SUPREME COURT NO. 19-1285
WARREN COUNTY CASE NO. PCCV036792

IN THE SUPREME COURT OF IOWA

KENNETH DOSS,
Applicant-Appellant,

v.

STATE OF IOWA
Respondent-Appellee.

APPEAL FROM THE WARREN COUNTY DISTRICT COURT
HONORABLE RICHARD B. CLOGG, DISTRICT COURT JUDGE

UPON FURTHER REVIEW FROM THE IOWA COURT OF APPEALS DECISION FILED JULY 22, 2020

FINAL BRIEF OF *AMICI CURIAE:*
AMERICAN CIVIL LIBERTIES UNION OF IOWA

IN SUPPORT OF APPLICANT-APPELLANT

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RULE 6.906(4)(d) STATEMENT

Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by amicus curiae.

IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLU of Iowa submits this amicus brief "at the request of the appropriate appellate court." Iowa R. App. Pro. 6.906(1); Nov. 4, 2020 Order.

The ACLU of Iowa is the statewide affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the state and federal Constitutions and laws, with thousands of Iowa members. Founded in 1935, the ACLU of Iowa is the fifth oldest state ACLU affiliate. The ACLU of Iowa works in the courts, legislature, and through public education and advocacy to safeguard the rights of everyone in our state.

The ACLU of Iowa has a longstanding interest in ensuring that the law protects the First Amendment and Iowa Constitutional freedom of association, including those rights as retained by parolees.

ARGUMENT

I. THE CHALLENGED PAROLE RESTRICTIONS VIOLATE DOSS'S FREEDOM OF ASSOCIATION UNDER THE U.S. AND IOWA CONSTITUTIONS AS APPLIED.

Introduction and Summary of the Argument

In this case, Doss, an applicant for postconviction relief (PCR), appeals the lower courts' denial of his constitutional challenges to parole conditions imposed pursuant to the special sentence for certain sex offenders. Iowa Code § 903B.1. These conditions ban his use of the Internet, prohibit dating, restrict his ability to associate with his family, seek counselling, and attend church. App. 54, 56. Doss has challenged these conditions as a violation of his right of free association under the U.S. and Iowa Constitutions. *Id.*

Courts around the country are split on whether the heightened scrutiny normally applied to restrictions of First Amendment freedoms, including as applied by the U.S. Supreme Court to strike down a law prohibiting registered sex offenders from accessing most online social media in the *Packingham* case[1],

[1] The particular heightened scrutiny applied depends on the kind of First Appendment intrusion at issue. Content-neutral speech restrictions are subject to First Amendment intermediate scrutiny, requiring that such a restriction be "narrowly tailored to serve a significant government interest" and not "burden substantially more speech than is necessary to further the government's legitimate interests." *See, e.g., Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). But other restrictions, such as content-based restrictions on speech, are subject to strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Such laws are presumptively unconstitutional and may be justified only if the

apply to parole conditions. This Court should find that it does. However, the Court should reverse the lower courts regardless of whether it applies the more or less protective standard, because the conditions fail both tests as applied to Doss. While the state's interest in preventing Doss from reoffending is compelling, the conditions fail the tailoring required to justify the intrusions on Doss's intimate and expressive associations.[2]

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government proves they are narrowly tailored to serve compelling state interests. *Id.* Government action targeting religious exercise is also subject to strict scrutiny, requiring a compelling government interest and narrow tailoring. *Church of the LukumiBabalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531-32 (1993). Restrictions on expressive associational rights are subject to strict scrutiny requiring a compelling state interest and narrow tailoring. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

[2] Doss has most clearly challenged his parole conditions as a violation of the freedom of association under the Iowa and U.S. Constitutions. App. 56. Because of this, and because his freedom of association claims are sufficient to resolve this case, amicus ACLU of Iowa focuses on the freedom of association in this brief.

However, because the freedom of association is implicit in the rights listed in the text of the First Amendment, the preservation of error on Doss's associational claims should preserve error on claims regarding the rights to free speech, assembly, petition, and religious exercise from which it arises. *See Jaycees*, 468 U.S. at 618 ("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."); *id.* at 622 (right to associate "implicit in the right to engage in activities protected by the First Amendment."); *Healy v. James*, 408 U.S. 169, 181 (1972) ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.").

Key to the failure of the parole conditions to survive either test is the fact that the state undertook no individualized consideration of Doss or the offenses resulting in his conviction before imposing them, and that they involve a greater deprivation of his liberty than reasonably necessary to deter future criminal conduct. Numerous alternative, less intrusive conditions are sufficient to meet the state's interests.

Finally, even if the Court determines that the parole conditions intruding on Doss's First Amendment free association rights are subject to less stringent scrutiny than would apply in the post-custodial context, it should nevertheless apply heightened scrutiny under the Iowa Constitution, pursuant to the *Ochoa* line of cases recognizing the retention of state constitutional rights by parolees.

Standard of Review

The Court reviews the denial of a PCR application asserting constitutional claims de novo. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

Error Preservation

It is undisputed that Doss preserved error on his freedom of association challenge to his parole conditions restricting his ability to date, associate with family, seek counselling, and attend church. App. at 54, 56; Court of Appeals at 6-7. However, the Court of Appeals erred in determining that Doss failed to preserve error on his challenge to the condition prohibiting him from "view[ing], access[ing], or us[ing] the Internet through any means." Court of Appeals at 6.

The Court of Appeals correctly found that in order to preserve an issue for appeal, it must be first presented to and ruled on by the district court. *Id.* (citing *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)); *see also State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002) (applying this rule to constitutional issues). However, it reads that rule too narrowly. This Court has emphasized that the preservation rule does not require the district court to have clearly or completely addressed an issue in order to preserve it for appeal. *Lamasters*, 821 N.W.2d at 864. "If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved." *Id.*

Like this case, *Lamasters* was a PCR appeal. *Id.* at 862. The Court held that Lamasters preserved error on his claim that trial counsel was ineffective for failing to *adequately support* his application for bifurcation, even though the district court had "recharacterized the issue somewhat" by ruling instead on whether his counsel was ineffective for failing to *raise* the bifurcation issue. *Lamasters*, 821 N.W.2d at 865. The fact that it would have been "better and safer" for counsel to file a rule 1.904 motion to enlarge did not render the failure to do so fatal. *Id.* The Court reasoned that the district court's recasting "[did] not make sense", the district court had in fact recounted the claim earlier in its ruling, and had disposed of the entire PCR application. *Id.* It therefore *necessarily* denied his claim that counsel failed to adequately support bifurcation. *Id.*

Under *Lamasters*, Doss preserved error on his challenge to the Internet ban. As the Court of Appeals recognized, "Doss pointed out that his parole was revoked and he was imprisoned a second time for violating the Internet-usage ban contained in his parole agreement". Court of Appeals at 6. Doss's application at its core challenged his incarceration, imposed after he violated his parole conditions by "having a girlfriend and the Internet." App. 54. In denying Doss's application, thereby allowing Doss to remain incarcerated, the district court *necessarily* upheld the constitutionality of the challenged parole conditions, because they were the basis of his revocation. App. 54, 67. It necessarily—albeit not "clearly or completely"—ruled on the Internet ban. *See Lamasters,* 821 N.W.2d at 864. Otherwise, as in *Lamasters*, the ruling "does not make sense." *Id.* at 865.

As a result, the Court of Appeals' decision that Doss failed to preserve error on his challenge to the Internet ban should be reversed.

A. The Parole Conditions Intrude on Doss's First Amendment Associational Rights.

The Court of Appeals' reliance on the *Baker* case to uphold the challenged parole conditions was misplaced. Court of Appeals at 7-8 (citing *Baker v. Iowa City*, 867 N.W.2d 44, 53 (Iowa 2015)).

In *Baker*, this Court held that the application of a municipal civil rights ordinance to a small business employer did not violate of the freedom of

association. *Baker*, 867 N.W.2d at 53. *Baker* relied on the *Jaycees* case, in which the U.S. Supreme Court determined the same, finding no violation of the right of association by the application of the Minnesota Human Rights Act to the national Jaycees. *Id.* at 52 (quoting *Jaycees*, 468 U.S. at 617-18, 619.)

However, unlike the associational rights at issue in those cases, the types of associations Doss seeks to protect in this case are the kind that the First Amendment is *most concerned with*, and are substantially more burdened. These rights fall into two categories—the freedom of intimate association, and of expressive association. *Jaycees*, 468 U.S. at 618-19.

Doss's right to associate with his girlfriend, family, members of his church, and counselors implicate his freedom of intimate association. The ban on Internet use and church attendance implicate his freedom of expressive association.

Intimate associations are those "that attend the creation and sustenance of a family" and in which membership is both "small" and "selective". *Id.* at 620. "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 621 (listing as examples, "raising and education of children" and "cohabitation with one's relatives"). The Court found that the associational interest the Jaycees organization had with its members was

not protected under the freedom of intimate association, because the Jaycees is "neither small nor selective". *Id.* at 621.

No bright line demarcates the type of relationships which enjoy First Amendment protection. The Court instead looks to the characteristics of a particular relationship on a case by case basis: "We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* at 620.

Applying these principles, Doss's relationships with his girlfriend and family are highly protected intimate associations. *See also Patel v. Searles,* 305 F.3d 130, 135-36 (2d Cir. 2002) (stating "husband/wife and parent/child relationships are obviously among the most intimate" and holding plaintiff's relationships with his father and siblings, although he did not live with them, "were of such an intimate nature as to warrant the highest level of constitutional protection") (citing *Rivera v. Marcus,* 696 F.2d 1016, 1024–25 (2d Cir. 1982)). *Miron v. Town of Stratford*, 881 F. Supp. 2d 280, 289 (D. Conn. 2012) ("The sibling relationship is one long recognized as warranting protection."); *Jones v. Bay Shore Union Free Sch. Dist.*, 947 F. Supp. 2d 270, 278 (E.D.N.Y. 2013) (father's relationship with daughter protected by First Amendment freedom of intimate association); *see also Vasquez v. Rackauckas*, 734 F.3d 1025, 1043 (9th Cir. 2013)("gang abatement order" barring association with family members in public places such as schools,

churches, parks, libraries, stores, and restaurants burdened First Amendment right of intimate association). *See also United States v. Caravayo*, 809 F.3d 269, 274 (5th Cir. 2015) (recognizing parolee's First Amendment associational interest in dating) (citing *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995)); *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 58 (2d Cir. 2014) (finding unmarried cohabitating couple had right of intimate association with one another); *contra Poirier v. Mass. Dep't of Corr.,* 558 F.3d 92, 96 (1st Cir. 2009), *and Cameron v. Seitz,* 38 F.3d 264, 274–76 (6th Cir. 1994); *but see the subsequent Sixth Circuit case Akers v. McGinnis,* 352 F.3d 1030, 1039–40 (6th Cir. 2003) ("Personal friendship is protected as an intimate association").

Doss's associational relationships with his church and counsellor are also almost certainly protected by the First Amendment right to intimate association. *See Jaycees*, 468 U.S. at 618 (listing the "exercise of religion" among those rights for which the right to associate is implicit); *Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg, N.Y.*, 111 F. Supp. 3d 459, 485 (S.D.N.Y. 2015) (Jewish town resident and Jewish business stated free exercise and freedom of association claims by alleging town issued stop-work order "to coercively prevent Hasidic Jewish residents . . . and property owners . . . from exercising their religion and associating with others to do the same."); *Commissioned II Love v. Yarbrough*, 621 F. Supp. 2d 1312, 1323-24 (S.D. Ga. 2007) (faith-based student organization expelled by public university stated intimate association claim; organization was

selective, with restrictive admission process requiring completion of semester-long "process of purity," acceptance of "Jesus Christ as Lord and Savior," and approval of leadership team).

Doss's right of expressive association is also directly burdened by the challenged parole conditions, in particular those banning his "use [of] the Internet" and attendance of "church or religious gatherings". App. 25; *See Jaycees*, 648 U.S. at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

Even though the Jaycees lacked a right of intimate association in membership, the Court found they *did* have a right to expressive association, because "a 'not insubstantial part' of the Jaycees' activities constitutes protected expression on political, economic, cultural, and social affairs." *Id.* at 626 (but finding that this right was not actually burdened by the challenged law). Here, because the ban on Internet use is total, it necessarily implicates Doss's ability to use the Internet to form and maintain close political, civic, cultural, and religious associations. The total ban on Doss's ability to attend church or religious gatherings also directly burdens his expressive religious associations.

As a result, these conditions must survive heightened scrutiny, as set forth below.

B. Heightened Scrutiny Applies to the Restrictions on Doss's Intimate and Expressive Associations under the First Amendment.

Certainly, outside the parole context (and amicus submits, within it)[3], the Supreme Court applies strict scrutiny to government restrictions on expressive associations. To survive this test, they must be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 622. *See also National Ass'n for Advancement of Colored People v. Patterson*, 357 U.S. 449, 466 (1958) (state failed to offer "controlling justification" for interfering with the right of free and private association of NAACP members).

Having found that no intimate associational rights were implicated in *Jaycees*, the Court did not expressly set out the constitutional test it would employ in reviewing cases where they were implicated. However, recognizing that the First Amendment protects intimate associations, the Court cited to a long line of cases in which heightened scrutiny or its predecessor equivalent was applied to protect fundamental rights around procreation, the education and upbringing of children, and marriage. *See Jaycees*, 468 U.S. at 618-19 (citing, inter alia, to *Zablocki v. Redhail*, 434 U.S. 374, 383–386, (1978); *Moore v. East Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 232

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[3] *See* Part I.C, below.

(1972); *Griswold v. Connecticut*, 381 U.S. 479, 482–485 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Poe v. Ullman*, 367 U.S. 497, 542–45 (1961) (Harlan, J., dissenting); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Carey v. Population Services International*, 431 U.S. 678, 684–86 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The heightened scrutiny these cases point to would require that such an intrusion "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388; *See also Wisconsin v. Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

Pulling the level of scrutiny from the First or Fourteenth Amendment cases examining the associational right at issue in any given case makes logical sense, and appears to be the tact that courts take in determining associational claims asserted secondary to a violation of free speech. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez,* 561 U.S. 661, 683 (2010) ("[W]e are persuaded that our limited-public-forum precedents

adequately respect both CLS's speech and expressive-association rights".); *Shahar v. Bowers*, 114 F.3d 1097, 1103 (11th Cir. 1997) (en banc), cert. denied, 522 U.S. 1049 (1998) (applying *Pickering* balancing test to associational rights implicated by public employer's policy).

C. First Amendment Rights are Retained by Parolees, But Courts are Divided on the Question Whether Normal Heightened Scrutiny, or a Less Exacting Balancing Test At Least Requiring Individualized Tailoring, Applies.

The Constitution, of course, allows greater restriction of constitutional rights following conviction of crime than of non-convicted persons. *See, e.g., Caravayo*, 809 F.3d at 274 ("It is axiomatic that the infringement of constitutional liberties occurs concomitantly with conviction of a crime, and many conditions of supervised release therefore permissibly infringe liberty interests") (quoting *United States v. Woods*, 547 F.3d 515, 519 (5th Cir. 2008)); *see also State v. King*, 867 N.W.2d 106, 121 (Iowa 2015) ("board of parole does not grant an inmate 'the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions'") (quoting *Morrissey v. Brewer,* 408 U.S. 471, 478–79 (1972)). But conviction of crime, even during the period of incarceration, does not strip a person of all their constitutional rights, either. A person convicted of a crime may be subject to punishment within the bounds of the constitution, but many basic constitutional rights unrelated to the state's legitimate penological interests

are retained. *See, e.g., Turner v. Safley*, 482 U.S. 78, 89 (1987) (inter alia, invalidating prisoner marriage restriction).

The courts are divided on the appropriate level of scrutiny to apply to parole conditions that infringe on First Amendment rights. As briefed by Doss, in *Packingham*, the U.S. Supreme Court struck down a ban on registered sex offenders accessing social media, assuming, without deciding, that such a ban is content-neutral rather than content-based, and therefore subjecting it to First Amendment intermediate scrutiny. *Packingham*, 137 S. Ct. at 1736.[4] The Court recognized the significance and ubiquity of the Internet to the free communication of ideas in our modern lives. *Id.* at 1735. Even in light of the state's considerable interest in preventing sexual abuse of children, the Court found that the ban was "unprecedented in the scope of First Amendment speech it burdens." *Id.* at 1737 ("[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.")

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[4] There is a strong argument that such a ban is content-based, because it targets particular speakers. *See* ACLU *Packingham* Amicus Br., at 27, *available here*: https://www.aclu.org/legal-document/packingham-v-north-carolina-amicus-brief. If so, strict scrutiny applies. *Reed*, 135 S. Ct. at 2230-31. But because the Court determined that the ban could not survive intermediate scrutiny, it was unnecessary to decide if it was content-based. *Packingham*, 137 S. Ct. at 1736; 1739 (J. Alito, concurring).

But the question of whether *Packingham* may be distinguished as to parolees, including sex offenders on lifetime supervised release, is not a settled one. Even though *Packingham* is a free speech and not a free association case, this Court must grapple with this question, for two reasons. First, the expressive associational rights at issue here are closely tied to the freedom of speech violation at issue in *Packington*, and indeed, all associational claims derived from other First Amendment rights.[5] Second, the principle is the same: If this Court follows the approach of those courts that apply *Packingham* to parolees, it should apply the normal heightened scrutiny to parole conditions restricting Doss's expressive and intimate associations. If not, it would apply a less stringent test to Doss' First Amendment associational claims[6]—but one that is still more exacting than that applied by the Court of Appeals, and which Doss's conditions cannot pass. These two approaches are set forth and applied to Doss's parole conditions below.

A handful of federal and state courts have determined that "*Packingham* invalidated only a *post*-custodial restriction". *United States v. Carson*, 924 F.3d 467 (8th Cir. 2019); accord *United States v. Rock*, 863 F.3d 827, 831 (D.C. 2017); *United*

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[5] *See* Part I, above, at n.2.

[6] In such a case his Iowa Constitutional claims should still enjoy heightened scrutiny. *See* Part I.E, below.

States v. Halverson, 897 F.3d 645, 657-58 (5th Cir. 2018); *United States v. Browder*, 866 F.3d 504, 511 n.26 (2d Cir. 2017); *United States v. Antezak*, 753 F.App'x. 705, 715 (11th Cir. 2018)(unpublished); *State v. King*, 950 N.W.2d 891, 900 (Ct. App. Wis. 2020); *Commonwealth v. Obert*, 2019 WL 2353547, at *9 n.20 (Pa. Super. Ct. June 4, 2019).

Other state and federal courts have applied *Packingham* to state restrictions of parolees' First Amendment rights. These courts require that restrictions be tailored to individualized determinations about the parolee and his offense in light of the state's interest in public safety and deterrence. *See, e.g., Manning v. Powers*, 281 F. Supp. 3d 953, 960 (C.D. Cal. 2017) (granting a preliminary injunction of a state-imposed parole restriction on social media under *Packingham* intermediate-scrutiny, because none of the parolee's sex-offense convictions involved the Internet or social media).

The West Virginia Supreme Court has likewise applied *Packingham* to find that parole restrictions on the use of the Internet violate the First Amendment. *Mutter v. Ross*, 240 W. Va. 336, 341 (W. Va. 2018). The court noted that a parole restriction on the use of the whole Internet infringes upon *more* First Amendment liberties than the social media restriction at issue in *Packingham*. *Id.* at 871. It found the ban failed narrow tailoring because the appellant's crime did not involve the Internet. *Id.* at 871. It thus allowed for the possibility that certain facts might justify a ban, but that such a restriction could not be imposed on a

parolee absent individualized consideration in order to satisfy narrow tailoring. *Id.* at 872. It rejected the State's reliance on *United States v. Rock* and the other federal circuit court cases, cited above, distinguishing custodial from non-custodial restrictions. *Id.* at 871-72. The court aptly pointed out that the *Packingham* decision made no exception for parole. *Id.* at 871-72.

The Illinois Supreme Court has also determined that *Packingham* applies to parole conditions, carefully examining and ultimately rejecting the federal circuit courts' rationales in distinguishing social media bans governing parolees from those governing post-custodial sex offenders. *People v. Morger*, 2019 WL 6199600, *12 (Ill. November 21, 2019). Applying *Packingham*, it determined that a parole condition banning Internet use is not sufficiently narrow if it "unnecessarily sweeps within its purview those who never used the Internet—much less social media—to commit their offenses and who show no propensity to do so, as well as those whose Internet activities can be supervised and monitored by less restrictive means." *Id.*

Alaska has also invalidated post-conviction restrictions on Internet use under the *Packingham* rule, reversing a prior holding that such restrictions were permissible. *Dalton v. State*, 2020 WL 6534580, at *3 (Alaska Ct. App. Nov. 6, 2020). The court recognized that what it had previously determined was a reasonable restriction of the Internet had to be adjusted in light of increased ubiquity and importance of the Internet to modern, everyday life, necessary to

access maps services, dictionaries or other reference materials, and the Court's website. *Id.*

The New Jersey Supreme Court has also applied *Packingham* retroactively to parole conditions restricting the use of social media. *State v. R.K.*, 232 A.3d 487, 501 (App. Div. 2020) (finding social media ban unconstitutional both facially and as applied to a person whose conviction did not relate to the use of social media or the Internet) (superseding *K.G. v. New Jersey State Parole Board*, 202 A.3d 636, 657 (N.J. Super. App. Div. 2019)).

And at least one federal circuit court has applied *Packingham* to parole conditions, finding that even when a defendant employs the Internet to commit his crimes, a complete ban on the use of the Internet is "draconian" and will rarely if ever meet narrow tailoring. *See United States v. Holena*, 906 F.3d 288, 292 (3d Cir. 2018).

Yet even in the jurisdictions distinguishing First Amendment rights during parole from the framework employed in *Packingham*, states do not have carte blanch to impose blanket restrictions on First Amendment rights of parolees. As to federal parole conditions, the federal Courts apply a statutorily-proscribed balancing test under 18 U.S.C. § 3583(d)(3), intended by the Sentencing Commission to assure that fundamental liberties, including the First Amendment rights of parolees, are protected while protecting public safety. *Carson*, 924 F.3d at 474; 475 (J. Kelly, dissenting). This is the same statutory test the Fifth Circuit

employed in invalidating a ban on dating in *Caravayo*. *See Caravayo*, 809 F.3d at 275. It is also the test used in the *Behren* case, which the Iowa Court of Appeals cited but misunderstood. Court of Appeals at 7 (citing *United States v. Behren*, 65 F.Supp.3d 1140, 1157 (D. Colo. 2014)).

The Court of Appeals misread *Behren* and the § 3583(d)(3) test that the federal courts have, at least prior to *Packingham*, applied to federal parole conditions implicating First Amendment rights. While the Court of Appeals correctly noted that the test requires a reasonable relationship between the conditions imposed and the goals of parole, it overlooked the requirement that the restriction must involve no greater deprivation of liberty than is reasonably necessary to deter criminal conduct. Court of Appeals at 7; *Behren*, 65 F.Supp.3d at 1147 (" 'conditions of supervised release [must] be linked to the offense and be no broader than necessary to rehabilitate the defendant and protect the public.'"); *see also Caravayo*, 809 F.3d at 274; *Carson*, 924 F.3d at 474. The Court of Appeals' reliance on *Behren* is puzzling, because *Behren* indicates that it would likely have been necessary to invalidate the ban on dating challenged in that case, had such a condition actually been before the court. *Behren*, 65 F.Supp.3d at 1157 ("Potentially, a total ban on dating may constitute a greater restriction on liberty than is necessary or a violation of the First Amendment right to association. However, in this case, there is no indication that such a ban actually will be imposed".)

Under the tailoring prong of this test, parole conditions must be supported by *individualized findings* of fact regarding the particular defendant and his crime to ensure each condition is "reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant, deterrence of criminal conduct, protection of the public, and treatment of the defendant's correctional needs; involve no greater deprivation of liberty than is reasonably necessary to deter criminal conduct, protect the public, and treat the defendant's criminal needs." *Carson*, 924 F.3d at 474 (cleaned up); *Caravayo*, 809 F.3d at 275.

Similarly, state courts making this distinction as to *Packingham* nevertheless require that Internet and social media restrictions must be justified by individualized considerations of parolees to ensure that they are "narrowly tailored to effectuate either rehabilitative or public-safety purposes". *See Fazili v. Commonwealth*, 71 Va. App. 239, 253 (Ct. App. Va. 2019) (invalidating a parole restriction on Internet use following a conviction for a crime not involving the use of the Internet); *see also State v. King*, 950 N.W.2d at 900 (determining *Packingham* did not apply to the challenged parole conditions, but nevertheless requiring tailoring through an "individualized determination that the condition was necessary based on the facts", and ultimately basing its finding that the Internet restriction at issue was constitutional on its determination that the particular parolee had used the Internet to commit sex offenses against children.)

An individualized assessment of the parolee is key to the tailoring inquiry, regardless of the scrutiny employed. Courts that disagree about whether *Packingham* applies to parole conditions generally do agree that parole conditions restricting social media or Internet use cannot be justified when the parolee's underlying crimes did not employ those methods. *See, e.g.*, *United States v. Eaglin*, 913 F.3d 88 (2nd Cir. 2019); *United States v. Halverson*, 897 F.3d 645; *United States v. Rock*, 863 F.3d 827 (Internet restrictions permitted only when underlying crime involved the Internet); *K.G.*, 202 A.3d at 657; *see also Holena*, 906 F.3d at 290-91, 293; *Jennings v. Commonwealth*, 2019 WL 1575570, at *5 (Ky. Ct. App. April 12, 2019); *Obert*, 2019 WL 2353547, at *9.

D. Doss's Parole Conditions Fail Both Tests.

Under either approach, Doss' parole restrictions violate the freedom of association.

Under the less stringent balancing test used to decide constitutional challenges to federal parole conditions, Doss's parole restrictions fail. As shown above, individualized consideration of the parolee and the particular circumstances of his offense are required by state and federal courts to justify restrictions of parolees' First Amendment Rights, whether or not they also apply *Packingham* to parole conditions. The cases also show that crimes not involving the Internet cannot justify broad Internet prohibitions.

But no individualized consideration was given to Doss in imposing the challenged restrictions. App. 57 (recounting testimony by Doss's parole officer that everyone in the sex offender treatment program is subject to the same draconian conditions, without any individualized consideration of the parolee or his underlying offenses). Unlike the crimes at issue in *Carson* and *King*, in which Internet restrictions were upheld, Doss's conviction was unrelated to his use of the Internet.

Nor were Doss's underlying offenses related to his church attendance, counselling, or relationships with family. *Id.* Those restrictions were not, and cannot, be justified by an individualized consideration of the circumstances of his offense.

The facts set forth by the district court regarding the circumstances of his offense did apparently involve minor children who he met as a result of his dating relationship. However, even the dating restriction likely fails the test employed by federal courts in weighing First Amendment rights of parolees, because it involves a greater deprivation of liberty than is reasonably necessary. *Carson*, 924 F.3d at 474; *Caravayo*, 809 F.3d at 274. The Fifth Circuit invalidated a federal parole condition prohibiting the parolee from dating a person with minor children as a violation of the parolee's First Amendment right to association under the 18 U.S.C. § 3583(d) test. *Caravayo*, 809 F.3d at 274. It reasoned, in part, that such a restriction was not necessary in light of the separate parole condition,

which the parolee had not challenged, barring his unsupervised contact with minors. *Id.* at 276.

Here, even if the record showed that Doss's parole condition restricting dating was based on an individualized consideration of the facts of his crime—which is not the case, App. 57—it fails because it is far more intrusive than reasonably necessary to deter re-offense. Doss's parole condition restricts his dating all people, whether or not they have minor children. App. 25. A prohibition on unsupervised contact with children, without the ban on dating, would secure the state's interests in preventing his re-offense without invading his associational rights to date. Likewise, Doss does not challenge the parole condition prohibiting his direct or indirect contact with minors.

Failing the less protective tests employed by the courts rejecting *Packingham*'s application to parole conditions, Doss's parole restrictions also fail the heightened scrutiny applied to content-neutral restrictions on speech in *Packingham,* and to restrictions of associational rights elucidated in *Jaycees* and its progeny.

The state's interest in protecting public safety and deterring re-offense by parolees are no doubt sufficiently important and compelling interests to meet the first prong of heightened scrutiny, but the parole restrictions lack the narrow tailoring required. The state's interests in preventing parolees from reoffending can "be achieved through means significantly less restrictive of associational

freedoms" than a total ban on Internet use. *Jaycees*, 468 U.S. at 622. The state cannot meet this narrow tailoring requirement, because Doss's underlying offenses were not related to the Internet in any way.

The restriction at issue here is so broad that it would probably fail the tailoring prong even as applied to offenses involving the Internet. Restrictions on total Internet use without exceptions for accessing Internet content unrelated to the parolee's offenses, including news, reference materials, directional and directory information, or government and court websites, just to name a few, could not likely be sustained for the reasons elucidated by the Third Circuit in the *Holena* case, as well as the Alaska, Illinois, West Virgina, and Pennsylvania state courts. *See Holena*, 906 F.3d at 292; *Mutter v. Ross*, 240 W. Va. at 341; *People v. Morger*, 2019 WL 6199600 at *12; *Dalton v. State*, 2020 WL 6534580, at *3; *State v. R.K.*, 463 N.J. Super. at 411. As the Supreme Court opined in *Packingham*, "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Packingham*, 137 S. Ct. at 1737.

The restrictions on Doss's family, romantic, church, and counselling associations similarly fail narrow tailoring. The record in this case shows that there was no individualized determination that Doss's associations with his family, girlfriend, mental health counsellor, or church were necessary or even

helpful to meeting the state's interests in public safety and deterrence. App. at 57. Research supports the opposite determination: positive social, familial, religious, and mental health support systems are essential to a parolee's successful reintegration, reducing recidivism.[7] And numerous less intrusive alternatives exist to satisfy the state's interests, such as parole restrictions on unsupervised contact with minor children.

Because the challenged restrictions were not based on any individualized consideration of Doss and the particular circumstances of his offense, and are more intrusive than reasonably necessary on his rights of free association, the district court's order upholding them under the First Amendment should be reversed.

E. The Parole Conditions Violate Doss' Freedom of Association under the Iowa Constitution.

This Court has recognized that the right to association under the Iowa Constitution is at least coextensive with the analogous federal constitutional right. *See Formaro v. Polk Cnty.*, 773 N.W.2d 834, 840 (Iowa 2009) (holding that the right to association under the state constitution was not violated by a residency requirement for sex offenders); *Iowans for Tax Relief v. Campaign Finance*

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[7] *See, e.g.,* Nat'l Reentry Resource Ctr., *Reducing Recidivism* (2014), https://csgjusticecenter.org/wp-content/uploads/2020/02/ReducingRecidivism_StatesDeliverResults.pdf; Thomas Mowen & Christy Visher, *Incarceration and Family Relationships: Changing the Ties That Bind*, 15 Criminology & Pub. Pol'y 503, 504-06 (2016).

Disclosure Com'n, 331 N.W.2d 862, 868 (Iowa 1983) (stating that "the applicable [F]irst [A]mendment standard" was "the same" as that for the state constitutional free speech and association challenge). The Iowa Constitution, therefore, protects a "fundamental right" to "engage in associations for the advancement of economic, religious, or cultural matters." *City of Maquoketa v. Russell*, 484 N.W.2d 179, 184 (Iowa 1992) (citing *NAACP*, 357 U.S. at 460–61). Because the parole conditions violate Doss's First Amendment associational rights, they also violate the Iowa Constitution.

However, to the extent that this Court finds that the First Amendment right of free association *would* tolerate the parole restrictions as applied to Doss in this case, it should nevertheless find that they are invalid under the Iowa Constitution's right of free association, given the broader retention of constitutional protections enjoyed by parolees under the Iowa Constitution, as recognized by this Court in the *Ochoa* line of cases.

1. Parolees Retain Their Rights Under The Iowa Constitution Whenever Possible.

The Iowa Supreme Court has held that parolees in Iowa maintain the same constitutional rights as people not on parole to be free from unreasonable searches and seizures. *State v. Cullison*, 173 N.W.2d 533, 537-38 (Iowa 1977) ("parolee maintained the same expectation of privacy enjoyed by people not out on parole and required the state to justify the warrantless search on other grounds

permitted under the constitution, not simply his status as a parolee"); *State v. Ochoa*, 792 N.W.2d 260, 281-86, 287-91 (Iowa 2009) (finding article I, section 8 under the Iowa Constitution prohibited warrantless, suspicion-less searches of parolees based on parole status alone, permissible under the Fourth Amendment); *see also State v. Baldon*, 829 N.W.2d 785, 802 (Iowa 2013) (finding parolee's signature on parole agreement to prospective warrantless consent-to-search was not voluntary consent under article I, section 8).

The Court has explained the parolee's retention of rights in language that is not limited to search and seizure:

> In *Cullison*, we strongly disapproved of the strip and dilute cases. We stated that the strip and dilute cases were based upon "what may best be described as socio-juristic rationalization, i.e., protection of the public and constructive custody" and were not "constitutionally sound, reasonable, fair or necessary." . . . We stated that the "dilution theory begins and ends nowhere, being at best illusory and evasive."
>
> . . . .
>
> ["T]he fact that a criminal accused is also a parolee should not, as to a new and separate crime, destroy *or diminish* constitutional safeguards afforded all people."

State v. Short, 851 N.W.2d 474, 494 (Iowa 2014) (quoting *Cullison*, 173 N.W.2d at 536-38).

There is no basis in the caselaw to distinguish a parolee's retention of the right of free association from his right to be free from unreasonable search and seizure. Indeed, the state's interest in preventing re-offense is arguably more

closely aligned with the ability to search parolees than with its ability to restrict their speech, association, and religious exercise. This is especially true where there is not a sufficient nexus between the restrictions of those rights and a parolee's underlying criminal offenses, as here.

Moreover, the privacy interest secured by the right to be free from unreasonable searches and seizures is closely related to the right of free association. *See*, *e.g., NAACP*, 357 U.S. at 1174 ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."); *Jaycees*, 468 U.S. at 619-20 (describing the right of intimate association that apply to "family relationships" that "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.")

In *Baldon*, this Court recognized that using a parolee's status as justification for otherwise impermissible and unnecessary intrusions onto their constitutional rights cause collateral harms to parolees and others. Suspicion-less consent searches of parolees impact the people they live with. *Baldon*, 829 N.W.2d at 795. As a result:

> [T]hose bystanders . . . may therefore be less willing to help him—a sadly ironic result designed to encourage reintegration into society. Moreover, the demeaning effect of arbitrary intrusions in to the parolee's privacy will be reflected in the attitudes of his relatives and friends. As a result, the parolee will suffer diminished feelings of self-worth, making his rehabilitation more difficult. In addition, warrantless parole officer searches may reinforce patters of resentment to authority, and excessive external controls may inhibit the development of necessary internal controls.

Id. at 796-97. These concerns are only *heightened* in the context of restrictions on romantic and family relationships, to which the freedom of intimate association adheres. *See Jaycees*, 468 U.S. at 619-20.

Because the Iowa Constitution traditionally affords to parolees the same constitutional rights as others when possible, permitting only parole restrictions which burden constitutional rights no more than necessary to secure state's interests in rehabilitation and deterrence, the Court should invalidate the parole conditions challenged as applied to Doss.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower courts and remand with instructions to grant Doss's PCR application, because his ongoing incarceration was based on a violation of unconstitutional parole restrictions.

In so holding, the Court should also provide guidance to Iowa parole officers that individualized consideration of the offender and his particular offense must be made before imposing parole conditions which intrude upon

protected First Amendment and Iowa Constitutional rights of speech, association, assembly, religion, and petition.

Respectfully submitted:

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