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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KARLIN,

Appellant,

-against-

NO. 66

STANFORD,

Respondent.

20 Eagle Street
Albany, New York
May 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE SALLIE MANZANET-DANIELS

Appearances:

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CHIEF JUDGE WILSON: Last case on today's calendar is Number 66, Matter of Karlin v. Stanford.

MS. NEITZEY: Good afternoon, and may it please the court. Christina Neitzey for appellant Daniel Karlin. May I please reserve three minutes for rebuttal?

CHIEF JUDGE WILSON: Yes.

MS. NEITZEY: Thank you. Appellant Daniel Karlin challenges as unconstitutional under the First Amendment, a parole condition which banned him from viewing, accessing, possessing or downloading any materials depicting any sexual activity, nudity, or erotic images. The condition is not limited to pornography. It has no carve outs. It allows for no exceptions.

JUDGE SINGAS: The condition is limited to that computer, correct?

MS. NEITZEY: No, Your Honor.

JUDGE SINGAS: To a computer?

MS. NEITZEY: It's the - - - the condition was implemented when Mr. Karlin received access to a computer, but it applies to any material that he accesses through any means.

JUDGE TROUTMAN: But he - - - he asks - - - he asks for.

JUDGE SINGAS: He can't - - - he can't go to the



1 movies? Are you saying that's part of his condition and
2 watch whatever he wants to watch or listen to? Explicit
3 music?

4 JUDGE CANNATARO: Television?

5 MS. NEITZEY: My understanding of the condition
6 is that it applied to any - - -

7 JUDGE SINGAS: And where is that in the record?

8 MS. NEITZEY: Well, the condition itself is not
9 limited in language to any material that Mr. Karlin
10 accesses through the internet.

11 JUDGE SINGAS: Well, the condition came up when
12 he asked for a computer that he needed for work, and they
13 gave him a sheet. And I think it's - - - I don't know how
14 many, eight or nine requirements that all have to do with a
15 computer, and the last one is this one which you're
16 challenging, which also has to do with a computer. So it's
17 safe to assume that it has to do with computers, no?

18 MS. NEITZEY: Mr. Karlin's assumption is not that
19 it's limited to anything that he accesses through the
20 internet. But regardless - - -

21 JUDGE TROUTMAN: And what - - - does he
22 specifically assert there were things he actually did not
23 do because of his condition?

24 MS. NEITZEY: So Mr. Karlin is subject to a
25 similar but different condition today, which does in fact

1 chill his conduct because of the violation which led to him
2 going back to prison for two years for violating this
3 condition. He - - - the condition he's subject to today
4 applies to sexually explicit material. So it raises
5 similar concerns. But Mr. Karlin went back to prison for
6 accessing a magazine that he was - - - that he found
7 through the website of his public library. It was a
8 nonpornographic magazine. The cover of the magazine
9 pictured several males who were nude from behind and showed
10 their bare buttocks in the cover photo. I believe the
11 magazine also had an article about sex.

12 This magazine, which he did access through the
13 internet, but through his library's website, he could have
14 gotten it in person at his library had he been there, was
15 the basis for the parole violation which sent him back to
16 prison for two years. The lower court erred in at least
17 three ways in this case. First, it erred by applying a
18 reasonable relationship standard to Mr. Karlin's challenge,
19 rather than a form of heightened scrutiny given the First
20 Amendment element of Mr. Karlin's claim.

21 JUDGE CANNATARO: Is it simply the First
22 Amendment alone that there's a First Amendment right that
23 triggers a higher level of scrutiny beyond what would be
24 rational?

25 MS. NEITZEY: In this case, yes.

1 JUDGE CANNATARO: Why is that?

2 MS. NEITZEY: It's the First Amendment claim that
3 gives rise to that heightened scrutiny. Because the
4 reasonable relationship test effectively looks like
5 rational basis here. But it comes from statutory law, not
6 from common law. And it doesn't account - - -

7 JUDGE TROUTMAN: How does his parole status come
8 into play under your analysis?

9 MS. NEITZEY: The parole status could come into
10 play by perhaps shifting the level of scrutiny from strict
11 scrutiny to intermediate. But applying - - - what the
12 State is arguing is that reasonable relationship applies.
13 Basically, asking the court to ignore the constitutional
14 element of this case altogether.

15 CHIEF JUDGE WILSON: Well, does the parole status
16 change the level of scrutiny from whatever it is to
17 something else? Or is it - - - does it affect the
18 tailoring of the restriction?

19 MS. NEITZEY: It affects the tailoring of the
20 restriction. The - - -

21 CHIEF JUDGE WILSON: So let me ask it this way.
22 Mr. Karlin, does he have a right to write his
23 congressperson a letter to ask for some law to be changed?

24 MS. NEITZEY: Of course.

25 CHIEF JUDGE WILSON: Under the First Amendment?

1 MS. NEITZEY: Of course.

2 CHIEF JUDGE WILSON: And that would be subject to
3 what kind of scrutiny in your view? Well, let me ask it
4 differently. Is his right in that regard subject to a
5 different level of scrutiny than mine?

6 MS. NEITZEY: You mean if there were a parole
7 condition which restricted his right to write to his
8 congressman?

9 CHIEF JUDGE WILSON: Correct. Correct. And
10 there was a - - - and there was a law that restricted mine
11 in the same way. I assume mine would be reviewed under
12 strict scrutiny.

13 MS. NEITZEY: Right and the court would need to
14 look at. I think strict scrutiny would apply even if there
15 was a parole condition barring Mr. Karlin from writing to
16 his congressman, yes.

17 JUDGE GARCIA: Would it make a difference if he
18 had sent threatening letters to congressmen?

19 MS. NEITZEY: If the parole conditions said he -
20 - -

21 JUDGE GARCIA: No. If he had been convicted of
22 that?

23 MS. NEITZEY: Possibly.

24 JUDGE GARCIA: Sending threatening letters to
25 members of Congress.

1 MS. NEITZEY: Possibly. And it would come - - -

2 CHIEF JUDGE WILSON: And that would - - - would
3 that affect the level of scrutiny or would it affect the
4 tailoring? That is the need for some restriction on him
5 because of what he'd done.

6 MS. NEITZEY: It would come into play with the
7 tailoring. Where the parole condition comes into play, and
8 a friend of the court, the New York Civil Liberties Union,
9 sets out how there is support - - - there's ample support
10 for applying strict scrutiny here.

11 JUDGE GARCIA: So in that case, with the
12 conviction for the threatening members of Congress, and the
13 condition is you can't write to members of Congress
14 violated, what level of scrutiny would you get? How would
15 you approach the violation in a constitutional analysis?

16 MS. NEITZEY: If a parole condition said, you
17 cannot write - - -

18 JUDGE GARCIA: You can't write to a member of
19 Congress, and your conviction was for sending threatening
20 communications to members of Congress.

21 MS. NEITZEY: Then I think strict scrutiny - - -
22 there's support for strict scrutiny applying, and the State
23 would then have to show that this parole condition is the
24 least restrictive means of achieving the government
25 interest of, I assume, it would be reducing recidivism,

1 rehabilitation, what have you.

2 JUDGE RIVERA: I thought it would be ensuring you
3 don't write any more threatening letters. You can write
4 your congressperson to please put more money into the
5 parks, but you can't write your congressperson that you're
6 going to kill them.

7 MS. NEITZEY: So that would be an example of
8 least restrictive means.

9 JUDGE RIVERA: Yes, that's true. Let me ask you
10 with respect to the condition itself, apart from the issue,
11 Judge Singas raised an important issue about whether or not
12 it's limited to the use of the computer. Is it your
13 position that sexual activity, nudity or erotic images,
14 each one of those was problematic?

15 MS. NEITZEY: The only - - -

16 JUDGE RIVERA: Or are any of those appropriate?

17 MS. NEITZEY: The only two at play for the
18 violations to which Mr. Karlin pleaded guilty are sexual
19 activity and nudity. All of them are broad. All - - - the
20 conditions scope is vast. So each of these on its own
21 would be overbroad. And my - - -

22 JUDGE MANZANET-DANIELS: Haven't some cases
23 likened the terms sexual activity with sexually explicit
24 activity, which has been held to be properly restricted for
25 someone in your client's position?

1 MS. NEITZEY: I'm not - - - in my mind, sexual
2 activity is much broader than the terms sexually explicit.
3 I think the terms sexually explicit still raises concerns
4 about overbroad - - -

5 JUDGE MANZANET-DANIELS: Well, sexual activity
6 can - - -

7 MS. NEITZEY: - - - in this particular case.

8 JUDGE MANZANET-DANIELS: Sexual activity connotes
9 sexual acts. Sexually explicit activity, the same. So I
10 mean, it's really - - - there's not much of a difference
11 other than the adjective explicit, right?

12 MS. NEITZEY: But there's still a tailoring
13 concern. A PG-13 movie could reflect - - - could contain
14 material that is sexually explicit in some individuals - -
15 -

16 JUDGE MANZANET-DANIELS: In a PG-13?

17 JUDGE CANNATARO: Is the question of tailoring as
18 relevant if the facts support, you know, this
19 interpretation that sexual - - - sexual activity really
20 means sexually explicit activity? I mean, I only ask
21 because the article that he read here is someone talking
22 about their experience the first time having anal sex,
23 which to me sounds pretty sexually explicit. It's sexual,
24 yes, but it's sexually explicit, as well. So you know,
25 part of me says, regardless of what you called it, in the

1 condition, it meets a sexually explicit requirement.

2 JUDGE MANZANET-DANIELS: And especially - - - if
3 I could just add to that, especially here, where the
4 sexually explicit material was related to the history of
5 your client's offenses.

6 MS. NEITZEY: The question before this court,
7 though, is not whether Mr. Karlin's conduct was him viewing
8 sexually explicit activity. There's not a fact question
9 here. The question is a question of law, of whether the
10 condition, it satisfies heightened constitutional
11 authority.

12 JUDGE CANNATARO: So because the condition was
13 not properly phrased as you legally understand it, the
14 underlying activity has no bearing on the analysis? Is
15 that - - - is that the argument?

16 MS. NEITZEY: Exactly. Because the condition is
17 overbroad, because it is not narrowly tailored to
18 government interests. And our position is that even under
19 the government's reasonable relationship standard, the - -
20 - when you look at the breadth and the scope of the
21 condition, and you look at the government's purported
22 interests, which yes, are legitimate interests, but there's
23 no - - - the State articulates no connection between this
24 particular condition - - -

25 JUDGE CANNATARO: I'm so interested in why you

1 chose to make this argument with respect to sexual
2 activity, as opposed to like maybe nudity, because nudity
3 could be looking at a Picasso or something like that. But
4 sexual activity, I don't know, it seems very reasonably
5 related to a legitimate penological purpose that's trying
6 to be achieved here. So are you sure that sexual activity
7 is the one that you're - - - you're focusing on here?

8 MS. NEITZEY: To be clear, we're not focusing on
9 one over the other.

10 JUDGE CANNATARO: Okay.

11 MS. NEITZEY: And nudity is an easier case. But
12 here the term sexual activity is it's inherently vague.
13 It's incredibly broad.

14 JUDGE RIVERA: So what would have been a way to
15 narrow? What - - - what - - - what in your view, could
16 have been written here?

17 MS. NEITZEY: So the government would - - - the -
18 - - the parole board would have had to identify legitimate
19 government interests and then craft a condition that is
20 near identical - - -

21 JUDGE RIVERA: Okay. But I think you get a sense
22 of what they're trying to do. So how could they have
23 achieved the goal and yet have come up with a condition
24 that, under your rule, under your interpretation, would
25 have survived constitutional scrutiny?

1 MS. NEITZEY: So I won't put myself in the parole
2 officer's shoes, because I'm not - - -

3 JUDGE RIVERA: I know, but I'm asking you the
4 hypothetical. How could this condition have been saved?

5 MS. NEITZEY: There are many different ways that
6 it could have been limited, for example, and this would not
7 necessarily have been sufficient, but it could be limited
8 to pornography specifically. That term is inherently vague
9 and raises other concerns, but that would be a way to
10 narrow this condition so that it's not so broad.

11 JUDGE TROUTMAN: Does it matter that the only
12 reason he was subject to this condition is because he asked
13 to use the computer for educational purposes and was
14 afforded that opportunity?

15 MS. NEITZEY: I don't think so, Your Honor. When
16 you look at recent case law, *Packingham v. North Carolina*
17 and other case law that's followed - - - I see my time's
18 expired. May I finish?

19 CHIEF JUDGE WILSON: Please continue. I have a
20 question for you, as well.

21 MS. NEITZEY: The internet - - - access to the
22 internet has become such a critical part of participating
23 in society. Accessing the internet is a First Amendment
24 right that the Supreme Court and the Second Circuit have
25 emphasized over and over again. So no. I - - -

1 JUDGE TROUTMAN: So are you suggesting here no
2 restrictions were allowed for him, despite the nature of
3 his - - - his conviction?

4 MS. NEITZEY: No, I'm - - - I'm arguing that only
5 narrowly tailored restrictions tied to his internet access
6 or otherwise are - - - would be appropriate here.

7 CHIEF JUDGE WILSON: I want you to return to
8 Judge Singas' question because you - - - you know, both in
9 your briefs and argument have presented your case as if the
10 restriction applies to all of his conduct, even walking
11 through the Metropolitan Museum. Suppose we were to
12 interpret, or suppose the condition itself had clearly
13 read, that this is just limited to what he can do on this
14 computer. Would that be sufficiently narrowly tailored?

15 MS. NEITZEY: I don't think so Your Honor.
16 Again, given that in today's society we use computers to go
17 to school, we do computers - - - we use computers to do
18 work, to read books, to watch movies.

19 CHIEF JUDGE WILSON: But do we also do things
20 like that - - - he can also go to the public library. He
21 can use his cell phone presumably, which is not I don't
22 know if he can have a cell phone actually.

23 MS. NEITZEY: He can. He can.

24 CHIEF JUDGE WILSON: Is there a restriction on
25 that?

1 MS. NEITZEY: But to your - - - to your - - -

2 CHIEF JUDGE WILSON: Do you know? Do you know if
3 there was a condition on the cell phone?

4 MS. NEITZEY: There are conditions. He is
5 subject to conditions related to his smartphone. I believe
6 many of those conditions have been rolled back over time.

7 CHIEF JUDGE WILSON: I'm sorry. I was asking
8 about not now, but back then. Did he have the same
9 conditions on his smartphone?

10 MS. NEITZEY: I'm not sure whether he was allowed
11 to have a smartphone back in 2018.

12 CHIEF JUDGE WILSON: Okay.

13 MS. NEITZEY: I don't know the answer to that.

14 CHIEF JUDGE WILSON: Okay.

15 MS. NEITZEY: But - - -

16 CHIEF JUDGE WILSON: But you would think that
17 even if this was simply limited to the computer, it would
18 still not be sufficiently tailored.

19 MS. NEITZEY: Absolutely. Because of the breadth
20 of the types of content that it still applies to. And - -
21 -

22 JUDGE TROUTMAN: So you're - - - still are
23 essentially saying they couldn't restrict his use of the
24 computer in any way.

25 MS. NEITZEY: Oh, they absolutely could, but they

1 can't restrict - - -

2 JUDGE TROUTMAN: How?

3 MS. NEITZEY: - - - him from viewing any
4 depiction of nudity in any magazine or book or film.

5 JUDGE TROUTMAN: So did it only have to be
6 children because those were the victims of his crimes? Is
7 that what you're suggesting? They have to be more
8 specific?

9 MS. NEITZEY: That could be a restriction that
10 might survive the tailoring. But yes, they need to be more
11 specific.

12 JUDGE SINGAS: Well, that wouldn't - - - I mean,
13 that, if it was children, it would be a crime. I mean,
14 does it matter that he's on parole for a sex offense versus
15 he's an arsonist or a robber? Does that come into play at
16 all?

17 MS. NEITZEY: I think that comes into play with
18 the narrow tailoring, but not with the fact that the
19 reasonable relationship standard completely ignores the
20 constitutional component - - -

21 JUDGE TROUTMAN: But the reasonable relationship
22 he's convicted of serious sex offenses, and the conduct
23 that is impacted is because of that. So you're - - -
24 you're - - - but I'm having difficulty grasping what you
25 say, if anything, they can do to limit his use of the

1 internet.

2 MS. NEITZEY: To me, there's a difference between
3 - - - so this condition bars Mr. Karlin from, say, watching
4 The Terminator on Netflix. The iconic opening scene of The
5 Terminator features a nude Arnold Schwarzenegger from
6 behind. Mr. Karlin can't watch that movie under the
7 condition that he challenges. That kind of ban bears no
8 reasonable relationship to his underlying conditions.

9 JUDGE TROUTMAN: So he has to ascertain, like
10 ratings of movies as to what - - - the greater difficulty
11 that I'm having here is originally was - - - let me ask you
12 this. Was the original condition that he couldn't use the
13 internet? Was he originally restricted in total?

14 MS. NEITZEY: I believe so.

15 JUDGE TROUTMAN: And then he - - - he said, may I
16 use the computer because I have need for educational
17 purposes, correct?

18 MS. NEITZEY: That's correct.

19 JUDGE TROUTMAN: And he was granted that
20 permission subject to certain conditions?

21 MS. NEITZEY: That is correct.

22 JUDGE TROUTMAN: Okay.

23 JUDGE MANZANET-DANIELS: Conditions that he
24 accepted.

25 MS. NEITZEY: That's correct. But under current

1 federal case law, the landscape has changed around First
2 Amendment rights surrounding access to the internet, even
3 for individuals subject to parole and probation.

4 JUDGE SINGAS: I'm not so certain that his access
5 to the internet is completely based on this condition. And
6 I'm not so certain that he couldn't watch Terminator
7 somewhere else at a friend's house or on his TV. So I
8 think we'll ask for clarification, but if I can, I just
9 have one more question. Should we ascribe any relevance to
10 the fact that his treatment provider said that, you know,
11 he - - - he was discharged from his program because of this
12 sexual preoccupation, and they think that this type of
13 material is harmful to his rehabilitation. So if they
14 think that, why isn't it reasonable that his parole officer
15 would think that?

16 MS. NEITZEY: So this came up only after Mr.
17 Karlin was charged with the violations. So it's sort of a
18 bootstrapping.

19 JUDGE MANZANET-DANIELS: I don't think so. I - -
20 - I - - - it was very clear that - - - that the report that
21 Judge Singas referred to the, the - - - the person at the
22 therapy treatment center was very clear that he had
23 violated his treatment program by accessing this material.
24 So I mean, it happened afterward only because it had to
25 happen afterwards, right? The psychiatrist doesn't have

1 access to his computer. His parole officer does. So the
2 fact that one happens before the other seems irrelevant to
3 me. The issue is whether it was - - - whether his
4 participation in the program was terminated because of his
5 violation of their conditions of treatment. It seems to me
6 that that's what the report indicated.

7 MS. NEITZEY: My sense is that the two are
8 inextricably - - - inextricably bound up and that it's
9 impossible to separate the two. Again, if his treatment
10 providers could show that imposition of the condition and
11 with its breadth, apply - - - were narrowly tailored to the
12 goals of his rehabilitation, including completing this
13 treatment program, then that would be a different story.
14 But here the two are so bound up that it's sort of a trying
15 to justify the condition after the fact, based on the
16 violation itself.

17 JUDGE MANZANET-DANIELS: I see nothing in the
18 record that would indicate that the treatment plan was
19 imposed after the fact.

20 MS. NEITZEY: No, but I mean the termination from
21 the treatment program.

22 JUDGE MANZANET-DANIELS: Again - - -

23 MS. NEITZEY: Came after the violation.

24 JUDGE MANZANET-DANIELS: It - - - there's no
25 other way that that could have happened, right? The only

1 way they would find - - -

2 JUDGE TROUTMAN: The termination - - -

3 JUDGE MANZANET-DANIELS: Go ahead.

4 JUDGE TROUTMAN: Yes, the termination happens
5 because the information is provided. When they participate
6 in these treatment programs, you agree that they give them
7 conditions in order to stay in good standing in the
8 program, correct?

9 MS. NEITZEY: That's correct.

10 JUDGE TROUTMAN: And if they receive information
11 that they're not in compliance with those very same
12 conditions, then they can be removed?

13 MS. NEITZEY: That's correct.

14 JUDGE TROUTMAN: So the only way that as, as
15 Judge said, he could be removed was for that information to
16 be relayed, but it couldn't be relayed other than the
17 provider getting it from the parole officer or someone else
18 who had access to his computer.

19 MS. NEITZEY: But I'm not sure that the condition
20 being challenged here is coterminous with any condition of
21 the treatment program.

22 JUDGE GARCIA: But it's the conduct. The conduct
23 here was the same trigger for the treatment program
24 decision. It wasn't the fact of a parole violation that
25 triggered that. It was the conduct. The conduct's

1 reported to treatment folks. They say this is a violation,
2 right? Because you violated our own terms of what we think
3 is - - - would hinder your rehabilitation; isn't that
4 right?

5 MS. NEITZEY: The charge for not completing the
6 sex offender treatment program is not a charge that Mr.
7 Karlin pleaded guilty to, so it's not part of this appeal.
8 The - - - your - - - your point is taken, Your Honor, that
9 the underlying conduct may have violated the terms of the
10 treatment program. But that doesn't change the fact that
11 the condition Mr. Karlin is challenging merits heightened
12 constitutional scrutiny.

13 JUDGE RIVERA: Can I just clarify, because you
14 said before - - - I think you said before that he already
15 had a condition imposed upon him that he could not access
16 the internet? Or did I misunderstand you?

17 MS. NEITZEY: I believe that's true.

18 JUDGE RIVERA: Okay. Just to be clear then. But
19 he's not challenging that; is that correct?

20 MS. NEITZEY: Well, because he - - - he got
21 access to a computer and the internet. So he's not
22 currently subject to - - - back in 2018 when this violation
23 occurred - - -

24 JUDGE RIVERA: No. I- - - I - - - I take you to
25 be saying that that request to use a computer for

1 educational purposes is functionally equivalent to saying,
2 please let me have general access to the internet?

3 MS. NEITZEY: My understanding is that he - - -

4 JUDGE RIVERA: And that's the way he understood
5 it.

6 MS. NEITZEY: My understanding is that his
7 internet access and access to his - - - access to a
8 computer was not conditioned on, but you can only use the
9 internet for educational purposes.

10 JUDGE CANNATARO: Would that have been a
11 legitimate - - - I was going to ask your adversary that
12 very question, but since you said it, I'll ask you. If he
13 had asked for access to a computer to do his education and
14 the condition the parole people put on letting him have a
15 computer was you can use it for educational purposes at
16 your university website, and for nothing else at all.
17 Can't stream HBO because sometimes that has nudity on it.
18 You can't go on TikTok. None of that. Would that have
19 been a legitimate condition of parole?

20 MS. NEITZEY: I don't think so Your Honor. Under
21 current - - -

22 JUDGE CANNATARO: Why?

23 MS. NEITZEY: Under current First Amendment case
24 law the rights of parolees, individuals on probation to
25 access the internet for purposes beyond just educational

1 purposes, but also for certain social and entertainment
2 purposes, has - - -

3 JUDGE CANNATARO: So if they give him access for
4 purposes of the stated reason that he wanted the access,
5 but they restrict him for any reason that's not connected
6 to that, they've violated his First Amendment rights.

7 MS. NEITZEY: Well, you'd have to engage in a
8 First Amendment analysis.

9 JUDGE CANNATARO: Okay. He can't watch HBO. He
10 can't stream HBO. That - - - that's a violation of his
11 First Amendment rights.

12 MS. NEITZEY: So that would be much narrower than
13 the condition we're dealing with here. I think it would
14 still raise concerns about narrow tailoring. But a blanket
15 ban on his use of the internet for anything other than
16 educational purposes would almost certainly fail First
17 Amendment. Not to say that a total internet ban would be
18 inappropriate in every situation for every individual, but
19 just that it has to meet that heightened scrutiny. And the
20 reasonable relationship test doesn't take these
21 constitutional considerations into account whatsoever.

22 CHIEF JUDGE WILSON: Thank you.

23 MS. NEITZEY: Thank you.

24 MS. NEPVEU: Good afternoon, Your Honors. Kate
25 Nepveu for respondent. Your Honors, I have to start by

1 clarifying that the condition at issue is both broader and
2 narrower than the court's talking about. It is not a
3 condition that's based on the internet on - - - only - - -
4 only applies to internet use, because the special condition
5 was something that petitioner's parole officer determined
6 was necessary to protect the public from petitioner's high
7 risk of re-offending as a serial sex offender, an abuser of
8 children. So if it were limited to just the internet, it
9 wouldn't protect - - -

10 CHIEF JUDGE WILSON: I just want to understand
11 with particularity what that means. So did it apply to his
12 activities that were not online activities at all?

13 MS. NEPVEU: That's correct.

14 CHIEF JUDGE WILSON: So walking through the
15 museum he can't see nudity?

16 MS. NEPVEU: No, that's not correct, Your Honor.

17 CHIEF JUDGE WILSON: Okay. So then you got to
18 explain a little more.

19 MS. NEPVEU: Sure. The charge - - - nudity here
20 is sexual nudity. The charge - - -

21 CHIEF JUDGE WILSON: No, I wasn't asking about -
22 - - sorry, I wasn't asking about nudity for the moment.

23 MS. NEPVEU: Sorry.

24 CHIEF JUDGE WILSON: I'm asking about what media
25 or activities it applies to.

1 MS. NEPVEU: Sure. All media, all activities.
2 Because the purpose of the special condition is to reduce
3 petitioner's access to stimulation of his sexual impulses.
4 Because his inability - - -

5 JUDGE GARCIA: Then why is it imposed when he
6 asks for a computer? If that's the goal, why isn't it
7 imposed right away?

8 MS. NEPVEU: Previously, he had been under a
9 slightly different condition.

10 JUDGE GARCIA: Which was?

11 MS. NEPVEU: Which was that he could not have - -
12 - purchase, possess or engage in any way with the use of
13 any sexually explicit materials or erotic magazines, tapes,
14 blah, blah, blah. So it's not as though - - -

15 CHIEF JUDGE WILSON: Is that in the record
16 anywhere or we don't have that in the record?

17 MS. NEPVEU: It's quoted in petitioner's reply
18 brief, Your Honor. No. Excuse me. That's his current
19 condition, which is quoted in his reply brief. He mentions
20 in his - - - yes, it is in the record. He states in his
21 petition previously, the condition I was under was that I
22 couldn't have access - - - I couldn't engage with sexually
23 explicit or erotic materials.

24 JUDGE GARCIA: So what about getting the computer
25 then?

1 MS. NEPVEU: That's not clear to me why there was
2 a shift. It may be that there was a shift in the parole
3 officer. It may be that there happened to be - - -

4 JUDGE SINGAS: I don't think it was a shift. I
5 mean, I'm looking at the document A38, and it's basically
6 special conditions one through eight, which all have to do
7 with the computer. And I think it was prompted when he
8 asked for a computer.

9 MS. NEPVEU: Right. But he had - - -

10 JUDGE SINGAS: And they added these conditions
11 because now he has a computer.

12 MS. NEPVEU: Right. So what it is, is the last
13 condition replaced the prior condition, which was about
14 sexually explicit or erotic. We regard these as basically
15 equivalent. And part of the reason that reasonable - - -
16 the reasonably related standard is appropriate here, as
17 opposed to the heightened scrutiny that petitioner is
18 arguing.

19 JUDGE CANNATARO: Going back to nudity for just a
20 second, did you answer the Chief Judge's question about why
21 walking through a museum wouldn't create a violation of the
22 nudity requirement?

23 MS. NEPVEU: The condition is interpreted by
24 DOCCS, and was - - - was charged as sexual nudity, Your
25 Honor.



1 JUDGE CANNATARO: What is that?

2 MS. NEPVEU: It's nudity that - - - it's not just
3 walking past a statue. And it's also - - - the condition
4 was view, access, download or I forget what the last verb
5 is.

6 JUDGE CANNATARO: Well, if there's - - -

7 MS. NEPVEU: View, access, possess or download.
8 And so those - - - you have to read view in context, Your
9 Honor, with the rest of those as affirmatively seeking out
10 and engaging the depictions of sexual activity and sexual -
11 - -

12 CHIEF JUDGE WILSON: What about Titian's painting
13 of the Rape of Europa?

14 MS. NEPVEU: I'm not familiar with that. I'm
15 going to take your word that it - - -

16 CHIEF JUDGE WILSON: It's in the Isabella Stewart
17 Gardner Museum. It's - - -

18 MS. NEPVEU: Sure.

19 CHIEF JUDGE WILSON: - - - it's - - - it's from
20 Ovid. It's from Metamorphoses. Presumably he can't read
21 Ovid either.

22 MS. NEPVEU: Well, the question here is - - -

23 CHIEF JUDGE WILSON: No. I'm not - - - I'm not
24 actually being facetious.

25 MS. NEPVEU: No, I understand that, Your Honor.

1 CHIEF JUDGE WILSON: That is sexual activity
2 painted several hundred years ago from a story from 2000
3 plus years ago.

4 MS. NEPVEU: Sure. The question here is that
5 this condition was imposed because petitioner's crimes, to
6 put it at a minimum, involve, you could call it, a failure
7 to restrain his sexual impulses. So the condition is meant
8 to limit stimulation of petitioner's sexual impulses. That
9 is a judgment that was made based on his crimes of
10 conviction, based on his need for rehabilitation.

11 JUDGE RIVERA: So if I'm understanding you, these
12 triggers that that they've determined, right, fall within
13 sexual nudity, sexual activity, and so forth.

14 MS. NEPVEU: Yes.

15 JUDGE RIVERA: The condition that applied to him
16 was anywhere you see this, whether it's in a museum, on a
17 poster, it doesn't matter. Anywhere you see this; is that
18 correct?

19 MS. NEPVEU: No, because - - -

20 JUDGE RIVERA: Okay.

21 MS. NEPVEU: - - - you have to be seeking out.
22 Or suppose, for instance, you're going - - -

23 JUDGE CANNATARO: Going to a museum is not
24 seeking out?

25 JUDGE RIVERA: Is that what the condition said?

1 Is that what the condition said?

2 MS. NEPVEU: It says - - - it says view, access
3 possess or download. So you need to see - - - read view
4 not in it crosses my eyeballs, but view as in similarly to
5 access, possess or download. It's crossed my eyeballs and
6 I stopped. I'm engaging with it - - -

7 JUDGE RIVERA: So when he's walking through the
8 museum - - -

9 MS. NEPVEU: Yes.

10 JUDGE RIVERA: - - - he's got to cover his
11 eyeballs as he walks by - - -

12 MS. NEPVEU: No.

13 JUDGE RIVERA: - - - this particular painting?

14 MS. NEPVEU: No.

15 JUDGE GARCIA: But if he stops and looks at it,
16 then it's a violation?

17 MS. NEPVEU: Yes. Because - - -

18 JUDGE CANNATARO: So this particular - - -

19 JUDGE SINGAS: I think - - - I think there's a
20 difference between Titian's rendition of a rape scene and
21 maybe the David, you know, Michelangelo's David or Venus de
22 Milo. So would that kind of context be taken into account?

23 MS. NEPVEU: Yes. These are - - - and that's one
24 of the reasons why the reasonably related standard is
25 important is because we're talking about highly - - -

1 JUDGE RIVERA: Okay. So where is that set out in
2 the condition? That all sounds like an interesting way to
3 perhaps limitations and contextualize and so forth. But
4 it's got to be in the conditions. So where is that?

5 MS. NEPVEU: He was charged with access to sexual
6 nudity.

7 JUDGE RIVERA: No, I'm not talking about the
8 charge. I'm talking about the condition that that he would
9 read and he would understand.

10 MS. NEPVEU: He's never argued that the
11 Constitution - - - that the condition was
12 unconstitutionally vague, Your Honor, which is what I think
13 your argument is getting - - - your question is getting at.
14 He never argued that - - -

15 CHIEF JUDGE WILSON: He's argued it sounds - - -
16 you're right. He hasn't argued vagueness. He's argued
17 it's unconstitutionally broad.

18 MS. NEPVEU: Right. And that argument requires
19 that he be actually chilled, which he has never argued
20 except before this court that he was chilled.

21 CHIEF JUDGE WILSON: No. I don't think - - - I
22 don't think that's right.

23 MS. NEPVEU: Yes, Your Honor. The question is,
24 is it going - - - you have to be substantial - - - it has
25 to encompass substantially more conduct than is

1 constitutional. And if something were using the reasonably
2 related standard, which is the appropriate standard,
3 because we're talking about administrative judgments that
4 require - - -

5 CHIEF JUDGE WILSON: But if he can't read Ovid,
6 it seems like that's substantially more than what's
7 required, unless you think there's a reason that he can't
8 read Ovid?

9 MS. NEPVEU: Your Honor, I'm going to note, first
10 of all, that he's not subject to that. The condition he's
11 currently subject to - - -

12 CHIEF JUDGE WILSON: No, no. Right. But we're
13 talking about the condition he was - - -

14 MS. NEPVEU: Yes.

15 CHIEF JUDGE WILSON: - - - subject to.

16 MS. NEPVEU: I just - - - I just want to - - -
17 but the reason I'm clarifying that is because it
18 demonstrates that this is a condition - - - petitioner
19 suggested below, that this is a state-wide condition or a
20 condition that applies to thousands of people. We can see
21 that even within this record that the conditions vary.
22 That they vary by the parole officer. They vary by - - -
23 and so the argument that their substantial overbreadth has
24 to also look to the chilling effect, not just to
25 petitioner. And there's no chilling effect on petitioner.

1 He has only argued in both his petition and the Appellate
2 Division, he never argued he changed his behavior. He's
3 only arguing that now. So the court, I think, can take
4 that fairly into consideration in arguing that his prior
5 condition, the one we're challenging, did not actually
6 chill his behavior.

7 JUDGE MANZANET-DANIELS: You continually use the
8 phrase sexual nudity, but I don't see sexual in front of
9 nudity anywhere in the condition. And it seems to me that
10 that changes what we're thinking about.

11 MS. NEPVEU: That's correct, Your Honor. I can
12 say first is that's how DOCCS interpreted it. If
13 petitioner had spoken to his parole officer at the time,
14 that's what he would have been told. It's not part of his
15 current condition. And again, petitioners never argued
16 that there's a vagueness to the - - -

17 JUDGE CANNATARO: It's an overbreadth. With
18 respect to chilling, to get back to where you were, you
19 talked about chilling him. Does there also need to be a
20 chilling effect to the community at large when you're
21 looking at a provision like this?

22 MS. NEPVEU: Precisely. And because this
23 condition doesn't apply to the general public, it also
24 doesn't - - -

25 JUDGE CANNATARO: The museum can still show the

1 Rape of Europa and the Uffizi can still have a statue of
2 David, I assume.

3 MS. NEPVEU: Yes.

4 JUDGE CANNATARO: Is that right?

5 MS. NEPVEU: Yes, Your Honor.

6 JUDGE CANNATARO: And the library computer can
7 still have Q magazine with all its pictures and articles in
8 it. He just can't look at them?

9 MS. NEPVEU: Right. And that's because the his
10 parole officer made a judgment based on his expertise,
11 based on the individual facts of the case, that this was
12 something that would harm petitioner's efforts at
13 rehabilitation and the public safety. Given - - -

14 JUDGE MANZANET-DANIELS: Don't we need more than
15 just the parole officer?

16 MS. NEPVEU: I'm sorry. I'm not sure - - -

17 JUDGE MANZANET-DANIELS: Don't we need more
18 evidence that there is a correlation between viewing these
19 materials and a heightened risk of re-offending?

20 MS. NEPVEU: No, Your Honor. But if you did, you
21 have it because of the - - - because of the discharge from
22 the sex offender program that was mentioned previously.
23 And that was not - - - and I realize that, you know, this
24 material was submitted in-camera. So I'm not criticizing
25 petitioner's counsel for not having seen it, but the

1 specific material - - - both accessing the material was a
2 violation of his conditions of treatment and showed that he
3 was not cooperating with treatment. The specific material
4 also made him more likely to reoffend, as was described in
5 the in-camera material. And also petitioner didn't
6 disclose that he accessed these materials in his treatment
7 so that they could be addressed. So it was reasonable - -
8 - reasonably related - - - the parole officer was tracking
9 the concerns raised by the sex offender treatment program
10 here and determining that this condition was reasonably
11 related.

12 CHIEF JUDGE WILSON: I still am having trouble
13 understanding how you would - - - even under a reasonably
14 related standard, you would say that a prohibition on his
15 reading something that is a depiction of nudity, is
16 reasonably related.

17 MS. NEPVEU: Because the - - -

18 CHIEF JUDGE WILSON: I mean, there are four
19 references to nudity in Genesis.

20 MS. NEPVEU: The question, Your Honor, is that -
21 - - the reason is that petitioner sexually abused multiple
22 children over - - -

23 CHIEF JUDGE WILSON: No, no. I get that he did
24 something bad.

25 MS. NEPVEU: - - - several years because he

1 couldn't control his harmful sexual impulses. And the
2 judgment was that in order to further his rehabilitation
3 and to protect the public, that the - - - he needed to have
4 his stimulation of his sexual impulses limited by not
5 letting him access sexual material - - -

6 CHIEF JUDGE WILSON: But the question - - - but
7 the question is whether the definition of the condition is
8 reasonably related to that, or is much more than what is
9 needed for that.

10 MS. NEPVEU: Right. And it's reasonably related
11 because he showed that he couldn't previously control his
12 harmful sexual impulses limiting - - -

13 CHIEF JUDGE WILSON: Well, his original - - - his
14 original condition was substantively a lot narrower, right?
15 I think you just read it to us.

16 MS. NEPVEU: Sexually explicit or erotic.

17 CHIEF JUDGE WILSON: Yeah. What was wrong with
18 that?

19 MS. NEPVEU: Nothing. But there's nothing wrong
20 with this, either. And this kind of going back and forth
21 between - - -

22 CHIEF JUDGE WILSON: So what if it just said he
23 can't read anything?

24 MS. NEPVEU: That would be overbroad, Your Honor,
25 because that's not reasonably related. The problem here is

1 petitioner's sexual impulses. These conditions were
2 related to those sexual impulses. And going back and forth
3 as to pornography versus sexually explicit versus sexual
4 activity, Your Honor, protecting - - - reducing someone's
5 likelihood of re-offending, it's not an exact science. We
6 can't run an - - - an ethical double blind study as to
7 whether, you know, this term or that term or the other term
8 would be sufficient, especially since we're talking about
9 individual people and not just blanket considerations.
10 We're talking about a parolee by parolee determination.
11 Making that kind of judgment - - -

12 JUDGE RIVERA: But I - - - but I - - - but I took
13 your argument to be that nudity must be interpreted as
14 sexual nudity, whatever that means.

15 MS. NEPVEU: Yes, that's correct, Your Honor.
16 But the argument as to - - -

17 JUDGE RIVERA: What does the sexual do for the
18 word nudity? What - - - what is it clarifying there?

19 MS. NEPVEU: It's clarifying that it's depictions
20 that involve, you know - - -

21 JUDGE RIVERA: Okay.

22 MS. NEPVEU: - - - the sexual impulses that are
23 being attempted to be - - -

24 JUDGE CANNATARO: Isn't that incredibly - - -

25 JUDGE RIVERA: Different from sexual activity?

1 Is that - - - this - - -

2 MS. NEPVEU: I'm sorry. Could you say that - - -

3 JUDGE RIVERA: There's a distinction you're or
4 the parole officer is drawing between sexual activity
5 representations, materials associated therewith and sexual
6 nudity; is that correct?

7 MS. NEPVEU: That's correct, Your Honor. Yes,
8 because the two categories are not - - - are not fully
9 overlapping.

10 JUDGE CANNATARO: That sexual nudity phrase
11 troubles me because it seems very subjective to me. You
12 know, if we're talking about the realm of all nudity, what
13 inspires some sort of sexual response to me seems like a
14 very particularized kind of inquiry. Especially with the
15 person who's a sex offender. And I think you said his
16 particular proclivity was abuse of children. So I'm not
17 sure whether David or Titian's painting would - - - would
18 spark any sort of sexual response in him, but something
19 else might.

20 MS. NEPVEU: There's two responses - - - there's
21 two responses to that, Your Honor. One is that's a
22 vagueness argument. And petitioner is not making that.

23 JUDGE CANNATARO: Okay.

24 MS. NEPVEU: And two, this kind of individualized
25 discussion is exactly why the determinations of the parole



1 officer who speaks with petitioner, who's on the ground,
2 who's making these judgment calls based on their
3 professional expertise - - -

4 JUDGE RIVERA: Is it really a vagueness - - - is
5 it - - - is it solely a - - -

6 MS. NEPVEU: - - - require reasonable or
7 reasonably related standard.

8 JUDGE RIVERA: Counsel, is this solely a
9 vagueness argument? If you're saying you're including - -
10 - I think part of the questioning was that this is
11 including images of adults. When that is not necessarily
12 what triggered the crimes, his interest in adults, right?
13 The interest in children, right?

14 JUDGE MANZANET-DANIELS: He's been very clear in
15 his treatment that - - - that his proclivity is to young
16 males. So how would restricting viewing a statue of a
17 naked woman, how - - - how could that possibly be tied to a
18 legitimate penological interest here?

19 MS. NEPVEU: It's possible that the statue of the
20 naked woman wouldn't be sexual nudity. And that's not what
21 he pled guilty - - - because that's not what he pled
22 guilty to. So the question wasn't explored.

23 JUDGE RIVERA: How is that not - - - wait a
24 minute. Wait a minute. Wait a minute. How is that not
25 sexual nudity? Now, I've lost you completely.

1 MS. NEPVEU: The question is, is it - - -

2 JUDGE RIVERA: In terms of the way the condition
3 is - - -

4 MS. NEPVEU: Yep.

5 JUDGE RIVERA: - - - I'm granting you for a
6 moment that that even though the word sexual is not placed
7 before the word nudity, that somehow, we should read it
8 that way. But how is a portrait, a statue, whatever you
9 want to say of a nude woman is not sexual nudity?

10 MS. NEPVEU: There's two ways that that can be
11 addressed. One is the context. If it was, you know,
12 designed to be sexually stimulating. In this case, we have
13 - - - the photograph was part of - - - the cover of a
14 magazine that included explicit sexual contact, which makes
15 - - - context, excuse me, content, context, both in this
16 case. That makes it sexual nudity. The other is what
17 would be viewed as sexual to the individual parolee, which
18 is why I was suggesting - - -

19 JUDGE RIVERA: Yeah. But I think that was the
20 question being asked.

21 MS. NEPVEU: Right. And that's why I was
22 suggesting that perhaps if petitioner has zero attraction
23 to women, that perhaps a statue of a woman would not count
24 - - -

25 JUDGE RIVERA: So how is it not overbroad as a

1 consequence?

2 MS. NEPVEU: Because it's the question of what's
3 sexual.

4 JUDGE RIVERA: It's not a trigger.

5 MS. NEPVEU: That's because - - -

6 JUDGE RIVERA: Then why is it prohibited then?

7 MS. NEPVEU: I said it might not - - - what I'm
8 trying to say is it might not be because it might not count
9 as sexual - - -

10 JUDGE TROUTMAN: So are you saying that although
11 the - - - there is verbiage describing the things that are
12 prohibited, as to whether or not one violated the
13 conditions, context is considered?

14 MS. NEPVEU: Yes. And because they're being it's
15 - - - the parole officer is making the - - - and also it's
16 important to note that petitioner could always speak to - -
17 -

18 JUDGE RIVERA: How does he know that in advance?

19 MS. NEPVEU: He could speak to his parole
20 officer.

21 JUDGE RIVERA: Like can I go look at a picture of
22 a nude woman, you mean?

23 MS. NEPVEU: Yes. Yes. Also, I'd just like to
24 note that there is an administrative process to challenge
25 conditions. So it's not as though petitioner can only find

1 out what's prohibited by getting arrested for it. I would
2 just like to add, extraordinarily - - -

3 JUDGE MANZANET-DANIELS: Except that - - - I'm
4 having trouble with that because it seems to me that how
5 can he anticipate what he's going to come across in order
6 to get a pre-approval to something he doesn't even know
7 he's going to see? So it seems to me that it's creating a
8 - - - a requirement that is impossible for him to meet.

9 MS. NEPVEU: And that's why the view, it's not
10 just whatever your eyeballs come across. That's not the
11 kind of conduct that's of concern. It's viewing in a way
12 that's sitting there and looking at it, that's actively
13 engaging with it in a similar way to access, possessing and
14 downloading. It's not meant to be a trap. It's meant to
15 be a way to further petitioner's rehabilitation and to
16 protect the public.

17 CHIEF JUDGE WILSON: How do you - - - how do you
18 know how long he viewed the cover of the magazine?

19 MS. NEPVEU: There's not a question - - -
20 petitioner didn't challenge that it was sexual nudity, Your
21 Honor.

22 CHIEF JUDGE WILSON: No, no. But - - - but you
23 said if he just - - - if he just looked at it and moved on,
24 that's not viewing. He has to really be gazing at it. How
25 do we know what he did?

1 MS. NEPVEU: Well, he sought out this particular
2 magazine. He downloaded it. And so he never - - - he
3 never disputed that this counted, Your Honor, so.

4 CHIEF JUDGE WILSON: Well, he pled guilty. But
5 that may be because he didn't view the way you're arguing
6 view it means now.

7 MS. NEPVEU: He hasn't - - - also hasn't raised
8 that argument at all ever, Your Honor. And so that like
9 petitioner's - - -

10 CHIEF JUDGE WILSON: And has he - - - in the
11 litigation prior to this argument today, have you ever
12 taken the position that view doesn't include just seeing
13 something, but you have to dwell on it?

14 MS. NEPVEU: He hasn't argued - - - he hasn't - -
15 - he hasn't raised that argument for us to raise it.

16 CHIEF JUDGE WILSON: Okay. So it hasn't come up
17 before? Okay.

18 MS. NEPVEU: No, it hasn't come up at all.

19 CHIEF JUDGE WILSON: Have you ever explained or
20 anybody in this litigation prior to you on your side of
21 things explained that interpretation of view?

22 MS. NEPVEU: No, because it hasn't come up.

23 CHIEF JUDGE WILSON: Okay.

24 MS. NEPVEU: In the same way that petitioner's
25 argument now for intermediate scrutiny had not come up

1 before this - - - before petitioner arrived in this court.
2 I would just like to very briefly, if I may, Your Honor,
3 say that strict scrutiny which amicus has argued for is
4 absolutely inappropriate because it requires that a
5 restriction be the least restrictive alternative, which
6 poses an enormous administrative - - -

7 JUDGE CANNATARO: Is strict scrutiny even
8 preserved in this case?

9 MS. NEPVEU: It actually is.

10 JUDGE CANNATARO: It is?

11 MS. NEPVEU: Petitioner argued in - - -
12 petitioner argued below that this was an overbroad argument
13 - - - overbroad restriction because strict scrutiny
14 applied. So that is actually all petitioner argued before
15 he got to this court.

16 JUDGE CANNATARO: And now they're arguing
17 intermediate. So I guess that raises the other - - - is
18 intermediate scrutiny - - -

19 MS. NEPVEU: Preserved?

20 JUDGE CANNATARO: - - - preserved?

21 MS. NEPVEU: No. Absolutely not, Your Honor.
22 And so that shouldn't even be decided by this court. But
23 strict scrutiny would pose an enormous administrative
24 burden to explain why individual decisions as to individual
25 parolees are the least restrictive and therefore, the

1 suggestion of amicus and petitioner below should be
2 rejected. Unless the court has further questions, we ask
3 that the decision be affirmed.

4 CHIEF JUDGE WILSON: Thank you.

5 MS. NEPVEU: Thank you, Your Honors.

6 JUDGE CANNATARO: Have you abandoned your strict
7 scrutiny argument?

8 MS. NEITZEY: Our position and appellant's
9 position all along has been that heightened scrutiny
10 applies here. The question before the court is whether the
11 condition is unconstitutional under the First Amendment and
12 the - - - throughout this proceeding, the courts have been
13 able to consider the entire spectrum of scrutiny from
14 reasonable basis - - - reasonable relationship, whatever
15 that means, rational basis all the way to strict scrutiny.

16 JUDGE GARCIA: And he was pro se when he filed
17 the petition?

18 MS. NEITZEY: That's correct. That's correct.
19 So below, appellant argued for strict scrutiny. We believe
20 that there is support, as the NYCLU points out, for
21 applying strict scrutiny here. However, intermediate
22 scrutiny is the bare minimum required here to account for
23 the constitutional interests at stake.

24 JUDGE GARCIA: Counsel, do you agree with your
25 opposing counsel's characterization of this condition as

1 general rather than tailored to the computer, and that it
2 somehow replaced or is a complement to some earlier
3 condition?

4 MS. NEITZEY: Mr. Karlin's understanding of the
5 condition is that it applied to anything digital or not
6 digital. That's correct. I will say this is the first
7 that I've heard that the term view in the condition means
8 that he has to actually seek out nudity or sexual activity,
9 particularly when we're talking about online content or say
10 you go to a used book sale and you pick up a bunch of
11 novels that look interesting, you now have those materials
12 in your possession. If you flip through it and you see a
13 picture you're not supposed to see, you viewed that. Did
14 you seek it out because you sought out the magazine but
15 didn't necessarily know what would be inside the magazine?

16 JUDGE TROUTMAN: Would it be different if you
17 went to a bookstore or used bookstore that specialized in
18 the explicit items that he was told he was prohibited from
19 seeing, so he knew it was more likely that it was - - -
20 that he was going to see those things?

21 MS. NEITZEY: I think that would be different if
22 the condition was limited to seeking out this information.
23 But the condition is so much broader than that as it's
24 written. It just says view, access, possess. So I don't
25 think it would make a difference under this broad condition

1 that Mr. Karlin challenges.

2 CHIEF JUDGE WILSON: Would it be fair to imply an
3 intent element to that?

4 MS. NEITZEY: Would you repeat your question?

5 CHIEF JUDGE WILSON: Yeah. Would it be fair to
6 imply at least some - - - some element of intent into view,
7 possess, etcetera, that, you know, if he's walking down the
8 street and I take some, you know, piece of pornography and
9 thrust in front of his face that we're not going to - - -
10 nobody would think to hold him liable there.

11 MS. NEITZEY: As the condition is currently
12 written, though I don't think there is an intent element.
13 That could be one way to narrow it when we're talking about
14 the practicalities of how it might be enforced.

15 CHIEF JUDGE WILSON: I guess I'm asking isn't - -
16 - isn't that sort of fair to imply? Because we generally,
17 when we think of crimes, at least we think of them as
18 having some mens rea requirement.

19 MS. NEITZEY: That's right. But the way the
20 condition is drafted is not geared that way.

21 JUDGE TROUTMAN: So the way you're suggesting the
22 condition in Buffalo, New York, on the Scajaquada
23 Expressway, there is a statue of David. If he drove by, he
24 would violate the conditions of his parole just by driving
25 by, even though he had no idea that that statue was there

1 because he's from downstate.

2 MS. NEITZEY: That's correct, Your Honor. And
3 that helps illustrate why this condition is just so
4 overbroad as it was drafted. There's no chilling effect
5 requirement to prevail on an overbreadth claim, just the
6 fact that there are so many applications of it which
7 clearly fall outside any legitimate scope of the condition,
8 is enough for Mr. Karlin to prevail.

9 JUDGE RIVERA: But in context, that condition
10 does - - - one would read that as volitional, right?

11 MS. NEITZEY: Viewing?

12 JUDGE RIVERA: Yeah. Well, it's view, access,
13 possess and/or download.

14 MS. NEITZEY: I don't think it's drafted in a way
15 that that provides for that narrowing. It should be.

16 JUDGE RIVERA: To view, you think, is not about a
17 volitional act?

18 MS. NEITZEY: Because you can possess material
19 without necessarily knowing everything that's inside of it.
20 You could start watching a movie and you didn't know that
21 there were - - - what the movie entailed.

22 JUDGE CANNATARO: So that seems to be veering
23 into vagueness a little bit, though, doesn't it?

24 MS. NEITZEY: Overbreadth and vagueness are - - -

25 JUDGE CANNATARO: Yeah, they really are.

1 MS. NEITZEY: - - - very overlapping, very much
2 overlapping. Although it is - - -

3 JUDGE RIVERA: So you don't read the - - - you
4 don't read the condition to put the burden on him to
5 determine, in these examples you give me, looking at a
6 magazine, viewing a movie, to find out in advance whether
7 or not there are depictions images that would fall within
8 the condition?

9 MS. NEITZEY: Correct. That's not reasonable to
10 put that burden on - - -

11 JUDGE RIVERA: Why not? Why not?

12 MS. NEITZEY: Because as a parolee, the - - - I
13 think it raises tailoring concerns and it - - -

14 JUDGE RIVERA: He could find out in advance. You
15 - - - I think you were saying before that pornography would
16 clearly fall within. I shouldn't find out in advance that
17 a movie I want to rent is a pornographic film.

18 MS. NEITZEY: So I think there's - - - there's a
19 difference between that question. If you're ordering a pay
20 per view movie from channel XXX versus if you're going to a
21 used bookstore and - - -

22 JUDGE MANZANET-DANIELS: But we don't even have
23 to go that far here, right? I mean, here, your client
24 downloaded Nymphomaniacs. The title of that movie by
25 itself puts him on notice that this is a sexual film.

1 MS. NEITZEY: A couple of points in response, if
2 I may. The movie was - - - is a film available on Netflix.
3 It made the rounds in the film festivals. It won a bunch
4 of awards in Europe.

5 JUDGE RIVERA: Many award-winning films have
6 sexual activity and sexual nudity, right?

7 MS. NEITZEY: Exactly. Exactly. And the Mr.
8 Karlin did not plead guilty to the charge that was related
9 to that movie. So I'll point out that that's not part of
10 this appeal.

11 JUDGE MANZANET-DANIELS: I don't know about that.

12 MS. NEITZEY: Separately, though, the question
13 isn't whether this movie fell under the condition as
14 drafted. It's whether the condition is so broad - - -

15 JUDGE MANZANET-DANIELS: Well, I think we can all
16 agree that it absolutely fell within the definition of the
17 condition.

18 MS. NEITZEY: Right. But that's - - -

19 JUDGE MANZANET-DANIELS: I mean, that's not even
20 up for debate. Can we agree on that?

21 MS. NEITZEY: Correct. We can agree on that,
22 although it's not part of this appeal. Mr. Karlin didn't
23 plead guilty to that particular violation. But the
24 question before this court is whether the condition and
25 everything it encompasses is substantially overbroad is

1 whether the condition is narrowly tailored to important
2 government interests, which it's not here. So for that
3 reason, we would ask - - -

4 JUDGE MANZANET-DANIELS: On that film, you would
5 make that argument? I don't think that argument can be
6 made with the history of your client and that film.

7 MS. NEITZEY: But the challenge isn't limited to
8 this film. The court must look at everything that the
9 condition encompasses, not just these specific examples.

10 JUDGE RIVERA: You concede that nudity is sexual
11 nudity?

12 MS. NEITZEY: Not necessarily. No, that's not
13 clear. The - - - the charge to which Mr. Karlin pleaded
14 guilty did use the term sexual nudity, but from the
15 condition itself, it's very unclear because then it - - -
16 the condition doesn't quite make sense then if it's sexual
17 activity - - - the language is sexual activity, nudity or
18 erotic images. So if sexual modified all three of those,
19 like, sexual erotic images doesn't - - -

20 JUDGE RIVERA: What nudity falls out of the
21 category of sexual nudity?

22 MS. NEITZEY: I'm not quite sure. I don't - - -

23 JUDGE MANZANET-DANIELS: Perhaps some baby
24 pictures?

25 MS. NEITZEY: It does something. It could

1 conceivably narrow it in some way, but then we run into
2 vagueness issues. But that's not how the condition was
3 drafted.

4 CHIEF JUDGE WILSON: Thank you.

5 MS. NEITZEY: Thank you.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Karlin v. Stanford, No. 66 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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