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.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

The State's position in this Appeal relies entirely on the notion that a parole condition proscribing Mr. Karlin's First Amendment rights to read books, watch movies, and engage with art need not satisfy any heightened level of constitutional scrutiny. This position exploits a gap in New York law around challenges to conditions of parole which implicate fundamental First Amendment rights.

Mr. Karlin's case presents an opportunity for this Court to bridge this gap, building on its decisions in *Anonymous v. City of Rochester*, 13 N.Y.3d 35 (2009), and *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187 (2020). The natural application of these decisions to Mr. Karlin's case is that, where the State proscribes a parolee's fundamental rights (such as the First Amendment right to receive information), the State must show that its restriction advances important governmental interests and is narrowly tailored to those interests. In other words, the State must satisfy intermediate scrutiny.

This outcome would fit neatly within the framework set forth in *Anonymous* and *Johnson*. It would also bring New York state courts in alignment with the growing body of federal caselaw concerning the First Amendment rights of individuals subject to parole and other forms of government supervision in the wake of the United States Supreme Court's decision in *Packingham v. North Carolina*, 582 U.S. 98 (2017). The "reasonable relationship" test may suffice in a

typical "arbitrary and capricious" challenge to a parole condition under New York law. But where parole conditions implicate First Amendment rights – especially here, where Mr. Karlin served an additional 22 months in prison for accessing a magazine available through his public library – the law requires more.

In any event, the State fails to demonstrate that the Condition Mr. Karlin challenges satisfies *any* level of constitutional scrutiny. The Condition's sweeping reach is clear on its face: even under the State's flawed "reasonable relationship" test, no additional factfinding could conjure a logical connection between all that the Condition proscribes – including much of what Barnes & Noble has on offer, many of the TV shows Mr. Karlin's colleagues discuss over lunch, and many of history's great works of art – and Mr. Karlin's past crimes or risk of recidivism.

Mr. Karlin therefore respectfully requests this Court to reverse the Appellate Division, vacate the Board of Parole's determination that Mr. Karlin violated the Condition, and declare the Condition[1] unconstitutional.

[1] Although inapposite to this Appeal given his punishment for violating the Condition, Mr. Karlin notes that he is no longer subject to the Condition he challenges in this Appeal and to which he pleaded guilty to violating. Mr. Karlin is now subject to a different special condition which raises similar concerns to those addressed in this Appeal (restricting Mr. Karlin from "purchas[ing], possess[ing] or engag[ing] in any way" with "any sexually explicit materials or erotic magazines, tapes, pictures, images, films, [or] DVD's").

ARGUMENT

I. INTERMEDIATE SCRUTINY IS PROPERLY PRESERVED

Before reaching the merits of Mr. Karlin's constitutional challenge, the State contends that the application of intermediate scrutiny in Mr. Karlin's case is unpreserved for this Appeal. (Resp. Br. 10–12.) The State is incorrect. Although this Court "does not review questions raised for the first time on appeal," *Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359 (2003), the question of whether to apply a heightened level of constitutional review has been at issue in this case from the start (a point the State acknowledges, Resp. Br. 11).[2] As Mr. Karlin raised the argument in Supreme Court that a heightened level of constitutional review should apply to his challenge, then, this question has already been "presented to and carefully considered by" the court of first instance. *Bingham*, 99 N.Y.2d at 359. It is therefore preserved for appeal.

Mr. Karlin's argument for the application of intermediate scrutiny is preserved both because it is not a standalone "question of law," and because it is not new to this case. The "question" before this Court is whether the Condition is

[2] For example, in Supreme Court, Mr. Karlin argued (appearing *pro se*) that, "[w]hile a parolee's First Amendment rights may be restricted to further a compelling government interest, these restrictions can be no greater than necessary, and thus must be narrowly tailored." (A24.) *See also id.* ("The standard of review for potential First Amendment infringement is the same as or higher than the heightened scrutiny applied under federal statute 18 USC § 3583(d)."); A25 ("Being a content-based restriction, this parole condition is subject to strict scrutiny, and as such, must employ the least restrictive means available.").

constitutional under the First Amendment; embedded *within* that question is the issue of what level of constitutional scrutiny applies.

The State acknowledges that Mr. Karlin argued for heightened scrutiny below, but takes issue with the fact that he did not explicitly advocate for *intermediate* scrutiny. (*See* Resp. Br. 11.) This position ignores that Mr. Karlin argued below for the *highest* form of heightened scrutiny—giving the trial and intermediate courts ample opportunity to determine which tier of scrutiny to apply on the spectrum from strict scrutiny to rational basis. (*See* A25.) This Appeal is far from the first opportunity for a court in this case to consider applying heightened scrutiny. The question is therefore preserved.

Moreover, as a matter of sound policy, it is worth noting that Mr. Karlin appeared *pro se* in both the courts below. This Court hardly requires *pro se* litigants to argue with the precision of a barred attorney. *See Bezio v. Dorsey*, 21 N.Y.3d 93, 99 (2013) (finding a *pro se* litigant's shouting about cruel and unusual punishment preserved a due process challenge). Mr. Karlin's raising strict scrutiny as a *pro se* litigant made clear he was asking the court to apply *heightened* scrutiny. This Court should not adopt a rule requiring *pro se* litigants to articulate constitutional doctrine with perfect specificity. Accordingly, the question of heightened scrutiny has been preserved and may be decided by this Court.

II. INTERMEDIATE SCRUTINY IS THE CORRECT STANDARD OF REVIEW

Special conditions of parole which burden fundamental liberty interests – interests such as the First Amendment right to read magazines, watch movies, and engage with art – must satisfy heightened constitutional scrutiny. (*See* App. Br. 12–14.) This Court laid the foundation for this approach in *Anonymous v. City of Rochester*, 13 N.Y.3d 35 (2009), and *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187 (2020). And in the Second Circuit, a growing body of federal caselaw concerning the First Amendment rights of individuals subject to parole and other forms of government supervision takes a similar approach, particularly in the First Amendment context on the heels of the United States Supreme Court's decision in *Packingham v. North Carolina*, 582 U.S. 98 (2017). Federal cases analyzing conditions of supervised release under federal sentencing guidelines, such as *United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019), further support the suitability of intermediate scrutiny here—not the other way around, as the State claims. (Resp. Br. 15–17, citing *Eaglin*.)

The "reasonable relationship" test the State urges may suffice in a typical "arbitrary and capricious" challenge to a parole condition under New York law, but where fundamental rights are implicated, the U.S. Constitution requires heightened scrutiny. And intermediate scrutiny, rather than strict scrutiny, allows for balance

between the State's "need for administrative expertise and flexibility" in the parole context and the fundamental rights at stake in cases like Mr. Karlin's. (*See* Resp. Br. 14.) To the extent Appellate Division decisions cited by the State fail to apply heightened scrutiny, the instant Appeal presents an opportunity for this Court to clarify the correct standard in parole condition challenges implicating fundamental constitutional rights.

For these reasons, this Court should apply the intermediate scrutiny test – not the "reasonable relationship" test the Appellate Division used and the State urges – to require the State to show that the Condition is narrowly tailored to important government interests.

A. Intermediate Scrutiny Provides Adequate Protection for First Amendment Rights While Also Accommodating the State's Need for Administrative Expertise and Flexibility in the Parole Context

The State argues that "[t]he need for administrative expertise and flexibility" in the parole context "distinguishes this matter from the juvenile curfew considered in *Anonymous v. City of Rochester*[, 13 N.Y.3d 35 (2009)]." (Resp. Br. 14.) The State asks this Court to instead take an approach identical to the standard applicable when inmates bring constitutional challenges to prison regulations. *Id.* This approach presents two key issues: it incorrectly assumes parolees enjoy no greater degree of freedom than prison inmates; and, it overlooks intermediate

scrutiny as a solution which balances the circumscribed nature of parolees' rights with their fundamental First Amendment rights.

First, as discussed in Mr. Karlin's opening brief, although parolees remain within the State's legal custody and control, they enjoy significantly greater freedoms as parolees than they did as inmates. (*See* App. Br. 10.) When it comes to restricting parolees' rights, then, the government does not have the same level of power that it has over inmates in a prison facility. Intermediate scrutiny accounts for this increase in freedom, while balancing that freedom against the State's legitimate need for administrative independence and flexibility in the parole context.

Second, although *Anonymous* involved the circumscribed rights of minors, rather than parolees, it sets forth a framework analogous to Mr. Karlin's case. In *Anonymous*, this Court observed that, "although children have rights protected by the Constitution, they can be subject to greater regulation and control by the state than can adults." *Anonymous*, 13 N.Y.3d at 47. Similarly, parolees retain significant First Amendment rights, though those rights may be circumscribed compared to the general public. *See Farrell v. Burke*, 449 F.3d 470, 497 (2d Cir. 2006). To balance the government's need for "flexib[ility] . . . to address the vulnerabilities particular to minors" with rights of a minor which, "if possessed by an adult, would be fundamental," *Anonymous* adopted intermediate scrutiny as a standard of

review "better suited [than strict scrutiny] to address the complexities of curfew ordinances." *Anonymous*, 13 N.Y.3d at 46–47. Here, too, intermediate scrutiny is "sufficiently skeptical and probing to provide rigorous protection of constitutional rights yet flexible enough to accommodate" the government's legitimate penological interests. *See id.*

Drawing from the framework set forth in *Anonymous*, this Court later noted in the context of an individual seeking release on parole that the Federal Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Johnson*, 36 N.Y.3d at 198 (citation omitted). In fact, the Court said, the government "may not infringe [] a 'fundamental' liberty interest 'unless the infringement is narrowly tailored to serve a compelling state interest'"—that is, unless the infringement satisfies strict scrutiny. *Id.* (citations omitted). *Johnson* ultimately held that the petitioner's interest in being released to parole was not a fundamental liberty interest such that heightened scrutiny applied. *Id.* at 200. However, its framework reinforces that heightened scrutiny applies when the government infringes fundamental rights in the context of a would-be parolee.[3]

[3] In a footnote, the Court declined to adopt the intermediate scrutiny standard from *Anonymous*, distinguishing *Anonymous* on the basis that it "involved a constitutionally unique situation" not present in petitioner Johnson's case. *Johnson*, 36 N.Y.3d at 200 n.8. The issues at play in Mr. Karlin's case, however – substantial infringement on fundamental liberty interests and punishment of nearly two years in prison for engaging in protected conduct, balanced against

The circumstances of this Appeal present an opportunity to build further on this framework and provide explicit guidance to New York courts about the level of scrutiny to apply in cases where a parole condition restricts fundamental rights.

B. The Appellate Division Decisions the State Cites Fail to Account for the Additional Protection the Federal Constitution Provides Against Government Infringements of Fundamental Rights

The State cites several Appellate Division cases for the proposition that the Appellate Division departments "have built a body of precedent regarding the standard of review applicable to constitutional challenges to conditions of release"—"in effect, rational-basis review."[4] (Resp. Br. 11–12.)[5] But a close read of these cases reveals a more complex state of affairs.

Two of the Appellate Division cases do not involve any challenge to infringement of a right the decisions characterize as fundamental; these cases are

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legitimate government interests – introduce complexities analogous to those in *Anonymous*. Intermediate scrutiny is therefore appropriate in Mr. Karlin's case. *See also id.* 221-22 (Rivera, J., dissenting) ("This Court has regularly applied intermediate scrutiny when the question presented implicates both a constitutional right and a concededly legitimate state action.") (listing cases).

[4] The State refers to the "reasonable relationship" test as "rational-basis review." Mr. Karlin acknowledges that, in this context, the two tests are nearly synonymous.

[5] Citing *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*, 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).

therefore irrelevant. *See Matter of Maldonado v. New York State Div. of Parole*, 87 A.D.3d 1231, 1233 (3d Dep't 2011); *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).[6]

In *Matter of M.G. v. Travis*, although the First Department purports to apply a version of the "reasonable relationship" test, it proceeds to *also* examine whether a condition prohibiting use of any "on-line computer service that involves the exchange of pornographic or sexually explicit electronic messages" was "narrowly tailored" in view of petitioner's First Amendment rights—in effect applying heightened scrutiny, albeit not explicitly. 236 A.D.2d 163, 168 (1st Dep't 1997), *lv. denied*, 91 N.Y.2d 814 (1998).

The three remaining Appellate Division decisions – *George*, *Boehm*, and *Williams* – each concern a parole condition restricting a parolee's contact with a romantic partner the parolee had previously abused.[7] These cases each involved a fundamental right, therefore warranting heightened scrutiny. But instead, the court purported to apply the "reasonable relationship" test in each. In *Boehm* and *Williams*, the court appeared to *also* hold that heightened scrutiny was satisfied.

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[6] Although *Ariola* makes a passing mention of the fundamental right to privacy, the decision does not appear to treat this right as fundamental for purposes of its analysis. *Ariola*, 62 A.D.3d at 1230.

[7] *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 Boehm v. Evans*, 79 A.D.3d 1445, 1447 (3d Dep't 2010), *lv. denied*, 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).

See Boehm, 79 A.D.3d at 1447; *Williams*, 71 A.D.3d at 526. In *George*, however, the court explicitly "decline[d] the invitation of amicus curiae to revisit . . . what standard to apply in assessing whether a parole condition impermissibly interferes with an inmate's associational rights." *George*, 107 A.D.3d at 1372 (citing *Boehm*, 79 A.D.3d at 1447).

To the extent these cases fail to apply heightened scrutiny where a fundamental right was infringed, the instant Appeal presents an opportunity for this Court to clarify the correct standard in parole condition challenges implicating fundamental constitutional rights—making explicit what follows logically from this Court's decisions in *Anonymous* and *Johnson*, as well as recent federal caselaw in the First Amendment context.

C. *Eaglin*'s Application of Federal Statutory Guidelines Further Supports the Use of Intermediate Scrutiny in Mr. Karlin's Case

The State attempts to use *Eaglin* in support of the "reasonable relationship" test's applicability. (Resp. Br. 15–17.) But *Eaglin* in fact cuts the *other* way: in favor of the intermediate scrutiny test. Federal conditions of supervised release must, under federal law, be both "reasonably related to" specified sentencing factors and "involve[] no greater deprivation of liberty than is reasonably necessary" for government interests including deterrence and public safety. 18 U.S.C. § 3583(d).

The State claims that use of the phrase "reasonably related" in *Eaglin* "in fact supports the application of rational-basis review"—demonstrating that "such a standard has been found both suitable and feasible in the federal system," and that "federal courts have not found it necessary or appropriate to deviate from rational-basis review when reviewing constitutional challenges to conditions of release." (Resp. Br. 15–16.) According to the State, then, the *Eaglin* court's "more searching review" was not in fact heightened scrutiny, but merely an extra-"careful[]" rational basis review. (*Id.* at 17.)

The State's analysis here focuses on the "reasonably related" phrasing in 18 U.S.C. § 3583(d)(1), and all but ignores the separate provision demanding that conditions of release "involve[] no greater deprivation of liberty than is reasonably necessary" for government interests including deterrence and public safety, 18 U.S.C. § 3583(d)(2). With this additional requirement, federal conditions of supervised release must satisfy a statutory standard which closely resembles intermediate scrutiny's "narrow tailoring" requirement—far surpassing the "reasonable relationship" or "rational-basis" standard the State urges. (*See* App. Br. 16 n.1.)

In fact, *United States v. Myers*, on which *Eaglin* relies, states explicitly that, "[i]f the liberty interest at stake is fundamental, a deprivation of that liberty is 'reasonably necessary' [under section 3583(d)(2)] only if the deprivation is

narrowly tailored to serve a compelling government interest." *United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (Sotomayor, J.); *see also Eaglin*, 913 F.3d at 95 (citing *Myers*, 426 F.3d at 126). In other words, where a condition of release burdens a fundamental right, it must satisfy strict scrutiny.

Reading *Myers* and *Eaglin* together leaves no doubt that the court's "more searching review" in *Myers* was heightened constitutional scrutiny. Contrary to the State's assertion, then, the Second Circuit's approach in these cases provides additional support for application of intermediate scrutiny in Mr. Karlin's case.

* * *

For these reasons, this Court should apply the intermediate scrutiny test to require the State to show that the Condition is narrowly tailored to important government interests.

III. THE CONDITION VIOLATES MR. KARLIN'S FIRST AMENDMENT RIGHTS UNDER BOTH THE "REASONABLE RELATIONSHIP" TEST AND INTERMEDIATE SCRUTINY

As explained in Mr. Karlin's opening brief, the Condition violates Mr. Karlin's First Amendment rights under whichever test this Court applies: the "reasonable relationship" test or intermediate scrutiny. (*See* App. Br. 14–21.) Mr. Karlin does not repeat those arguments here. However, two of the State's points on this issue merit brief discussion.

First, notably, the State does not assert that the Condition could survive intermediate scrutiny, instead focusing solely on the merits of the "reasonable relationship" test. Through this omission, the State effectively concedes that Mr. Karlin's constitutional challenge prevails if this Court applies intermediate scrutiny, as it should.

Second, the State comes up short in its attempt to fashion a "reasonable relationship" between the Condition and Mr. Karlin's criminal history and chances of recidivism. Aside from parroting the Appellate Division's conclusory reasoning on this point, the State relies on two Third Department cases from the civil confinement context. These cases involved no parole conditions, no First Amendment challenges, and pornography (in contrast to the Condition's blanket ban on depictions of nudity and sexual activity). These two cases have no bearing on the Condition's relationship to legitimate penological interests as applied to Mr. Karlin.

A. Respondent Appears to Concede that the Condition Does Not Survive Intermediate Scrutiny

First, nowhere in its brief does the State attempt to argue that the Condition survives intermediate scrutiny—effectively conceding that, if intermediate scrutiny applies (as it should), the Condition is unconstitutional. Nor *could* the State demonstrate that the Condition survives intermediate scrutiny. As discussed in Mr.

Karlin's opening brief, because the Condition fails the "reasonable relationship" test, it necessarily fails intermediate scrutiny. (*See* App. Br. 18–21.)

The Condition independently fails intermediate scrutiny because its ban on all depictions of nudity or sexual activity in any context is not narrowly tailored to important government interests such as Mr. Karlin's risk of recidivism. *See Cornelio v. Connecticut*, 32 F.4th 160, 166, 172 (2d Cir. 2022). Importantly, the State makes no attempt to defend the Condition's breadth or to demonstrate that alternative measures burdening substantially less protected content would fail to achieve governmental interests. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014) ("[T]he 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.").

In short, this Court should hold that the Condition is unconstitutional because it is not narrowly tailored to important government interests as required under the intermediate scrutiny test—a conclusion the State makes no effort to contest in its brief.

B. The Condition Also Fails the "Reasonable Relationship" Test

For the reasons articulated in Mr. Karlin's opening brief, the Condition also fails under the "reasonable relationship" test (the test which the Appellate Division applied and the State urges this Court to adopt, as well). (*See* App. Br. 15–18.) In

short, no reasonable relationship exists between legitimate penological interests and the Condition as it applies to Mr. Karlin. Although the State repeats the Appellate Division's conclusion that the Condition "was reasonably related to [Mr. Karlin's] past crimes and the mitigation of his future risk of recidivism," and largely repeats the Appellate Division's rationale in reaching that conclusion, the State still does nothing to actually connect the *substance* of the Condition to these penological interests. (*See* Resp. Br. 17–18.)

In other words, the State makes no attempt to explain how banning Mr. Karlin from viewing an Oscar-winning movie in which a character briefly appears nude, or Michelangelo's *David* sculpture, or even a magazine cover depicting the backsides of adult men, bears *any* logical relationship to penological interests, much less a *reasonable* relationship.

Aside from merely repeating the Appellate Division's incomplete analysis on this issue, the State relies on two Third Department decisions for the generality that: "[I]t cannot be said that accessing material depicting sexual activity and sexual nudity bear no rational relationship to a child sex offender's past crime and risk of recidivism." (Resp. Br. 18, citing *Matter of State of New York v. Karl X.*, 172 A.D.3d 1498 (3d Dep't 2019), and *Matter of State of New York v. David HH*, 147 A.D.3d 1230 (3d Dep't 2017).)

The two Third Department decisions the State cites are of no moment to this Court's analysis in this Appeal. Both cases involve determinations regarding terms of civil confinement and supervision under New York's Mental Hygiene Law. Neither involve conditions of parole or probation, and neither involve First Amendment challenges. Both cases address the use of pornography specifically—a category of content much narrower than the scope of the Condition Mr. Karlin challenges.

Given these critical legal and factual differences, neither *Karl X.* nor *David HH.* helps elucidate the relationship between the Condition Mr. Karlin challenges and his criminal history or risk of recidivism. For example, whether pornography is a trigger factor for recidivism in Mr. Karlin's case is irrelevant here. This is true because none of the content giving rise to Mr. Karlin's parole violations was pornographic (the offending content was available through Mr. Karlin's public library, after all). Moreover, the Condition's scope extends far beyond whatever the bounds of "pornography" may be, extending to all materials which may depict nudity or sexual activity alongside artistic, entertainment, or educational content.

Mr. Karlin does not dispute that circumstances exist under which the government may proscribe an individual sex offender's access to certain materials. But that possibility, paired with Mr. Karlin's criminal history, does not give the

State *carte blanche* to enact blanket bans on protected First Amendment content, as happened here.

The State nonetheless makes only a surface-level attempt to demonstrate a reasonable relationship between the State's penological interests and the full scope of the material covered by the Condition. The State's circular, conclusory recitations of Mr. Karlin's criminal history and purported risk of recidivism do not suffice to satisfy the "reasonable relationship" test the State urges. By extension, this is also not enough to satisfy intermediate scrutiny. This Court should therefore find the Condition unconstitutional under both tests.

IV. THE CONDITION IS UNCONSTITUTIONALLY OVERBROAD

The State's discussion of overbreadth misapplies *Farrell* and fails to provide a workable application of overbreadth doctrine. (Resp. Br. 19–22.)

First and foremost, the fact that the Condition applies only to Mr. Karlin is neither decisive nor particularly relevant, despite the State's exhortations to the contrary. (Resp. Br. 19, 21–22.) Even by *Farrell's* own terms, the fact that a regulation applies to only one person is relevant only insofar as the regulation is decidedly valid with respect to that person. *See Farrell*, 449 F.3d at 497. In *Farrell*, the petitioner "was the only person whose conduct might have been chilled," so it was decisive that he failed to allege that *his own* protected speech could be chilled. *Id.* at 497–98. Indeed, a condition can suffer from vagueness or overbreadth "if

even one person's constitutionally protected conduct is chilled." *Id.* at 497. Accordingly, this point of the State's is irrelevant and a red herring; there is only one question determinative of overbreadth.

The Condition is overbroad if it punishes a substantial amount of protected conduct beyond its "plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This "legitimate sweep" is often interpreted as those applications which survive constitutional scrutiny. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (observing that a facial challenge involves establishing that a regulation lacks any legitimate sweep). Therefore, Mr. Karlin effectively contends that the Condition has *no* legitimate sweep because, as discussed above, it fails any level of scrutiny. *See id.* Nevertheless, even if this Court finds that *some* component of the Condition passes constitutional muster, the Condition is still invalid under the overbreadth doctrine because of myriad applications of the Condition which fall far afield of any conceivable legitimate scope:

- Access to popular film and television depicting romantic and sexual relationships between characters.
- Works of literature depicting the same.
- Music with sexually explicit lyrics.
- Historical works of art depicting nudity.

- Any Internet browsing, in which computer algorithms and/or spammers may bombard an innocent user with explicit images through pop-up advertisements and other content.

The Condition therefore proscribes a significant amount of constitutionally-protected conduct. The overbreadth is substantial, even and especially "judged in relation to the [Condition's] plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

The State is correct that "[t]he mere fact that one can conceive of some impermissible applications" is not enough to make a regulation overbroad. (Resp. Br. 20, quoting *United States v. Williams*, 553 U.S. 285, 303 (2008).) But Mr. Karlin does not merely conceive of *some* impermissible applications; he provides a laundry list of protected conduct which the Condition regulates even by the most charitable construction. What's more, Mr. Karlin served 22 months in prison for a violation of the Condition which clearly fell outside any legitimate sweep. The overbreadth concerns Mr. Karlin raises are not hypothetical thought exercises: the Condition's overbreadth has imposed an actual, lasting impact on Mr. Karlin.

The Condition's ambiguity is further relevant to analyzing its overbreadth. *Farrell*, 449 F.3d at 499 (when evaluating overbreadth, "[a]s with facial vagueness challenges, we must consider not only conduct clearly prohibited by the regulation but also conduct that arguably falls within its ambiguous sweep"). Much of the

conduct listed above has expressive value that clearly overcomes any possible tendency to cause harm, but the Condition makes no attempt to distinguish purpose or intent. May Mr. Karlin visit the Met, which displays statues in the nude? May he go to see the *Barbie* movie, which *satirizes* the genitalia of a famous children's toy? Such expressive, artistic, and ultimately harmless materials "constitute the vast majority of materials subject to" the Condition. *See Stevens*, 559 U.S. at 473.

Respondent relies heavily on *Farrell* as persuasive authority, but the case is distinguishable in critical ways. (*See* Resp. Br. 20–21.) First, the special condition in *Farrell* involved a regulation of "pornographic material," a category of content much narrower than the Condition's scope. 449 F.3d at 476. Arguably ambiguous, the court declined to define "pornography" because the book *Scum*, possessed by the parolee in *Farrell*, clearly fell into any one of the definitions the court considered. *Id.* But by identifying "pornography" as such, the condition at least attempted to distinguish the material's purpose from other depictions of nudity and sexual activity (unlike the Condition at issue here). The *Farrell* court expressly clarified: "[w]e do not suggest that all material that might be called 'pornographic,' given the term's inherent vagueness, could be prohibited without violating the First Amendment." *Id.* at 497. Where *Farrell* mentions "regulations of his possession of *sexual material*," it does so in the context of a discussion on pornography and pornographic content—not all sexual material generally, and much less any

material depicting nudity. *Id.* (emphasis added). Moreover, *Farrell* expressed the need for "greater efforts [to] be made in the future to define adequately the terms of parole conditions dealing with pornographic materials." *Id.* at 498. Read in full context, then, *Farrell* does little to defeat Mr. Karlin's argument.

In sum, Mr. Karlin was prohibited from accessing numerous examples of protected, purely expressive materials; the Condition substantially exceeds its legitimate sweep in this way. *Broadrick*, 413 U.S. at 615. This is not merely hypothetical. The materials for which Mr. Karlin was punished for accessing – a gay lifestyle magazine, featuring bare male bottoms on the cover – had similarly expressive components. (A22, 28–29.) Because the Condition prohibited a substantial amount of protected material in relation to its legitimate sweep (if any), the Condition is unconstitutionally overbroad.

V. REMAND IS NEITHER NECESSARY NOR APPROPRIATE IF THIS COURT HOLDS THE CONDITION IS UNCONSTITUTIONAL

The State argues that, "if the Court determines that the special [C]ondition cannot be sustained on the current record," the Court should remand the matter to Supreme Court so the State can "present evidence demonstrating that [Mr. Karlin's] accessing depictions of sexual nudity or sexual activity could lead to his re-offending." (Resp. Br. 22–23.) But the State fails to present any legal or factual justification for why it should get two bites at the apple. This proposal is

particularly illogical here, where Mr. Karlin has already served 22 months in prison for violating the Condition and is no longer even subject to this particular Condition.[8]

In the event that this Court (correctly) declares the Condition to be unconstitutional, a remand would be improper and unnecessary. The State has had ample opportunity to justify the Condition. If the State has not satisfied its burden, the Condition must be declared unconstitutional and the Board of Parole's determination that Mr. Karlin violated the Condition vacated.

CONCLUSION

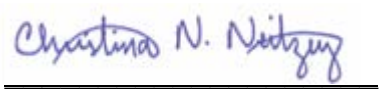
For these reasons, Mr. Karlin respectfully requests this Court reverse the Appellate Division, Third Department, vacate the Board of Parole's determination that Mr. Karlin violated the Condition, and declare the Condition unconstitutional.

[8] In a footnote, the State also proposes the alternative of a "de novo final [parole] revocation hearing" on a separate charge that Mr. Karlin violated his parole by not completing a sex offender treatment program. (Resp. Br. 23, n.7.) Again, the State does not get a second bite at the apple. In any event, as Mr. Karlin pointed out in his opening brief, he only failed to complete the treatment program because he was charged with violating the Condition. (App. Br. 18.) Thus, Mr. Karlin's failure to complete the treatment program at that time is inextricably wound up with the unconstitutional Condition and cannot stand on its own as a parole violation.

Dated: November 17, 2023
Ithaca, NY

Respectfully submitted,

CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC[9]

by: 

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[9] Nothing in this brief should be construed to represent the institutional views of Cornell University or Cornell Law School.

[10] Cornell Law School Clinic students Alexander Venditti, Dominic Muscarella, and Jared McMahon assisted in drafting this brief, under the supervision of attorney Christina Neitzey.

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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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 17th day of November, 2023, deponent served the within:

REPLY BRIEF FOR APPELLANT

upon designated parties indicated herein at the addresses provided below by means of Federal Express Priority Overnight Delivery of 3 true copies of the same at the addresses of said attorney/parties with the names of each represented party:

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