To be Argued by:
CHRISTINA N. NEITZEY
(Time Requested: 15 Minutes)

APL-2022-00182

Court of Appeals
of the
State of New York

In the Matter of
DANIEL KARLIN,

Appellant,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

– against –

TINA M. STANFORD, as Chair of the Board of Parole,

Respondent.

BRIEF FOR APPELLANT

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Dated: June 23, 2023

Appellate Division, Third Department, Docket No.: 533214
Albany County Clerk's Index No.: 3928/2020

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QUESTIONS PRESENTED

1. Do parolees retain First Amendment rights such that a special parole condition is reviewable on constitutional grounds, or does the circumscribed nature of parolees' First Amendment rights render those rights a legal nullity?
2. Does a special parole condition prohibiting a parolee from viewing, accessing, possessing, or downloading any materials depicting sexual activity, nudity, or erotic images pass constitutional muster where the condition is not reasonably related to legitimate penological interests and burdens substantially more speech than necessary to further any important government interest?
3. Is a special parole condition prohibiting a parolee from viewing, accessing, possessing, or downloading any materials depicting sexual activity, nudity, or erotic images unconstitutionally overbroad when the condition prevents parolees from viewing substantial amounts of artistic, entertainment, and educational material, including mainstream and award-winning films, books, paintings, and magazines?

PRELIMINARY STATEMENT

Depictions of nudity and sexual activity are ubiquitous in mainstream society and culture: *The Terminator's* iconic opening scene featuring a nude Arnold Schwarzenegger in search of clothing; Michelangelo's *David* sculpture; Gustav Klimt's *Mother and Child* painting; countless romance novels; most late-night television. But for Appellant Daniel Karlin, viewing any of this content – or even possessing copies of it – could result in arrest and imprisonment for violating his parole.

This scenario is not hypothetical: in 2019, Mr. Karlin pleaded guilty to violating parole for accessing a magazine through his public library which, accompanying an article about kayaking, included a cover photograph of several nude men from behind. Today, out of fear that he may inadvertently violate this parole condition again, Mr. Karlin refrains from watching most popular shows and award-winning films. He has decided against visiting the Metropolitan Museum of Art with his mother on an upcoming trip to New York City, knowing the museum almost certainly displays nude paintings. He no longer freely browses the magazines available online through his public library.

Although Mr. Karlin, as a parolee and a registered sex offender, is subject to myriad constraints on his liberty, these restrictions have a limit. The special

condition Mr. Karlin challenges here far surpasses any permissible limitations on his First Amendment rights.

In rejecting Mr. Karlin's First Amendment challenge to this parole condition, the Appellate Division, Third Department functionally treated Mr. Karlin's parole status as erasing any First Amendment rights he would otherwise possess. However, even as a parolee, Mr. Karlin retains certain First Amendment rights. By prohibiting Mr. Karlin from accessing a wide range of material protected by the First Amendment – the prohibition of which burdens substantially more speech than necessary to further any identifiable important government interest and which bears no reasonable relationship to legitimate penological interests such as Mr. Karlin's rehabilitation or public safety – the State violates the First Amendment.

Mr. Karlin respectfully requests this Court reverse the Appellate Division, Third Department, vacating the Board of Parole's determination that Mr. Karlin violated the special condition he challenges, striking the condition, and declaring the condition unconstitutional. This outcome would help restore Mr. Karlin's otherwise unblemished parole record as he builds a new life outside of prison. Striking down the condition would also allow Mr. Karlin to participate more fully in society and exercise his constitutional rights without fear of imprisonment.

STATEMENT OF FACTS

Petitioner Daniel Karlin was incarcerated at the age of twenty-one for sex offenses he committed as a teenager in the early 1990s. (*See* A45:20–A46:6; A50:10-13.) After serving twenty-five years in prison, on September 27, 2018, Mr. Karlin was released on parole. (*See* A40, A60.) Following his release from prison, Mr. Karlin moved into an apartment and enrolled in college courses as a full-time student on a scholarship. (*See* A55:21–22.) Because he was in college, Mr. Karlin was granted permission to possess a computer. (*See* A46:21–22.) He also attended group and individual therapy as part of a sex offender treatment program. (*See* A55:19–22.)

As a condition of Mr. Karlin's computer and Internet access, the New York State Board of Parole (the "Board") mandated that Mr. Karlin comply with several special conditions of release. (*See* A38.) On December 6, 2018, Mr. Karlin signed a form acknowledging these conditions. (*See id.*) One of the conditions (the "Condition") stated that "[Mr. Karlin] will shall [sic] not view, access, possess, and/or download any materials depicting sexual activity, nudity, or erotic images." (*Id.*) Mr. Karlin was also subject to unannounced examinations of any of his computers or storage devices, and he agreed to provide his parole officer with login information for these devices and programs upon request. (*Id.*)

On February 19, 2019, Mr. Karlin's parole officer examined his computer and requested the passwords to Mr. Karlin's Libby account (which Karlin used to access online materials from the Monroe County Public Library), as well as to his Netflix account. (*See* A41, A47:11–21.) Mr. Karlin acquiesced without objection. (*See* A47:15–17.) In this examination, Mr. Karlin's parole officer found information indicating that Mr. Karlin had accessed, through his Libby account, a magazine that depicted nude men from behind and contained an article about sex. (*See* A47:22–A48:4.) Additionally, the Parole Officer alleged that Mr. Karlin's Internet history indicated that Mr. Karlin had viewed twenty-two minutes of a Netflix movie that depicted sexual nudity. (A48:5–11.)

The New York State Department of Corrections & Community Supervision charged Mr. Karlin with violating the Condition by "access[ing] materials depicting sexual activity" and "sexual nudity" and "us[ing] the internet to access pornographic materials" on or before his Parole Officer's search on February 19, 2019. (*See* A41.) As a result of this alleged conduct, Mr. Karlin was also dismissed from his sex offender treatment program, which led to him being charged with failure to complete the program, as well. (*See* A41, A49:5–10.) On March 5, 2019, the Board found probable cause that Mr. Karlin violated the Condition. (*See* A39.) Mr. Karlin had no prior parole violations at the time. (*See* A50:2–4). The Board held a Final Revocation hearing on Mr. Karlin's case on August 14, 2019. (*See*

A43.) Mr. Karlin pled guilty to charges of "access[ing] materials depicting sexual activity" and "sexual nudity," but pled not guilty to other charges of "access[ing] pornographic materials," "access[ing] materials depicting sexual activity," and failing to complete sex offender treatment. (*See* A57; A60.)

The charges that Mr. Karlin pled guilty to related to his access of an online publication, *Q Magazine*. (*See* A42.) Mr. Karlin testified at his Final Revocation hearing that he found the magazine giving rise to the violation through a search on the Monroe County Public Library's website. (*See* A56:1–5.) He searched the website for gay-lifestyle magazines, expecting to find results like *Out* or *The Advocate*, and found the offending magazine in his search. (*See id.*) The magazine's cover depicted four nude men standing on a boat, facing away from the camera; the magazine also contained an article about sex. (*See* A11; A6.) According to Mr. Karlin, "I certainly didn't go looking for anything with nudity, or explicit sexual content. I never realized that the prohibition was so all-encompassing." (A56:6–8.)

The Hearing Officer revoked Mr. Karlin's release and sentenced him to a twenty-two month hold, during which Mr. Karlin returned to prison. (*See* A57:8–9.) Mr. Karlin submitted an administrative appeal *pro se* to the Board of Parole Appeals Unit, which affirmed his sentence. (*See* A61.)

Mr. Karlin, still *pro se*, subsequently commenced an Article 78 proceeding challenging the Board's decision in the Supreme Court, Albany County. (*See* A20–A37.) Mr. Karlin argued that the Condition was unconstitutionally overbroad and infringed on his First Amendment rights. (*See* A23–A33.) The Supreme Court rejected Mr. Karlin's constitutional claims and ruled that he was not entitled to relief, finding that the Condition was "reasonably and necessarily related to the legitimate interests of the parole regime," and that it was not overbroad. (*See* A17–A19.)

Again *pro se*, Mr. Karlin appealed to the Appellate Division, Third Department. (*See* A5.) The Appellate Division issued a decision on October 27, 2022. (*Id.*) Affirming the Supreme Court's decision, the Appellate Division asserted that parolees' First Amendment rights are circumscribed by virtue of their status as parolees. (*See* A7.) The court held that the Condition did not violate Mr. Karlin's First Amendment rights because it was "reasonably related to [Mr. Karlin's] past crimes and the mitigation of his future risk of recidivism." (A7.) Further, the Appellate Division held that the Condition was not unconstitutionally overbroad. (A7–A8.) The court reasoned that the Condition "was a plainly legitimate sweep" under the First Amendment and stressed that the Condition applied to Mr. Karlin alone, rather than the public at large. (A8.)

JURISDICTIONAL STATEMENT

Mr. Karlin filed a motion for leave to appeal and a notice of appeal with this Court on November 28, 2022. (*See* A2.) On January 10, 2023, at the Court's request, both parties served and filed jurisdictional response letters regarding this Court's subject matter jurisdiction over this appeal under CPLR 5601(b)(1). In a letter dated April 25, 2023, the Court terminated its jurisdictional inquiry and set a briefing schedule for Mr. Karlin's appeal. The same day, the Court denied Mr. Karlin's motion for leave to appeal as unnecessary given the appeal as of right.

As discussed further in Appellant's January 10, 2023, jurisdictional response letter, this Court has jurisdiction under CPLR 5601(b)(1) to entertain this appeal and review the questions raised. The appeal turns directly on the Condition's constitutionality. (A6–A8.) Mr. Karlin maintains that the Condition – which he pleaded guilty to violating in 2019, resulting in a 22-month revocation of his parole release, (*see* A54–57), and to which he is once again subject today – violates the First Amendment to the United States Constitution. This constitutional question is central to both the Supreme Court's and Third Department's decisions below. (*See* A6–A8; A16–17.) Therefore, this appeal directly involves a substantial constitutional question, and this Court has subject matter jurisdiction over this appeal, taken as of right under CPLR 5601(b)(1).

ARGUMENT

The Condition unconstitutionally restricts Mr. Karlin's First Amendment rights. This Court must reverse the Appellate Division's decision and strike the Condition for three main reasons. First, the Appellate Division erroneously dismissed Mr. Karlin's First Amendment challenge when it failed to acknowledge the extent to which parolees retain constitutional rights when on supervised release. Second, the Condition violates the First Amendment because it is not narrowly tailored to important governmental interests, nor is it reasonably related to legitimate penological objectives. Finally, the Condition violates the First Amendment because it is unconstitutionally overbroad. The Condition is overbroad in relation to its plainly legitimate sweep and has unlawfully restricted Mr. Karlin's access to a wide range of constitutionally protected materials.

For these reasons, and as elaborated further below, the Condition is unconstitutional and must be stricken.

I. THE FIRST AMENDMENT PROTECTS AGAINST UNCONSTITUTIONAL PAROLE CONDITIONS

Parolees retain certain First Amendment rights—rights expanded from what they possessed as inmates, though more limited than the rights the general public enjoys. Although parole boards have broad discretion to impose special conditions of release on parolees, these conditions must be lawful. Unlawful conditions – including conditions which impermissibly infringe on a parolee's First

Amendment rights – are invalid and must be stricken. Here, because the Condition burdens a fundamental liberty and chills protected First Amendment activity, the Condition must satisfy intermediate scrutiny to survive constitutional muster. Given the Condition's breadth – a blanket ban on any depiction of nudity or sexual activity – and the dearth of evidence in the record that the Condition is tailored whatsoever to any government interest, the Condition does not satisfy this test. And even under the less stringent "reasonable relationship" test the Appellate Division applied, the Condition is still invalid.

A. Parolees Subject to Special Conditions of Release Retain Certain First Amendment Rights

Though parolees remain within the State's legal custody and control, they enjoy significantly greater freedoms as parolees than they did as inmates. *See Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972) ("[A] parolee should enjoy greater freedom in many respects than a prisoner."); *Sobell v. Reed*, 327 F. Supp. 1294, 1304 n.8 (S.D.N.Y. 1971) ("In general, it would seem that one on parole should enjoy greater freedom in all respects than one still confined."). Parolees' First Amendment rights may be "circumscribed" compared to the general public, *Farrell v. Burke*, 449 F.3d 470, 497 (2d Cir. 2006), but the extent to which the government can limit these rights is *itself* limited. *See United States v. Eaglin*, 913 F.3d 88, 95–96 (2d Cir. 2019) (striking down federal supervised release conditions banning access to the Internet and otherwise legal adult pornography); *United*

States ex rel Sperling v. Fitzpatrick, 426 F.2d 1161, 1164, 1164n.8 (2d Cir. 1970) ("Parolees are, of course, not without constitutional rights.") (collecting cases); *Jones v. Stanford*, 489 F. Supp. 3d 140, 148 (E.D.N.Y. 2020) ("While 'the First Amendment rights of parolees [may be] circumscribed,' . . . they may not be disregarded.") (citations omitted). In other words, "the First Amendment cannot be reduced to a legal nullity" in the parole context. *See Trisvan v. Annucci*, 284 F. Supp. 3d 288, 302 (E.D.N.Y. 2018).

Accordingly, parole boards may only impose special conditions of release "in accordance with law." *Ariola v. New York State Div. of Parole*, 62 A.D.3d 1228, 1229 (1st Dep't 2009) (citations omitted). Conditions that violate parolees' First Amendment rights are unlawful and therefore invalid. *See Eaglin*, 913 F.3d at 99, 101.

The Appellate Division gave lip service to the requirement that a special condition be "made in accordance with law." (A6.) However, the court proceeded as if the "circumscribed" nature of parolees' First Amendment rights did, indeed, render any First Amendment-based challenge to a special condition essentially a "legal nullity," *Trisvan*, 284 F. Supp. 3d at 302. (A7–A8.) The lower court's analysis was incomplete and its conclusion incorrect on this point. As discussed further below, the Condition was not made in accordance with law because it

violates the First Amendment rights Mr. Karlin retains as a parolee. The Condition is therefore invalid and should be stricken.

B. Special Conditions That Restrict Parolees' First Amendment Rights Must Satisfy Intermediate Scrutiny

Special conditions which burden a fundamental liberty interest, like speech, or that risk chilling protected First Amendment activity, are subject to heightened constitutional scrutiny. *See Cornelio v. Connecticut*, 32 F.4th 160, 170 (2d Cir. 2022) (applying "heightened scrutiny under the First Amendment" because state disclosure requirement for sex offender registrants "risk[ed] chilling online speech, anonymous and otherwise"); *United States v. Bolin*, 976 F.3d 202 (2d Cir. 2020); *Eaglin*, 913 F.3d at 95 (where a "constitutional right" is implicated, courts frequently "conduct a more searching review in light of the 'heightened constitutional concerns' presented in such cases") (quoting *United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005)); *Tremper v. Ulster Cnty. Dep't of Prob.*, 160 F. Supp. 2d 352, 357 (N.D.N.Y. 2001) ("Reasonable relationship may be the appropriate test when conditions of probation are challenged as outside those permitted by N.Y. Penal Law § 65.10 . . . . Here, however, the condition of probation is challenged, not as impermissible under New York statutory law, but as depriving plaintiffs of the fundamental right of liberty in their family life as guaranteed by the United States Constitution . . . . A heightened level of scrutiny must therefore be applied.") (citations omitted). This "more searching review" is

frequently – though not always – intermediate scrutiny, particularly since the United States Supreme Court's decision in *Packingham*. *Packingham v. North Carolina*, 582 U.S. 98, 109 (2017). *See, e.g.*, *Cornelio*, 32 F.4th at 170; *Jones*, 489 F. Supp. 3d at 148; *Yunus v. Robinson*, Case No. 17-cv-5839 (AJN), 2019 WL 168544, at *15 (S.D.N.Y. Jan. 11, 2019).

In *Eaglin*, the Second Circuit made clear that the right to access social media articulated in *Packingham* applies to individuals under parole or community supervision. 913 F.3d at 96. The court then applied a "more searching" standard of review (though not explicitly intermediate scrutiny) to invalidate a ban on Internet access imposed as a condition of federal supervised release. Then, in *Jones*, a federal district court in New York applied intermediate scrutiny to find that New York's equivalent of the law struck down in *Packingham* was "not narrowly tailored to target those offenders who pose a factually based risk to children through the use or threatened use of the banned sites or services." 489 F. Supp. 3d at 148 (quoting *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1111 (D. Neb. 2012)).

Although *Packingham, Jones,* and *Cornelio* involved laws applicable to broad groups of individuals, and *Eaglin* involved a special condition of federal supervised release, these cases are instructive. *See Doe v. Lima*, 270 F. Supp. 3d 684, 702 (S.D.N.Y. 2017) (noting that the Second Circuit applied the same scrutiny to restrictions on fundamental rights, "denominated as parole (as in New York

State) or as supervised release (as in the federal system)"), *aff'd sub nom. Doe v. Cappiello*, 758 F. App'x 181 (2d Cir. 2019). Because the Condition implicates Mr. Karlin's First Amendment right to receive information, and in the wake of *Packingham* and its Second Circuit progeny, this Court should apply intermediate scrutiny to determine whether the Condition violates the First Amendment. *See also Anonymous v. City of Rochester*, 13 N.Y.3d 35, 41, 46–48 (2009) (striking down juvenile nighttime curfew as unconstitutional and applying intermediate scrutiny given that fundamental rights were implicated but in light of fact that "children do not possess the same constitutional rights" as adults in many situations and can therefore "be subject to greater regulation and control by the state") (citation omitted).

In assessing the Condition under intermediate scrutiny, this Court should look to whether the Condition burdens substantially more speech than necessary to further an important government interest. For the reasons explained below, it does not, and should therefore be stricken as invalid.

II. THE CONDITION VIOLATES MR. KARLIN'S FIRST AMENDMENT RIGHTS BECAUSE IT CANNOT SATISFY ANY LEVEL OF CONSTITUTIONAL SCRUTINY

Regardless of which level of scrutiny this Court applies to the Condition – intermediate scrutiny or the "reasonable relationship" test the Appellate Division applied – the Condition is an unconstitutional infringement on

Mr. Karlin's First Amendment rights. Under intermediate scrutiny, the State must demonstrate that the Condition advances important governmental interests and is narrowly tailored to those interests. *See Cornelio*, 32 F.4th at 172. In applying the less-stringent "reasonable relationship" test, the Appellate Division considered whether the Condition was reasonably related to Mr. Karlin's past crimes and the mitigation of his risk of recidivism. (A7, citing *Birzon*, 469 F.2d at 1241, 1243; *Ariola*, 62 A.D.3d at 1229.) The Condition fails both tests. Its blanket ban on *any* depiction of the nude human body or people engaged in any form of sexual activity threatens imprisonment for conduct as unremarkable as flipping through television channels at night, browsing a used bookstore, or visiting an art museum. Even if Mr. Karlin's past crimes and alleged risk of recidivism would have justified a narrower version of the Condition, the implications of this particular Condition are absurd—a far cry from reasonable. And if the Condition does not satisfy the "reasonable relationship" test, it necessarily also fails at heightened levels of scrutiny, including intermediate scrutiny.

A. The Condition Banning All Depictions of Nudity or Sexual Activity Is Not Reasonably Related to Legitimate Penological Interests Such as Mr. Karlin's Criminal History or Risk of Recidivism

The Appellate Division applied a "reasonable relationship" test to the Condition. To survive this test, the government must establish that a special condition is reasonably related to legitimate penological interests such as criminal

history, public safety, or risk of recidivism. (A7, citing *Birzon*, 469 F.2d at 1241, 1243; *Ariola*, 62 A.D.3d at 1229.)[1]

The Appellate Division dedicates just two sentences to its "reasonable relationship" analysis:

> As to petitioner's specific circumstances, the record reflects his significant criminal sexual history against children. The record further reveals that petitioner had been scored as having a "high risk" for recidivism and that his admitted conduct in accessing the material in violation

[1] Courts frequently apply a version of the substantive due process reasonable relationship test when conditions of confinement, probation, or parole are challenged under the governing sentencing factors (for probation conditions) or as arbitrary and capricious (for parole conditions and conditions of confinement). *See, e.g.*, *Eaglin*, 913 F.3d at 95; *Birzon*, 469 F.2d at 1243 ("It has been properly held that the Government can infringe the [F]irst [A]mendment rights of prisoners so long as the restrictions are reasonably and necessarily related to the advancement of some justifiable purpose of imprisonment."); *People v. Letterlough*, 86 N.Y.2d 259, 261 (1995) (vacating probation condition ordering individual to display fluorescent sign stating "CONVICTED DWI" on his license plate, because condition was "not reasonably related to defendant's rehabilitation," where state probation sentencing guidelines in effect at the time only allowed for probation conditions with rehabilitative goals).

In the context of federal conditions of supervised release, a special condition must "involve[] no greater deprivation of liberty than is reasonably necessary." 18 U.S.C. § 3583(d). *See also Bolin*, 976 F.3d 202, 214 (2d Cir. 2020). With this requirement (which does not apply to Mr. Karlin's case, but is instructive), the reasonable relationship test used in these federal probation condition cases is more closely aligned with the intermediate scrutiny standard than with the version of the reasonable relationship test the Third Department applied.

Where a "constitutional right" is implicated, courts frequently "conduct a more searching review in light of the 'heightened constitutional concerns' presented in such cases." *Eaglin*, 913 F.3d at 95 (quoting *Myers*, 426 F.3d at 126); *Tremper*, 160 F. Supp. 2d at 357 ("Reasonable relationship may be the appropriate test when conditions of probation are challenged as outside those permitted by N.Y. Penal Law § 65.10 . . . . Here, however, the condition of probation is challenged, not as impermissible under New York statutory law, but as depriving plaintiffs of the fundamental right of liberty in their family life as guaranteed by the United States Constitution. A heightened level of scrutiny must therefore be applied."). This "more searching review" is often intermediate scrutiny, particularly since the *Packingham* decision, as discussed in Section I.B above. *See also Jones*, 489 F. Supp. 3d at 148.

> of the imposed special condition was also the basis for his termination from a sex offender treatment program.

(A7.) It then concludes: "Under these circumstances, we find that the special condition imposed was reasonably related to petitioner's past crimes and the mitigation of his future risk of recidivism." (*Id.*) The lower court lists three legitimate penological interests in relation to Mr. Karlin: Mr. Karlin's criminal history, his risk of recidivism, and his rehabilitation. But nowhere does the court seek to establish *any* relationship – much less a *reasonable* relationship – between these factors and the challenged Condition. Nowhere does the court attempt to justify the Condition's sweeping breadth in relation to these factors. The Appellate Division thus erred in finding that the Condition was reasonably related to legitimate penological interests.

Even had the Appellate Division sought to articulate a reasonable relationship between the Condition and legitimate penological interests, the record does not support such a finding. For example, that Mr. Karlin has a "significant criminal sexual history against children," (*id.*), does not support a finding that the Condition is reasonably related to that history. The Condition extends to *any* depiction of nudity or sexual activity, regardless of the age of the individuals depicted or the nature of the depiction. Moreover, Mr. Karlin's convictions involved no allegations that he photographed or recorded his victims. Mr. Karlin's reported "'high risk' for recidivism" is similarly inapposite, where neither the State

nor the Appellate Division could show how that assessment relates to the challenged Condition. (A7.) Finally, the Appellate Division states that Mr. Karlin's "admitted conduct in accessing the material in violation of the [Condition] was also the basis for his termination from a sex offender treatment program." (A7.) But the logic to this argument is flawed—this argument illustrates only a collateral consequence of the unconstitutional Condition, not a rationale for the Condition's initial imposition. The record does not reflect evidence of the State Parole Board considering any other legitimate penological interests, much less establishing a reasonable relationship between those interests and the Condition. Proscribing Karlin from accessing any depiction of a nude body – regardless of the nature or context of that depiction – cannot possibly be reasonably related to any penological interest.

In short, boilerplate and circular references to Mr. Karlin's criminal history, recidivism risk, and rehabilitation fail to establish a reasonable relationship between these or other legitimate penological factors and the Condition Mr. Karlin challenges. The Condition is therefore invalid and unlawful.

B. The Condition Banning All Depictions of Nudity or Sexual Activity Cannot Survive Intermediate Scrutiny

Because the Condition fails the "reasonable relationship" test, it necessarily fails heightened levels of constitutional scrutiny, such as intermediate scrutiny. *See Cornelio*, 32 F.4th at 170–71 (declining to decide whether intermediate or strict

scrutiny applied to analysis, because plaintiff "states a plausible claim even under intermediate scrutiny, [so] the level of scrutiny would not alter our decision") (citing *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality opinion); *Packingham*, 582 U.S. at 110 (Alito, J., concurring in the judgment)). In any event, the Condition fails intermediate scrutiny independently because it is not narrowly tailored and substantially infringes on Mr. Karlin's rights to access a wide range of artistic, entertainment, and educational content protected under the First Amendment. "[T]o survive intermediate scrutiny, the government must show that the [Condition] advances important governmental interests and is narrowly tailored to those interests." *Cornelio*, 32 F.4th at 166, 172 (holding plaintiff-appellant plausibly alleged First Amendment claim where law required registered sex offenders to notify state of any new internet username or email address).

To "establish that the law advances important governmental interests, the government 'must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Id.* at 171 (citations omitted). Although "[i]ntermediate scrutiny does not demand that the law follow the least restrictive means possible[,] . . . 'the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the

chosen route is easier.'" *Id.* (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)). In other words, the Condition must be "the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 799 (1989) (citation omitted).

Here, for the reasons explained in Section II.A above, the Condition is not narrowly tailored to advance any important governmental interest. While government interests in public safety and rehabilitation are of course laudable, the State fails to articulate that the Condition is reasonably related to any such interest, *see* Section II.A, much less that the Condition is narrowly tailored to achieving these interests. *See Packingham*, 582 U.S. at 109 ("It is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.'") (citation omitted); *see also Doe v. Nebraska,* 898 F. Supp. 2d 1086, 1111 (D. Neb. 2012) (finding Nebraska law banning sex offenders from social media was not narrowly tailored and therefore failed intermediate scrutiny).

Because the Condition bans Mr. Karlin from accessing a wide range of artistic, entertainment, and educational materials which pose little to no relation to any chance of Mr. Karlin's recidivism or to public safety, the Condition is not

narrowly tailored. The Condition therefore fails to satisfy intermediate scrutiny and should be stricken independently on that ground.

III. THE CONDITION IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT PROHIBITS A SUBSTANTIAL AMOUNT OF PROTECTED CONDUCT BEYOND ITS LEGITIMATE SWEEP

The Condition is unconstitutionally overbroad if it punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Here, the Condition's scope – which bans possession or access to *all* material with *any* depiction of nudity or sexual activity – is tremendously broad in relation to its legitimate sweep. Its legitimate sweep is substantially narrower than its scope, as discussed at length above. Therefore, the Condition is unconstitutionally overbroad and should be stricken.

A. The Condition Need Not Apply to the Public at Large to Be Constitutionally Overbroad

As a threshold issue, it is of no moment that the Condition applies only to Mr. Karlin, and not to the public at large like a law of general applicability would. The Appellate Division held Mr. Karlin's overbreadth challenge to the Condition to be "without merit," ostensibly because "overbreadth challenges address the chilling effect that a law can have on the free speech of the public at large." (A8 (citing *Farrell*, 449 F.3d at 498; *People v. Marquan M.*, 24 N.Y.3d 1, 8 (2014)).) However, a special condition like the one challenged here need not be generally

applicable to suffer from the infirmity of overbreadth. Indeed, courts frequently entertain overbreadth challenges to individualized conditions of probation and parole, particularly when these challenges involve blanket prohibitions on accessing depictions of nudity, like here. *See, e.g.*, *United States v. Kelly,* 625 F.3d 516, 517 (8th Cir. 2010) (holding unconstitutionally overbroad special condition of supervised release barring plaintiff from possession of any material which "contains nudity or that depicts or alludes to sexual activity or depicts sexual arousing material"); *United States v. Loy*, 237 F.3d 251, 255, 266-67 (3d Cir. 2001) ("[W]here a ban could apply to any art form that employs nudity . . . a defendant's exercise of First Amendment rights [is] unconstitutionally circumscribed or chilled. A probationary condition is not 'narrowly tailored' if it restricts First Amendment freedoms without any resulting benefit to public safety."). *See also United States v. Bolin*, 976 F.3d 202, 214–15 (2d Cir. 2020) (on vagueness challenge to special condition, stating that, "Although a condition of supervised release applies only to the releasee, rather than to the general public, '[a] probationer [ ] has a[ ] due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison.") (alterations in *Bolin*) (citations omitted).

Neither of the authorities the Appellate Division cited on this point support the proposition that overbreadth challenges are "without merit" if they do not

involve a chilling effect "on the free speech of the public at large." (A8 (citing *Farrell*, 449 F.3d at 498; *Marquan M.*, 24 N.Y.3d at 8).) *Marquan M.* merely observes in dicta that a "regulation of speech is overbroad if constitutionally-protected expression may be 'chilled' by the provision because it facially 'prohibits a real and substantial amount of' expression guarded by the First Amendment." 24 N.Y.3d at 8 (citation omitted). This statement describes one *possible* type of overbreadth challenge; it does not purport to limit overbreadth challenges to public chilling cases. In *Farrell*, the Second Circuit acknowledged that the challenged special condition banning "pornographic material" applied only to plaintiff-appellant, and that therefore he was "the only person whose conduct might have been chilled" under the condition. 449 F.3d at 497. The court continues: "Of course, the First Amendment is implicated if *even one person's* constitutionally protected conduct is chilled; any injury to First Amendment rights is a matter of profound concern to the courts." *Id.* Thus, *Farrell* confirms that the Condition need not apply to the public at large to be constitutionally overbroad. In other words, even if the Condition is only overbroad as to one person – Mr. Karlin – it is unlawful and invalid.

B. The Condition's Scope Banning Possession of All Material with Any Depiction of Nudity or Sexual Activity Is Tremendously Broad in Relation to its Legitimate Sweep

The Condition's overbreadth is substantial in light of its extensive and unwarranted intrusion into Mr. Karlin's First Amendment rights. Notwithstanding that Mr. Karlin's First Amendment rights are "circumscribed" by virtue of his supervised release status, he nevertheless retains constitutional protections that the State cannot abrogate without justification, as discussed above.

To determine whether a challenged law or order is unconstitutionally overbroad under the First Amendment, courts typically proceed in a two-part analysis. First, a court construes the challenged provision to determine its scope. *United States v. Williams*, 533 U.S. 285, 293 (2008). After making this initial determination, courts then assess whether the challenged provision, as construed, covers a "substantial" amount of activity protected by the First Amendment. *Id.* at 297. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (citation omitted).

The Condition imposes a total ban on "view[ing], access[ing], possess[ing], and/or download[ing] *any* materials depicting sexual activity, nudity, or erotic images." (A38.) It is not limited to pornography. It is not limited to materials Mr.

Karlin *actually* watches or reads. It does not provide for any exceptions. In other words, the Condition's scope is vast.

The legitimate sweep of the Condition, in this case, is limited by comparison, given that the Condition does not pass First Amendment muster under either the "reasonable relationship" test or intermediate scrutiny. Given this mismatch, the Condition's scope punishes far beyond a "substantial" amount of protected free speech in relation to its legitimate sweep. The Condition is therefore unconstitutionally overbroad. *See Cornelio*, 32 F.4th at 175 (finding plaintiff-appellant plausibly alleged First Amendment overbreadth claim where law required registered sex offenders to notify state of any new internet username or email address); *United States v. Cabot,* 325 F.3d 384, 386 (2d Cir. 2003) (vacating special condition prohibiting possession of matter that "depicts or alludes to sexual activity" or "depicts minors under the age of eighteen" as overbroad under First Amendment); *Kelly,* 625 F.3d at 517; *Loy*, 237 F.3d at 255, 266-67.

When a Condition's plain language prohibits an individual from reading a biology textbook, visiting an art museum, or watching television, that condition proscribes a substantial amount of constitutionally protected conduct in relation to its plainly legitimate sweep. Such is the case here.

CONCLUSION

For the foregoing reasons, Mr. Karlin respectfully requests this Court reverse the Appellate Division, Third Department, vacating the Board of Parole's determination that Mr. Karlin violated the Condition, striking the Condition, and declaring the Condition unconstitutional.

Dated: June 23, 2023
Ithaca, NY

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR Section 500.13(c) the foregoing brief was prepared on a computer using Microsoft Word.

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Line Spacing: Double

WORD COUNT: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service and certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 5,747.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Arnold Dennis, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 212-04 99th Avenue, 2nd Floor, Queens Village, New York 11429

That on the 23rd day of June, 2023, deponent served the within:

BRIEF FOR APPELLANT

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