![10]

Per North Carolina law, Packingham's above quoted statement on Facebook was in violation of N. C. GEN. STAT. ANN. § 14-202.5 (2015).[11] As a registered sex offender, Packingham was banned from accessing commercial social networking sites.[12] Packingham's statement posted to Facebook was spotted by a police officer employed by the Durham Police Department who was investigating registered sex offenders who were suspected to have

3. *Id*. at 1733-34.
4. *Id*. at 1734.
5. *Id*.
6. § 14-202.5(b)(4).
7. *Packingham*, 137 S. Ct. at 1734.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.

been violating § 14-202.5.[13] Packingham's personal Facebook account was under the name "J.R.Gerrard," and after the police officer cross-referenced recent court records, the officer confirmed that Packingham had recently had a traffic ticket dismissed.[14] Subsequent to a search warrant, evidence was uncovered to prove that "J.R. Gerrard" was in fact Lester Packingham, a registered sex offender, who was accessing a social media website in violation of § 14-202.5.[15]

Packingham was indicted by a grand jury for violating § 14-202.5.[16] Packingham sought to have the indictment dismissed on First Amendment grounds, but it was denied.[17] Packingham was convicted in state court even though the State, at no point, alleged that Packingham had committed any crime while on the internet.[18]

On appeal to the Court of Appeals of North Carolina, Packingham argued that § 14-202.5 violated the Free Speech Clause of the First Amendment.[19] The Court of Appeals reversed the trial court; holding that § 14-202.5 "is not narrowly tailored to serve the State's legitimate interest in protecting minors from sexual abuse."[20] However, the North Carolina Supreme Court ultimately reversed.[21] That court found that § 14-202.5 did not violate the First Amendment, but was "constitutional in all respects."[22] Further finding that the law was merely a "limitation on conduct," not a limitation of speech.[23] The United States Supreme Court subsequently granted certiorari.[24]

II. LEGAL BACKGROUND

Both historically and as of late, laws applicable to registered sex offenders have been among the most controversial. Even more compelling is how these laws intersect with the First Amendment and social media. As stated by the Court, *Packingham* is "one of the first this Court has taken to address the relationship between the First Amendment and the modern In-

13. *Packingham*, 137 S. Ct. at 1734.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Packingham*, 137 S. Ct. at 1734.
20. *Id*. at 1734-35.
21. *Id*. at 1735.
22. *Id*.
23. *Id*.
24. *Id*.

ternet."[25] The Court illustrated its analysis and decision through precedents and statistics supporting the prevalence of social media in modern society.[26]

A. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

In pertinent part the First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[27]

At issue in *Packingham* is the Free Speech provision of the First Amendment. If a law functions to regulate or interfere with an individual's right to free speech, a state must show that it has either a significant or compelling interest that it's regulation will achieve in furthering.[28] The interest a state must prove hinges on which level of scrutiny the Court will examine the law under.[29] Specifically, if a law is content-based, namely, if the law distinguishes between the content of speech on its face, the law will be subject to strict scrutiny.[30] Alternatively, if a regulation of speech "serves purposes unrelated to the content of expression," that regulation is subject to intermediate scrutiny.[31]

Furthermore, a state may enact regulations on speech if the law merely regulates the place or time speech may be made regardless of the content of the speech.[32] The United States Supreme Court has examined laws under the intermediate scrutiny standard if such law was a time, place, or manner regulation.[33] A content-neutral time, place, or manner regulation on speech may be upheld if it is "narrowly tailored to serve a significant governmental interest and . . . [it] leave[s] open ample alternative channels for communication of the information."[34] A law is narrowly tailored if it does not "burden substantially more speech than is necessary to further the government's legitimate interests."[35]

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25. *Packingham*, 137 S. Ct. at 1736.
26. *See id.* at 1735-38.
27. U.S. CONST. amend. I.
28. *See* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2748-49 (1989).
29. *Id.*
30. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2522-23 (2014).
31. *Ward*, 109 S. Ct. at 2754.
32. *See id.* at 2757-58.
33. *Id.*
34. *Ward*, 109 S. Ct. at 2753 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).
35. *See McCullen*, 134 S. Ct. at 2523 (quoting Ward v. Rock Against Racism, 109 S. Ct. 2746, 2534-40 (1989)).

B. THE FIRST AMENDMENT PRIOR TO THE MODERN INTERNET

Historically, the Court has made clear that First Amendment speech is protected within certain public physical spaces, such as parks.[36] Specifically, in *Ward v. Rock Against Racism*, the Court upheld a New York City's restriction on the volume of a rock performance in Central Park; finding that the restriction was a permissible time, place, and manner restriction that did not discriminate based on content.[37] In *Ward*, the Court explained that New York City's regulation was narrowly tailored to serve its substantial and content-neutral interest in controlling volume, and the tranquility of private homes, which satisfied intermediate scrutiny.[38] Further, the Court noted that governmental protection in no way is limited to that context, but the government may seek to protect "even such traditional public forums as city streets and parks."[39] Twenty-eight years after *Ward*, the Court determined that physical places such as city streets and parks remain important spaces to gather and express views, but now, it is clear that the most important place for exchanging views, and protesting others, is the Internet.[40]

C. THE FIRST AMENDMENT AND THE MODERN INTERNET

In *Reno v. American Civil Liberties Union*, the First Amendment was introduced to the modern Internet.[41] In that case, the Court struck down two provisions of the Communications Decency Act of 1996; specifically, provisions that were designed to protect minors from "obscene or indecent" communications on the Internet.[42] The Court explained that said provisions were content-based restrictions on speech, and overly broad because the law prohibited unprotected as well as protected speech.[43] Further, the Court determined that "the growth of the Internet has been and continues to be phenomenal."[44] As such, the Court stressed the importance of the freedom of expression in a democratic society – in "the vast democratic fora of the Internet."[45] For these reasons, the Court found the law unconstitutional.[46]

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36. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
37. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2756 (1989).
38. *Id.* at 2760.
39. *Id.* at 2756.
40. *Packingham*, 137 S. Ct. at 1735.
41. *See* Reno v. Am. Civil Liberties Union, 117 S. Ct. 2329, 2334 (1997).
42. *Id.* at 2351.
43. *Id.* at 2342.
44. *Id.* at 2351.
45. *Id.* at 2343.
46. *Id.* at 2351.

Twenty years have since passed since the ruling in *Reno v. American Civil Liberties Union*, where the Court predicted the phenomenal growth of the Internet.[47] Today, in 2018, 81% of the United States population holds a social media account.[48] Additionally, approximately 185 million Americans used social media in 2016, a number predicted to reach 200 million people by the year 2020.[49] The Court used similar statistics to describe the prevalence and utility of social media in today's modern culture to depict how individuals take to his or her social media account to "engage in a wide array of protected First Amendment activity."[50] Facebook serves as an outlet to discuss religion and politics with friends, as well as a forum to share other personal thoughts and images.[51] LinkedIn can be used as a tool to network with professionals in an individual's field of work, or to receive employment openings or advice.[52] Twitter is a forum to follow political leaders, where an individual could petition the same, and engage in a myriad of activity.[53] As such, the Court discussed how the "Cyber Age is a revolution of historic proportions," stating: "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."[54]

Subsequently, *Packingham* is one of the first cases the Court has decided to address the First Amendment and the modern Internet.[55] Given the enormous impact that social media has on our society's culture, the Court proceeded with "extreme caution" as to not suggest that the First Amendment provides little protection to United States citizens wishing to participate in that space.[56]

III. ANALYSIS

In *Packingham v. North Carolina*, the United States Supreme Court ruled that § 14-202.5 could not stand because the statute's broad wording not only barred registered sex offenders from social media websites, but al-

47. *See* Reno v. Am. Civil Liberties Union, 117 S. Ct. 2329, 2351 (1997).

48. *Percentage of U.S. population with a social media profile 2008-2017* STATISTA (Aug. 9, 2017, 7:44 PM), https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/.

49. *Id.*

50. Packingham v. North Carolina, 137 S. Ct. 1730, 1735-36 (2017).

51. *Id.* at 1735.

52. *Id.*

53. *Id.*

54. *Id.* at 1736.

55. *Id.*

56. *Packingham*, 137 S. Ct. at 1736.

so encompassed a vast array of unrelated websites.[57] This far reaching restriction on protected speech, which is unprecedented in its scope, could not satisfy even intermediate scrutiny.[58] Overall, the Court concluded that § 14-202.5 violated the Constitution.[59] Lastly, the Court considered the State's argument; specifically, the law's important and preventative purpose of protecting minors from registered sex offenders, but found that the State did not meet its burden to show that the law is "necessary or legitimate to serve that purpose."[60]

A. THE MAJORITY OPINION: NORTH CAROLINA STATUTE § 14-202.5 IS UNCONSTITUTIONAL

On June 19, 2017, the Supreme Court unanimously decided *Packingham v. North Carolina* in favor of the Petitioner.[61] Justice Kennedy delivered the opinion for the majority.[62] Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in the majority opinion.[63]

1. American Revolution

The Court relied on its prior decisions to illustrate its ruling.[64] *McCullen v. Coakly* stands for the proposition that in order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest."[65] Further, *McCullen* provides that "the law must not burden substantially more speech than is necessary to further the government's legitimate interest."[66] The Court made certain to note that a state, without doubt, has an interest in protecting children and other victims of sexual assault from abuse, and that the "sexual abuse of a child is a most serious crime"; however, that interest is not exempt from all constitutional protections.[67]

The Court went on to explain "that for centuries now, inventions heralded as advances in human progress have been exploited by the criminal

57. *Id.*
58. *Id.* at 1736.
59. *Id.* at 1738.
60. *Id.*
61. *Packingham*, 137 S. Ct. at 1733. Justice Gorsuch took no part in the consideration or decision of this case.
62. *Id.*
63. *Id.*
64. *See id.*, 137 S. Ct. at 1735-38.
65. *Id.* at 1736 (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014)).
66. *Id.*
67. *Id.* at 1736 (quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002)).

mind."[68] Essentially the Court demonstrated how our society is continuously changing and adapting, thus the Court needed to adapt with it by considering advances in science and the social context.[69] In *Packingham*, the Court was given the task of protecting minors, while simultaneously protecting individual's First Amendment rights in light of today's moral, political and cultural climate.[70] *Packingham* is a novelty, and the Court noted that its prior cases and legislative history may not show the actual extent of the application of the First Amendment to the new frontier of the Internet.[71]

2. Overbreadth

Furthermore, the Court agreed that a State may enact specific, narrowly tailored laws to prevent a sex offender from engaging in criminal conduct; however, North Carolina's law banning registered sex offenders from social media websites was so broad that the Court determined that it was unprecedented in the scope of protected speech it abridges.[72]

Given the wording and construction of § 14-202.5, North Carolina's law banned not only Facebook, but a myriad of websites, such as Webmd.com, which have nothing to do with the State's purported interest of protecting minors from sex offenders gathering his or her personal information.[73] Again, the Court stressed that this opinion should not be read as a bar on states enacting specific laws to prevent criminal behavior.[74] Rather, the Court stressed that the law just must be more narrowly tailored than § 14-202.5.[75] As illustrated in *Brandenburg v. Ohio*, the Court struck down the Ohio Criminal Syndicalism Act, which made it a crime to advocate for violence, as unconstitutional.[76] In *Brandenburg*, the Petitioner, a member of the Ku Klux Klan, challenged Ohio's law on First Amendment grounds.[77] Ultimately, the Supreme Court ruled in favor of the Petitioner, holding that the law violated the Petitioner's right to free speech.[78] Even so, in that case, the Court made certain that "[s]pecific criminal acts are not

68. *Packingham*, 137 S. Ct. at 1736.
69. *See id.*
70. *See id.*
71. *See id.*
72. *Id.* at 1737.
73. *Id.*
74. *See Packingham,* 137 S. Ct. at 1737.
75. *Id.*
76. Brandenburg v. Ohio, 89 S. Ct. 1827, 1830 (1969).
77. *Id.* at 1828.
78. *Id.* at 1830.

protected speech even if speech is the means for their commission."[79] The same guidance was given in *Packingham*.[80]

As such, the Court found that North Carolina's law did not punish specific criminal acts, but barred sex offenders from engaging in protected speech on social media completely.[81] As stated before, social media today functions as a device to share ideas, religious views, and access to United States elected officials.[82] Given the same, if that access was denied, the Court stated that it would be comparable to denying that same individual the right to speak in public streets or parks.[83]

In general, the State's argument centered on the importance of keeping minors and victims of sexual abuse safe.[84] The State argued that § 14-202.5 was merely a content-neutral, time, place or manner restriction, subject to intermediate scrutiny.[85] Further, the State argued that § 14-202.5 set out four requirements, as to only limit sex offenders from accessing websites where he or she could use minor's personal information in order to target them.[86] The Court, even assuming that the above arguments were true, could not let the law stand.[87]

3. Majority's Conclusion

For the reasons stated above, the Court ruled the North Carolina statute unconstitutional.[88] Because § 14-202.5 impermissibly restricted lawful speech in violation of the First Amendment's Free Speech Clause, the Court struck it down as unconstitutional.[89] Additionally, the Court considered the Respondents' arguments related to prevention, and found them nonetheless unpersuasive.[90]

B. THE CONCURRING OPINION

Even though the Court was unanimous in its decision to strike down § 14-202.5, Justices Alito, Roberts, and Thomas joined and authored a con-

79. *Packingham*, 137 S. Ct. at 1737.
80. *See Brandenburg*, 89 S. Ct. at 1827.
81. *Packingham*, 137 S. Ct. at 1737.
82. *See id*.
83. *Packingham*, 137 S. Ct. at 1735.
84. *Id*. at 1737.
85. *Id*.
86. *Id*.
87. *Id*. at 1736.
88. *Id*. at 1738.
89. *Packingham*, 137 S. Ct. at 1738.
90. *Id*. at 1737.

currence.[91] The concurring opinion was in agreement about North Carolina's law's "staggering reach," stating that § 14-202.5 barred sex offenders from websites that could not reasonably lead to the abuse of minors.[92]

However, where the three concurring justices could not agree with the majority is when its rhetoric compared the Internet to public streets and parks.[93] Most significantly, the concurrence warned that some may interpret the majority's language to mean that the State may not be able to restrict sex offenders from any websites or regulate speech on the Internet.[94] In retrospect, Justice Alito's statement, "I am troubled by the implications of the Court's unnecessary rhetoric,"[95] may have been foreshadowing to the challenges that sex offenders are likely, and already have brought against their states' laws restricting his or her access to the modern Internet.

IV. IMPACT

The *Packingham v. North Carolina* ruling may have an impact on states with similar restrictions on sex offenders. The *Packingham* decision has already been cited and used to challenge a probation condition in *United States v. Rock*.[96] In that case, Defendant was charged and pleaded guilty to one count of distribution of child pornography.[97] The crime leading to Defendant's charge was the fact that Defendant took pictures of then girlfriend's eleven-year-old daughter naked, and distributed them on the internet.[98] Subsequently, the Defendant took an appeal to challenge the length of his sentence and the conditions of his release.[99] Here, the Defendant argued that the condition he not possess or use a computer, goes against the Court's ruling in *Packingham v. North Carolina*.[100] The D.C. Court found this argument unpersuasive because the Defendant's release condition was not a post-custodial restriction as was in *Packingham*.[101] Further, that court stated, "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."[102]

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91. *Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring).
92. *Id.*
93. *Id.*
94. *See id.*
95. *Id.*
96. United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017).
97. *Id.* at 829.
98. *Id.*
99. *Id.*
100. *Id.* at 831.
101. *Id.*
102. *Rock*, 863 F.3d at 831 (quoting United States v. Knights, 122 S. Ct. 587, 591 (2001)).

As illustrated above, the warning from Justice Alito, who wrote for the concurrence in *Packingham*, may already be proving true.[103] North Dakota imposes restrictions on sex offenders that are similar to the one challenged in *United States v. Rock*.[104] As such, it is likely that North Dakota defendants will use *Packingham*'s decision to challenge such restrictions.

A. NORTH DAKOTA PROBATION CONDITIONS APPLIED TO SEX OFFENDERS

In North Dakota, a sex offender is subject to probation conditions at a judge's discretion.[105] Specifically, a judge may impose that a registered sex offender "must not subscribe to any Internet service provider, by modem, LAN, DSL or any other manner."[106] Furthermore, the judge may order that such an individual, "may not use another person's Internet or use Internet through any commercial venue until and unless approved in writing by [a] parole/probation officer."[107]

Like the challenge in *United States v. Rock*, North Dakota defendants may challenge such a restriction on First Amendment grounds.[108] It is likely that a North Dakota Court would render a similar decision as the *Rock* Court. However, it is impossible to say with certainty.

B. PACKINGHAM'S EFFECTS ON NORTH DAKOTA SPECIFIC LAWS

In the 2003 case of *State v. Backlund*,[109] the North Dakota Supreme Court considered a constitutional challenge to N.D.C.C. § 12.1-20.05, which makes it a crime for an adult to lure minors by computer or other electronic means.[110] In that case, the defendant argued that North Dakota's law violates the free speech provisions of the federal and state constitutions.[111] Interestingly, the defendant used a similar legal argument as the petitioner in *Packingham*.[112] In *Backlund*, the defendant declared that North Dakota's law was overbroad, as there was no communication to a minor, and that it was a content-based restriction on his right to free speech,

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103. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017).
104. *See* N.D.R.Crim.P. Form 9.
105. *See id.*
106. N.D.R.Crim.P. Form 9.
107. *Id.*
108. *See* United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017).
109. State v. Backlund, 2003 ND 184, ¶ 1, 672 N.W.2d 431.
110. *Id.*; *see* N.D. CENT. CODE § 12.1-20-05.1.
111. *Id.* ¶ 18, 672 N.W.2d at 438.
112. *See id.*

and not narrowly tailored to serve the states legitimate interest.[113] However, the North Dakota Supreme Court rejected the defendant's argument, finding that § 12.1-20-05.1 does not violate the free speech clause of the state and federal constitutions.[114] The Court reasoned that North Dakota's law does not allow for prosecution of "pure" speech, but merely criminalizes conduct directed at "luring" and abusing minors.[115]

After *Packingham*, North Dakota may see similar challenges to its laws and restrictions placed on sex offenders, and perhaps the North Dakota Supreme Court's conclusion will be different than in *Backlund*. However, North Dakota's law is more narrowly tailored than the law in North Carolina, and its restrictions are placed on registered sex offenders still under supervision, not post-supervision.[116] Although, after the ruling in *Packingham*, it is impossible to state with certainty which direction the North Dakota Supreme Court would go after fourteen years since the ruling in *Backlund*. Ultimately, the future impact of *Packingham* is difficult to predict because the "[t]he forces and directions of the Internet are so new, so protean, and so far-reaching that courts must be conscious that what they say today might be obsolete tomorrow."[117]

V. CONCLUSION

Overall, in *Packingham v. North Carolina*, the United States Supreme Court struck down a North Carolina law barring registered sex offenders from accessing social networking websites (and because of the law's broad language, a myriad of other web sites as well) as unconstitutional.[118] *Packingham* is one of the first modern Internet cases decided by the Court, so its holding will likely have an impact on other states with similar laws or restrictions, including North Dakota.[119]

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113. *Id.* ¶ 18, 672 N.W.2d at 438.
114. *Id.* ¶ 32, 672 N.W.2d at 442.
115. *Backlund*, ¶ 32, 672 N.W.2d at 442.
116. *See* N.D. CENT. CODE § 12.1-20-05.1.
117. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).
118. *Id.* at 1737.
119. *See id.* at 1732.

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