No. APL-2022-00182

To be argued by:
KATE H. NEPVEU
15 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

DANIEL KARLIN,

Appellant,

-against-

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

Respondent,

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

BRIEF FOR RESPONDENT

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Dated: October 11, 2023

Supreme Court, Albany County, Index No. 3928/2020
Third Department No. 533214

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PRELIMINARY STATEMENT

Petitioner Daniel Karlin was released to parole supervision after having been incarcerated for his convictions on multiple child sex offenses. That release was revoked after he pled guilty to administrative charges of accessing materials depicting sexual activity and sexual nudity, in violation of a special condition of release imposed by his parole officer in response to his request for computer access. He then brought this article 78 proceeding challenging the revocation of his release on the grounds that the special condition could not survive strict scrutiny under the First Amendment and was unconstitutionally overbroad. Supreme Court dismissed the petition, and the Appellate Division, Third Department, unanimously affirmed, holding that the special condition was reasonably related to petitioner's past crimes and the mitigation of his future risk of recidivism, and also was not unconstitutionally overbroad.

Petitioner now argues for the first time that the special condition cannot survive a different First Amendment standard, intermediate scrutiny. His argument lacks merit. The Appellate

Division properly found that the special condition was constitutional as applied to petitioner because it was reasonably related to his past crimes and the government's legitimate interest in mitigating his risk of recidivism. And because the special condition was constitutional as applied to petitioner, and did not affect anyone else, it was not unconstitutionally overbroad. The Appellate Division's decision should therefore be affirmed. However, should the Court find that there are questions regarding the need for the condition, it should remand to Supreme Court for additional fact-finding.

QUESTIONS PRESENTED

1. Did the Appellate Division properly find that the challenged special condition was constitutional under the First Amendment, because (a) it was reasonably related to petitioner's past crimes and the mitigation of his future risk of recidivism, and (b) it did not prohibit anyone else's speech, or a substantial amount of petitioner's protected speech, relative to its plainly legitimate sweep?

2. In the event that the Court finds that the record is insufficiently developed to determine the propriety of the special condition, should the Court remand the matter to Supreme Court for development of the record?

STATEMENT OF THE CASE

A. Background

In 1991, petitioner, while a summer camp counselor, had sexual contact with four ten-year-old boys and one nine-year-old boy, and sexual contact and intercourse with three eleven-year-old boys. (Appendix at A-40.) He was convicted after a jury trial in 1993 of one count of sodomy in the first degree, two counts of sodomy in the second degree, four counts of sexual abuse in the first degree, three counts of sexual abuse in the second degree, and one count of endangering the welfare of a child. (A-40; Answer, Exhibit A (pre-sentence investigation report).)[1] He was sentenced to an aggregate indeterminate term of 6 to 18 years of imprisonment. (A-40.)

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[1] Exhibits A, C, and E were submitted for *in camera* review with respondent's answer and are submitted herewith, as is the complete parole revocation decision notice, pages 2 and 4 of which

(*continued on the next page*)

In 1994, petitioner pled guilty to sodomy in the first degree for subjecting a ten-year-old boy to sexual contact while babysitting. (A-40; Ex. A.) He was sentenced to an indeterminate term of 8 1/3 to 25 years for that offense, to run concurrent with the sentence imposed in 1993. (A-40; Ex. A.)

Petitioner is listed in the Sex Offender Registry as a sexually violent offender.[2] He is a level three offender, meaning that the sentencing court determined that his "risk of repeat offense is high and there exists a threat to the public safety." Correction Law § 168-*l*(6)(c); *see* Correction Law § 168-n(2).

Petitioner was conditionally released to community supervision in September 2018. (A-40.) In December 2018, petitioner requested a computer with internet access, for use in connection with his attendance at school. Petitioner's Parole Officer approved his request, but imposed on him a special condition of release

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are missing from the copy submitted with respondent's answer (*see* A-59).

[2] *See* https://www.criminaljustice.ny.gov/SomsSUBDirectory/offenderDetails.jsp?offenderid=48925&lang=EN (last accessed October 11, 2023).

denominated ADD8, which directed that he "shall not view, access, possess and/or download any materials depicting sexual activity, nudity, or erotic images." (A-38; *see* A-46; Answer, Exhibit E at 2 (violation of release report)).

B. Revocation Proceedings

Less than five months after his release, in February 2019, petitioner was charged in parole revocation proceedings with violating his conditions of release. (A-41.) Charge 3 alleged that "he accessed materials depicting sexual activity," and charge 4 alleged that "he accessed materials depicting sexual nudity," in violation of prohibitions contained in special condition ADD8. (A-41; *see* Ex. E at 3.) Specifically, petitioner was charged with having accessed online, through his Rochester Public Library account, two issues of a periodical that contained a picture of "several nude, young men, with their backs facing the camera" and an "article about having anal sex for the first time." (Ex. E at 3; *see also* A-22.)

Because petitioner accessed the above materials, he was discharged from his sex offender treatment program. (*See* A-41; Answer, Exhibit C (discharge summary).) Specifically, his treat-

ment program found that his high-risk behavior in accessing the above materials "demonstrate[d] not only sexual preoccupation but a disregard for the expectations placed upon him by treatment." (Ex. C at 2.)

At the final revocation hearing, petitioner pled guilty to charges 3 and 4. (A-54 to A-55.) Although he thus acknowledged accessing materials depicting sexual activity and sexual nudity, he denied that he had been "looking for anything with nudity, or explicit sexual content." (A-56.) He was sentenced to a 22-month time assessment, a determination that was upheld on administrative appeal. (A-61.)

C. Proceedings Below

Petitioner commenced this article 78 proceeding challenging the determination finding him guilty of violating the above two prohibitions in special condition ADD8. (A-20.) He contended that special condition ADD8 was unconstitutionally overbroad (A-23) and "subject to strict scrutiny" (A-25). He further claimed that "nothing in his history, criminal or therapeutic, suggests that the use of such materials either contributed to his offending or has ever

been a problem for him" (A-33), despite his removal from sex offender treatment for accessing such materials. By way of relief, he sought an order vacating respondent's determination, restoring him to parole supervision, expunging all references to the determination from his custodial records, and declaring that the subject special condition is unconstitutional. (A-32 to A-33.)

After unsuccessfully moving to dismiss the petition on the ground that petitioner had pled guilty to the charges (*see* A-10), respondent filed an answer. Supreme Court, Albany County (Connolly, J.), denied the petition and dismissed the proceeding. (A-10.) Petitioner appealed to the Appellate Division, Third Department.

In the interim, petitioner had been re-released to community supervision in December 2020 at the expiration of his time assessment.

D. Memorandum and Order of the Third Department

In his Appellate Division brief (at 4), petitioner continued to argue that condition ADD8 was subject to strict scrutiny under the First Amendment. He also argued (at 12) that the condition was not

rationally related to his criminal history or future chance of recidivism.

The Appellate Division affirmed the judgment and rejected these arguments. Initially, the court noted that because petitioner was on parole, his First Amendment rights were "circumscribed." (A-7.) It then considered "petitioner's specific circumstances," including "his significant criminal sexual history against children," that he "had been scored as having a 'high risk' for recidivism," and that his accessing the materials "was also the basis for his termination from a sex offender treatment program." (A-7.) The court accordingly concluded that the special condition "was reasonably related to petitioner's past crimes and the mitigation of his future risk of recidivism." (A-7.)

The Appellate Division further concluded that the special condition was not unconstitutionally overbroad. The court noted that overbreadth claims "address the chilling effect that a law can have on the free speech of the public at large." (A-8.) And the court concluded that, as applied to petitioner, "the special condition was a plainly legitimate sweep to regulate petitioner's access to certain

materials during his conditional release based upon his criminal history and risk of recidivism." (A-8.)

Petitioner appealed as of right and also moved for leave to appeal. The Court invited the parties to submit comments on its subject matter jurisdiction, and subsequently retained jurisdiction and dismissed the motion for leave as unnecessary.

ARGUMENT

POINT I

THE CHALLENGED SPECIAL CONDITION SHOULD BE UPHELD

The Appellate Division properly upheld the special condition as applied to petitioner because it was reasonably related to his past crimes and the mitigation of his future risk of recidivism. Petitioner's argument for a different standard of review, intermediate scrutiny, is not preserved for judicial review, and in any event is without merit. Further, the special condition is not unconstitutionally overbroad.

A. Petitioner's Argument for the Application of Intermediate Scrutiny Is Unpreserved and Without Merit.

Petitioner argues for the first time before this Court that the challenged condition should be subjected to intermediate scrutiny, which considers whether the condition "burdens substantially more speech than necessary to further an important government interest." (Br. at 14.) Because he has failed to preserve this argument, it is not properly before this Court. In any event, the Appellate Division applied the proper standard of review.

As this Court has plainly stated, "[j]udicial review of administrative determinations pursuant to CPLR article 78 is limited to questions of law. Unpreserved issues are not issues of law." *Matter of Khan v. New York State Dept. of Health*, 96 N.Y.2d 879, 880 (2001) (citations omitted); *accord Matter of Corrigan v. New York State Off. of Children & Family Servs.*, 28 N.Y.3d 636, 643 (2017). More generally, "this Court with rare exception does not review questions raised for the first time on appeal," because it "best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the

trial and intermediate appellate courts." *Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359 (2003); *accord JF Capital Advisors, LLC v. Lightstone Group, LLC*, 25 N.Y.3d 759, 767 (2015).

Here, petitioner argued in Supreme Court and the Appellate Division that either strict scrutiny or rational-basis review should apply; he did not advocate for any other level of review. (A-25; Petitioner's Appellate Division Br. at 4.)[3] This issue is therefore not subject to this Court's limited judicial review in article 78 proceedings. And even if it were, it should not be considered now: the departments of the Appellate Division have built a body of precedent regarding the standard of review applicable to constitutional challenges to conditions of release, one that requires the conditions be rationally or reasonably related to the releasee's criminal history, past conduct, and future chances of recidivism[4]—

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[3] While petitioner appeared pro se in those courts, his papers demonstrate a sound grasp of the legal doctrines in question.

[4] *See Matter of George v. New York State Dept. of Corr. and Community Supervision*, 107 A.D.3d 1370, 1372 (3d Dep't), *lv. dismissed*, 22 N.Y.3d 928 (2013); *Matter of Maldonado v. New York State Div. of Parole*, 87 A.D.3d 1231, 1233 (3d Dep't 2011); *Matter of Boehm v. Evans*, 79 A.D.3d 1445, 1447 (3d Dep't 2010), *lv. denied*,

(*continued on the next page*)

in effect, rational-basis review. As a result, this Court would have benefitted from Supreme Court and the Appellate Division's careful consideration of petitioner's argument in that context.

In any event, the Appellate Division properly chose to employ rational-basis review, which asks whether the challenged condition of release was reasonably related to petitioner's past crimes and the mitigation of his future risk of recidivism. Those on parole "are, in essence, convicted criminals who are released from prison before the expiration of their term, under supervision, and who are allowed to remain outside the penal institution only on stated conditions." *Matter of Alvarez v. Annucci*, 38 N.Y.3d 974, 990 (2022) (Wilson, J., dissenting) (internal quotation omitted). Moreover, the State "has an overwhelming interest in supervising parolees" because "combating recidivism is the very premise behind the

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16 N.Y.3d 707 (2011), *cert. denied*, 565 U.S. 1159 (2012); *Matter of Williams v. New York State Div. of Parole*, 71 A.D.3d 524, 526 (1st Dep't), *lv. denied*, 15 N.Y.3d 710, *appeal dismissed*, 15 N.Y.3d 770 (2010); *Matter of Ariola v. New York State Div. of Parole*, 62 A.D.3d 1228, 1229 (3d Dep't), *lv. denied*, 13 N.Y.3d 707 (2009); *Matter of M.G. v. Travis*, 236 A.D.2d 163, 168 (1st Dep't 1997), *lv. denied*, 91 N.Y.2d 814 (1998).

system of close parole supervision." *Samson v. California*, 547 U.S. 843, 853 (2006) (internal quotations omitted).

Questions of parole supervision "involve[ ] the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). The decision to impose special conditions in New York is made not by a court, as in some systems, but "under active *administrative* supervision of trained officials." *Matter of M.G. v. Travis*, 236 A.D.2d 163, 167 (1st Dep't 1997) (internal quotation omitted, emphasis in original), *lv. denied*, 91 N.Y.2d 814 (1998). Thus, as the Appellate Division noted, "[I]t is well settled that the imposition of a special condition upon the release of an [incarcerated individual] is discretionary in nature and beyond judicial review so long as it is made in accordance with law." (A-6, alterations in original.)

In light of these interests, a rational-basis standard—which requires that conditions of parole release bear a reasonable relationship to legitimate government interests—is appropriate. As the Supreme Court explained with regard to constitutional

challenges to prison regulations, the rational-basis standard "is necessary if prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations." *Turner v. Safley*, 482 U.S. 78, 89 (1987) (internal quotation and alterations omitted). Similarly, administrative expertise is required to make the difficult judgments regarding the conditions under which parolees are allowed to remain outside the penal institution, rendering rational-basis review appropriate. As a result, the Second Circuit has held that federal parolees may be subject to special conditions of release "that are reasonably and necessarily related to the interests that the Government retains after [a parolee's] conditional release"—even where those conditions affect their First Amendment rights. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972).

The cases cited by petitioner in support of his argument for intermediate scrutiny do not compel a different conclusion. The need for administrative expertise and flexibility distinguishes this matter from the juvenile curfew considered in *Anonymous v. City of Rochester* (Br. at 14), where this Court found intermediate scrutiny

more appropriate than strict scrutiny, without explicitly considering rational-basis review. 13 N.Y.3d 35, 46-48 (2009). The very fact of parole supervision distinguishes this matter from *Cornelio v. Connecticut* (Br. at 12), which involved requirements applicable to *all* registered sex offenders in Connecticut. 32 F.4th 160, 167 (2d Cir. 2022); *see also Packingham v. North Carolina*, 582 U.S. 98 (2017) (striking down statute that made it felony for all registered sex offenders to access certain social networking sites).

And *United States v. Eaglin* (Br. at 12-13) in fact supports the application of rational-basis review. 913 F.3d 88 (2d Cir. 2019). That case involved review of a federal releasee's conditions of release, which, under federal law, must be "reasonably related" to various statutory factors and "involve only such deprivations of liberty or property as are reasonably necessary" for various statutory purposes. 18 U.S.C. §§ 3563(b), 3583(d)(1)-(2). As an initial matter, that the federal government has chosen to adopt a reasonableness standard itself weighs in favor of rational-basis review here, because it demonstrates that such a standard has been found both suitable and feasible in the federal system.

But more importantly, federal courts have not found it necessary or appropriate to deviate from rational-basis review when reviewing constitutional challenges to conditions of release. Thus, in *Eaglin*, the Second Circuit invalidated the challenged conditions, which completely banned internet use and the possession or viewing of pornography, under only the statutory standard cited above. 913 F.3d at 97, 99. The Circuit did state that "[w]here a condition of supervised release implicates a constitutional right, we conduct a more searching review in light of the 'heightened constitutional concerns' presented in such cases." 913 F.3d at 95 (quoting *United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005)). But this "more searching review" did not, as petitioner implies, result in a different standard or tier of review. Instead, after thoroughly examining the law and the record as to the two challenged conditions, the Circuit concluded that "neither is reasonably related to the relevant sentencing factors and both involve a greater deprivation of liberty than is reasonably necessary to implement the statutory purposes of sentencing." 913 F.3d at 101.

In other words, the Circuit ensured that it carefully considered all relevant information in its application of rational-basis review—but it nonetheless applied that standard. This satisfied the constitutional concerns before the Circuit in *Eaglin*, and also satisfied those before the Appellate Division. The use of rational-basis review should thus be upheld.

B. The Special Condition Is Reasonably Related to Petitioner's Past Crimes and Future Chances of Recidivism.

The Appellate Division properly concluded that the challenged special condition, specifically its prohibitions on accessing depictions of sexual activity and sexual nudity[5] imposed as a response to petitioner's request for computer and internet access, was reasonably related to his past crimes and the mitigation of his future risk of recidivism.

Petitioner is a sexually violent offender who was adjudicated by the sentencing court to be at high risk of a repeat offense. The

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[5] The special condition also barred petitioner from accessing erotic images. However, petitioner was not charged with violating that prohibition, which accordingly is not at issue in this case.

record reflects that he committed multiple serious sex offenses against multiple children aged 9-11. (A-40.) It further reflects that he was discharged from his sex offender treatment program because accessing the materials at issue was high-risk behavior that "demonstrate[d] not only sexual preoccupation but a disregard for the expectations placed upon him by treatment." (Ex. C at 2.) More generally, it cannot be said that prohibitions on accessing material depicting sexual nudity and sexual activity bear no rational relationship to a child sex offender's past crimes and risk of recidivism. *Cf. Matter of State of New York. v. Karl X.*, 172 A.D.3d 1498, 1499-500 (3d Dep't) (revoking regimen of strict and intensive supervision in part because sex offender diagnosed with pedophilia denied that adult pornography "was a high-risk factor for him"), *lv. denied*, 33 N.Y.3d 911 (2019); *Matter of State of New York v. David HH.*, 147 A.D.3d 1230, 1232 (3d Dep't) (noting that "pornography depicting adults was 'a trigger for [respondent's] sexual offending cycle'" against minors), *lv. denied*, 29 N.Y.3d 913 (2017).

Contrary to petitioner's claim (Br. at 17-18), then, the prohibitions contained in the special condition were reasonably

related to petitioner's past crimes and mitigating his future risk of recidivism, as evaluated by the very program working toward that mitigation. The Appellate Division therefore properly upheld the special condition as applied to petitioner.

C. The Special Condition Is Not Unconstitutionally Overbroad.

The Appellate Division also properly concluded that the special condition is not unconstitutionally overbroad, because it applies only to petitioner and does not prohibit a substantial amount of petitioner's protected speech in relation to its plainly legitimate sweep.

The First Amendment overbreadth doctrine "seeks to strike a balance between competing social costs" by invalidating only those restrictions that are so overbroad as to prohibit a "substantial" amount of protected speech "relative to the [restriction's] plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). The "doctrine is strong medicine; it has been invoked by the courts with hesitation and only as a last resort." *People v. Foley*, 94 N.Y.2d 668, 678 (internal quotations omitted), *cert. denied*,

531 U.S. 875 (2000). In particular, "[t]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Williams*, 553 U.S. at 303 (internal quotation omitted).

Applying these principles, the Second Circuit has rejected an overbreadth challenge to a condition of release that prohibited possession of pornographic material. *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006) (Sotomayor, J.). The Circuit found that the condition of release did not present a "danger of chilling sufficient" to sustain either a facial vagueness or an overbreadth challenge. *Id.* at 497; *see id.* at 499. First, "[b]ecause [the plaintiff] was a convicted sex offender, most regulations of his possession of sexual material would be reasonably and necessarily related to the Government's legitimate interests in the parolee's activities and thus would not violate the First Amendment." *Id.* at 497 (internal quotation omitted); *see id.* at 499. Second, the plaintiff "was the only person whose conduct might have been chilled" by the challenged condition, "which made it less likely that any protected conduct was chilled." *Id.* at 497. As a result, the Circuit held that "we cannot say that the

Special Condition's overbreadth was both real and substantial in relation to its plainly legitimate sweep." *Id.* at 499.

As the Appellate Division concluded (A-7 to A-8), *Farrell* is persuasive authority in favor of rejecting petitioner's overbreadth challenge. Petitioner is a convicted sex offender subject to supervision, a status that means that "most regulations of his possession of sexual material would be reasonably and necessarily related to the Government's legitimate interests … and thus would not violate the First Amendment." 449 F.3d at 497. Indeed, as noted above (Point I.B), the special condition here *was* reasonably related to legitimate government interests, and therefore did not violate the First Amendment. As a result, any overbreadth of the special condition as to petitioner would not be substantial when compared to its "plainly legitimate sweep," contrary to petitioner's claims (Br. at 25). *Williams*, 553 U.S. at 292.

Moreover, there could be no chilling of anyone else's behavior, as petitioner implicitly concedes (Br. at 21). The challenged restriction is not a statute, but a special condition that was imposed upon petitioner in response to his individual circumstances, namely

his criminal history and his approval to possess a computer with internet access. (A-38, A-46; Ex. E at 2.) In light of this inability of the special condition to restrict others' behavior, combined with its lack of substantial overbreadth as to petitioner, the Appellate Division properly found that the special condition was not unconstitutionally overbroad.

POINT II

ALTERNATIVELY, THE MATTER SHOULD BE REMANDED TO DEVELOP A RECORD REGARDING THE REASONS FOR THE SPECIAL CONDITION

As argued in Point I, this Court should uphold the special condition against petitioner's constitutional challenge. But should the Court determine that the record is not sufficiently developed to determine whether the special condition is reasonably related to petitioner's offenses and risk of recidivism, the Court should not reverse and vacate the determination. Because Supreme Court agreed with respondent that the record before it was sufficient to dispose of petitioner's challenges, no additional evidence was submitted regarding the need for the special condition. Given the nature and severity of petitioner's offenses, if the Court determines

that the special condition cannot be sustained on the current record, the Court should remand this matter to Supreme Court[6] to allow respondent to present evidence demonstrating that petitioner's accessing depictions of sexual nudity or sexual activity could lead to his re-offending.[7]

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[6] As noted in the petition (A-33), constitutional questions are not properly raised in a parole revocation proceeding.

[7] Should Supreme Court find the challenged special condition unconstitutional, respondent notes that petitioner was also charged with violating a separate condition of release requiring him to complete sex offender treatment. (A-41.) If necessary, that charge should be the subject of a de novo final revocation hearing, because it was withdrawn in exchange for petitioner's guilty plea.

CONCLUSION

The memorandum and order of the Appellate Division should be affirmed; alternatively, the matter should be remanded to Supreme Court for additional fact-finding.

Dated: Albany, New York
October 11, 2023

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Kate H. Nepveu, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,915 words, which complies with the limitations stated in § 500.13(c)(1).

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Kate H. Nepveu