**IN THE SUPREME COURT OF IOWA**

**SUPREME COURT NO. 19-1285**

**KENNETH LEE DOSS,**
**Applicant-Appellant,**
**vs.**
**STATE OF IOWA,**
**Respondent-Appellee.**

**APPEAL FROM THE IOWA DISTRICT COURT**
**FOR WARREN COUNTY**
**THE HONORABLE RICHARD B. CLOGG**

# AMICUS CURIAE BRIEF of the IOWA ASSOCIATION FOR JUSTICE

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## STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

No party or party's counsel authored this brief in whole or in part nor contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

## IDENTITY AND INTEREST OF AMICUS CURIAE

The objectives of the Iowa Association for Justice (hereinafter "IAJ") include supporting the Constitution of the United States and the Constitution of the State of Iowa and the limitations on government's authority over all individuals including those who are charged or been convicted of a crime. The association is committed to protecting individual rights including the following statement from the Iowa Lawyer's Oath: "[We] will never reject, from consideration personal to [ourselves], the cause of the defenseless or oppressed."

Presently comprising more than 600 members, IAJ member attorneys collectively represent thousands of Iowans annually who are charged with crimes or otherwise come into contact with the criminal justice system. IAJ serves the legal profession and the public through its efforts to strengthen the criminal justice system's fairness, and its work to reform inequities within this system.

The cornerstone of our system of justice is the Constitution for the State of Iowa, and the Constitution of the United States. Both protect the rights of the citizens of Iowa. The limitations imposed in the present matter infringe upon both fundamental concepts.

On November 4, 2020, this Court invited various groups, including IAJ, to submit amicus briefs "on the merits of the defendant's constitutional challenges to the terms of his special sentence and parole." IAJ accepts this invitation and has set forth below the reasons for which this court should find these conditions unconstitutional.

## ARGUMENT

The Appellant was placed on a special sentence of lifetime parole after discharging his prison sentence pursuant to Iowa Code Section 903B.1 (2005). The conditions of this special sentence of lifetime parole required in part that he: (1) "will not participate in any form of outside counseling"; (2) "will not attend church or religious gatherings in any form or location"; (3) "will not establish, pursue or maintain any dating, romantic, and/or sexual relationship(s)"; (4) "will not view, access or use the Internet through any means" and (5) "will not view, or possess images/photos/videos of my victims(s) or minors." See Plaintiff's Ex. 2; App. P. 25. These conditions were imposed as a matter of course on all persons who were placed on the special sentence of lifetime parole and had the Appellant refused to agree to those conditions he would have been sent back to prison. Post-Trial Brief P. 11; App. P. 57. Although not entirely clear from the record, the Appellant

appears to subsequently have been sent back to prison for violating some or all of these conditions imposed as part of his special sentence.

The unilateral imposition of these conditions interfered with the Appellant's fundamental rights under the First Amendment of the United States Constitution and Article 1, Section 7 of the Iowa Constitution. The restrictions impose upon fundamental rights which are not narrowly tailored to serve a compelling governmental interest. Other constitutional principles such as due process are also interwoven into this analysis. Thus, to the extent that the conditions imposed are unconstitutional, holding the Defendant in prison for a violation of those conditions is likewise unconstitutional.

## I. THE BELIEF RECIDIVISM RATES OF SEX OFFENDERS ARE "FRIGHTENING AND HIGH" IS INCORRECT AND REQUIRES REVIEW TO PROPERLY UNDERSTAND THE SPECIAL CONDITIONS AT ISSUE.

At issue here is whether Mr. Doss' conditions impermissibly violate his rights under the First Amendment of the United States Constitution and/or Article 1, Section 7 of the Iowa Constitution. When there is a challenge to the constitutionality of a restriction placed upon an individual by the State, it is axiomatic that the underlying purpose for the restriction imposed by the State must also be evaluated.

The late Senator Daniel Patrick Moynihan once stated "[y]ou are entitled to your opinion. But you are not entitled to your own facts." The facts about sex offender recidivism are significantly different than the perceptions upon which the laws are created and subsequently evaluated, some of which form the basis of judicial fact making unsupported by the evidence.

The stated purpose of Iowa Code Section 903B.1 is to protect citizens of Iowa from becoming victims of sex crimes because the "risk of recidivism is 'frightening and high.'" *State v. Harkins*, 786 N.W.2d 498, 505 (Iowa 2009) *quoting Smith v. Doe*, 538 U.S. 84, 103 (2003). The notion that sex offender recidivism was "frightening and high" was first recognized by the Iowa Supreme Court in *State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005). The notion has survived unchallenged in numerous instances over the course of time when the Iowa Supreme Court addressed sex offender issues. See *State v. Wade*, 757 N.W.2d 618 (Iowa 2008); *Kozlow v. State*, 813 N.W.2d 731 (Iowa 2012); *State v. Harkins*, 786 N.W.2d 498 (Iowa 2009); *State v. Salis*, 786 N.W.2d 508 (Iowa 2009); *State v. Russell*, 772 N.W.2d 270 (Iowa 2009).

More recently this purpose was highlighted in *State v. Aschbrenner*, where the Iowa Supreme Court stated, "it is well-settled that protecting the

public from sex offenders is a significant governmental interest." 962 N.W.2d 240, 252 (Iowa 2019). This "governmental interest" was the founding justification cited by the Court to require the mandatory disclosure of internet identifiers by convicted sex offenders as part of the sex offender registration statutes which did not violate the First Amendment.

As a general proposition, the State does have a significant interest in protecting the public from sex offenders, however, the means utilized to maintain these protections grow increasingly draconian and removed from their stated purposes; especially if sex offenders are not likely to commit future sex offenses as previously believed. Justice Appel recently recognized this dichotomy when he wrote the notion that recidivism rates for sex offenders is "frightening and high" was a fallacy long overdue for a challenge. See *State v. Chapman*, 944 N.W.2d 864 (Iowa 2020) Apple, J., Specially Concurring ("embarrassingly, the 'frightening and high' risk of recidivism has been totally eviscerated"). Citing numerous studies, scholarly articles, and an emerging shift among the courts, Justice Apple's observations are truisms which cannot and should not be ignored.

Much like the Iowa Supreme Court invited the Iowa Association for Justice to weigh in on the constitutionality of the imposed conditions on Mr. Doss, our organization invites this Court to weigh in on the continued

viability of the false conclusion recidivism rates of all sex offenders are "frightening and high." Reluctance to do so undeniably devalues the constitutional analysis the issues presented in this case rightfully deserve.

The most direct attack on the proposition sex offender recidivism rates are high, and its continued viability as a judicially accepted fact, arises from a scholarly article written by Professors Tara and Ira Mark Ellman. Ira Mark Ellman & Tara Ellman, *"Frightening and High", The Supreme Court's Crucial Mistake About Sex Crimes Statistics*, 30 Const. Comment. 495. This article unraveled the unsupported basis of Justice Kennedy's conclusions sex offender recidivism is "frightening and high" as he articulated in *Smith v. Doe*, 538 U.S. 83 (2003), and *McKune v. Lile*, 536 U.S. 24 (2002). In doing so, the Ellmans convincingly present a case Justice Kennedy's conclusion was "just an unsupported assertion of someone without research expertise who made his living selling…counseling programs to prisons." *Id*. at 499.

In addition to this article, numerous studies from various states have scientifically examined the recidivism rates for sex offenders and found them to be relatively low.[1] In fact, Iowa has conducted such a study and reached the same conclusion.

[1] A link to many of these studies can be located at https://www.womenagainstregistry.org/recidivism

In 2015, a report was prepared for the Iowa legislature captioned SEX OFFEDER RESEARCH COUNCIL, REPORT TO THE IOWA GENERAL ASSEMBLY.[2] (Hereinafter "Iowa Report"). The study examined recidivism rates over a three-year period comparing said rates from before and after the enactment of the special sentence. Table 2 of the report divided reported recidivism into several categories. Those categories included "New Conviction", "New Sex Conviction", "New Felony Conviction" and "New Felony Sex Conviction." Concerning new sex convictions, the report reflected only a 0.9% decrease in convictions after the implementation of the lifetime parole. Put into actual numbers of individuals this was a total number of 3 defendants. The overall average recidivism time frame did not change, 14 months. (See Iowa Report p. 16).

This data provides critical information in two ways. First, the actual recidivism rates are low; lower than recidivism rates amongst defendants on probation or parole for other offenses. Second, the imposition of lifetime parole did little to change the already low recidivism rates involving sex offenses.

These facts coupled with a shift to rely on scientific analysis of sex offender recidivism of the courts outlined in Justice Apple's special

[2] This report is available at https:/ /humanrights.iowa.gov/cjjp/councils/sex-offender-research-council

concurrence undeniably makes it necessary for this court to revisit this conclusion.

## II. THE CONDITIONS IMPOSED AS PART OF THE LIFETIME PAROLE ARE UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION.

### A. Parolees retain the constitutional rights of any other citizen and their rights may only be restricted where such restriction is related to parole's goals.

Historically, parole is considered "a conditional and experimental release before expiration of [a] sentence." *State v. King*, 867 N.W.2d 106, 120 (quoting *Addis v. Appelgate*, 154 N.W. 168, 176 (Iowa 1915); *see also* Iowa Code § 906.1(1)(a) (defining parole as "the release of a person who was committed to the custody of the director of the Iowa department of corrections"). In the 1970s the United States Supreme Court examined Iowa's system of parole and described the parole officer's role as follows:

> The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parole and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.

*Morrisey v. Brewer*, 408 U.S. 471, 478 (1972). Although there is no constitutional or inherent right to be paroled from prison prior to the expiration of a valid sentence, once a state has established a system of parole constitutional protections are triggered. *State v. Cronkhite*, 613 N.W.2d 664, 667 (Iowa 2000); *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Morrisey* 408 U.S. at 484.

The Iowa Supreme Court has rarely visited challenges to the specific terms and conditions of parole agreements. The same is not true for conditions of probation.

Conditions of probation cannot be unreasonable nor arbitrary. *State v. Rogers*, 251 N.W.2d 239, 243 (Iowa 1977). In order to be valid, "probation conditions must be reasonably related to the offense involved, the rehabilitation of the defendant, the protection of the public, or another legitimate punitive purpose." *State v. Valin*, 724 N.W.2d 440, 446 (Iowa 2006) (quoting 5 Wayne R. LaFave et al., *Criminal Procedure* § 26.9(a) at 833 (2d ed. 1999).

"A condition of probation promotes the rehabilitation of the defendant or the protection of the community when it addresses some problem or need identified with the defendant." *Id.* "[C]onditions that are found to be vindictive, vague, overbroad, or unreasonable, will be stricken from the

probation order. Moreover, conditions of probation which have no relationship to the crime of which the offender was convicted, relate to conduct which is not in itself criminal, and require or forbid conduct which is not reasonably related to future criminality, do not serve the statutory ends of probation are invalid." *Id.* at 446-447 (quoting 21A Am. Jur.2d *Criminal Law* § 907 at 171-73 (1998).

In *State v. Cullison*, 173 N.W.2d 533, 538 (Iowa 1977), the Supreme Court held parolees maintain the same constitutional safeguards afforded probationers and ordinary citizens. The holding was affirmed in *State v. Ochoa*, 765 N.W.2d 607 (Iowa 2009), and reaffirmed in *State v. King*, 867 N.W.2d 106 (Iowa 2015). Appellate courts have stricken conditions of probation where the condition is unrelated to the crime at issue or alternatively where the condition bears no nexus to either the goal of rehabilitating the offender or protecting the community. Stricken restrictions include restrictions prohibiting contact with anyone under the age 18 where the defendant was convicted of third-degree sexual abuse in violation of Iowa Code § 708.4(2)(c)(4), *State v. Lathrop*, 781 N.W.2d 288, 298-301 (Iowa 2010); and requirements to complete sex offender treatment following an OWI conviction, *State v. Valin*¸724 N.W2.d 440, 448-449 (Iowa 2006). Similarly, the Iowa Court of Appeals has vacated conditions

of probation which are overbroad or invade constitutional rights. See *State v. Hall*, 740 N.W2.d 200, 201 (Iowa Ct. App. 2007) (striking a term of probation in which the term of probation prohibited incidental communication with minors); *State v. Fatland*, 882 N.W.2d 123 (Iowa Ct. App. 2016) (striking a term of probation prohibiting a defendant convicted of child endangerment from becoming pregnant as an unconstitutional violation of the defendant's right to procreation).

In *State v. Short* the Court described the two broad categories of how parolee's fourth amendment rights are treated. Courts divided into either the "'strip' or '[d]ilute'" camp or the "afford full validity and recognition" camp. *State v. Short*, 851 N.W.2d 474, 494 (Iowa 2014). In rejecting the strip and dilute rational the *Short* decision stated:

> 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." *Id.* We stated that the "dilution theory begins and ends nowhere, being at best illusory and evasive." We quoted with approval a statement in *Hernandez*, where the court declared that the notion that parolees lose their constitutional rights by accepting parole "makes constitutional rights dependent upon a kind of 'contract' in which one side has all the bargaining power" and that "[a] better doctrine is that the state may not attach unconstitutional conditions to the grant of state privileges."

*State v. Short*, 851 N.W.2d 474, 494 (Iowa 2014) (cleaned up) (quoting *People v. Hernandez*, 229 Cal.App.2d 143 (1964)).

Turning to the case at bar, there is no reason to treat the parole conditions analysis under Iowa Code § 903B differently than the review of probation conditions. The question is what standard of review should be utilized in considering the appropriateness of the parole conditions. It is axiomatic parole conditions inhibit a parolee's constitutional rights in some form. It is urged here, restrictions on a parolee's fundamental rights must meet the appropriate level of scrutiny associated with the protections afforded to all citizens whose rights would be similarly restricted, keeping in mind the purpose for which the person is on parole in the first place. *State v. Hall*, 740 N.W2.d 200, 203 (Iowa Ct. App. 2007) (citing *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000)).[3]

### B. The conditions imposed on Mr. Doss violate his First Amendment and/or Substantive Due Process Rights

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. CONST., Amend. 1. Rights

[3] It is this balancing test which necessitates this Court be objective in reviewing sex-offender recidivism. The perception sex-offenders recidivate at astronomical rates is not based upon a reality. While perception may fuel legislatures, which are more exposed to the whims of popular opinion and emotion, the exercise of protecting constitutional rights demands consideration based upon facts free from irrational fear.

recognized under the First Amendment include freedom of religion, speech, assembly, and association. *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183-184 (Iowa 1992) ("whenever the First Amendment rights of freedom of religion, speech, assembly, and association require one to move about such movement must necessarily be protected under the First Amendment"). These rights are recognized as fundamental. *Id*. at 184-185.

When courts are asked to determine whether government action interferes with First Amendment rights, the Government action must be evaluated to see if "it attempts to achieve a governmental purpose to control or prevent activities constitutionally subject to state regulation by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *State v. Pilcher*, 242 N.W.2d 348, 353 (Iowa 1976). This is commonly referred to as the overbreadth doctrine; a doctrine generally confined to the denial of First Amendment Rights. See *Moose Lodge #107 v. Irvis*, 407 U.S. 163 (1972).

Additionally, it is important to remember the Due Process Clause may also be at issue when evaluating the constitutionality of the conditions imposed on Mr. Doss. The Due Process Clause of the Fourteenth Amendment of the United States Constitution prevents a state from "depriving any person of life, liberty, or property, without due process of

law." The basic concept of liberty as embodied in the due process clause includes each of the liberties guaranteed by the First Amendment. *City of Maquoketa*, 484 N.W.2d at 181.

In determining which constitutional provision is applicable the distinction between applying the Due Process Clause or any other amendment is one of specificity. The United States Supreme Court held "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (same). For example, all First Amendment liberties are protected by the Due Process Clause of the Fourteenth Amendment but not all due process rights are protected by the First Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Constitution's principles including liberty and due process "were purposely left to gather meaning from experience." *Nat'l Mut. Ins. Of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 6446 (1949) (Frankfurter, J., dissenting). Like its federal counterpart the Iowa Constitution "is a living and vital instrument." *In re Johnson*, 257 N.W.2d 47, 50 (Iowa 1977).

Where a government restriction creates undue burdens on fundamental rights, the government crosses the line drawn by the Founding Fathers and violates those constitutional principles whether under the terms of a specific amendment or as a general violation of due process. It becomes this Court's responsibility to jealously guard and protect against even slight infringements upon those sacred rights even when doing so is sure to result in heated debate and public outcry.

With these foundations in mind, the following conditions placed upon Mr. Doss must be found unconstitutional for the reasons set forth within each subsection.

***A. "I will not participate in any form of outside counseling"***

The phrase "any" in this context also means "all". The restriction prohibiting all forms of outside counseling unconstitutionally burdens Mr. Doss' freedom of speech and association as well as violating his substantive rights to due process by restricting his freedom to associate with treatment providers outside of the Department of Corrections. The question presented is whether this abridgment of Mr. Doss' speech and association is unconstitutional. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535 (1980) (stating not every limitation on speech violates the Constitution).

The first step in evaluating the constitutionality of a First Amendment restriction is to determine the appropriate level of scrutiny. If the restriction at issue is content neutral, then intermediate scrutiny is appropriate. *Packingham v. North Carolina*, 137 S.Ct. 1730, 1740 (2017). Under intermediate scrutiny, the restriction must be designed to serve a compelling state interest and it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 1740 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781,798-799 (1989)). Alternatively, if the restriction at issue regulates content, the restriction is subject to strict scrutiny analysis – that is, it must be the least restrictive means of achieving a compelling state interest. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

The U.S. Supreme Court's decision in *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994), has guided the Iowa Supreme Court in determining whether a particular regulation is content neutral or not.

> [T]he "principal inquiry in determining content neutrality…is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." …But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

*State v. Musser*, 721 N.W.2d 734, 743 (Iowa 2006) (quoting favorably *Turner Broad. Sys., Inc.* 512 U.S. at 642-643).

Here the restriction prohibits "any form of outside counseling." (State's Exhibit 2; App. P. 25). The restriction is not content neutral. The restriction clearly favors state sponsored or authored treatment over all other treatment. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Entm't Group, Inc.*, 529 U.S. at 813. (citation omitted).

Here it is difficult to discern the compelling Government interest in prohibiting "any" form of counseling other than the State's required programming. How are the interests of the government, or the public for that matter, served by prohibiting the defendant from participating in substance abuse counseling for example? How are the same interests served by prohibiting faith-based counseling in addition to the State's programs?

Even if this court determines the restrictions on "any outside counseling" are content neutral, the prohibitions must still survive intermediate scrutiny. "To satisfy [intermediate scrutiny], a regulation need not be the least speech-restrictive means of advancing the Governments interests." *State v. Aschenbrenner*, 926 N.W.2d 240, 252 (Iowa 2019) (quoting *Turner Broad. Sys., Inc.*¸512 U.S. at 662). But the reviewing court "must consider whether 'the means chosen…'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Aschenbrenner,* 926 N.W.2d at 252 (quoting *Ward* 491 U.S. at 799). This broad restriction is significantly broader than any governmental interest can possibly support.

Even if the First Amendment is not implicated, Mr. Doss' substantive due process rights are unconstitutionally restricted. The United States Supreme Court has identified individual liberty interests including "the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Washington v. Glucksberg*, 421 U.S. 702, 720 (1997) (citations omitted). Additional liberty interests arise in the context of the right to worship, the right to contract, and the right to engage in the common

occupations of life. See *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564, 572 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

It is also well settled, the Constitution places strong limits on a State's right to interfere with a person's basic decisions concerning bodily integrity. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849 (1992). Such guarantees in the Iowa Constitution exist to "prevent unwarranted governmental interferences with personal decisions in life." *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 238 (Iowa 2018).

Here the overbroad prohibition on "participating in any form of outside counseling" is baffling which falls short of satisfying a strict scrutiny analysis. Identifying, choosing, and attending counseling from a particular person or group is one of the most personal and important decision some people make. See Sarah Lewis, Pharm D. "7 Tips for Choosing a Counselor." [4]

Although the State can restrict even fundamental rights where there is a legitimate state interest, the regulation "must further the identified state interest that motivated the regulation not merely in theory, but in fact." *Planned Parenthood of the Heartland*, 915 N.W.2d at 240. In other words, a

[4] available at https://www.healthgrades.com/right-care/mental-health-and-behavior/7-tips-for-choosing-a-counselor.

restriction of a fundamental right is unconstitutional unless it both addresses a compelling state interest and does so in a way narrowly defined to protect that interest. *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000). The broad prohibition on "any form" of outside counseling meets neither criteria.

The restriction prohibiting "any outside counseling" violates Doss' First Amendment rights and his substantive due process rights.

### B. ***"I will not attend church or religious gatherings in any form or location***

Both the United States and Iowa Constitutions contain protections for the exercise of religion. The two broad categories of protections are identified as the Free Exercise Clause and the Establishment Clause.

The Free Exercise Clause "preserves 'the right to believe and profess whatever religious doctrine one desires.'"; the Establishment Clause which "forbids an official purpose to disapprove of a particular religion or of religion in general…[t]he Establishment Clause guards against 'the sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 36-37 (Iowa 2018) (internal citations omitted); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 ,532 (1993).

The Free Exercise Clause of the First Amendment "protect[s] religious observers against unequal treatment" and places laws targeting the

religious status of individuals to strict scrutiny review. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017). Government action may survive constitutional scrutiny where the restriction only incidentally burdens an individual's exercise of religion. *Holt v. Hobbs*, 135 S.Ct. 853, 859 (2015).

Recently the United States Supreme Court reviewed COVID related regulations where the State of New York restricted the number of persons who could attend a religious service. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020). The regulation at issue limited church and synagogue attendance to no more than 10 or 25 people depending on the COVID zone in which the church or synagogue was geographically located. *Id.* at * 1. The majority in *Roman Catholic Dioceses of Brooklyn* found New York's restrictions violated "the minimum requirement of neutrality" to religion because other businesses "such as acupuncture facilities, campgrounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities" were exempt. *Id.* at *2. Because the restriction on church and synagogue attendance was not neutral, the law was subject to a strict scrutiny analysis. *Id.* at *2.

In Doss' case, the parole restriction is neither incidental nor neutral. The restriction is as direct as could be authored by any person: "I will not attend church or religious gatherings in any form or location." Direct barriers to religion, must advance "only those interests of the highest order," and be narrowly tailored to serve those interests. *Church of the Lukumi Babalue Aye*, 508 U.S. at 546.

The State's interest in such a direct broadside on Mr. Doss' ability to attend a religious service is apparently devoid from this record. It is difficult to imagine an interest which supports a restriction so broadly. As a result, the restriction violates the parolee's constitutionally protected right to freely exercise his religion.

### C. *"I will not establish, pursue or maintain any dating, romantic and/or sexual relationship(s)"*

The United States Supreme Court has held "that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). As the *Roberts* court noted:

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these

> relationships from unwarranted state interreference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

*Roberts*, 468 U.S. at 619.

In. Doss' case, Condition #9 states "I will not establish, purse, or maintain any dating, romantic, and/or sexual relationship(s)". The restriction as written and enforced in Mr. Doss' case is unconstitutionally broad. This restriction unconstitutionally burdens Mr. Doss' First Amendment right of association including his right of intimate association as well as his rights under Article I, Section 7 of the Iowa Constitution. Further, the restriction(s) violate his substantive rights to due process by restricting his freedom to associate with potential significant other, or pursue, establish or maintain any type of romantic or sexual relationship. The restriction also violates his substantive due process by restricting his right to pursue marriage and procreation.

The Iowa Court of Appeals noted in its Opinion that Mr. Doss, in his constitutional arguments, relied upon *United States v. Behren*, 65 F. Supp. 3d. 1140 (D.Colo. 2014), when he contended that the rules "unnecessarily violate his First Amendment Rights to Association and his rights under article I, section 7 of the Iowa Constitution." In Mr. Doss' Post-Trial Brief following the PCR Trial, trial counsel for Mr. Doss cited *United States v.*

*Behren* ("[n]oting that a ban on dating may constitute a greater restriction on liberty than is necessary or a violation of the First Amendment right to association" See Petitioner's Post-Trial Brief, p.10; App. P. 56. The Iowa Court of Appeals deemed that reliance on *Behren* was "inapposite", stating that in *Behren*, a provision authorizing restrictions on relationships and dating was "not, on its face, a greater deprivation of liberty than is necessary nor is it necessarily an undue infringement of the right of association, a right which routinely and necessarily is severely limited by a sentence in a criminal case (*Doss v. State,* 2020 WL 4201002, 949 N.W.2d 441 (Table) (Iowa App. 2020) citing *Behren,* 65 F. Supp. 3d at 1157.

The Court of Appeals failed, however, to address the difference between the language of Behren's parole conditions and the language of Doss's parole conditions. In Behren's contract, under the portion of the contract entitled "Relationships and Dating", condition #4 provided that "relationships and dating may be completely or partially restricted *until RSA staff determines that a particular situation/relationship is safe.*" *Behren,* 65 F. Supp. 3d at 1157. Emphasis Added.

Conversely, in Mr. Doss' Contract, Condition #9 states "I will not establish, pursue or maintain *any* dating, romantic and/or sexual relationship(s)." Emphasis Added. Mr. Doss' condition is a complete

prohibition – not only on establishing or maintaining any of the mentioned relationships – but even on pursuing any of the noted relationships. In *Behren*, the contract included the term "may" which connotes a degree of discretion, and includes "completely or partially restricted" which also connotes discretion on the part of the parole officer, and lastly, includes "until RSA staff determines that a particular situation/relationship is safe." The condition in Behren's case is one that includes many potential and varying levels of discretion and which does not, "on its face" completely prohibit the relationship or potential relationship. The same is not true in Mr. Doss's case, where the condition explicitly prohibits even pursuing such a relationship, let alone establishing one or maintaining one. Mr. Doss' condition is a blanket prohibition.

As mentioned in Section II(B)(A) relating to substantive due process violations in the realm of the prohibition on participating in outside counseling, the United States Supreme Court has held that individual liberty interests for purposes of due process include "the right to marry, to have children, to directing the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) (citations omitted). Cases involving the right to marry and involving the right to have children

include *Loving v. Virginia*, 388 U.S. 1 (1967) ((“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness”) and *Turner v. Safley*, 482 U.S. 78, 95, (1987) (“[T]he decision to marry is a fundamental right”); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental”); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty includes “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”).

The blanket condition of prohibiting Mr. Doss from establishing, pursuing, or maintain any dating, romantic and/or sexual relationship(s) is a direct ban on numerous associations including with potential significant other. The right to intimate association refers to the right of individuals to maintain close familial or other private associations free from state interference. Such rights include the right to marriage, the rearing of children and the right to habitate with relatives. Some courts place the right to intimate association under the Due Process Clause while others place it under the realm of the First Amendment.

Regardless of which right is triggered, this Court must consider whether the means chosen by the Government burden substantially more

speech than is necessary to further its legitimate interests. In this case, the broad restriction of a blanket prohibition forbidding the establishment, pursuit or maintenance of any dating, romantic and/or sexual relationships is a significantly broader restriction than any governmental interest can possibly support. See *State v. Fatland*, 882 N.W.2d 123 (Iowa Ct. App. 2016) (striking a term of probation prohibiting a defendant convicted of child endangerment from becoming pregnant as an unconstitutional violation of the defendant's right to procreation).

The State arguably has an interest in restricting an offender's associations under certain circumstances. For example, restricting an offender's relationships with minor children where the offender's offense involved minors. Even there, however, the restriction must be carefully tailored to meet the need for the restriction given the particular offender. *United States v. Caravayo*, 809 F.3d. 269 (5th Cir. 2015) provides an example of this.

In *Caravayo*, the Fifth Circuit examined restrictions placed upon an offender previously convicted of possessing child pornography. The restriction prevented Mr. Caravayo from dating a person with children under the age of 18. In *Caravayo*, the 5th Circuit held that the district court abused its discretion in imposing the special condition when "'the district court's

rationale' in imposing the special condition 'is unclear' even after a review of the record." *Id* at 275.

Mr. Caravayo's restrictions are different than Mr. Doss's in several respects. First, the prohibition was far less restrictive in *Caravayo*. Mr. Carvayo could hypothetically date anyone he wanted so long as that person did not have minor children. Here Mr. Doss's restriction is a broad and all-encompassing blanket prohibiting him from any meaningful relationship with another individual. Second, in *Caravayo* there was a semblance of a hearing and the restriction was imposed by the district court following this hearing. *Id. at 272.* Conversely in this case, the sentencing judge was not involved in the restrictions; rather the restrictions were part of a non-negotiable condition bestowed upon Mr. Doss as requirements of parole so he could remain from being returned to prison. Mr. Doss was not even informed of the special conditions until 2015 and 2016 when he signed the non-negotiable terms of the Parole Order and Agreement in August 2015 and in October 2016 when he signed the SOTP rules and conditions contract. See Parole Order & Agreement; App. P. 22-24; SOTP Rules & Conditions Contract; App. P. 25-26.

The special conditions here are unconstitutionally restrictive and place unnecessary and unjustified burdens upon Mr. Doss's freedom of association

and unconstitutionally infringe on his liberty interests. Mr. Doss was never afforded a factual determination by any Court that the special conditions imposed were reasonably related to his case. The restrictions as written in condition #9 of Mr. Doss' Rules and Conditions Contract are unconstitutionally broad and violate his rights.

***D. I will not view, access or use the Internet through any means.***

The First Amendment protects a person's right to use the internet. "The fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more…While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace…" *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017).

In *Packingham*, the United States Supreme Court determined that a statute which prohibited a sex offender from accessing social media sites violated the First Amendment. *Id*. In reaching the conclusion that the government restriction "was unprecedented in the scope of First Amendment speech it burdens", the court noted "even convicted criminals -- and in some instances especially convicted criminals might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to

reform and to pursue lawful and rewarding lives." *Id.* at 1732. The regulations at issue in Mr. Doss' case are even more broad than those determined to be unconstitutional in *Packingham* and therefore must fall.

It is clear the State has an interest in protecting the community from those defined as sex offenders, however, as set forth above, that interest may not be compelling as once thought. Nevertheless, whatever the State's interest is, it is insufficient to warrant such a broad restriction on speech and this restriction is clearly unconstitutional. See *Mutter v. Ross*, 811 S.E.2d 866 (W.Va. 2018) ("we now hold that, generally under *Packingham v. North Carolina*, a parole condition imposing a complete ban on a parolee's use of the internet impermissibly restricts lawful speech in violation of the First Amendment of the United States Constitution"). Nor can the imposition of this condition be salvaged by the fact that the parole officer may permit access to the parolee. See *United States v. Maxson*, 281 F. Supp. 3d 594, 600 (D. Md. 2017) ("the fact that the Defendant may use the Internet if he obtains prior written approval from his probation officer cannot salvage this otherwise overly broad restriction,") *citing United States v. LaCoste*, 821 F.3d 1187, 1192 (9th Cir. 2016) ("imposing a total ban and transferring open-ended discretion to the probation officer to authorize needed exceptions in not a permissible alternative."); see also *United States v. Ramos*, 763 F.3d

45, 61 (1st Cir. 2014) ("this authority of probation or a future court to modify a sweeping ban on computer or internet use does not immunize the ban from an inquiry that evaluates the justification for the ban in the first place."); see also *United States v. Barsumyan,* 517 F.3d 1154, 1161–62 (9th Cir. 2008) (holding that the sentencing court plainly erred in imposing a restriction on all computer use as a condition of supervised release); *United States v. Sales,* 476 F.3d 732, 736 (9th Cir.2007) (holding that a condition of release that required computer monitoring "result[ed] in a far greater deprivation of [the defendant]'s liberty than [wa]s reasonably necessary" in light of the nature of the counterfeiting offense and the defendant's history and characteristics).

*United States v. Carson,* 924 F.3d 467 (8th Cir.2019), involved a district court imposing special conditions of supervised release including prohibiting the defendant from accessing the internet without prior approval from the probation office and prohibiting the defendant from maintaining social media profiles. *Carson* is distinguishable from Mr. Doss's case in a couple very important respects. First, in *Carson*, it was, again, the district court which imposed the special conditions of supervised release, and the Supreme Court held that a district court imposing special conditions of supervised release must make an individualized inquiry into the facts and

circumstances underlying a case and make sufficient findings on the record so as to ensure that the special condition satisfies the statutory requirements. *United States. Carson*, 924 F.3d 467 (8th Cir. 2019) citing *United States v. Poitra*, 648 F.3d 884, 889 (8th Cir. 2011) (quoting *United States v. Wiedower*, 634 F.3d. 490, 493 (8th Cir. 2011). Second, in Carson and the cases cited therein, it appears as though the crimes committed somehow involved the use of the internet. Third, there has been disagreement with the holding in Carson. See United *States v. Holena*, 906 F.3d 288, 294-95 (3d. Cir. 2018), (addressing conditions of supervised release from prison and stating, "under *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster"): see also *People v. Morger*, --N.E.2d-- (Ill. 2019) (striking down a statute that precluded social media access as a condition of probation and dismissing the notion that *Packingham* only applied to people released from custody).

In Mr. Doss' case, it was not the sentencing judge who specifically imposed the restrictions. There was no individualized determination by the district court regarding imposition of the future conditions and restrictions, nor were the terms crafted as part of Doss' sentence. The sentencing judge made no determination and gave no individualized consideration of the conditions. The record in Mr. Doss' case is that the terms and conditions

were the standard terms imposed on all parolees subject to later modification by the Department. Nor does it appear that Mr. Doss utilized the internet in committing his criminal offense. These factual differences from *Carson* are important.

The Dissent in *Carson* aptly points out that read literally, Carson could violate Special Condition 14, which prohibits possessing or using any computer or electronic device with access to any 'on-line computer service' without the prior approval of the Probation Office, "by accessing any number of internet-connected household devices, from thermostats to doorbells" (*Carson, dissent at 476).* The dissenting judge goes on, "I trust that the U.S. Probation Office will judiciously exercise its discretion in enforcing this prohibition. But the sheer breadth of discretion afforded to the Probation Office only underscores the need for the district court to conduct a careful, individualized inquiry before imposing a condition that some courts have described as "lifetime cybernetic banishment" *Id*. citing *United States v. Voelker*, 489 F.3d 139, 148 (3d Cir. 2007).

Mr. Doss' case involves a similar all-encompassing prohibition. Condition #11 states "I will not view, access or use the Internet through any means." Let us take a moment to consider what Mr. Doss would be prohibited from doing currently especially in light of the COVID pandemic.

He could not meet with this court's order to participate in video court, he could not visit with a relative that was in quarantine or possibly dying in the hospital, and he could not attend an online funeral for a loved one. Even absent the COVID pandemic he could not talk to his parole officer on the phone if it was voice over internet service, he could not apply for many jobs, he could not order groceries and have them delivered, he would have a hard time marketing any business he was involved in, and he would be limited to brick and mortar vendors for purchasing any goods or services, and he could not even file a pleading or document in his own criminal case.

The internet restriction as written in Mr. Doss' case is unconstitutionally broad. The special condition and restriction imposed prohibiting Mr. Doss from viewing or accessing or using the Internet through any means was not imposed by the sentencing judge, after making an individualized determination by the Court, or with any determination by the Court that those conditions were the least restrictive means necessary to accomplish the goals of sentencing. Furthermore, the facts and sexual misconduct in Mr. Doss' case did not involve the internet.

Mr. Doss' conditions were imposed after Mr. Doss was released from prison, as a condition of release, and were not narrowly tailored to Mr. Doss' offense for which he was sentenced. The conditions prohibiting viewing,

accessing or using the Internet through any means are not narrowly tailored to serve a compelling government interest.

### *E. I will not view or possess images/photos/videos of…minors.*

The First Amendment protects a person's right to view and possess images, photos, and videos of children. Condition #12 of Mr. Doss' Rules and Conditions Contract states "I will not view or possess images/photos/videos of my victim(s) or minors". The prohibition is overbroad.

Under the First Amendment, a government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "The constitutionality of a restriction on speech depends in large part upon whether it is content based and thus 'subject to the most exacting scrutiny,' *Phelps – Roper v. City of Manchester, Mo.*, 697 F.3d 678, 686 (8th Cir. 2012) (en banc), or a content neutral time, place, or manner regulation subject to intermediate scrutiny. *Id." Survivors Network of Those Abused by Priests, Inc., v. Joyce*, 779 F.3d 785, 789 (8th Cir. 2015). A statutory provision is content-based if it requires "enforcement authorities to examine the content of the message that is conveyed to determine whether a

violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). "[C]ontent-neutral" speech regulations are those that "are justified without reference to the content of the regulated speech." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

The prohibition of Condition #12 is content based because it only regulates images, photographs and videos of minors, which would subject it to a strict scrutiny analysis, requiring the State to demonstrate that the prohibition is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. As set forth in earlier sections, the Supreme Court has held that to satisfy strict scrutiny, the provision "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464 (2014) citing *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803 (2000).

Mr. Doss' case did involve a victim who was a child. However, to prevent Mr. Doss from possessing photographs or videos of *any* minors is overbroad. The prohibition is not narrowly tailored. The State has a compelling interest in protecting children and may have an interest in preventing Mr. Doss from possessing images of the victim of his crime. However, the prohibition is not narrowly drawn, and the means are not the least restrictive because it prohibits Mr. Doss from even possessing or

viewing photographs or videos of all minors – not just the victim – including members of his family who are minors. The prohibition is an all-encompassing, blanket ban on possessing or viewing images, photographs, and videos of minors. Further, children are not harmed by a parolee having possession of a nonobscene, nonpornographic photograph of them. One can imagine that Mr. Doss would want to, at the very least, keep a photograph of a loved one who is a child, be updated on life events of a minor family member as those special occasions occur, or perhaps even receive a Christmas card. To prevent a parolee from possessing or viewing such an image, or photograph, or video, of one's family member, is unconstitutionally overbroad.

A prohibition on possessing or viewing an image, photograph or video might also extend further than the plain text of Condition #12; it might also be read to prohibit taking photographs, since the action of photographing or taking a video inherently includes the action of possessing and viewing the subject. *State v. Oatman*, 871 N.W.2d 513 (Wis. 2015), involved a Wisconsin statute which prohibited sex offenders from photographing minors without parental consent. While the actions of actively taking photographs of someone versus merely possession or viewing photographs are clearly different, the Court in *Oatman* held that the statute was facially

overbroad and violated the defendant's first amendment rights. The Court further determined that children were not harmed by nonobscene, nonpornographic photographs taken in public places. In Mr. Doss' case, there is similarly no harm to children should Mr. Doss view or possess nonobscene, nonpornographic photographs.

The condition prohibiting Mr. Doss' from possessing photographs or videos of the victim in Mr. Doss' case can be appreciated. This specific prohibition relating to the minor victim of his crime is more narrowly tailored than a prohibition against images and videos of *all* minors. A general prohibition against any pictures or videos of all children or minors – including photographs of children in Mr. Doss' family – is overbroad and violative of Mr. Doss' first amendment rights of freedom of speech. The prohibition includes all photographs, both for personal viewing or sharing images. As noted in *Oatman,* sharing images is customarily the very reason for photography, thus the prohibition as written in Mr. Doss' case would also prohibit Mr. Doss from taking photographs as well as sharing photographs. The Court in *Oatman* stated, "[a]ccordingly, while we may dislike the fact that someone might have objectionable thoughts when viewing ordinary images of children, the State is constitutionally prohibited from precluding citizens from creating such images." *Id. at* 518.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240, 256 (2002), the Court considered a related issue of possession or distribution of virtual or simulated images of child pornography. The Court concluded that the Child Pornography Prevention Act (CPPA) was unconstitutionally overbroad insofar as it prohibited the possession or distribution of images that were neither obscene under the definition of *Miller v. California*, 413 U.S. 15 (1973) nor constituted child pornography as defined in *New York v. Ferber*, 458 U.S. 747 (1982). The *Ashcroft* Court reasoned that the images did not harm any children in the production process, and differentiated such images from child pornography, where the recorded acts are intrinsically related to victims of actual sexual abuse.

In Mr. Doss' case, merely possessing or viewing images, photographs, or videos of minors does not harm any children and serves no governmental interest. One can think of many examples where an individual might inadvertently come into possession of a photograph of a child, not by any invitation of his own. For example, a parolee might receive unsolicited mail such as a catalog or magazine selling clothing or other goods which might include photographs of children. The parolee would then be violating Condition #12 without having invited or requested the magazine or catalog be sent to him or her. The absurdity of the prohibition extends to any every

day, common place occurrences: viewing a billboard which depicts a child on the board; viewing a commercial on television which depicts a child; watching the nightly news which features a story about a local family with children; or countless other circumstances where a parolee might inadvertently encounter an image or video depiction of a child through no fault of his own.

The prohibition as written in Condition #12 is unconstitutional and is not narrowly tailored to serve a compelling government interest.

## III. IN THE EVENT THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT THE CONDITIONS IMPOSED, THE IOWA CONSTITUTION MUST.

Mr. Doss challenges the conditions of his parole under both the United States Constitution and under the Iowa Constitution. Mr. Doss argues that both the First Amendment of the United States Constitution and the Due Process Clause under the Fifth and Fourteenth Amendment are violated. Mr. Doss also argues that his constitutional rights under the Iowa Constitution are violated.

The First Amendment states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the government for a redress of grievances."

Article I, section 7 of the Iowa Constitution goes further, stating in relevant part: "Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press…" Article I, Sec. 7.

Article I, section 3 of the Iowa Constitution provides that "[t]he general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" Article I, Sec. 3.

Article I, section 1 of the Iowa Constitution provides that "All men and women are, by nature, free and equal, and have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness. Article I, Sec. 1.

The Supreme Court is the final arbiter of the meaning of the Iowa Constitution, and the Court has the duty to independently determine the meaning of the Iowa Constitution. *See State v. Gaskins*, 866 N.W.2d 1, 7 (Iowa 2015). The question remains whether the Iowa Constitution should provide greater constitutional protections for parolees such as Mr. Doss

generally and specifically under the First Amendment, which would continue the tradition of *State v. Ochoa*, *State v. Baldon*, and *State v. Short*, all cases involving parolees' constitutional rights which were analyzed under the Iowa Constitution.

This Court should consider extending the tradition of the recent Iowa caselaw involving parolees over the last decade, by determining that the Iowa Constitution provides for greater protections for parolees under the Iowa Constitution.

*State v. Ochoa* 792 N.W.2d 260 (Iowa 2010), involved a warrantless, suspicionless search by a police officer of a motel room in which a parolee resided, wherein the Court held that the search violated the search and seizure provision of the Iowa Constitution. *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013), held that a parolee's signature on a parole agreement, which included a prospective consent-to-search provision that provided for warrantless searches of the parolee and his home, vehicle, and belongings, did not constitute voluntary consent to search. Finally, in *State v. Short*, 851 N.W.2d 474 (Iowa 2014). the Court determined that the search provision contained in the parolee's parole agreement did not represent a voluntary grant of consent within our constitutional meaning, and thus, the

suspicionless search of the parolee's vehicle violated article I, section 8 of the Iowa Constitution.

*State v. Ochoa* acknowledged that "[a] properly limited, nonarbitrary warrantless search of the home by a parole officer *might* conceivably be supported under the 'special needs' doctrine." 792 N.W.2d 260, 288 (Iowa 2010). A few years later in *State v. King*, 867 N.W.2d 106 (Iowa 2015), the Court considered that issue under the Iowa Constitution, holding that a parole officer was authorized to search a parolee's home under the special-needs exception to the warrant requirement and finding that article I, Section 8 of the Iowa Constitution was not violated.

Mr. Doss' case involves an agreement signed by Mr. Doss, a decade after he was sentenced. Mr. Doss' signing of the agreement was a prerequisite to his release from prison to be paroled for a lifetime. Mr. Doss was required to sign the non-negotiable agreement as a condition of his release. In Iowa, a parolee must agree to the terms of parole as a condition of release. Iowa Admin. Code r. 201–45.1(2) ("The parolee may not be released on parole prior to the execution of the parole agreement."). Mr. Doss' constitutional issues arise under Article I, Section 7 as it relates to the prohibitions against outside counseling, against use of the internet, and against possessing photographs or images of all children. Mr. Doss'

constitutional issues also arise under Article I, Section 3 as it relates to the prohibition against any form of outside counseling and the prohibition against attending church or religious gatherings. Finally, Mr. Doss' constitutional issues also arise under Article I, Section I "rights of persons" which includes possessing property and pursuing and obtaining safety and happiness, as it relates to pursuing dating, romantic and/or sexual relationships and possessing photographs and videos.

The Court, through the years, has held differing views on whether the Iowa Constitution should always provide greater protections for its citizens than the United States Constitution. The United States Constitution may not necessarily be a floor and the Iowa Constitution may not necessarily be a ceiling, but this Court has historically interpreted the Iowa Constitution as providing greater protections for its citizens. When both federal and state constitutional claims are raised, the Court may, in its own discretion, choose to consider either claim first in order to dispose of the case, or the Court may consider both claims simultaneously. *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010).

Mr. Doss' constitutional claims should be considered under the Iowa Constitution where the particular section provides for more protections than the United States Constitution does. The two constitutions' language do not

track identically. Article I, Section 7 affords the right of every person to "speak, write and publish" whereas the United States Constitution is more generalized in its language in the First Amendment, but that amendment includes prohibitions against the free exercise of religion or abridging the freedom of speech. Similarly, Article 1 Section 1 provides that inalienable rights include enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. This section certainly includes the right to possess property such as photographs or videos and pursuing happiness which would include potentially marriage and procreation. Mr. Doss' constitutional claims must be analyzed under the Iowa Constitution separately if the Court determines the federal constitution does not provide the protection sought. The tradition of analyzing and extending parolee's rights under the Iowa Constitution, which was articulated in *Ochoa*, *Baldon* and *Short* should be similarly extended in Mr. Doss' case, which involves fundamental and basic rights.

## CONCLUSION

For all of the reasons set forth herein, the Iowa Association for Justice requests this Court strike down the parole restrictions as they are in violation of the freedoms protected under both the U.S. and Iowa Constitutions.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally-spaced typeface using Times New Roman in 14-point font and contains 9,647 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). The Iowa Association for Justice filed a Motion for Leave to Exceed Brief Length for Amicus Curiae Brief which the Supreme Court granted on December 16, 2020.

December 17, 2020
Date

/s/ *Matthew T. Lindholm*
Matthew T. Lindholm