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.

APL-2022-00182

BRIEF OF AMICUS CURIAE THE NEW YORK CIVIL LIBERTIES UNION

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union hereby discloses that it is a non-profit, 501(c)(4) organization and is the New York State affiliate of the American Civil Liberties Union.

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PRELIMINARY STATEMENT

This case, which arises from the 22-month reincarceration of Daniel Karlin for a parole violation because he accessed a lawful LGBTQ magazine containing a nude image, presents the Court with an important opportunity to clarify the constitutional limits on the imposition of parole conditions that plainly could not be imposed on members of the general public and that needlessly risk reincarceration. Four years ago, in *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, six members of the Court recognized, without explicitly holding, that a condition of release that burdens a fundamental constitutional right must withstand strict scrutiny, as would be the case for such a restriction on other members of the public. Here, however, the lower courts have applied rational basis review to uphold a parole condition burdening Mr. Karlin's core First Amendment right. Amicus curiae, the New York Civil Liberties Union, writes to urge this Court to firmly declare – consistent with *Johnson* – that people on parole and under post-release supervision are afforded the same protections as other members of the public against violations of their constitutional rights.[1]

[1] On appeal to this Court, Mr. Karlin argues that his special condition must be reviewed under intermediate scrutiny (App Br at 12). At the Supreme Court, when Mr. Karlin commenced this article 78 proceeding, and in front of the Appellate Division, he argued that the special condition was subject to strict scrutiny (Resp Br at 6-7), thus preserving the argument amicus curiae makes in this brief for consideration by the Court.

Amicus curiae also writes to emphasize that content-based restrictions on speech, such as the special condition challenged by Mr. Karlin in this case, must withstand strict scrutiny. The special condition that Mr. Karlin "not view, access, possess and/or download any materials depicting sexual activity, nudity, or erotic images" is plainly a content-based restriction on speech and therefore must survive strict scrutiny, as would be the case for such a restriction on someone free from supervision of the criminal legal system.

Safeguarding the constitutional rights of members of the community who are subject to the supervision of the Department of Corrections and Community Supervision (DOCCS) supports reintegration. As Mr. Karlin's situation exemplifies, people on parole and under post-release supervision are subjected to onerous, expansive, and invasive restrictions that burden their lives and circumscribe their constitutional rights beyond what is necessary to promote rehabilitation or to protect public safety. This regime actively frustrates reintegration. People living in the community must be supported by the state, and their constitutional rights must be respected with the same vigor as would be available to any other member of the public.

ARGUMENT

I. THIS COURT SHOULD EXPRESSLY HOLD WHAT IT RECOGNIZED IN *JOHNSON*: PEOPLE ON PAROLE AND THOSE SUBJECT TO POST-RELEASE SUPERVISION ARE AFFORDED THE SAME PROTECTIONS AS ALL OTHER MEMBERS OF THE PUBLIC AGAINST VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS.

In *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, this Court considered the appropriate standard of review for a condition of parole release mandated by the Sexual Assault Reform Act. In a majority opinion joined by five members, the Court stated that if the State infringes upon "a fundamental liberty interest" then the infringement must be "narrowly tailored to serve a compelling state interest" (*People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 199 [2020]). In a separate opinion, Judge Wilson endorsed a similar position, explaining that "to the extent that Mr. Ortiz asserts that DOCCS violated his fundamental right to family integrity, DOCCS's actions are properly subject to strict scrutiny" (*id*. at 243 n.10 [Wilson, J. dissenting]).

Ultimately, the *Johnson* majority applied rational-basis review to the petitioners' challenges because it held that the petitioners asserted a non-fundamental right to be free from continued confinement past their open parole dates and maximum release dates, respectively, rather than asserting a violation of a fundamental constitutional right (*id*. at 199-200, 202 [stating that "Ortiz's

substantive due process claim must therefore be understood as asserting non-fundamental constitutional rights and, as with Johnson's, it is subject to rational basis review, not strict scrutiny"]). But the key point that emerges from *Johnson* is that six members of the Court agreed that the applicable standard of review was determined by the underlying right burdened by the condition rather than the petitioners' statuses as individuals subject to post-release supervision.[2]

Johnson is consistent with Second circuit caselaw on constitutional challenges to federal conditions of release. In *U.S. v Myers* – a case cited by both the majority and Judge Wilson in *Johnson* – the Second Circuit held that when evaluating a constitutional challenge to a federal condition of supervised release, "[i]f the liberty interest at stake is fundamental, a deprivation of that liberty is 'reasonably' necessary only if the deprivation is narrowly tailored to serve a compelling government interest" (426 F3d 117, 126 [2d Cir 2005]). As the majority in *Johnson* emphasized "the *Myers* opinion leaves no doubt that the reason the Second Circuit imposed strict

[2] Unlike prison, where restrictions on the constitutional rights of incarcerated individuals are "valid if [they are] reasonably related to legitimate penological interests" due to the unique nature of carceral settings (*Turner v Safley*, 482 US 78, 89 [1987]; *id*. at 84-85 [explaining that deference was owed to prison officials because "the problems of prisons in America are complex and intractable . . . Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government"]; *see also Bezio v Dorsey*, 21 NY3d 93, 104 [2013] [holding that in applying the *Turner* standard this Court should look at numerous factors unique to prisons like compatibility with incarceration, effect on the "prison population" as well as "allocation of prison resources"]), neither this Court nor the Supreme Court of the United States has held that this minimal standard of review is applicable beyond prison walls to the constitutional claims of people released into the community.

scrutiny was that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court" (*Johnson*, 36 NY3d at 201 [internal quotations omitted]).

Contrary to *Johnson*, the Appellate Division and the State cited to an over 50-year-old case (*Birzon v King*, 469 F2d 1241 [2d Cir 1972]), for the proposition that rational basis review should apply to Mr. Karlin's condition of release (*Karlin v Stanford*, 209 AD3d 1189, 1190 [3d Dept 2022]; Resp Br at 14). However, *Birzon* is inconsistent with how the Second Circuit now evaluates constitutional challenges to conditions of release.

In fact, the Second Circuit has applied the same analysis endorsed by *Myers* to First Amendment challenges. In *U.S. v Reeves*, the court vacated a federal condition of supervised release restricting the associational rights of a defendant convicted for possession of child pornography, holding that "[w]here a condition of supervised release impairs a protected associational interest . . . a deprivation of that liberty is 'reasonably necessary' only if the deprivation is narrowly tailored to serve a compelling government interest" (591 F3d 77, 82-83 [2d Cir 2010], citing *Myers*, 426 F3d at 126; *see also U.S. v Hernandez*, 209 F Supp 3d 542, 543-44 [ED NY 2016] [vacating a condition of release restricting an individual's First Amendment Free Exercise rights to attend religious services because "conditions of supervised release must be 'narrowly tailored to serve a compelling government interest'"]

[quoting *Reeves*, 591 F3d at 82-83]). In each of these cases, the underlying right asserted demanded strict scrutiny, just as a similar claim would trigger strict scrutiny outside of the parole or post-release supervision context.[3]

The Second Circuit's rejection of the *Turner v Safley* standard (482 US 78, 89 [1987]) for individuals released into the community makes sense, especially given that the exercise of fundamental rights is crucial for the reintegration process. As recognized by the U.S. Supreme Court in *Packingham v North Carolina*, "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in

[3] Rejecting the *Turner* standard for individuals released into the community would be consistent with a number of federal cases applying intermediate scrutiny to content neutral parole conditions following the U.S. Supreme Court's decision in *Packingham v North Carolina* (582 US 98, 108 [2017] [invalidating a North Carolina statute prohibiting people on the sex offender registry from accessing social media websites because the statute burdened the First Amendment rights of those impacted without being "necessary or legitimate" to serve its purpose of protecting vulnerable victims from convicted sex offenders]) (*see Jones v Stanford*, 489 F Supp3d 140, 143 [ED NY 2020] [issuing a preliminary injunction enjoining New York State from prohibiting certain subcategories of people under community supervision from accessing social media and the internet] *id*. at 148-50 [supporting its conclusions of law by evaluating the restrictions as applied individually to each named plaintiff and finding that in every instance the ban was not narrowly tailored to the plaintiffs' particular circumstances and thus failed to survive intermediate scrutiny]; *Yunus v Robinson*, No 17-CV-5839 (AJN), 2019 WL 168544, *15-17 [SD NY Jan 11, 2019] [holding that a parole condition that imposed a categorical ban on accessing social networking sites for an individual convicted of kidnapping a minor in New York State burdened "substantially more speech than necessary and therefore fail[ed] intermediate scrutiny"]; *Ennis v Annucci*, No 518-CV-0501 [GTS/TWD], 2019 WL 2743531, *8-9 [ND NY July 1, 2019] [explaining that following *Packingham*, government defendants were not entitled to qualified immunity for imposing a parole condition restricting an individual's ability to access the internet or social media that was not narrowly tailored to the individual parolee]). Importantly, these cases applied intermediate scrutiny to the parole conditions in those cases because they were content-neutral restrictions, whereas we argue below that Mr. Karlin's condition is *content-based* and must therefore receive strict scrutiny. Nonetheless, none of those courts applied rational basis review to the conditions at issue in those cases.

particular if they seek to reform and to pursue lawful and rewarding lives" (582 US 98, 108 [2017]). Similarly, in *U.S. v Eaglin*, the Second Circuit recognized that a mere hypothetical risk to public safety cannot alone justify the curtailing of releasees' First Amendment rights – "[a]lthough Internet access through smart phones and other devices undeniably offers the potential for wrongdoing, to consign an individual to a life virtually without access to the Internet is to exile that individual from society" (913 F3d 88, 91 [2d Cir 2019]).

Courts have emphasized the importance of First Amendment rights to promoting reintegration beyond the sphere of conditions restricting internet use. In *Hernandez*, the court noted the importance of First Amendment protected religious expression to the rehabilitation of formerly incarcerated people (*Hernandez*, 209 F Supp3d at 546 [holding that a condition prohibiting a defendant convicted of the receipt of child pornography from attending religious services with minors present "impedes rehabilitation, one of the primary goals of supervised release. Participating in religious services can assist past offenders to return to their community and avoid recidivism"]). Likewise, in *Reeves*, the Second Circuit held that a notification requirement that curbed an individual's associational rights "would almost certainly adversely affect, and could very well prematurely end, any intimate relationship he might develop, placing him at greater risk of social isolation and thus impair, rather than enhance, his rehabilitation" (*Reeves*, 591 F3d at 82).

In sum, amicus curiae urges this Court to issue an explicit holding – consistent with *Johnson* – that conditions of release that infringe the fundamental rights of someone on parole or subject to post-release supervision must survive strict scrutiny. This holding would also be consistent with how the Second Circuit now views the constitutional rights of people released into the community.

II. CONDITIONS OF RELEASE THAT IMPOSE CONTENT-BASED RESTRICTIONS ON SPEECH – SUCH AS MR. KARLIN'S – MUST WITHSTAND STRICT SCRUTINY.

Recognizing that the restriction imposed on Mr. Karlin is subject to the same level of constitutional scrutiny as if it was imposed on any other member of the public, the issue next before this Court is to determine the level of scrutiny based on the nature of the right burdened. Here, because Mr. Karlin's condition states that he may "not view, access, possess and/or download any materials depicting sexual activity, nudity, or erotic images" (A38), it is a content-based restriction that infringes on his fundamental First Amendment right to view such content. Thus, it must be evaluated under strict scrutiny.

In *Erznoznik v City of Jacksonville*, the U.S. Supreme Court held that nude content is protected speech, and restrictions targeting nude materials are content-based restrictions (422 US 205, 211 [1975]; *see also Schad v Borough of Mount Ephraim*, 452 US 61, 66 [1981] ["[n]udity alone does not place otherwise protected material outside the mantle of the First Amendment"]; *Tunick v Safir*, No 99 CIV

5053 (HB), 1999 WL 511852, at *4 [SD NY July 19, 1999], aff'd and remanded, 228 F3d 135 [2d Cir 2000] [holding that "New York case law supports my conclusion that artistic nude photography is protected expression" and that "the New York Penal Law itself together with the First Amendment clearly protect the expression of artistic nudity" while issuing a preliminary injunction to permit a nude photo shoot on the streets of New York City]). The *Erznoznik* court held that a local ordinance prohibiting drive-in movie theaters from showing films containing nudity when the screen was visible from public streets (422 US at 206) was a content-based restriction because the "ordinance discriminate[d] among movies solely on the basis of content" and "[i]ts effect [was] to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational" (*id*. at 211). Restrictions on speech that target erotic or sexually explicit content are also content-based restrictions (*US v Playboy Entertainment Group, Inc.*, 529 US 803, 811-12 [2000]; *id*. at 806-07, 827 [holding that a federal statutory requirement that cable television operators providing access to channels "dedicated to sexually-oriented programming" block access to those channels between 6 a.m. and 10 p.m. was not the least restrictive means of achieving the statute's interest and therefore violated the First Amendment]).

Content-based restrictions on speech and expressive conduct "are presumptively invalid" (*R.A.V. v City of St. Paul*, 505 US 377, 382 [1992]), and must

survive strict scrutiny in order to pass constitutional muster (*Reed v Town of Gilbert, Ariz.*, 576 US 155, 164 [2015]). Under strict scrutiny, the government bears the burden of proving that a content-based restriction "is the least restrictive means for serving a compelling government interest" (*Town of Delaware v Leifer*, 34 NY3d 234, 244 [2019]).

Mr. Karlin's condition restricting his access to all nude or erotic material plainly restricts his access to such materials purely on the basis of their content. The State's discrimination against nude content specifically is evidenced by Mr. Karlin's hearing officer revoking his release and sending him back to prison for twenty-two months for accessing a gay lifestyle magazine featuring a photograph of nude men from behind that accompanied an article about kayaking (App Br at 2, 5-6). Since the special condition imposed on Mr. Karlin singles out materials based on its content, it must be subject to strict scrutiny.

III. TO WITHSTAND STRICT SCRUTINY, A CONDITION OF RELEASE THAT INFRINGES UPON A FUNDAMENTAL RIGHT MUST BE NARROW IN ITS SCOPE AND BE CLOSELY TIED TO THE FACTS OF THE UNDERLYING CRIMINAL CONVICTION.

A state action can withstand strict scrutiny "only when the State can show that the law furthers a compelling state interest by the least restrictive means practically available" (*Aliessa ex rel. Fayad v Novello*, 96 NY2d 418, 431 [2001]). The State

has not met its burden to demonstrate that Mr. Karlin's special condition can withstand strict scrutiny for at least two reasons.

First, even if the State can articulate a compelling interest motivating its imposition of a specific condition of release, it must put forth evidence that the particular condition is the least restrictive means of doing so (*see U.S. v Reeves*, 591 F3d 77, 83 [2d Cir 2010] [stating that "[e]ven assuming arguendo that the [compelling] goal of the condition is the protection of children, we would conclude that it is not narrowly tailored since it applies to any significant romantic relationship, even those which would not bring Reeves into contact with children"]). Given that the prohibition on accessing content featuring any "sexual activity, nudity, and/or erotic images" applies to a wide swath of innocuous content, it cannot be said to be sufficiently tailored. The text of the special condition curtails Mr. Karlin's ability to access significant amounts of art, literature, and educational materials. Even if the State can establish a link between prohibiting access to pornography and its compelling interests, Mr. Karlin's special condition plainly extends beyond pornography to any depiction of nudity whatsoever, no matter the context.

Second, the condition here is not supported by the specific facts of Mr. Karlin's criminal convictions. Although Mr. Karlin's convictions involve serious offenses against minors, none involve the creation or dissemination of materials containing illegal nude or sexual content. Therefore, prohibiting Mr. Karlin from

accessing materials that depict nudity in particular cannot be the "least drastic means of ensuring the public's safety" because the condition lacks a specific connection to the criminal conduct described in Mr. Karlin's convictions (*see U.S. v Hernandez*, 209 F Supp 3d 542, 546 [ED NY 2016] [holding a prohibition on the defendant attending church services with minors present unnecessarily burdened the defendant's First Amendment right to exercise his religion because the condition was "not the least drastic means of ensuring the public's safety" despite the defendant's convictions for receiving child pornography]).

Accordingly, the State has failed to meet its burden to show that Mr. Karlin's condition of release that he "not view, access, possess and/or download any materials depicting sexual activity, nudity, or erotic images" is the least restrictive means of meeting its interest in advancing public safety.[4]

CONCLUSION

For the foregoing reasons, amicus curiae New York Civil Liberties Union urges the Court to hold that people on parole and those subject to post-release supervision are afforded the same protections as all other members of the public against violations of their constitutional rights. Conditions of release that restrict individuals' ability to exercise their fundamental rights – including those which

[4] Amicus curiae agree with and support Mr. Karlin's assertion that the special condition also cannot meet intermediate scrutiny or the "reasonable relationship" test for the reasons stated in his briefs before this Court.

impose content-based restrictions on speech – must therefore be assessed under strict scrutiny. As such, amicus curiae further urges the Court to reverse the Appellate Division's ruling in this case and to hold that Mr. Karlin's special condition unconstitutionally circumscribes his First Amendment rights.

Respectfully submitted,

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[5] The NYCLU would like to acknowledge the assistance of Thomas W. Munson on the brief.

CERTIFICATE OF COMPLIANCE

Pursuant to the State of New York, Court of Appeals Rules of Practice, 22 NYCRR Part 500.1 §§ (j)(l) and Part 500.13 §§ (c)(1) and (c)(1)(3), I certify that the foregoing brief was prepared on a word processor, using 14-point Garamond proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, table of contents, table of citations, certificate of compliance, and affidavit of service is 3,140.

Dated: February 29, 2024
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