PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6926

UNITED STATES OF AMERICA,

Plaintiff − Appellee,

v.

SEBASTIAN ALEXANDER MORRIS,

Defendant – Appellant.

MELISSA O. MARTINEZ, Esq.,

Court-Assigned Amicus Counsel.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Robert J. Conrad, Jr., District Judge. (5:13−cr−00063−RJC−DCK−1)

Argued: March 8, 2022 Decided: June 24, 2022

Before MOTZ and DIAZ, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Diaz wrote the opinion, in which Judge Motz and Senior Judge Keenan joined.

ARGUED: Melissa O. Martinez, MCGUIREWOODS LLP, Baltimore, Maryland, for Court-Assigned Amicus Counsel. Anthony Joseph Enright, OFFICE OF THE UNITED

STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Dena J. King, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

DIAZ, Circuit Judge:

Sebastian Morris pleaded guilty to two child-pornography offenses. The district court sentenced him to sixty months' imprisonment and ten years' supervised release—subject to certain conditions. Four years later, Morris moved to modify eight of his supervised-release conditions under 18 U.S.C. § 3583(e)(2).

Morris appeals the district court's order dismissing that motion for lack of jurisdiction. He argues that the court had jurisdiction because (1) six of his conditions restrict his liberty more than necessary and (2) intervening Supreme Court precedent rendered two other conditions limiting his internet use unconstitutional. We reject Morris's first argument but agree that changed legal circumstances vested the district court with jurisdiction to modify Morris's internet-use conditions. We therefore affirm in part, vacate in part, and remand.

I.

An undercover FBI agent downloaded files containing child pornography from an IP address assigned to one of Morris's computers. The FBI then acquired and executed a search warrant for Morris's home. It found child pornography on three of his devices. Morris admitted to viewing and downloading child pornography.

Morris was indicted for transporting—and aiding and abetting the transportation of—child pornography in violation of 18 U.S.C. § 2252A(a)(1) and possessing or accessing with intent to view child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). He pleaded guilty, and the district court sentenced him to two

concurrent sixty-month prison sentences. The court also imposed two concurrent ten-year terms of supervised release with conditions. Morris didn't appeal.

Four years later, Morris moved to modify his supervised-release conditions under 18 U.S.C. § 3583(e)(2). He challenged eight conditions:

> [1] The defendant shall provide access to any personal or business financial information as requested by the probation officer. . . .
>
> [2] The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer. . . .
>
> [3] As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics[] and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement. . . .
>
> [4] The defendant shall submit to a mental health evaluation/treatment program under the guidance and supervision of the U.S. Probation Office. The defendant shall remain in treatment and maintain any prescribed medications until satisfactorily discharged by the program and/or with the approval of the U.S. Probation Office. . . .
>
> [5] The defendant shall submit to a psycho-sexual evaluation by a qualified mental health professional experienced in evaluating and managing sexual offenders as approved by the U.S. Probation Officer. The defendant shall complete the treatment recommendations and abide by all of the rules, requirements, and conditions of the program until discharged. The defendant shall take all medications as prescribed. . . .
>
> [6] The defendant shall submit to risk assessments[] [and] psychological and physiological testing, which may include, but is not limited to a polygraph examination and/or Computer Voice Stress Analyzer (CVSA), or other specific tests to monitor the defendant's compliance with supervised release and treatment conditions, at the direction of the U.S. Probation Officer. . . .
>
> [7] The defendant shall not use, purchase, possess, procure, or otherwise obtain any computer or electronic device that can be linked to any computer networks, bulletin boards, internet, internet service providers, or exchange formats involving computers unless approved by the U.S. Probation Officer.

> Such computers, computer hardware[,] or software is subject to warrantless searches and/or seizures by the U.S. Probation Office. . . .
>
> [8] The defendant shall not have any social networking accounts without the approval of the U.S. Probation Officer.

J.A. 237–38.

Morris argued that the first six conditions didn't relate to his crimes, deprived him of his liberty more than necessary, and improperly delegated judicial authority to the probation office. He also claimed that *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), which invalidated a North Carolina law prohibiting sex offenders from using social media, made the internet-use conditions unconstitutional.

The government missed the deadline to respond to Morris's motion, so he moved for summary judgment. The government then responded to both motions, arguing the court lacked jurisdiction to modify the conditions under § 3583.

The district court granted the government leave to file a late response and denied Morris's motions. The court explained:

> Section 3583(e)(2) allows a court to modify conditions of supervised release upon consideration of certain sentencing factors in 18 U.S.C. § 3553(a). The United States Court of Appeals for the Fourth Circuit has recognized that a request that effectively attacks the district court's original sentencing decision provides no basis for modification. Here, the defendant contends that conditions originally imposed by the sentencing judge are unconstitutional, not warranted by the facts of his case, and an impermissible handing over power to the probation officer. Accordingly, the defendant is not entitled to relief under § 3583(e)(2).

United States v. Morris, No. 13-cr-00063, 2018 WL 3381423, at *1 (W.D.N.C. July 11, 2018) (internal citations omitted).

Morris timely appealed.[1] We calendared the case and appointed amicus counsel to argue against the district court's order.

II.

We begin with a procedural question. Morris says the district court should have disregarded as untimely the government's response to his motion to modify his supervised-release conditions. Though the court *could* have done so, it didn't err by considering the response.

"When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(1)(B). We review a district court's decision to extend time for an abuse of discretion. *See United States v. Farris*, 834 F. App'x 811, 812 (4th Cir. 2021) (per curiam) (citing *United States v. Breit*, 754 F.2d 526, 528–29 (4th Cir. 1985)).

The district court gave the government thirty days to respond to Morris's modification motion. The deadline passed, and Morris moved for summary judgment. Then, in a single filing, the government responded to both motions. As for its neglect to timely respond to the modification motion, the government said only that it had "inadvertently missed the deadline." J.A. 372.

[1] We held this case in abeyance for *United States v. McLeod*, 972 F.3d 637 (4th Cir. 2020).

That neglect weighs against the district court's decision to consider the late response. But two factors support the court's decision. First, the government's response argued only that § 3583 didn't grant jurisdiction to the district court—an issue the court had to resolve. *See Di Biase v. SPX Corp.*, 872 F.3d 224, 232 (4th Cir. 2017) (explaining that Article III courts have a duty to resolve their subject-matter jurisdiction); *United States v. Faber*, 950 F.3d 356, 357 (6th Cir. 2020) (stating that § 3583 vests district courts with jurisdiction to modify supervised-release conditions); *United States v. Ramer*, 787 F.3d 837, 838–39 (7th Cir. 2015) (per curiam) (specifying that § 3583's jurisdictional grant is one of subject-matter jurisdiction). It makes little sense to deprive the court of briefing on an issue it was bound to consider.

Second, Morris has never argued that the government failed to timely respond to his separate motion for summary judgment. As part of that response, the government had the right to challenge the district court's jurisdiction. So Morris suffered no prejudice.

Thus, the district court didn't abuse its discretion by granting the government leave to file a tardy response.

III.

Section 3583 provides that a court "may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release." 18 U.S.C. § 3583(e)(2). But challenges that "rest[] on the factual and legal premises that existed at the time of [the defendant's] sentencing" are "impermissible." *United States v. McLeod*, 972 F.3d 637, 644 (4th Cir. 2020). Defendants can only maintain

challenges based on "new, unforeseen, or changed legal or factual circumstances, including those that go to the legality of a sentence." *Id.*

A.

Morris argues that the first six supervised-release conditions deprive him of his liberty more than necessary. But that argument was available to him at sentencing. Because he doesn't allege any change in circumstances relevant to those conditions, the district court lacked jurisdiction to modify them.

B.

Morris's challenges to his internet-use conditions are different. He argues that *Packingham v. North Carolina* changed the legal landscape for supervised-release conditions related to sex offenders' internet use. Amicus relies on two other cases, *United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021), and *United States v. Hamilton*, 986 F.3d 413 (4th Cir. 2021), in which we discussed supervised-release conditions restricting internet access for sex offenders.[2]

In *Packingham*, the Supreme Court considered a First Amendment challenge to a North Carolina statute prohibiting sex offenders from accessing certain social media. 137 S. Ct. at 1733. Assuming the statute was content-neutral, the Court found that it didn't withstand intermediate scrutiny. *Id.* at 1736. Calling the statute "unprecedented," the

[2] The government asks us to ignore amicus's argument because (1) Morris didn't preserve it in the district court, and (2) he didn't raise it in his informal opening brief. We find this argument ironic given the government's own procedural gaffe. In any event, because *Hamilton* and *Ellis* issued after Morris filed his informal opening brief, we won't penalize him for failing to predict their holdings.

Court said that it restricted access to "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* at 1737. It found no state interest significant enough to justify the "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture." *Id.* at 1737–38.

We relied on *Packingham* in *Ellis*. In *Ellis*, the defendant was convicted of child pornography offenses in state court and failure to register as a sex offender in federal court. 984 F.3d at 1095–97. As part of the defendant's supervised release for the federal conviction, the district court barred him from accessing the internet. *Id.* at 1097.

We concluded that the internet ban wasn't "reasonably related" to the defendant's offenses because "there [wa]s no evidence connecting the internet to any criminal conduct." *Id.* at 1102-03. And because it deprived the defendant of more liberty than necessary, we held that the internet restriction was overbroad. *Id.* at 1104. We looked to other circuits, most of which have "held that a complete ban on internet access is overbroad even where the record contains evidence of non-contact child pornography activity . . . on the internet." *Id.* at 1104–05 (citing *United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003) (collecting cases)).

We expanded on the propriety of internet bans in *Hamilton*. There, the defendant pleaded guilty to a non-contact offense—possession of child pornography. 986 F.3d at 416. But the district court also had evidence before it that the defendant found his minor victim online and sexually exploited her. *Id.* So we affirmed the restriction.

"[T]wo key threads" justified conditioning the defendant's supervised release on restricted internet access. *Id.* at 421. First, the defendant used the internet to find his minor victim. *Id.* at 422. Second, the defendant repeatedly raped her. *Id.* Generally, "a total [internet] ban sweeps too broadly" in non-contact child pornography cases. *Id.* But when the defendant has sexual contact with a minor, a ban may be appropriate. *Id.*

We're satisfied that *Packingham*, *Ellis*, and *Hamilton* created "new, unforeseen, or changed legal . . . circumstances" relevant to Morris's internet-use conditions. *McLeod*, 972 F.3d at 644. *Packingham* balanced an offender's First Amendment right to access certain websites with the state's interest in preventing sex offenses. *Ellis* established that non-contact sex offenses can't justify an internet ban absent a connection between the ban and the offender's conduct. And *Hamilton* clarified that using the internet to locate victims, coupled with evidence of a contact offense (even without a conviction) may support an internet ban.

Because *Packingham*, *Ellis*, and *Hamilton* altered the law surrounding internet-use conditions, the district court had jurisdiction to consider Morris's challenge to them. We therefore vacate that portion of the district court's judgment and remand for the court to decide whether to modify those conditions. By our opinion, we express no view on that question.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.