WIRED

The Supreme Court Could Soon Decide if You Have a Right to Facebook

Issie Lapowsky

February 28, 2017

Lester Packingham Jr. registered as a sex offender in 2002 after pleading guilty to having sex with a 13-year-old girl when he was 21. But that offense isn't what brought Packingham to the Supreme Court of the United States on Monday.

The crime this time around? A Facebook post.

The post itself was benign enough. In 2010, Packingham took to Facebook to celebrate a recently dismissed parking ticket. "Praise be to GOD, WOW!" he wrote. But in posting that message—indeed, in using Facebook at all—Packingham was breaking a 2008 North Carolina law that prohibits registered sex offenders from accessing websites that enable people to exchange information where minors can participate. Facebook is one of those sites.

Packingham fought back against the conviction, arguing that cutting people off from platforms like Facebook amounts to a violation of his First Amendment rights. In taking the case, the Supreme Court could ultimately determine whether sites like Facebook, Youtube, and others banned by the North Carolina law have become so instrumental to 21st century life that Americans now have a fundamental right to use them.

Is preventing sex offenders from visiting virtual places no different from prohibiting them from visiting a playground?

"That's of importance to anyone who uses the internet and digital products and services," says Neil Richards, a Washington University law professor who specializes in privacy and First Amendment theory.

In arguments Monday, Packingham's lawyer, David Goldberg, argued the law "forbids speech on the very platforms on which Americans today are most likely to communicate, to organize for social change, and to petition their government"—that is, rights which clearly fall under the First Amendment.

But the government has demonstrated it has the right to restrict people's use of technology as punishment before. Courts regularly ban hackers from using the internet. That's why the real issue at hand is that the North Carolina law isn't "narrowly tailored," Goldberg argued. The

punishment doesn't fit the crime, because the law impacts broad swaths of people, some of whom have never contacted minors over the internet and others who committed their crimes long before Facebook even existed.

This law, Goldberg said, is "most likely to find the people who are doing nothing wrong." Like crowing about beating a parking ticket.

Political Communication

The state's case, meanwhile, hinges on the idea that preventing sex offenders from visiting virtual places is no different from prohibiting them from visiting a playground or a schoolyard. The state's attorney, Robert Montgomery, argued that banning this population from these sites is the only enforceable option, because monitoring each person's individual use of those sites would be impossible.

But social media sites are so many different things to so many different people. Platforms like Twitter, LinkedIn, and Facebook are news sites, messaging platforms, government outreach portals, and job sites all rolled into one. As Justice Sonia Sotomayor put it, "very few of them are purely anything anymore."

Justice Elena Kagan took particular issue with the idea that this law would prevent someone like Packingham from accessing President Trump's Twitter feed, a key communication channel between the president and the public. "This has become a crucial—crucially important channel of political communication," Kagan said.

Montgomery maintained that there are alternative channels on which sex offenders can get their information, like news websites and elected officials' own websites. But the only justice who seemed to agree was Samuel Alito. "I know there are people who think life is not possible without Twitter and Facebook and these things and that 2003 was the Dark Ages," he said, "but I don't know that there are any channels of communication that were available at that time that have been taken away."

Despite Alito's limited reservations, court watchers already predict Packingham will win in a landslide. "This court has been more protective of the First Amendment than probably any court in history," says Ilya Shapiro, a senior fellow with the Cato Institute, which co-authored a friend of the court brief with the American Civil Liberties Union opposing the law. Shapiro cites the 2011 Snyder v. Phelps case, which protected the Westboro Baptist Church's right to protest a veteran's funeral, as evidence of the court's commitment to free speech.

The question now is whether the court will issue a broad decision that effectively makes access to Facebook and other platforms a basic right or rule narrowly, striking down the North Carolina law but not making any grand statements about, for instance, a person's right to access information.

Richards, for one, anticipates the latter. "I don't think it'll do much more than correct an error," he says. "The court doesn't want to set precedent for other cases unexpectedly without having those facts in front of it."

And yet, Richards says, the fact that the Supreme Court took this case on at all—highly unlikely given the volume of applications it receives each year—is a positive sign that the court cares about ensuring the law evolves with the times.

Technologists have argued for years that access to the web is a fundamental right. By this summer, the country may know if the Constitution is on their side.