RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2965-21

A.L.,[1]

Appellant,

v.

NEW JERSEY STATE
PAROLE BOARD,

Respondent.

———————————————

Submitted June 7, 2023 – Decided June 12, 2024

Before Judges Gooden Brown and DeAlmeida.

On appeal from the New Jersey State Parole Board.

A.L., appellant pro se.

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Christopher Josephson, Deputy Attorney General, on the brief).

[1] We use initials because the record is impounded. R. 1:38-3(f)(4).

The opinion of the court was delivered by

GOODEN BROWN, P.J.A.D.

A.L., who is serving a special sentence of parole supervision for life (PSL) under N.J.S.A. 2C:43-6.4, appeals from the April 27, 2022, final agency decision of the New Jersey State Parole Board (Board) denying his request to discharge special conditions pertaining to the Internet and pornography. We affirm.

I.

By way of background,

> [i]ndividuals who have been convicted of certain sexual offenses enumerated in N.J.S.A. 2C:43-6.4(a) must serve, in addition to any existing sentence, a special sentence of [PSL] commencing upon the offender's release from incarceration. N.J.S.A. 2C:43-6.4(a) and (b).
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> PSL offenders remain in the legal custody of the Commissioner of the Department of Corrections, are supervised by the Division of Parole, and are "subject to conditions appropriate to protect the public and foster rehabilitation." N.J.S.A. 2C:43-6.4(b). These conditions include general conditions that are imposed upon all PSL offenders and special conditions imposed upon individual PSL offenders that are "deemed reasonable in order to reduce the likelihood of recurrence of criminal or delinquent behavior." N.J.S.A. 30:4-123.59(b)(1); see also N.J.A.C. 10A:71-6.12(d) (listing general conditions); N.J.A.C. 10A:71-6.12(n) ("Additional special conditions may be

> imposed by the District Parole Supervisor . . . when it is the opinion that such conditions would reduce the likelihood of recurrence of criminal behavior."). A violation of a PSL condition may be prosecuted as a third-degree crime, N.J.S.A. 2C:43-6.4(d), or treated as a parole violation, N.J.S.A. 2C:43-6.4(b). Additionally, an offender who violates a PSL condition may be subjected to additional special conditions. See N.J.S.A. 30:4-123.60(a).
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> [K.G. v. N.J. State Parole Bd., 458 N.J. Super. 1, 15 (App. Div. 2019) (omission in original).]

Our courts and the United States Supreme Court have explained that parole conditions are generally considered constitutional because

> "parole is an established variation on imprisonment of convicted criminals." Morrissey v. Brewer, 408 U.S. 471, 477 (1972). "Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able without being confined for the full term of the sentence imposed." Ibid. To accomplish this objective, parolees are typically subjected to "conditions [that] restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." Id. at 478.
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> [J.B. v. N.J. State Parole Bd., 433 N.J. Super. 327, 337 (App. Div. 2013) (alteration in original).]

Accord J.I. v. N.J. State Parole Bd., 228 N.J. 204, 221 (2017).

Stated differently, because parolees are convicted offenders, they do not enjoy the right to "absolute liberty" that non-offending citizens enjoy, but rather, have "conditional liberty properly dependent on observance of special parole

restrictions." Morrissey, 408 U.S. at 480. As such, the Board may impose restrictions on parolees without violating a parolee's constitutional rights, so long as the conditions "bear a reasonable relationship to reducing the likelihood of recidivism and fostering public protection and rehabilitation." J.I., 228 N.J. at 221. Still, although parolees do not enjoy the full panoply of constitutional rights, a court will invalidate, as unreasonable and arbitrary, conditions that do not meet these penological goals. Id. at 230.

II.

Turning to the underlying facts in this case, A.L.'s PSL sentence stems from his then-wife catching him in the act of molesting his then-fourteen-year-old stepdaughter. A.L. eventually confessed to engaging in sexual conduct with his stepdaughter multiple times over the preceding months and taking digital photographs of her for his sexual pleasure. At the time of his initial arrest on August 15, 2005, officers discovered over 1,000 images of child pornography on A.L.'s computer—some he had created depicting his stepdaughter both partially and completely nude and others downloaded from the Internet depicting other children.

Ultimately, A.L. pled guilty to three counts of first-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(3); one count of second-degree

endangering the welfare of a child, N.J.S.A. 2C:24-4(a); and one count of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a). He was sentenced to an aggregate ten-year term of imprisonment, a special sentence of PSL, and compliance with Megan's Law requirements, N.J.S.A. 2C:7-1 to -23. A.L. completed his custodial sentence on February 3, 2013, and began serving his PSL sentence immediately thereafter.

As one of the general conditions of his parole, A.L. was prohibited from "using any computer and/or device to create any social networking profile or to access any social networking service or chat room" (the social media ban). In addition, A.L. was subject to a special condition that directed him to "refrain from viewing or possessing a picture, photograph, negative, film, movie, videotape, DVD, CD, CD-ROM, streaming video, computer generated or virtual image or other representation, publication, sound recording or live performance that is predominately orientated to the descriptions or depictions of sexual activity" (the sexually-oriented materials ban). For purposes of the sexually-oriented materials ban, "sexual activity means actual or simulated ultimate sexual acts including sexual intercourse, oral sex, masturbation or bestiality," and the medium "shall not be considered predominately orientated to descriptions or depictions of sexual activity unless the medium features or

contains such descriptions or depictions on a routine basis or promotes itself based upon such descriptions or depictions."

While on PSL, A.L. was charged with two violations of his parole conditions. Specifically, in 2016, A.L. was charged with "failing to refrain from accessing sexually oriented websites, material information or data via the Internet; and failing to refrain from viewing or possessing depictions of sexual activity," in violation of the sexually-oriented materials ban. As a result, A.L.'s PSL status was revoked, and he served a twelve-month term of incarceration.[2]

Upon his release from custody in 2017 and resumption of PSL status, A.L. was subjected to another special condition directing him "to refrain from the possession and/or utilization of any computer and/or device that permits access to the Internet unless specifically authorized by the District Parole Supervisor or designated representative" (the Internet access ban). The condition specifically prohibited A.L. from "accessing the Internet from any computer and/or device at any time or for any reason unless authorized by the District Parole Supervisor or designated representative." The condition directed that if he were to obtain approval for Internet access, A.L. would be required to submit

[2] In the event an offender violates a term of PSL, the Board may revoke parole and return the offender to custody for a period between twelve and eighteen months. N.J.S.A. 30:4-123.51b(c).

to monitoring of his devices by his parole officers. Finally, A.L. was again prohibited from consuming content that was "predominately orientated to descriptions or depictions of sexual activity."

In 2018, A.L. was charged with "using a computer to create a social networking profile" in violation of the social media ban and the Internet access ban. A.L.'s PSL status was again revoked, and he served a fourteen-month term of incarceration. No additional conditions were imposed when A.L. was released from custody in March 2019 and resumed PSL status. However, in August 2019, A.L. was granted an exemption to the Internet access ban that allowed him to "use the Internet at [his] place of work, but specified that [he was] not to utilize the Internet outside of [his] employment capacity."

In 2021, A.L. submitted an application to the Board seeking to be relieved of the social media ban, the Internet access ban, the sexually-oriented materials ban, and other conditions not pertinent to this appeal. A.L. raised constitutional challenges, arguing that the social media and Internet access bans violated the First Amendment, and the sexually-oriented materials ban was unconstitutionally vague and overbroad.

In support, A.L. relied on his classification as a "low-risk," "Tier 1" Megan's Law registrant, the United States Supreme Court decisions in

Packingham v. North Carolina, 582 U.S. 98, 109 (2017), invalidating a social media ban for convicted sex offenders in a criminal statute as violative of their First Amendment rights, and Miller v. California, 413 U.S. 15, 24 (1973), enunciating the test for obscenity, as well as our decisions in K.G., 458 N.J. Super. at 13, requiring reasonably tailored Internet restrictions in PSL conditions to avoid constitutional infringement, and State v. R.K., 463 N.J. Super. 386, 392-93 (App. Div. 2020), holding that a blanket social media prohibition imposed on a convicted sex offender was unconstitutional on its face and as applied.

In a letter dated July 12, 2021, the District Parole Supervisor denied A.L.'s application to be relieved of the sexually-oriented materials and the Internet access bans "in . . . the interest of public safety." In the letter, the supervisor "reviewed [A.L.'s] case record" and PSL violations as well as "psychological evaluations and recommendations given by [his] therapist, Dr. Emili Rambus." After recounting the circumstances of A.L.'s underlying offenses, the supervisor noted that A.L. himself had "identified viewing pornography and having unrestricted access to a computer as triggers that would put [him] at risk to re-offend based on [his] sex offender dynamics."

The supervisor further cited counseling records and recommendations made by Dr. Rambus prior to A.L.'s release from incarceration in 2013 directing that any computer use by A.L. be monitored "'by the most advanced, up-to-date computer monitoring software'" in light of A.L.'s "'advanced computer skills.'" According to the supervisor, more recently, Dr. Rambus "st[ood] by her initial recommendation" and believed that "unrestricted [I]nternet access" and "view[ing] pornography" would be "detrimental to [A.L.'s] rehabilitative efforts." Dr. Rambus also expressed concern to the supervisor that "since [A.L.] ha[d] been out in the community [he] seem[ed] to be less cognizant" of his triggers than while incarcerated, and "stress[ed] that [A.L.] should not be granted [his] request to discharge these conditions without strict monitoring."

In a supplemental letter dated July 29, 2021, the supervisor granted A.L.'s application to discharge the social media ban, explaining that "[a]s of February 12[,] 2020, the Division of Parole ceased the use and enforcement of [the social media ban] for all parolees under supervision." In its place, "the Board adopted a new rule" that redefined the social media ban, but the supervisor "d[id] not see sufficient justification" for imposing the new rule on A.L.

On January 5, 2022, A.L. submitted another application to the Board seeking discharge of the sexually-oriented materials and the Internet access bans

and renewing his constitutional challenges to the imposition of those conditions. In a January 27, 2022, letter, the Division of Parole denied the application "[b]ased on [A.L.'s] commitment offense, multiple revocations of . . . parole[,] and sex-offender counselor's recommendations throughout [his] incarceration and release." Citing those factors, the letter informed A.L. that "it [was] apparent that [he] need[ed] the [n]o Internet and [p]ornographic material ban," and that "[i]t [was] obvious that pornography may act as a trigger in [his] re-offense cycle."

A.L. appealed to the Board, raising the same constitutional challenges. In a letter dated March 23, 2022, "a Board panel reviewed [A.L.'s] case and determined to affirm the special conditions relative to computer/Internet use and pornography." A.L. submitted an administrative appeal to the full Board on March 30, 2022. On April 27, 2022, the full Board "concur[red] with the determination of the Board panel" and denied A.L.'s "request to discharge the special conditions pertaining to the Internet and pornography." In its written decision, the Board acknowledged that A.L. "ha[d] been designated a Tier 1 'low risk' offender," but noted that the designation was "for Megan's Law requirements only and ha[d] no bearing on special conditions imposed by the State Parole Board."

Next, the Board disagreed with A.L.'s interpretation of K.G. The Board explained that in K.G., the

> Appellate Division held that parole conditions restricting sex offenders' Internet access, including access to online social networking, must be reasonably tailored to the circumstances of the individual offender, "taking into account such factors as the underlying offense and any prior criminal history, whether the Internet was used as a tool to perpetrate the offense, the rehabilitative needs of the offender, and the imperative of public safety." [458 N.J. Super.] at 13 (quoting J.I. v. N.J. State Parole Bd.[, 228 N.J. 204, 224 (2017))].

Applying that principle, the Board rejected A.L.'s contention that the condition was unconstitutional as applied to him, reasoning that A.L. was "in possession of a large volume of child pornography at the time of [his] commitment offense" and that he had been "found to be utilizing the Internet in violation of [his] conditions of supervision." The Board also found that because A.L. was "allowed to utilize the Internet for employment purposes," the Internet access ban "was reasonably tailored in [his] case to advance the goals of public safety and rehabilitation and [was] valid under K.G."

Regarding the sexually-oriented materials ban, the Board stated:

> [Y]ou assert that the special condition prohibiting you from viewing or possessing sexually explicit material is unconstitutional; that the broad range of material covered by the special condition prohibiting pornography encompasses constitutionally protected

> material that is protected by the [F]ourteenth [A]mendment; and that due to the vagueness it is impossible to determine the point demarcating constitutionally protected conduct and conduct that the Parole Board may legitimately prohibit in the interest of rehabilitation and public safety. The Board notes that the Board's supervision of PSL offenders includes the authority to impose both general and special conditions, which are "appropriate to protect the public and foster rehabilitation." N.J.S.A. 2C:43-6.4(b). The Board finds that at the time of your commitment offense you were found to be in possession of a large amount of child pornography, some of which you created. The Board further finds that you have been found in possession of a large amount of pornography on two . . . occasions while under supervision[3] and that your possession of same is against your relapse prevention plan created in sex offender specific counseling. As your impermissible behavior continues to be of concern, the Board finds the decision to deny your request to discharge the special conditions pertaining to the [I]nternet and pornography is appropriate at the present time. Therefore, the Board finds that your contentions are without merit.

A.L. filed a notice of appeal to us on May 26, 2022. In a November 14, 2022, letter, the Board notified A.L. that after reviewing his case pursuant to

[3] The Board mistakenly referred to the 2018 PSL violation as involving possession of pornography whereas that violation involved A.L. creating a social networking profile with a computer.

N.J.A.C. 10A:72-14.4,[4] it would discharge the Internet access ban. In its place, the Board imposed a condition that allows A.L. access to Internet-capable devices, but requires him "to notify [his p]arole [o]fficer prior to purchasing, possessing or utilizing any computer and/or device that permits access to the Internet" (notify-computer condition).[5]

The condition also provides that if A.L. elects to obtain such a device, his use is subject to the following additional restrictions:

> 1. [He is] prohibited from possessing or using any data encryption techniques and/or software programs that conceal, mask, alter, eliminate and/or destroy information and/or data from a computer and/or device;
>
> 2. [He] agree[s] to install on the computer and/or device, at [his] expense, one or more hardware or software system(s) to monitor [his] computer and/or device use if such hardware or software system(s) is(are) determined to be necessary by the District Parole Supervisor or designated representative;

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[4] N.J.A.C. 10A:72-14.4 was adopted in 2018 and requires the Board to review the imposition of an Internet access ban on an annual basis. N.J.A.C. 10A:72-14.4(a). The regulation also sets forth a non-exhaustive list of criteria that should be considered in the evaluation. N.J.A.C. 10A:72-14.4(c).

[5] We granted the Board's motion to supplement the record with the November 14, 2022, letter. See R. 2:5-5.

3. [He] agree[s] to permit the monitoring of [his] computer and/or device activity by a Parole Officer and/or computer/device specialist through the use of electronic means;

4. [He is] subject to periodic unannounced examinations of the computer and/or device by a Parole Officer or designated computer/device specialist, including the retrieval and copying of all data from the computer and/or device and any internal or external peripherals and removal of such equipment to conduct a more thorough inspection;

5. [He is] to disclose all passwords used by [him] to access any data, information, image, program, signal or file on [his] computer/device.[6]

In this ensuing appeal, A.L. makes the following arguments:

> I. IMPOSITION OF THE TOTAL INTERNET BAN VIOLATES THE FREE SPEECH PROTECTIONS OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND PARAGRAPH 6 OF ARTICLE 1 OF THE N.J. CONSTITUTION.
>
> > A. Access To And The Right To Use The Internet Is A Fundamental Right Protected Under U.S. Const., Amend. I, And N.J. Const., Art 1, ¶ 6, Any Restrictions Of Which Are Subject To Intermediate Scrutiny.

[6] The condition's full text was submitted with A.L.'s December 29, 2022, motion to settle the record, which we granted. See R. 2:5-5.

B. The Parole Board's Reliance On K.G. Resulted In It Erroneously Denying Appellant's Constitutional Rights.

II. THE SPECIAL CONDITION PROHIBITING APPELLANT FROM VIEWING OR POSSESSING SEXUALLY ORIENTED MATERIAL IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE IN VIOLATION OF U.S. CONST., AMEND. 1 AND N.J. CONST., ART[.] 1, ¶ 6 AND FURTHER UNCONSTITUTIONALLY PROHIBITS PROTECTED SPEECH UNDER THOSE CLAUSES.

A. Sexually-Oriented Material Constitutes Protected Speech Under The State And Federal Constitutions, And Is Subject To Strict Scrutiny As The Restriction Is Content Based.

B. The Sexually-Oriented Material Ban Is Unconstitutional Under The State And Federal Constitutions As [It] Prohibits Protected Speech And Is Not Narrowly Tailored To Serve A Compelling State Interest.

C. The Sexually-Oriented Material Condition Is Overbroad And Vague And Thus Violates Appellant's Procedural Due Process Rights Under The U.S. Const., Amend. XIV, And N.J. Const., Art. 1, ¶ 1.

III.

We first delineate some guideposts that inform our review. "Our review of the Parole Board's determination is deferential in light of its expertise in the

specialized area of parole supervision[.]" J.I., 228 N.J. at 230. Thus, "[w]e will reverse a decision of the Board only if the offender shows that the decision was arbitrary or unreasonable, lacked credible support in the record, or violated legislative policies." K.G., 458 N.J. Super. at 30. "However, 'the parole authorities do not have unbridled discretion to impose unnecessary or oppressive . . . conditions that do not advance a rational penological policy.'" Ibid. (quoting J.I., 228 N.J. at 230). "Moreover, the Board's actions may not violate constitutional protections." Ibid. Whether the Parole Board's actions violate constitutional rights is a legal question, which we review "de novo." J.B. v. N.J. State Parole Bd., 229 N.J. 21, 35 (2017).

On appeal, A.L.'s arguments mirror those made to the Board, asserting that both bans violate his state and federal constitutional rights to free speech. Regarding the Internet access ban, the Board argues that because the condition has been discharged and replaced with a less restrictive condition, A.L.'s appeal of the Internet access ban is now moot. A.L. counters that the ban could be reimposed at any time absent a ruling on its constitutionality.

"To avoid resolving abstract legal issues and to preserve judicial resources, courts ordinarily do not address legal questions that have been rendered moot." Malanga v. Twp. of W. Orange, 253 N.J. 291, 307 (2023)

(citing Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996)). "An issue is 'moot' when the decision sought in the matter, when rendered, can have no practical effect on the existing controversy." Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 467 N.J. Super. 385, 398 (App. Div. 2021) (quoting Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006)). "On occasion, however, we will decide such appeals where the underlying issue is one of substantial importance, likely to reoccur but capable of evading review." Zirger, 144 N.J. at 330.

This issue is not of that nature. A.L.'s application sought the discharge of the special condition that completely prohibited his access to the Internet and Internet-capable devices. Because A.L. is no longer subject to that condition, a ruling in his favor will "have no practical effect on the existing controversy," Malanga, 253 N.J. at 307, and the underlying issue does not otherwise dictate our review. As such, we dismiss A.L.'s Internet access challenge as moot. We also point out that in J.I., the Court endorsed the notify-computer condition that replaced A.L.'s Internet access ban as "acceptable alternatives" to the Internet ban "to ensure public safety and the offender's rehabilitation." 228 N.J. at 229-30. Indeed, without access to the information A.L. views on the Internet, his

parole officer would be unable to determine whether he is at risk of reoffending and harming the public.

Turning to the sexually-oriented materials ban, A.L. argues the ban is "both unconstitutionally vague and extraordinarily broad." According to A.L., the ban restricts his access to materials that "would not qualify as obscene under the Miller test, or even as pornographic as understood in contemporary society." Thus, A.L. contends the ban "fails to pass constitutional muster."

"In Miller, [the United States Supreme Court] reviewed a criminal conviction against a commercial vendor who mailed brochures containing pictures of sexually explicit activities to individuals who had not requested such materials." Reno v. ACLU, 521 U.S. 844, 872 (1997) (quoting Miller, 413 U.S. at 18). In vacating the conviction, the Miller Court reaffirmed the proposition that "obscene material is unprotected by the First Amendment." 413 U.S. at 23. However, recognizing that "no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power," the Court attempted to clarify "the permissible scope of such regulation to works which depict or describe sexual conduct." Id. at 22, 24.

To that end, the Court set forth a three-part test requiring courts to consider:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> [Reno, 521 U.S. at 872 (quoting Miller, 413 U.S. at 24).]

The Court further explained that in applying this test, community standards should be framed in local, rather than national, terms. Miller, 413 U.S. at 32-33.

In New York v. Ferber, 458 U.S. 747, 764 (1982), the Court later "adjusted" the Miller test to define "the category of child pornography which, like obscenity, is unprotected by the First Amendment." Under Ferber, states may criminalize the advertisement and distribution of child pornography regardless of its obscenity or offensiveness, and without reference to the entire work in which the visual depiction of sexual conduct by a child appeared. Id. at 764-65. The Court explained that leaving such material outside the scope of the First Amendment's protections was warranted because "works that visually

depict sexual conduct by children below a specified age," id. at 764 (emphasis omitted), were "intrinsically related to the sexual abuse of children," both as "a permanent record of the children's participation" and as a perpetuation of the "distribution network for child pornography," id. at 759. Thus, regulations of such content were justified by the State's "compelling" interest in "safeguarding the physical and psychological well-being of a minor." Id. at 757 (quoting Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 607 (1982)).

Subsequently, the Court held that the strength of this interest also allows a state to "constitutionally proscribe the possession and viewing of child pornography" regardless of whether the materials were distributed. Osborne v. Ohio, 495 U.S. 103, 110-11 (1990). In that regard, child pornography is entitled to less First Amendment protection than mere obscenity. See Stanley v. Georgia, 394 U.S. 557, 568 (1969) ("We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."). However, because government restrictions on child pornography are justified by "the harm it cause[s] to its child participants," Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2002), "virtual child pornography" created using computer-generated images or photo-editing software without the

involvement of actual children, id. at 241, remains constitutionally protected speech, id. at 250-51.

To summarize, "[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." Roth v. United States, 354 U.S. 476, 487 (1957) (footnote omitted). Barring obscene materials as defined in Miller, or child pornography as defined by Ferber and Free Speech Coalition, individuals generally have a constitutionally protected right to distribute and consume depictions of sexual activity. Reno, 521 U.S. at 874-75; see also United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) ("[N]onobscene, sexually explicit materials involving persons over the age of [seventeen] are protected by the First Amendment."). Moreover, this right includes a "right to view and possess obscene material in the privacy of [one's] home." State v. Higginbotham, 475 N.J. Super. 205, 235 (App. Div. 2023) (citing Stanley, 394 U.S. at 560-61), aff'd as modified, 257 N.J. 260 (2024).

Applying these principles, A.L. correctly points out that the sexually-oriented materials ban encompasses materials that, under ordinary circumstances, he would have a constitutional right to view or possess. In that regard, the condition restricts A.L.'s access to materials that are "predominately

orientated to descriptions or depictions of sexual activity," regardless of whether they might be patently offensive, excessively sexual in the eyes of the community, or lacking in "serious literary, artistic, political, or scientific value," Miller, 413 U.S. at 24. It applies not only to visual depictions of sexual activity, but also to audio and written content. It also appears to prohibit A.L. from consuming the proscribed content even in the privacy of his own home. See Stanley, 394 U.S. at 560-61. Furthermore, the condition prohibits A.L. from "creating" the proscribed content, thus effectively preventing him from engaging in an entire category of otherwise protected speech. Free Speech Coalition, 535 U.S. at 253-54 ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it" absent a showing of a "direct connection . . . [to imminent] illegal conduct").

That the restriction at issue is a condition of supervised release, rather than proscribed criminal conduct, does not negate the First Amendment's protections. See United States v. Thielemann, 575 F.3d 265, 272 (3d Cir. 2009) (noting that "there are First Amendment implications for a ban that extends to explicit material involving adults" as a condition of supervised release (quoting United States v. Voelker, 489 F.3d 139, 151 (3d Cir. 2007))); United States v. Gnirke, 775 F.3d 1155, 1163 (9th Cir. 2015) (noting that parole condition

restricting access to pornography "unquestionably implicates [parolee's] First Amendment right to access protected speech").

Although an offender's PSL status augments the government's interest in restricting access to certain materials, it does not change the protected nature of the content. Gnirke, 775 F.3d at 1165 (noting that even for parolees, "non-pornographic materials receive full protection under the First Amendment"). Therefore, the Board's contention that "Miller does not apply to the pornography condition at issue here because [Miller] was not addressing a convicted sex offender's far more limited First Amendment rights" finds no support in settled First Amendment principles. See United States v. Loy, 237 F.3d 251, 262-63 (3d Cir. 2001); see also Pazden v. N.J. State Parole Bd., 374 N.J. Super. 356, 370 (App. Div. 2005) ("[A] special condition of parole that cannot pass constitutional muster in the same strict sense that we demand of other statutes with penal consequences must fail.").

Conditions of supervised release are intended to advance the State's interest in "protect[ing] the public and foster[ing] rehabilitation," N.J.S.A. 2C:43-6.4(b), as well as "reduc[ing] the likelihood of recurrence of criminal or delinquent behavior," N.J.S.A. 30:4-123.59(b)(1)(a). See State v. Perez, 220 N.J. 423, 437 (2015) ("[Community Supervision for Life (CSL), PSL's

predecessor,[7]] is designed to protect the public from recidivism by sexual offenders."). Our courts have consistently recognized that this interest justifies subjecting "an offender on parole . . . [to] substantial restrictions not faced by the average citizen." J.I., 228 N.J. at 221.

Nevertheless, to avoid "questions about [the parole statutes'] constitutionality," id. at 227, "specific conditions restricting the activities of a CSL offender . . . must bear a reasonable relationship to reducing the likelihood of recidivism and fostering public protection and rehabilitation," id. at 221. This principle extends to parole conditions that burden the parolee's First Amendment rights. See K.G., 458 N.J. Super. at 41 (directing the Board to reconsider imposition of more stringent condition because record failed to establish that a less restrictive condition was insufficient to serve State's interests). Therefore, "in order to comport with First Amendment standards, [a] prohibition on pornography must be narrowly tailored to serve the goals of advancing . . . rehabilitation and protecting the public." Loy, 237 F.3d at 263.

The parties in this case present dramatically different views of the scope of the challenged condition. A.L. contends that the condition prohibits him from

[7] In 2003, the Legislature amended N.J.S.A. 2C:43-6.4 to replace all references to community supervision for life with PSL. L. 2003, c. 267, § 1 (eff. Jan. 14, 2004).

viewing "any description or depiction of sexual activity, irrespective of the medium used for the description or depiction." Thus, in A.L.'s view, the condition prohibits him from consuming "sexually explicit sex education material such as 'The Joy of Sex,'"[8] "artistic materials such as Madonna's 1992 book, Sex,"[9] "literary works exploring female and male sexuality," and "scientific/educational presentations such as the National Geographic [d]ocumentary, [Sex: How It Works]."[10] Further, A.L. asserts, the condition prohibits him from viewing "any animated depiction of sexual intercourse, oral sex, masturbation or bestiality, even if intended for satire or parody." Therefore,

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[8] Alex Comfort & Susan Quilliam, The Joy of Sex (Crown Publishers 2008). The book, characterized as a "groundbreaking sex manual" by the BBC, contains explicit illustrations of a variety of sex positions and practices. Cordelia Hebblethwaite, How the Joy of Sex was illustrated, BBC (Oct. 26, 2011), https://www.bbc.com/news/magazine-15309357.

[9] The book features a number of sexually suggestive photographs of Madonna and "passages . . . too dirty to quote" in contemporary reporting. Roger Catlin, You Can Tell This Book By Its Cover, Hartford Courant (Oct. 21, 1992), https://web.archive.org/web/20121105124754/http://articles.courant.com/1992-10-21/features/0000110977_1_gutenberg-bible-madonna-s-new-album-encore-books.

[10] The product description for this documentary reads: "Through gripping real-life stories, new technology, and cutting edge computer graphics we explore sex like never before, journeying from first times to playing the field – all the way to humankind's ultimate goal, procreation." Sex: How It Works, https://www.amazon.com/Sex-How-Works-Various/dp/B00DCG36AK (last visited May 28, 2024).

while he acknowledges that "the State certainly has a compelling . . . interest" in imposing the condition, A.L. contends that "the parole condition is not narrowly drawn to serve that interest." See Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

In contrast, the Board is steadfast in its reference to the condition as a "pornography condition" that prohibits only "pornography," notwithstanding the fact that the term never appears in the condition's text. In that regard, the Board asserts "[A.L.] mischaracterizes the nature and scope of the pornography condition" because "the condition imposed on [A.L.] defined pornography as images that are 'predominately orientated to descriptions of sexual activity.'" The Board also points out that "the pornography condition imposed on [A.L.] . . . is the same condition that the court upheld in K.G."

In reality, the condition appears to be neither as broad as A.L. describes, nor as narrow as the Board suggests. The condition contains a limiting provision—it does not prohibit A.L. from consuming material predominately oriented towards descriptions or depictions of sexual activity "unless the medium features or contains such [material] on a routine basis or promotes itself

based upon such descriptions or depictions." Consequently, A.L.'s claim that the condition "applies to any description or depiction of sexual activity" is inaccurate. For example, A.L. would not violate his parole if he viewed "a film containing a single depiction of simulated sexual intercourse." K.G., 458 N.J. Super. at 40.

That said, the Board's insistence that the condition is a narrow restriction on pornography is, at best, misleading. The condition does not, as the Board suggests, define pornography. Instead, it defines the phrase "predominately orientated," and even then, only by negative implication. Putting aside the definitional problems attending the term "pornography," Loy, 237 F.3d at 263-64, a literal application of the condition would seem to include a variety of content that would not commonly be understood as pornographic. In addition to the examples A.L. provides, A.L. is arguably prohibited from watching television shows like Bridgerton and consuming written works like Fifty Shades of Grey as well as its film adaptation. Additionally, considering that "sexual activity," as defined in the condition, includes "actual or simulated sexual acts such as . . . bestiality," A.L. could potentially violate his PSL by viewing art

depicting the story of Leda and the Swan.[11] See Loy, 237 F.3d at 264. These examples arguably contain depictions of sexual activity on a routine basis or promote themselves based on such content, but are not commonly understood as pornographic. Although the condition's breadth does not necessarily render it constitutionally infirm, an understanding of the condition's potential scope is crucial to determining whether the condition is narrowly tailored in A.L.'s case to advance the State's legitimate interests in public safety and A.L.'s rehabilitation.

"Overbreadth and vagueness are analytically distinct concepts that implicate different constitutional concerns." State v. Hill, 474 N.J. Super. 366, 376 (App. Div. 2023), rev'd in part, 256 N.J. 266 (2024), reconsideration denied, 256 N.J. 461 (2024). Overbreadth occurs when a "statute 'reaches a substantial amount of constitutionally protected conduct.'" State v. Carter, 247 N.J. 488, 518 (2021) (quoting State v. Burkert, 231 N.J. 257, 276 (2017)). A statute regulating expressive activity is unconstitutionally overbroad if it "effectively suppresses a large amount of speech that adults have a constitutional right to

[11] Louise Jury, Feathers fly at the police station over gallery's 'bestial' Leda and the Swan, Evening Standard (Apr. 27, 2012), https://www.standard.co.uk/news/london/feathers-fly-at-the-police-station-over-gallery-s-bestial-leda-and-the-swan-7684646.html.

receive and to address to one another." Reno, 521 U.S. at 874. Thus, "[w]hen considering overbreadth, the 'first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.'" State v. B.A., 458 N.J. Super. 391, 407 (App. Div. 2019) (quoting State v. Saunders, 302 N.J. Super. 509, 517 (App. Div. 1997)).

Vagueness, on the other hand, stems from due process principles that "require[] that citizens be given adequate notice of what the law proscribes." State v. Morrison, 227 N.J. 295, 314 (2016). "The United States Supreme Court has defined the concept of void for vagueness in terms of whether a statute or regulation gives a person of ordinary intelligence fair warning of what conduct is prohibited . . . and whether it is specific enough to provide an explicit standard to guide its enforcement." Pazden, 374 N.J. Super. at 369 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). That said, "[a] statute need not be a 'model of precise draftsmanship,' but rather need only 'sufficiently describe[] the conduct that it proscribes." Hill, 474 N.J. Super. at 377 (second alteration in original) (quoting State v. Afanador, 134 N.J. 162, 169 (1993)).

Pertinent to this appeal, "any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to

serve a compelling government interest, and restrictions based on viewpoint are prohibited." Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (citations omitted) (first citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); and then citing Carey v. Brown, 477 U.S. 455, 463 (1980)). Nevertheless, "even under strict scrutiny, a rule may use 'broad terms, provided it is controlled by a sufficient basic norm or standard. It need not be minutely detailed to cover every possible situation.'" K.G., 458 N.J. Super. at 43 (quoting Karins v. City of Atl. City, 152 N.J. 532, 542 (1998)).

We first address and reject A.L.'s void-for-vagueness argument. In K.G., one of the appellants, a convicted sex offender serving a PSL sentence like A.L., challenged as unconstitutionally vague a number of special conditions, including a similar provision as here prohibiting access to "sexually-oriented websites, material, information[,] or data." Id. at 42. We rejected the argument because the term was "'controlled by a sufficient basic norm or standard'" to withstand the void-for-vagueness challenge. Id. at 43 (quoting Karins, 152 N.J. at 542). We concluded that "a plain reading of the term 'sexually-oriented materials' and the corresponding definition in the special condition clearly indicates that the prohibition applies to any medium that contains any actual or simulated description or depiction of sexual intercourse, whether it be a movie,

television show, novel, or pornographic website." Ibid. Given that the same language appears in A.L.'s special condition, our reasoning in K.G. applies with equal force here.

The question of whether the condition is unconstitutionally overbroad "requires a more robust analysis." R.K., 463 N.J. Super. at 403. The crux of the issue is whether the special condition "'reach[es] farther than is permitted or necessary to fulfill the state's interests'" in "'reducing the likelihood of recidivism and fostering public protection and rehabilitation.'" Id. at 402, 404 (first quoting State v. Wright, 235 N.J. Super. 97, 103 (App. Div. 1989); and then quoting J.I., 228 N.J. at 221). The Board contends that the condition is reasonably tailored to A.L.'s case because of the circumstances of A.L.'s commitment offense. The Board also cites A.L.'s acknowledgment that pornography may be a trigger for recidivism, as well as his therapist's longstanding recommendation that A.L. not be allowed to view pornography. A.L. counters that the condition remains more restrictive than necessary because it "extends far beyond the type of material [his therapist] is concerned would be detrimental to [his] rehabilitation." A.L. further argues that the condition is overbroad because neither his therapist nor the Board and its representatives have "articulated any rationale or explanation of why allowing [A.L.] to access

adult pornography is likely to increase the risk of him committing a future sexual offense against a child."

Although a literal reading of the ban would arguably include material that is not commonly considered pornographic, there is sufficient evidence in the record to establish the ban's required "nexus to the goals of supervised release." Voelker, 489 F.3d at 150. According to A.L.'s Adult Diagnostic and Treatment Center (ADTC) evaluation, N.J.S.A. 2C:47-1,[12] A.L.'s "repetitive criminal sexual behavior was performed compulsively," and A.L. "admitted that he continued to engage in the behavior despite full knowledge of its wrongfulness, feelings of guilt and shame and continually exhorting himself to stop the behavior." In 2012, while he was confined at the ADTC pursuant to N.J.S.A. 2C:47-1 to -3, A.L. himself acknowledged that he "should not possess or have access to pornography." In 2021, when A.L.'s application for discharge of the condition was pending, A.L.'s therapist maintained her position that "allowing [A.L.] to view pornography [was] detrimental to [his] rehabilitative efforts."

[12] The evaluation is required when a person is convicted of enumerated offenses, including the offenses of which A.L. was convicted, and "[t]he examination shall include a determination of whether the offender's conduct was characterized by a pattern of repetitive, compulsive behavior and, if it was, a further determination of the offender's amenability to sex offender treatment and willingness to participate in such treatment." N.J.S.A. 2C:47-1.

Moreover, A.L.'s therapist has opined that when he is in the community, he appears "less cognizant" of his "compulsions" and the potentially "high-risk activities that would cause [him] to reoffend."

Given this record, the scope of the ban is justifiable in relation to A.L.'s rehabilitation and risk of recidivism, and the Board's findings on this point are entitled to deference. See J.I., 228 N.J. at 230 ("[R]eview of the Parole Board's determination is deferential in light of its expertise in the specialized area of parole supervision, and [courts] must uphold findings that are supported by credible evidence in the record."). Thus, although the sexually-oriented materials ban undoubtedly imposes a heavy burden on A.L.'s otherwise protected right to view non-obscene expressions of sexual activity, the credible evidence in the record supports the imposition of the condition and represents a permissible infringement on A.L.'s First Amendment right. See Pazden, 374 N.J. Super. at 369 ("Many rights, including free speech and assembly, may permissibly be restricted as a condition of parole." (citing Morrissey, 408 U.S. at 477-83)).

Affirmed.