

THE AIR WE ALL BREATHE: INTERNET BANS IN PROBATION CONDITIONS— *DALTON V. STATE*

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ABSTRACT

In today's world, the Internet is synonymous with opportunity. Recently, the Supreme Court has even recognized a First Amendment right to access the Internet. However, it is still common practice to assign the special conditions of Internet bans or restrictions for individuals on parole or supervised release. Courts have split on how to strike a balance between the goal of deterrence and protection of an individual's rights. The Court of Appeals of Alaska weighed into this ongoing debate in Dalton v. State, by holding that a restriction requiring prior approval from a parole officer before any and all Internet use was unconstitutionally broad. This decision marked a departure from precedent, and a general recognition that the Internet has become an indispensable part of living in, and importantly, successfully reentering society today.

I. INTRODUCTION

Now more than ever, Internet access is a lifeline—not a luxury. In *Dalton v. State*, the Court of Appeals of Alaska held that a special condition of release requiring parole officer approval before the parolee may access the Internet was unconstitutional under the First Amendment.¹ In its holding, the court quoted the parolee's own plea against the condition, that the Internet "is 'the air that we all breathe now.'"² This Comment addresses a growing disagreement among jurisdictions, with some identifying total Internet bans as a justified condition for parole or probation. At the crux of this disagreement are tens of thousands of supervised individuals who seek reintegration into society. This Comment argues that, in this modern era, banning a parolee

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2. *Id.* at 656.

from the Internet suffocates their ability to integrate back into society, essentially taking away the air that we all breathe.

This Comment reviews the ways in which different jurisdictions have approached Internet restrictions within probation and parole conditions and the impact of access to the Internet for reintegration generally. Part II reviews the history of restricting Internet access as a parole or probation condition and the case law concerning this issue. Part III details the Court of Appeals of Alaska's recent decision in *Dalton v. State*. Next, Part IV provides an analysis of the court's decision while also comparing and contrasting the decision with other jurisdictions' approaches to the issue of total Internet bans in parole and probation conditions. Finally, Part V discusses how the Internet has become indispensable for meaningful social interaction and a crucial part of reintegrating into society after incarceration.

II. BACKGROUND

Today, roughly four million people in the United States live under some form of parole, supervised release,³ probation, or community supervision program, including one in sixty-six Alaskan citizens.⁴ For tens of thousands of these people, one of the special conditions of release from imprisonment is some kind of restriction of their use of the Internet or social media.⁵ The review of these conditions requires a balancing act by the courts. On the one hand, there is a desire to deter the kind of activity that led to the crime, and on the other, there is a need to protect the defendant's constitutional rights, particularly to free speech and due process. This balance is especially difficult in light of the goals of probation and supervised release programs: rehabilitation and reintegration. While the purpose of incarceration can include both rehabilitation and punishment, probation and parole are intended to focus primarily on rehabilitation and deterrence.⁶ These goals may conflict in the context of Internet restrictions as special conditions of

3. The term parole usually describes a conditioned release under state law instead of imprisonment, whereas supervised release describes the same situation under federal law. Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. REV. L. & SOC. CHANGE 663, 668 (2019). The terms should be read as synonymous for purposes of this comment, as the constitutionality of Internet restrictions implicates both state and federal criminal justice systems.

4. DANIELLE KAEBLE & MARIEL ALPER, U.S. DEP'T JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2017-2018 1 (2020); PEW CHARITABLE TRUSTS, PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 6 (2018).

5. Hutt, *supra* note 3, at 665.

6. *Id.* at 672-73.

release. As technology becomes increasingly necessary for political engagement, commerce, employment, and social connection, an Internet restriction designed to prevent recidivism may also prevent the alternative goal of societal reentry.⁷

Restrictions on the use of computers and access to the Internet as a condition of supervised release or parole began in the first half of the 1990s.⁸ While Internet restrictions are not tied exclusively to sexually-based offenses,⁹ Internet and social media restrictions have most commonly been applied to this category of offenses in recent years.¹⁰

As courts began using Internet restrictions as special conditions for parole and probation, they also began to develop jurisprudence to assess these conditions' constitutionality. Restrictions on Internet access have been reviewed in a manner similar to other special conditions for parole or supervised release. This review centers around: (1) the relatedness of the restriction to the offense and (2) whether the condition is more restrictive than necessary for the state's legitimate interest in ensuring deterrence and facilitating rehabilitation.¹¹

The balance of tailoring Internet restrictions has changed over the last twenty years, reflecting the Internet's ever-growing importance to everyday life. The United States Supreme Court formally recognized this shift in *Packingham v. North Carolina*.¹² The Court considered a North Carolina statute making it a felony for registered sex offenders to engage on social media platforms that allowed minors to make accounts on that website.¹³ The statute was held to be in violation of the First Amendment.¹⁴ While the Court recognized the valid government interest in protecting children and sexual assault victims from further abuse, it found the statute was still too broad to survive even intermediate scrutiny.¹⁵ It held that the statute placed a broader burden on speech than

7. *Id.* at 665–66.

8. *See generally* United States v. Riggs, 967 F.2d 561 (11th Cir. 1992); State v. Riley, 846 P.2d 1365 (Wash. 1993) (en banc).

9. *See generally* United States v. Keller, 366 F. App'x 362 (3d Cir. 2010) (banning a defendant's use of Internet to create business websites for three years after conviction of ten counts of mail fraud); United States v. Stanfield, 360 F.3d 1346 (D.C. Cir. 2004) (regarding Internet restrictions in relation to identity theft and drug trafficking).

10. *See* Hutt, *supra* note 3, at 665, 670 (noting that the majority of Internet and social media bans are tied to sex offenses, and that these types of restrictions "have proliferated over the last few years, often outpacing" legislative regulation).

11. United States v. Hamilton, 986 F.3d 413, 417 (4th Cir. 2021); United States v. Crandon, 173 F.3d 122, 127 (3d Cir. 1999).

12. 137 S. Ct. 1730 (2017).

13. *Id.* at 1733.

14. *Id.* at 1736.

15. *Id.* at 1736–37.

was necessary to meet its legitimate policy goals.¹⁶ The Court reasoned that the statute prohibiting all presence on any social media would forbid otherwise protected kinds of speech.¹⁷ Importantly, the Court's holding established a constitutional right to an online presence, noting that although "in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular."¹⁸ This part of the Court's holding reflects the reality that access to the Internet has become as indispensable to free speech as air is to breathing.

Courts have interpreted *Packingham's* impact differently in the few years since its publication, particularly as to whether it extends to special conditions for parole or supervised release.¹⁹ However, it is clear that there is an established constitutional protection over the ability to engage online. While it is uncontested that individuals on probation, supervised release, or parole may have their rights limited to a degree, the extent to which a restriction maintains constitutionality was the subject of *Dalton*.

III. DALTON V. STATE

In June 2017, Kevin Dalton sexually assaulted his twelve-year-old stepdaughter.²⁰ The assault was immediately reported and investigated.²¹ Pursuant to a search warrant, the police searched Dalton's iPad and discovered multiple visits to a pornography website in the seventy-two hours preceding the abuse, where Dalton viewed content that closely resembled the assault, such as sex acts between stepfathers and stepdaughters.²²

Dalton was charged with two counts of first-degree sexual abuse of a minor.²³ He later plead guilty, pursuant to a plea agreement, to a single reduced charge of second-degree sexual abuse of a minor.²⁴ The plea agreement left the length and terms of Dalton's sentence to the discretion of the trial court.²⁵ The trial court imposed a sentence of twenty years, ten

16. *Id.* at 1736.

17. *Id.* at 1738.

18. *Id.* at 1735.

19. See *infra* Part IV for discussion on the current circuit split and where the *Dalton* decision fits within that disagreement.

20. *Dalton v. State*, 477 P.3d 650 (Alaska Ct. App. 2020).

21. *Id.* at 651.

22. *Id.*

23. *Id.*

24. *Id.* (noting that the plea deal included a stipulation that Dalton's conduct was among the most serious included within the definition of the offense); see also ALASKA STAT. § 12.55.155(c)(10) (2020) (listing this factor as one that may be considered by the sentencing court).

25. *Dalton*, 477 P.3d at 651.

of which were suspended, as well as ten years of probation.²⁶ The trial court also imposed probation conditions that: (1) restricted Dalton's contact with the victim of his crimes and (2) prohibited Internet access without prior approval from his probation officer.²⁷

On appeal, Dalton challenged the constitutionality of the probation condition prohibiting him from accessing the Internet without his probation officer's approval.²⁸ He argued that the trial court had a duty to apply special scrutiny to a condition that implicated Dalton's First Amendment right.²⁹ The State countered this appeal by pointing to two prior decisions: *Dunder v. State*³⁰ and *Diorec v. State*.³¹ In *Dunder*, the court reviewed a probation condition that prohibited possession of any device that could access the Internet, store movies or photographs, or had a wireless capability.³² *Dunder's* offenses involved the use of the Internet to commit serious sexual offenses against minors and to distribute child pornography.³³ The court disapproved of the total ban on electronics in *Dunder*, and instead adopted a probation condition that limited his possession of Internet-capable electronics and electronic storage devices unless he obtained permission from his probation or parole officer.³⁴ In *Diorec*, the court reviewed a probation condition that prohibited "opening an Internet account or accessing the Internet from another person's account without the prior written permission of his probation officer."³⁵ *Diorec's* offenses involved impersonating a teenage boy to contact teenage girls, including his fourteen-year-old stepdaughter, and using the Internet to buy a spy camera, which he installed in his stepdaughter's room.³⁶ The court upheld the probation condition outlined in *Diorec*.³⁷

In *Dalton*, the court noted that the role of the Internet in society had grown significantly in the eleven years since its decision in *Dunder* and in the seven years since its decision in *Diorec*.³⁸ Further, the court surveyed several other jurisdictions and found that many are no longer receptive to total Internet and electronic bans as probation and parole conditions.³⁹

26. *Id.*

27. *Id.*

28. *Id.* at 651-52.

29. *Id.* at 652.

30. No. A-10205, 2009 WL 1607917 (Alaska Ct. App. June 10, 2009).

31. 295 P.3d 409 (Alaska Ct. App. 2013).

32. *Dunder*, 2009 WL 1607917, at *1.

33. *Id.*

34. *Id.*

35. *Diorec*, 295 P.3d at 418.

36. *Id.* at 412.

37. *Id.* at 418.

38. *Dalton v. State*, 477 P.3d 650, 655 (Alaska Ct. App. 2020).

39. *Id.* at 653-54.

The court pointed to the Third Circuit as an example.⁴⁰ In *United States v. Holena*,⁴¹ the Third Circuit recently vacated a probation condition that prohibited an individual from possessing or using computers, or otherwise accessing the Internet without his probation officer's approval.⁴² The Third Circuit acknowledged the role the Internet had played in the individual's underlying offenses, but nonetheless concluded that the Internet restriction was overbroad and unduly restrictive of liberty because it "gave the probation office no guidance on the sorts of [I]nternet use that it should approve."⁴³

Expanding on the First Amendment considerations, the *Dalton* court also discussed the burdens that Internet bans have on probationers seeking to reintegrate into society, especially given the increasing dependence on the Internet in the conduct of one's daily life.⁴⁴ What was a substantial hindrance on reintegration a decade ago is now an almost total hindrance on reintegration into modern society and would deprive a probationer from meaningful participation in public discourse.⁴⁵

However, the court decided not to overrule its two prior decisions.⁴⁶ Rather, the court factually distinguished Dalton's appeal from *Dunder* and *Diorec*.⁴⁷ Here, the court held that the Internet played a greater role in Dunder's distribution of child pornography and Diorec's campaign to exploit his stepdaughter than it did in Dalton's viewing files on a pornography website before the sexual assault of his stepdaughter.⁴⁸

Ultimately, the court agreed with the trial court that there was a factual nexus justifying a restriction on Dalton's Internet access.⁴⁹ However, the court held that a total Internet ban, subject to the unconstrained discretion of a probation officer, would unduly restrict Dalton's liberty under the First Amendment.⁵⁰ The case was remanded to the trial court with the direction that it must narrowly tailor any restrictions it should impose on Dalton's Internet access.⁵¹

40. *Id.* at 653.

41. 906 F.3d 288 (3d Cir. 2018).

42. *Id.* at 295.

43. *Id.* at 293.

44. *Dalton*, 477 P.3d at 655.

45. *Id.* (citing *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017)).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 656.

51. *Id.*

IV. ANALYSIS

a. The Role of the Internet

While the Internet played a disturbing role in Dalton, Dunder, and Diorec's crimes, the Internet can also have a crucial role in their rehabilitation.⁵² Moreover, in *Dalton*, the court factually distinguished the case before it from its prior decisions in *Dunder* and *Diorec*, arguing that the Internet played a greater role in the previous cases.⁵³ This is not supported by the facts of the cases described above. Moreover, it is questionable for the court to compare the "role" of the Internet in crimes that were committed in 2009 and 2013 with a crime committed in 2017, as the court itself notes the exponential growth and increased role of the Internet in society during this time period.⁵⁴ Instead, the court should have looked to the Internet's role in the crime in light of its prevalence at the time of the crime—along with other known parole and probation conditions that promote deterrence and rehabilitation.

b. Circuit Split on First Amendment Issue

Although *Dalton* is a state court decision, it brings Alaska into the federal debate over the preservation of First Amendment rights for parolees. *Packingham* did provide some guidance for Internet restrictions, but the holding there was limited in scope. The statute invalidated by *Packingham* made it a felony for registered sex offenders to access certain websites.⁵⁵ Neither the statute nor the holding reached the issue of special conditions of parole or supervised release. Individuals on parole or probation have limited rights compared to citizens who are not living

52. See generally Tamara S. N. Wild et al., *Web-Based Health Services in Forensic Psychiatry: A Review of the Use of the Internet in the Treatment of Child Sexual Abusers and Child Sexual Exploitation Material Offenders*, 9 FRONT PSYCHIATRY 1, 1-2 (2018) (noting the recent proliferation in web-based health services and providing a meta-analysis of online treatment for child sexual abusers); Madhumita Pandey, *Rehabilitating Sex Offenders Maybe Controversial - But It Is the Need of the Hour*, SHEFFIELD INST. FOR POL'Y STUD. (Nov. 13, 2020) <https://sheffieldinstituteforpolicystudies.com/2020/11/13/rehabilitating-sex-offenders-maybe-controversial-but-it-is-the-need-of-the-hour/>. Even though there is no general consensus on whether offenders who commit sex crimes against children can be rehabilitated, many psychologists point to low rates of re-offending for those who complete treatment programs and high rates of re-victimization for those who do not. Further, the COVID-19 pandemic has pushed many treatment programs and resources online.

53. *Dalton*, 477 P.3d at 655-56.

54. *Id.* at 655.

55. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733 (2017) (citing N.C. GEN. STAT. § 14-202.5(a) (2015) (amended 2019)).

under these circumstances.⁵⁶ Over time, there have been inconsistent interpretations of *Packingham* and different articulations of rights for individuals on probation or parole among the circuits.

The Third and Tenth Circuits have held that allowing a probation officer total discretion over an individual's Internet access is unconstitutionally broad.⁵⁷ These cases were relied upon by the state court in *Dalton*.⁵⁸ These circuits explicitly recognize the importance of the Internet to participate in everyday life in America, and that restrictions on Internet use therefore pose questions of constitutionality even when they are ultimately found to be valid.⁵⁹ Each circuit also suggests alternatives to bans, such as monitoring programs, as potentially less restrictive conditions.⁶⁰

A majority of the circuits do not hold this view. The Eleventh Circuit, for example, has expressly criticized the Third Circuit's interpretation of *Packingham* as too broad.⁶¹ Specifically, the Eleventh Circuit distinguished *Packingham* from cases involving Internet bans as conditions to parole where the original crime was connected to the use of the Internet.⁶² Other circuits are less clear on the constitutionality of Internet bans lifted only at the discretion of a parole or probation officer. Several of the other circuits, including the Second, Fourth, Eighth, and Ninth, uphold the general rule that when the Internet is connected to the original crime committed, Internet bans and restrictions are constitutionally acceptable, although the specific conditions vary from case to case.⁶³ There is thus general disagreement over whether *Packingham* applies to special conditions for parole or supervised release, making the constitutional question on this point blurry. The court in *Dalton* seems to side with the courts that have taken a more cautious approach to First Amendment restrictions in this context.

56. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

57. *See* *United States v. Blair*, 933 F.3d 1271, 1278 (10th Cir. 2019) (holding that banning Internet access entirely except for the discretionary allowance of the probation office was an overbroad special condition); *see also supra* Part III for a discussion of *United States v. Holena*, 906 F.3d 288, 290–95 (3d Cir. 2018).

58. *Dalton*, 477 P.3d at 653.

59. *See Blair*, 933 F.3d at 1277; *Holena*, 906 F.3d at 292 (“Still, internet bans are ‘draconian,’ and we have said as much ‘even in cases where we have upheld them.’”).

60. *Blair*, 933 F.3d at 1278; *Holena*, 906 F.3d at 294.

61. *United States v. Bobal*, 981 F.3d 971, 978 (11th Cir. 2020).

62. *Id.*

63. *See, e.g., United States v. Bolin*, 976 F.3d 202, 216 (2d Cir. 2020); *United States v. Mixell*, 806 F. App'x 180, 187 (4th Cir. 2020); *United States v. Perrin*, 926 F.3d 1044, 1050 (8th Cir. 2019); *United States v. Peterson*, 776 F. App'x 533, 534 (9th Cir. 2019); *United States v. Halverson*, 897 F.3d 645, 657–58 (5th Cir. 2018).

c. Collateral Consequences of Internet Limitations and Reintegration

Restrictions on the use of the Internet and social media are, at their core, a balance of policy interests for the courts that review them. On the one hand, parole and probation are distinct from incarceration in that only the former center around the rehabilitation of the individuals and their reentry into society.⁶⁴ At the same time, it is clear that the Internet provides plenty of opportunities for causing harm, particularly to vulnerable populations like minors. Thus, there is a tension present between the goal of societal reentry and “the need to protect both the public and sex offenders themselves from [the Internet’s] potential abuses” when determining special conditions for probation and parole.⁶⁵

However, the importance of the Internet, and the barriers to reentry posed by the denial of access, cannot be ignored by courts. In 2019, ninety percent of American adults had Internet service.⁶⁶ In that same year, almost three-quarters of adults used some kind of social media, making these websites important places of personal connection.⁶⁷ Social media can also serve as a source of news and political activism, particularly for marginalized communities.⁶⁸ The Internet is even increasingly central to one’s physical health. Internet access enables people, wherever they live, “to communicate freely with their physicians, to access electronic medical records, to research health conditions and treatment, or find resources for healthy behaviors and lifestyle changes.”⁶⁹ The realities of the COVID-19 pandemic have only reinforced the necessity to be able to connect remotely. The Internet is thus a necessary tool for accessing the information one needs to maintain relationships, be an informed citizen, and even stay healthy.

64. Hutt, *supra* note 3, at 671–73.

65. *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003).

66. *Internet/Broadband Fact Sheet*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#internet-use-over-time>.

67. *Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

68. See Brooke Auxier, *Social Media Continue to be Important Political Outlets for Black Americans*, PEW RES. CTR. (Dec. 11, 2020), <https://www.pewresearch.org/fact-tank/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/> (citing data that Black Americans use social media to engage with political issues and find like-minded individuals at higher rates than White Americans).

69. Carmen Guerra et al., *Why Internet Access is a ‘Super’ Determinant of Health*, PHILA. INQUIRER (July 7, 2020), <https://www.inquirer.com/health/expert-opinions/internet-access-telemedicine-determinants-of-health-low-income-20200707.html>.

The Internet is also central for one of the most important aspects of reentry: seeking employment. In 2015, ninety percent of recent job seekers looked for employment online, and eighty-four percent applied to jobs through online applications.⁷⁰ Many people also use social media to gain informal employment tips and information about employers.⁷¹ For people operating their own businesses, online advertising and networking are important tools and may be attractive to people whose access to certain job markets are restricted due to their criminal history.⁷² Computer access, and access to social media, are thus undeniably critical for meaningful participation in the present-day world. While there are fair concerns of deterring future crimes committed on computers, the idea that people can effectively reenter society after incarceration without access to the Internet is an increasingly untenable position.

d. Digital Inequality in America's "Last Frontier"

Alaska has the worst Internet speeds and coverage in the United States.⁷³ For people living in one of the most remote areas in the country, having access to fast, strong, and reliable connectivity is critical for economic opportunity, education, and access to quality health care. Particularly in light of the pandemic, access to a reliable and fast Internet connection directly impacts community growth and the future success of youth.⁷⁴ Moreover, access to reliable Internet is crucial for the many employees who now find themselves part of a virtual workforce.

Alaska faces a particularly steep challenge to widespread, equitable Internet access. The Federal Communications Commission (FCC) estimates that "less than 60% of people living on tribal lands have access to broadband compared to 97% of Americans living in urban areas."⁷⁵ In February 2020, the FCC created a priority window for federally recognized Native American tribes and Alaska Native villages to claim

70. AARON SMITH, *SEARCHING FOR WORK IN THE DIGITAL ERA* 9 (2015).

71. *Id.* at 7.

72. Hutt, *supra* note 3, at 684–85.

73. See Tyler Cooper & Julia Tanberk, *Best and Worst States for Internet Coverage, Prices and Speeds, 2020*, BROADBANDNOW RES. (Mar. 3, 2020), <https://broadbandnow.com/research/best-states-with-internet-coverage-and-speed> (noting that Alaska ranks lowest in terms of Internet coverage, prices, and speeds, "with 61% wired and fixed wireless broadband coverage and no low-priced (wired) plan availability").

74. Ben Fate Velaise, *Alaska Native Tribes Must Act Fast to Close Digital Divide*, ANCHORAGE DAILY NEWS (July 8, 2020), <https://www.adn.com/opinions/2020/07/08/alaska-native-tribes-must-act-fast-to-close-digital-divide/>.

75. *Id.*

unlicensed Educational Broadband Service spectrum.⁷⁶ These licenses promised to aid villages in establishing and expanding high-speed Internet access at no cost to them.⁷⁷

The COVID-19 pandemic has demonstrated the essential nature of access to reliable, fast-speed Internet.⁷⁸ From the ability to look up pertinent information about the virus and preventative measures to providing a means to connect with loved ones, access to the Internet has become even more crucial for our society than ever. And in America's "Last Frontier," Internet connectivity is now an integral part of a customary self-reliance lifestyle. The clear need to improve connectivity only further supports Dalton's argument that the Internet is "the air we all breathe."

V. Conclusion

Access to the Internet is a right, not a privilege. As trial courts continue to allow Internet restrictions as conditions of parole or probation, many jurisdictions across the United States are left grappling with how to strike a balance between the goal of deterrence and the protection of individual rights. The Court of Appeals of Alaska weighed into this ongoing debate in *Dalton v. State*, holding that a total Internet ban that requires prior approval from a parole officer before any and all Internet use is unconstitutionally broad. This decision broke from established precedent, and acknowledged that the Internet has become indispensable to living in and successfully reentering society today. It will be interesting to see if other courts follow this lead regarding special conditions.

76. 2.5 GHz Rural Tribal Window, FED. COMM. COMMISSION, <https://www.fcc.gov/25-ghz-rural-tribal-window> (last visited Feb. 18, 2021).

77. *Id.*

78. Emily A. Vogels et al., *53% of Americans Say the Internet Has been Essential During the COVID-19 Outbreak*, PEW RES. CTR. (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.