

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JONATHAN J. POLLARD,	:	
	:	
Petitioner,	:	15-cv-09131-KBF
	:	
v.	:	
	:	
UNITED STATES PAROLE COMMISSION, J.	:	
PATRICIA WILSON SMOOT, solely in her capacity as	:	
Chair of the United States Parole Commission, UNITED	:	
STATES PROBATION OFFICE FOR THE SOUTHERN	:	
DISTRICT OF NEW YORK, and MICHAEL J.	:	
FITZPATRICK, solely in his capacity as Chief U.S.	:	
Probation Officer,	:	
	:	
Respondents.	:	

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**REPLY MEMORANDUM OF LAW IN SUPPORT  
OF PETITION FOR A WRIT OF HABEAS CORPUS**

**TABLE OF CONTENTS**

Table of Authorities..... ii

Preliminary Reply Statement..... 1

I. THE COMMISSION HAS FAILED TO JUSTIFY  
THE COMPUTER MONITORING CONDITION.....3

II. THE COMMISSION HAS FAILED TO JUSTIFY  
THE RARELY-IMPOSED GPS MONITORING CONDITION .....4

III. THE GPS MONITORING CONDITION VIOLATES RFRA .....6

IV. THE COMMISSION HAS FAILED TO JUSTIFY THE CURFEW .....9

Conclusion..... 10

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. ___, 134 S. Ct. 2751 (2014) .....	6
<i>Campos v. Coughlin</i> , 854 F. Supp. 194 (S.D.N.Y. 1994) .....	8
<i>Jolly v. Coughlin</i> , 76 F.3d 468, 477 (2d Cir. 1996).....	6
<i>Jova v. Smith</i> , 582 F.3d 410 (2d Cir. 2009).....	8, 9
<i>Sasnett v. Sullivan</i> , 908 F. Supp. 1429 (W.D. Wis. 1995) .....	8
<i>Small v. Lehman</i> , 98 F.3d 762 (3d Cir. 1996) .....	7
<i>United States v. Malenya</i> , 736 F.3d 554 (D.C. Cir. 2013) .....	3
<i>United States v. Neeley</i> , 675 F. Supp. 2d 655 (W.D. Va. 2009).....	10
<i>United States v. Sloley</i> , No. 03 Cr. 1190 (WHP), 2013 U.S. Dist. LEXIS 105035 (S.D.N.Y. July 18, 2013).....	5
<i>United States v. Tafelmeyer</i> , 584 Fed. Appx. 766 (9th Cir. 2014) .....	5
<i>United States v. Whitfield</i> , 464 Fed. Appx. 525 (6th Cir. 2012).....	10
<i>Valdez v. City of New York</i> , No. 11 Civ. 05194 PAC DF, 2013 WL 8642169 (S.D.N.Y. Sept. 3, 2013) .....	6
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	8
<i>Yahweh v. U.S. Parole Comm'n</i> , 158 F. Supp. 2d 1332 (S.D. Fla. 2001) .....	7

### **Statutes**

18 U.S.C. § 4206 .....	1
42 U.S.C. § 2000bb .....	6

### **Regulations**

28 C.F.R. § 2.53.....	1
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Jonathan J. Pollard respectfully submits this Reply Memorandum of Law in support of his Amended Petition for a Writ of Habeas Corpus (ECF No. 11-1).

**Preliminary Reply Statement**

Respondents' Opposition ignores the admissions by the DOJ and by the Parole Commission that there is *no reasonable probability* that Mr. Pollard will commit another crime. Nowhere in their 21-page memorandum do they even acknowledge the July 1, 2015 letter from the U.S. Attorney in Washington, D.C. admitting that there is no reasonable probability that Mr. Pollard will commit another crime (ECF No. 3 at Ex. E), or the fact that as a matter of statute and regulation, in granting parole, the Parole Commission necessarily made the same determination. *See* 18 U.S.C. § 4206(d); 28 C.F.R. § 2.53(a). The Commission simply declares, in *ipse dixit* fashion, that there is a rational basis for the parole conditions, and that the Court should defer entirely to the judgment of the Parole Commission and the Probation Office.

Respondents offer no basis for such deference. The sum and substance of their Opposition is that 30 years ago, Mr. Pollard engaged in "covert" conduct, and for this reason he must now be monitored on a non-stop basis. (ECF No. 19 at pp. 13, 14, 20). Respondents claim to be concerned that Mr. Pollard will disclose 30-year old information that the uncontested evidence shows to be useless and of no value. It is on this putative basis that the Commission seeks to justify the Computer Monitoring Condition, the GPS Monitoring Condition, and the curfew.<sup>1</sup> Even putting aside the irreconcilable nature of that position with the admissions of the DOJ and the Parole Commission described above, the claim is unsupported by any evidence. For the reasons stated in the Petitioner's opening memorandum (ECF No. 11-3) – reasons that remain wholly unrebutted – the Parole Commission misapplied the governing legal standards.

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<sup>1</sup> As used herein, "the Commission" refers to all Respondents.

The Commission posits that Mr. Pollard remains a threat today to disclose *the same information* he disclosed over 30 years ago. Nothing supports this. More than 30 years ago, Mr. Pollard delivered classified information to the State of Israel. Since then, Mr. Pollard has had no access to any classified information. Thus, the only theoretically conceivable classified information known to Mr. Pollard is the information (if any) that remains in his head from 1985. But the record is *uncontested* that that information is of no value to anyone. The Commission ***does not rebut*** the Declarations of former U.S. National Security Advisor Robert McFarlane and former Senate Intelligence Committee member Dennis DeConcini, who ***have personal knowledge***, and who each state that whatever information Mr. Pollard might still recall after 30 years is “***of no value to anyone today.***” (ECF No. 3 at Exs. C ¶ 12 & D ¶ 7) (emphasis added).

Unable to dispute this, the Commission simply asserts that the Parole Commission’s “judgment” overrides this uncontested evidence. (ECF No. 19 at p. 15). But so-called “judgment,” especially by those lacking any expertise in the subject matter (and there is no claim that the Parole Commission has any such expertise), cannot override *evidence*. That is not a rational basis for imposing such onerous parole conditions.

In sum, all of the parole conditions are predicated on the phantom premise that Mr. Pollard poses a threat of further disclosure of useless 30 year-old information, because he supposedly has a proclivity for making such disclosures and thus needs to be restricted. There is not one fact that supports that premise. All of the evidence – including the admissions of the DOJ and the Parole Commission – negates any such premise.

There is no rational basis for any of the challenged conditions. The conditions are unlawful and must be vacated.

**I. THE COMMISSION HAS FAILED TO JUSTIFY THE COMPUTER MONITORING CONDITION**

There is no dispute that Mr. Pollard has no classified *documents*. The sole issue then – assuming Mr. Pollard even recalls classified information from 30 years ago – is whether the risk that he might disclose that information justifies the Computer Monitoring Condition.

Significantly, the Commission has expressed *no concern* that Mr. Pollard will transmit classified information via telephone, in a personal meeting, or via hard mail. The Commission has imposed *no prohibition* on the use of a landline or non-data phone, on in-person meetings, or on sending letters by mail. ***This lack of concern belies any claim that the Commission genuinely fears Mr. Pollard might transmit useless 30-year old information to anyone.***

The Computer Monitoring Condition lacks any rational basis and furthers no governmental interest, but prevents the very objective the Commission should be advancing – the ability of this highly-educated and employable Stanford graduate to re-enter the workforce and become a productive citizen. The Commission stoops to feigning disbelief that in 2015, an analyst “in the finance department of an investment firm” must actually use a computer, claiming there is no evidence to support that. (ECF No. 19 at p. 14). The Commission also feigns disbelief that prospective employers would not be prepared to allow the U.S. government unfettered access to its computer systems in order to employ Mr. Pollard. (*Id.*). These disingenuous assertions merit no response. The propositions are incontrovertible.<sup>2</sup> *See, e.g., United States v. Malenya*, 736 F.3d 554, 560 (D.C. Cir. 2013) (release conditions that included requirement that employer’s computer could be searched “would shrink [releasee’s] employment opportunities to the vanishing point.”).

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<sup>2</sup> Mr. Pollard has an offer of employment pending. Counsel for Mr. Pollard has recommended to the employer that the start of employment await the determination of this challenge to the Computer Monitoring Condition.

The Commission distorts Mr. Pollard's decision not to contest the parole condition that requires monitoring of his *personal* computer. Although a pointless exercise, Mr. Pollard is willing to allow monitoring of his personal computer. The Commission, however, declares that "the boundaries between personal and business computer use are blurred." (ECF No. 19 at p. 13). But, personal and work computers can be distinct. Mr. Pollard can have a personal computer, as well a work computer owned by his employer, used for business purposes.

Finally, the Commission invokes the 1986 Plea Agreement, which prohibits Mr. Pollard from publishing a book or article without permission. The Commission pretends that risk of violation of the Plea Agreement is a concern that justifies the Computer Monitoring Condition. (ECF No. 19 at p. 13). The Commission makes this argument in the very same paragraph in which it argues that it is Mr. Pollard's "covert conduct" 30 years ago that supposedly warrants the harsh parole conditions. (*Id.*). Publishing a book or article is the opposite of "covert." Any publication will become instantly known, and will result in Mr. Pollard's immediate return to prison, no doubt for a very long time. The notion that Mr. Pollard would act so recklessly and self-destructively has no basis in fact.

Contrived rationales such as these cannot justify depriving Mr. Pollard of livelihood. The Computer Monitoring Condition has no rational basis and must be vacated.

## **II. THE COMMISSION HAS FAILED TO JUSTIFY THE RARELY-IMPOSED GPS MONITORING CONDITION**

The Commission has not challenged (and therefore concedes) the Declarations of Messrs. McFarlane and DeConcini who state that Mr. Pollard has no useful information to disclose. Thus, there is no rational reason to electronically monitor his location. It seems that the only purpose of the GPS Monitoring Condition is to burden him.

Mr. Pollard has no passport. He cannot travel. Nor is he a stalker, pedophile, drug dealer, or gang member. Mr. Pollard is no different from the vast multitude of releasees who are not subject to GPS tracking. Having him make periodic visits to the Probation Office, maintaining phone contact, and allowing his Probation Officer to conduct spot checks, are more than adequate means of supervising him.

The Chief of the Probation Office states that “no paroled individual ha[s] ever been granted permission not to maintain a charged GPS monitor[.]” (ECF No. 20 at ¶ 18). This disingenuously implies that GPS tracking is standard practice. It is not. The Commission does not dispute the admission by U.S. Probation Officer Michael Wasmer that in his experience as a U.S. Probation Officer since 1992, having handled “thousands” of cases, this is only his third case that involves GPS tracking. (ECF No. 9 at ¶ 5).

Reported decisions illustrate the considerations that govern the imposition of GPS tracking on a releasee. For example, in *United States v. Sloley*, No. 03 Cr. 1190 (WHP), 2013 U.S. Dist. LEXIS 105035 (S.D.N.Y. July 18, 2013), the releasee had a lengthy criminal history that included armed robbery, drug dealing, and possession of a firearm. Only after multiple violations of the terms of supervised release did Judge Pauley impose a GPS tracking condition: “Given [releasee’s] propensity to violate his conditions of supervised release almost as soon as he is released from imprisonment, GPS monitoring is necessary to ensure that the goals of supervised release are met.” *Id.* at \*6. The Commission relies on *United States v. Tafelmeyer*, 584 Fed. Appx. 766 (9th Cir. 2014), which involved the supervised release of a longtime consumer of child pornography. The court upheld GPS tracking because it “facilitates compliance with other conditions of supervised release, such as the requirement that [releasee] avoid schools and other places frequented by children.” *Id.* at 768.



In contrast to these cases, here there is no rational link between the GPS Monitoring Condition and any legitimate governmental objective.

### III. THE GPS MONITORING CONDITION VIOLATES RFRA

The GPS Monitoring Condition violates the Religious Freedom Restoration Act (“RFRA”), which prohibits the government from “substantially burden[ing] a person’s exercise of religion” unless it can “demonstrate[] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a)-(b). RFRA “provide[s] very broad protection for religious liberty,” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_, 134 S. Ct. 2751, 2761 (2014), and extends to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. §2000bb-2(4).

A substantial burden exists where the government “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). In this context, the “‘exercise of religion’ involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons.” *Burwell*, 134 S. Ct. at 2770 (citations omitted). A “substantial burden” does not have to involve the overt “prohibition of religious practice (as in, for example, prohibiting attendance at a religious service). Rather, coercive conduct that, directly or indirectly, tends to force the individual to restrict the practice of his religion may well be sufficient.” *Valdez v. City of New York*, No. 11 Civ. 05194 PAC DF, 2013 WL 8642169, at \*13 (S.D.N.Y. Sept. 3, 2013).

The GPS Monitoring Condition substantially burdens the ability of Mr. Pollard, an Orthodox Jew, to adhere to basic tenets of his religion, and forces him to violate a cardinal prohibition of his faith. One of the fundamental tenets of Judaism is the observance of the Sabbath, which lasts 25 hours. (ECF No. 6 at ¶¶ 6-7). Inserting an electrical plug into an outlet,

or removing one from an outlet, is prohibited on the Sabbath. (*Id.* at ¶ 9). The GPS Monitoring Condition forces Mr. Pollard to violate these fundamental tenets by requiring that he attach the charging wire to the monitoring device during the Sabbath. While the Commission states that the GPS unit can hold a charge for “about 24 hours” (ECF No. 20 at ¶ 8), that is immaterial because the Sabbath lasts 25 hours. Thus, according to the Commission, charging the device during the Sabbath will likely be inevitable.

The charging prohibition also applies to major Jewish holidays. (ECF No. 6 at ¶ 14). Most holidays occur in two (sometimes three) day segments and thus last for 49 (or 73) hours. (*Id.*). By forcing Mr. Pollard to violate the Sabbath and desecrate the Jewish holidays, the GPS Monitoring Condition imposes a substantial burden on his exercise of religion.<sup>3</sup>

In addition, group worship is integral to Sabbath observance. (ECF No. 6 at ¶¶ 11-12). Courts have held that “an opportunity to worship as a congregation by a substantial number of prisoners may be a basic religious experience and, therefore, a fundamental exercise of religion[.]” *Small v. Lehman*, 98 F.3d 762, 767 (3d Cir. 1996). In *Yahweh v. U.S. Parole Comm’n*, 158 F. Supp. 2d 1332, 1345 (S.D. Fla. 2001), the court found that a parole condition prohibiting a parolee from worshipping, meeting, or communicating with his fellow practitioners *without the prior written consent of his parole officer* constituted a “substantial burden” on the parolee’s religious beliefs: “[a] restriction that prohibits an individual from engaging in group worship, but allows solitary worship, must be characterized as a substantial burden when group worship has been shown to be an important aspect of the religion.” *Id.* at 1346.

As the Commission acknowledges, the GPS device’s battery drains faster if the parolee is away from home. (ECF No. 20 at ¶ 8). Thus, even assuming the charge lasted 25 hours when

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<sup>3</sup> In a misguided gesture, the Probation Office has ordered a new GPS device that requires a replacement of a battery instead of a plug-in during the Sabbath. (ECF No. 24 at ¶ 3). Replacing a battery on the Sabbath or holiday is no different than plugging into an outlet: both are forbidden. (ECF No. 6 at ¶ 9).

Mr. Pollard is at home, he still could not attend services without draining the battery and necessitating a faster recharge. By effectively requiring Mr. Pollard to choose between (a) participating in group worship, or (b) violating the Sabbath, the GPS Monitoring Condition substantially burdens Mr. Pollard's religious freedom in this additional respect.

The Commission contends that even if Mr. Pollard "were occasionally required to charge the monitor during the Sabbath, that imposition on his religious practice would be objectively minimal in comparison with considerably more substantial burdens involved in other ... cases, and more like the 'modicum of paperwork' found" to be insubstantial. (ECF No. 19 at p. 19). This glib comparison is extremely disrespectful, as well as incorrect. Desecration of the Sabbath violates one of the Ten Commandments. It is not akin to a bookkeeping task. (ECF No. 6 at ¶ 6). Second, the Commission is wrong on the law. Courts have found less intrusive interferences to "substantially burden" a plaintiff's free exercise of religion. *See, e.g., Sasnett v. Sullivan*, 908 F. Supp. 1429, 1446 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *cert. granted, judgment vacated on other grounds*, 521 U.S. 1114 (1997) (ban on wearing crucifixes substantially burdened prisoners' religious rights by depriving them of religious symbol they believed helped advance their faiths and feel closer to God).

There is no "compelling interest" for the interference with Mr. Pollard's religious freedom. Compelling interests include "only those interests of the highest order[.]" *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). The government thus "cannot merely brandish the words 'security' and 'safety' and expect that [its] actions will automatically be deemed . . . permissible conduct." *Campos v. Coughlin*, 854 F. Supp. 194, 207 (S.D.N.Y. 1994). Governmental conduct "grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RFRA's] requirements." *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009) (citation

omitted). There is no justification at all for the GPS Monitoring Condition, let alone a “compelling” one.

Nor is the GPS Monitoring Condition the least restrictive means of achieving whatever interests the Commission purports to have. “[T]o demonstrate that its practice is the least restrictive means, [the Commission] must show that it actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Jova*, 582 F.3d at 416. The Commission has failed to demonstrate that more typical parole conditions are insufficient. Indeed, releasees are sometimes prohibited from visiting locations where their crimes occurred or where they were deemed to be at risk of recidivism; in only the rarest exceptions are those releasees monitored through GPS. Rather, they are supervised using traditional methods of supervision, which are substantially less restrictive than GPS monitoring.

In sum, the GPS Monitoring Condition has no rational basis. Moreover, it violates RFRA. For both reasons, the condition is unlawful and must be vacated.

#### **IV. THE COMMISSION HAS FAILED TO JUSTIFY THE CURFEW**

Mr. Pollard is not a nocturnal criminal. He is not a drug dealer, gang member, rapist, or armed robber. He has not violated any conditions of parole. He poses no threat whatsoever to commit crimes at night (or at any other time). He is a 61-year old Stanford graduate who is waiting to start his job as a financial analyst. He has been married to the same woman for about two decades. Nor is curfew a mandatory or standard condition of parole. The imposition of a curfew is not rationally-based.

The Commission says the curfew can “be modified where appropriate,” such as “to attend events” or “if he secured employment.” (ECF No. 20 at ¶ 14). In a similar vein, the Commission has offered to modify the curfew to allow for Mr. Pollard’s religious observances. (*Id.* at ¶ 19). The implication is that religious observance or the need to attend events provides a

rational basis for easing the curfew. (ECF No. 19 at p. 18). *The Commission has it backwards*. There must be a rational basis for *imposing* a curfew, not for *easing* a curfew. If Mr. Pollard is now going to be permitted to be outside of his apartment Friday and Saturday evenings until 11 p.m., and between 6 and 7 a.m. on both of those days, it shows there was no rational basis in the first place for prohibiting him from being out at these times. And if Mr. Pollard can leave the apartment on those days of the week, there is no rational basis for prohibiting him from doing so on other days of the week. The curfew is an arbitrary imposition with no rational basis.

An example of a rationally-based curfew may be found in *United States v. Whitfield*, 464 Fed. Appx. 525 (6th Cir. 2012). The releasee was a gun-toting criminal with “an extensive criminal record and [a] history of recidivism.” *Id.* at 527. On those facts, the Sixth Circuit upheld a curfew. In another case, the court rejected a proposed curfew for a longtime pedophile whose latest crime was possession of a sawed-off shotgun. *United States v. Neeley*, 675 F. Supp. 2d 655 (W.D. Va. 2009). Although the court found that the releasee “poses a genuine threat to children,” the court nevertheless rejected the curfew, finding it “unreasonably related to [releasee’s] history and characteristics.” *Id.* at 658-59.

There is no rational basis for a curfew in this case. The curfew is unlawful and must be vacated.

### **Conclusion**

The Court should grant the Petition and vacate the conditions of parole insofar as they include the Computer Monitoring Condition, the GPS Monitoring Condition, and the curfew.

Dated: New York, New York  
December 13, 2015

CURTIS, MALLET-PREVOST,  
COLT & MOSLE LLP

By: Eliot Lauer  
Eliot Lauer  
Jacques Semmelman  
Gabriel Hertzberg  
Sylvi Sareva\*  
101 Park Avenue  
New York, NY 10178  
Tel.: (212) 696-6000  
Fax: (212) 697-1559

*Attorneys for Petitioner Jonathan J. Pollard*

\*SDNY admission pending

24063193