ADVANCE SHEET HEADNOTE
June 24, 2024

**2024 CO 28**

**No. 23SC4, *Salah v. People*—Right to Familial Association—Sex Offender Intensive Supervision Probation—Due Process Clause**

In this case, the supreme court considers a sex offender probationer's challenge to the constitutionality of probation conditions that restricted his ability to contact or live with his minor nephew. The court rejects the probationer's argument that a biological connection alone is dispositive of whether a probationer has a constitutional right to contact or live with a member of their extended family. The court holds, instead, that whether a probation condition implicates a sex offender probationer's constitutional right to familial association with a member of their extended family depends, as a threshold matter, on whether the probationer demonstrates the nature of their relationship with the family member. This threshold showing is necessary so that a trial court reviewing a claim of familial association can determine where on the spectrum of protection the relationship falls.

**The Supreme Court of the State of Colorado**
2 East 14th Avenue • Denver, Colorado 80203

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**2024 CO 54**

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**Supreme Court Case No. 23SC4**
*Certiorari to the Colorado Court of Appeals*
Court of Appeals Case No. 19CA180

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**Petitioner:**

Abdullahi Salah,

v.

**Respondent:**

The People of the State of Colorado.

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**Judgment Affirmed**
*en banc*
June 24, 2024

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**Attorneys for Petitioner:**
Megan A. Ring, Public Defender
John Plimpton, Deputy Public Defender
*Denver, Colorado*

**Attorneys for Respondent:**
Philip J. Weiser, Attorney General
Katharine Gillespie, Senior Assistant Attorney General
*Denver, Colorado*

**Attorney for Amicus Curiae Colorado Office of Respondent Parents' Counsel:**
Zaven T. Saroyan
*Denver, Colorado*

**JUSTICE BERKENKOTTER** delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE GABRIEL, JUSTICE HART**, and **JUSTICE SAMOUR** joined.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 After a jury convicted Abdullahi Salah of sexually assaulting a fifteen-year-old girl, the trial court sentenced him to sex offender intensive supervision probation. The court included, as conditions of his probation, provisions that prohibited Salah from contacting or living with minor children, except for his own children, his minor-age siblings, and any child with whom he had a parental role. Salah's probation was subsequently revoked, following a hearing, after his probation officer discovered that Salah was living with his adult sister and her infant son.

¶2 Salah appealed, contending that the probation conditions prohibiting him from contacting or living with his sister and nephew violated his constitutional right to associate with family members. More precisely, he argued that the right to familial association automatically extends to all members of a probationer's biological family and that a blood relationship is dispositive of constitutional protection. He further asserted that the court erred by failing to make specific findings identifying the compelling circumstances that justified the imposition of these conditions.

¶3 In a unanimous, published decision, a division of the court of appeals rejected Salah's argument that the scope of the right to familial association in this context is determined entirely by the existence of a blood relationship between a

probationer and a minor child. The division further concluded that, because Salah did not present any evidence at his probation revocation hearing regarding his relationship with his nephew, the probation conditions didn't violate his right to familial association and the trial court didn't err by failing to make specific findings. *People v. Salah*, 2022 COA 134M2, ¶¶ 18, 22, 525 P.3d 298, 301–02.

¶4 We, too, reject Salah's argument that a biological connection alone is dispositive of whether a probationer has a constitutional right to familial association in this context. Like most other courts that have addressed the parameters of sex offender probation conditions when a probationer asserts a right to familial association, we hold that whether a probation condition implicates a probationer's constitutional right to familial association with an extended relative[1] depends, as a threshold matter, on whether the probationer demonstrates the nature of their relationship with the family member. *See, e.g.*, *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 842–44 (1977) ("[T]he importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association . . . ."); *United States v. Pacheco-Donelson*, 893 F.3d 757, 760 (10th Cir. 2018) (rejecting a probationer's claim to familial association

[1] We use the terms "extended relative" and "extended family member" in this opinion to specifically refer to a minor child who is a member of a sex offender probationer's extended biological family.

where he presented no evidence of a "close familial relationship between himself and [his] two foster brothers"). This threshold showing is necessary so that a trial court reviewing a claim of familial association can determine where on the spectrum of protection the relationship falls.

¶5 In the proceedings below, Salah didn't present any evidence demonstrating the nature of his relationship with his nephew. Consequently, the trial court didn't err by prohibiting Salah from contacting or living with his nephew or by failing to make specific findings identifying the compelling circumstances that justified the imposition of these restrictions. Accordingly, we affirm the division's judgment.

## I. Facts and Procedural History

¶6 In October 2017, Salah contacted the victim, a fifteen-year-old girl, via a social media app. A few days later, Salah picked the victim up from her home and drove her to a parking lot, where he sexually assaulted her and took photos of her breasts. Salah then dropped the victim off at an intersection near her home. Based on these events, a jury convicted Salah of second degree kidnapping, sexual assault, and two counts of sexual exploitation of a child.

¶7 The trial court sentenced Salah to concurrent terms of sex offender intensive supervision probation. In doing so, the court found that, while Salah didn't "pose a threat to [his] own children," he nevertheless wouldn't "be able to be around children." The court told Salah that he must "comply with additional terms and

conditions of supervision for adult sex offenders," including two conditions that prohibited him from contacting or living with children under the age of eighteen, except for his siblings or children "with whom [he] ha[d] a parental role (for example, biological children, adoptive children, or step-children)."

¶8 Days later, after discovering during a home visit that Salah was living with his sister and infant nephew, a probation officer moved to revoke his probation. At the revocation hearing, defense counsel argued that Salah had a constitutional right "to be in contact with his sister's young son, who is his nephew." Specifically, counsel asserted that two federal cases—*United States v. Burns*, 775 F.3d 1221 (10th Cir. 2014), and *United States v. White*, 782 F.3d 1118 (10th Cir. 2015)—extend the right to familial association "to other familial relationships where the probationer has some sort of parental like role." Counsel elicited testimony from Salah's cousin that members of the Somali community, like Salah, "are expected to help other members of the Somali community." Counsel also argued, "I believe that in this particular community, in this particular family, Mr. Salah would have had a parent like role as it related to his young nephew who was in the house that the probation officer testified about."

¶9 The court acknowledged Salah's cousin's testimony about the dynamics within the Somali community. The court observed, however, that "there is no evidence before this Court that as it relates to the defendant and his nephew, that

there is a parental like role." The court further noted that the "*White* case made it clear that it would have been the defendant's burden to demonstrate the nature of the relationship to the children in question." Thus, because Salah was living with his minor nephew and he didn't present any evidence that he had a parental role with his nephew, the court found that Salah violated the terms of his probation. The court later revoked Salah's probation, re-imposed the original probation sentences with the same conditions, and added a ninety-day jail sentence.

¶10 Salah appealed, contending that the right to familial association extends to all blood relatives and that the trial court erred by failing to make specific findings regarding the compelling circumstances justifying the imposition of the probation conditions prohibiting him from contacting and living with his nephew. In support, he relied on *People v. Cooley*, 2020 COA 101, ¶ 36, 469 P.3d 1219, 1226, which held that "conditions of probation that infringe on a defendant's fundamental constitutional rights must be supported by a specific finding that (1) compelling circumstances require their imposition and (2) less restrictive means are not available."

¶11 In a unanimous, published decision, a division of the court of appeals rejected Salah's contention. *Salah*, ¶ 18, 525 P.3d at 301. The division emphasized that the defendant in *Cooley* claimed a right to associate with his own children, whereas Salah claimed a right to associate with his nephew. *Id.* at ¶ 15, 525 P.3d

at 301. To the division, this difference mattered because "restrictions on a defendant's contact with [their] own children are subject to stricter scrutiny." *Id.* (alteration in original) (quoting *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014)). It is for this reason, the division concluded, that, "[i]n the context of a parent-child relationship, the right to familial association is fundamental and can be infringed only upon a finding of compelling circumstances." *Id.* at ¶ 15, 525 P.3d at 301.

¶12 The division acknowledged that the United States Supreme Court has "recognized familial rights in persons other than parents," but it emphasized that "the parameters of that interest are less well-defined." *Id.* at ¶ 16, 525 P.3d at 301 (quoting *White*, 782 F.3d at 1139). And the division observed that "a non-custodial [individual's] right to familial association is entitled to less constitutional protection." *Id.* (alteration in original) (quoting *White*, 782 F.3d at 1140). Moreover, the division explained, a "probationer bears the burden of demonstrating the nature of his relationship with a family member who isn't his child," and more specifically, "'the degree to which that relationship resembles a parental one.'" *Id.* at ¶ 17, 525 P.3d at 301 (quoting *White*, 782 F.3d at 1140). Relying on *White*, the division concluded that a defendant's "right to familial association should be afforded 'a level of constitutional protection directly

proportional to the significance of that liberty interest.'" *Id.* (quoting *White*, 782 F.3d at 1141).

¶13 Applying these principles, the division determined that "*Cooley*'s requirement of a 'compelling circumstances' finding before imposing a condition that infringes on a [sex offender] probationer's right to familial association doesn't imply a right to live with family members without regard to the nature of the relationship." *Id.* at ¶ 18, 525 P.3d at 301 (citing *White*, 782 F.3d at 1141). And here, because "Salah had no parental or custodial role with his nephew, and he otherwise failed to demonstrate the nature of his relationship with his sister and nephew," the division concluded that the trial court didn't err by prohibiting Salah from contacting or residing with his nephew. *Id.* at ¶ 22, 525 P.3d at 302.

¶14 Salah petitioned this court for certiorari review, which we granted.[2]

## II. Analysis

¶15 The question presented in this case is whether the trial court violated Salah's constitutional right to familial association by prohibiting him from contacting or living with his minor nephew.

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[2] We granted certiorari to review the following issue:

> Whether the district court violated petitioner's constitutional right to familial association when it revoked his probation because he lived with his sister and her infant son.

¶16 We begin by setting forth the standard of review. From there, we examine Supreme Court precedent outlining the right to familial association generally and decisions from other courts that have addressed challenges to the imposition of sex offender probation conditions based on the right to familial association. In the end, we hold that whether a probation condition that prohibits contact or cohabitation with an extended family member implicates a probationer's right to familial association depends, as a threshold matter, on whether the probationer has demonstrated the nature of their relationship with the family member in question. Without this evidence, a trial court cannot determine where on the spectrum of protection the relationship falls.

¶17 Because Salah didn't present any evidence demonstrating the nature of his relationship with his nephew, his right to familial association wasn't implicated, and the trial court therefore didn't err by prohibiting him from contacting or living with his nephew or by failing to make specific findings regarding the compelling circumstances justifying the imposition of these probation conditions.

¶18 For these reasons, we affirm the division's judgment.

## A. Standard of Review

¶19 "The interpretation of the United States Constitution is a 'question[] of law, which we review de novo.'" *Sharrow v. People*, 2019 CO 25, ¶ 27, 438 P.3d 730, 737 (alteration in original) (quoting *People v. Higgins*, 2016 CO 68, ¶ 7, 383 P.3d 1167,

1169). Accordingly, we review "de novo whether a probation condition is constitutional or statutorily authorized." *Cooley*, ¶ 26, 469 P.3d at 1224; *see also People v. Roberson*, 2016 CO 36, ¶ 38, 377 P.3d 1039, 1045 (recognizing that probation cannot be revoked based on the exercise of a constitutional right). A trial court's decision whether to revoke a defendant's probation, however, is subject to the abuse of discretion standard. *Cooley*, ¶ 26, 469 P.3d at 1224. A court "abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or misapplies or misconstrues the law." *Id.*

## B. The Constitutional Right to Familial Association Generally

¶20 The Supreme Court has long recognized that the Due Process Clause of the Fourteenth Amendment guarantees all persons the right to freedom of association. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984); *accord Ferguson v. People*, 824 P.2d 803, 808 (Colo. 1992) (noting "that there are certain activities which are constitutionally protected as fundamental rights under the aegis of constitutional privacy"). Historically, the Court has classified the right to association "in two distinct senses." *U.S. Jaycees*, 468 U.S. at 617. The first sense, commonly referred to as the right to familial association, relates to the right "to enter into and maintain certain intimate human relationships." *Id.*; *see also Moore*, 431 U.S. at 503 ("[T]he Constitution protects the sanctity of the family precisely because the institution of

the family is deeply rooted in this Nation's history and tradition."). The second sense relates to the "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." *U.S. Jaycees*, 468 U.S. at 618.

¶21 The "Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974). Still, the Court has also made clear that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case." *U.S. Jaycees*, 468 U.S. at 618. The relationships entitled to the greatest constitutional protection "are those that attend the creation and sustenance of a family." *Id.* at 619 (listing marriage, childbirth, the raising and education of children, and the right to cohabitate with relatives as those personal affiliations deserving of the highest constitutional protection). "The importance of the familial relationship, to the individuals involved and to the society, *stems from the emotional attachments that derive from the intimacy of daily association . . . .*" *Smith*, 431 U.S. at 844 (emphasis added). Whether the state may intrude on the right to familial association therefore requires "a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most

intimate to the most attenuated of personal attachments." *U.S. Jaycees*, 468 U.S. at 620.

¶22 On this spectrum of personal attachments, the parent-child relationship is afforded the greatest constitutional protection. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (citing "extensive precedent" guaranteeing parents the fundamental right "to make decisions concerning the care, custody, and control of their children"); *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) ("It is self-evident that [parent-child relationships] are sufficiently vital to merit constitutional protection in appropriate cases."). This is so, the Court reasoned, because "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Troxel*, 530 U.S. at 65–66 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). In *Troxel*, the Court recognized the rights of parents vis-à-vis other family members as paramount, holding that a fit parent's right to make decisions for their children must be given "special weight" over the rights of other family members, like grandparents. *Id.* at 64, 69–70 (acknowledging the "important role" grandparents have traditionally played in children's lives but nonetheless according "at least some special weight to the parent's own determination" of whether to allow their child to visit grandparents).

¶23 Even so, in some contexts, the Court has also concluded that a parent who does not have a substantial relationship with their own child may not enjoy a right to familial association. *Lehr*, 463 U.S. at 266–67 ("[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."); *see also Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.").

### C. Challenges to Conditions of Sex Offender Probation Based on the Probationer's Right to Familial Association

¶24 The Supreme Court has also observed, albeit in a plurality opinion, that the right to familial association "is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Moore*, 431 U.S. at 504. In *Moore*, the Court considered a familial association challenge to a housing ordinance that prohibited the plaintiff's grandson from living with her. *Id.* at 496–97. There, the Court declared that "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504. Accordingly, "the choice of relatives in this degree of kinship to live together may not lightly be denied by the State." *Id.* at 505–06.

¶25 Certain conditions of a sex offender's probation can exist at the intersection between public safety and the offender's constitutional rights. *Cooley*, ¶ 1, 469 P.3d at 1221. This is certainly the case as it relates to the imposition of probation conditions that govern a sex offender's ability to contact or live with a minor family member. "Generally, a court may grant probation subject to such conditions as, in its discretion, it deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist him or her in doing so." *People v. Forsythe*, 43 P.3d 652, 654 (Colo. App. 2001). Thus, "in certain situations," probation conditions may properly "infringe on fundamental liberty interests." *Cooley*, ¶ 28, 469 P.3d at 1224–25; *accord Bear*, 769 F.3d at 1229 ("When a defendant has committed a sex offense against children or other vulnerable victims, general restrictions on contact with children ordinarily do not involve a greater deprivation of liberty than reasonably necessary.").

¶26 Whether a probation condition impermissibly infringes on a probationer's right to associate with a family member, however, largely depends on the nature of the relationship implicated by the condition. *See U.S. Jaycees*, 468 U.S. at 620 (recognizing the "broad range of human relationships *that may make greater or lesser claims to constitutional protection* from particular incursions by the State" (emphasis added)); *see also Lehr*, 463 U.S. at 256 (considering first "the nature of the interest in liberty for which appellant claims constitutional protection and then turn[ing]

to a discussion of the adequacy of the procedure that [the state] has provided for its protection"). As we explain in greater detail below, most courts have reviewed sex offender probation conditions that implicate the parent-child relationship with a more exacting eye than conditions that implicate more distant familial bonds. We examine those decisions next.

### 1. Conditions that Implicate the Right of a Person Sentenced to Sex Offender Probation to Familial Association with Their Own Children

¶27 As discussed, the parent-child relationship is afforded the greatest constitutional protection within the context of the right to familial association. *Troxel*, 530 U.S. at 66. Unsurprisingly, then, several courts have concluded that "restrictions on a defendant's contact with his own children are subject to stricter scrutiny." *Bear*, 769 F.3d at 1229; *see also Trujillo v. Bd. of Cnty. Comm'rs*, 768 F.2d 1186, 1189 (10th Cir. 1985) (conferring "the greatest degree of protection" to the parent-child relationship); *United States v. Edgin*, 92 F.3d 1044, 1049 (10th Cir. 1996) ("[A] father has a fundamental liberty interest in maintaining his familial relationship with his [child].").

¶28 Given the constitutional protection afforded the parent-child relationship, the Tenth Circuit has explained that probation conditions restricting a parent or custodian's right to associate with their child "must be supported by express findings of compelling circumstances," *White*, 782 F.3d at 1141, and be "especially

fine-tuned to achieve the goals" of sentencing. *Edgin*, 92 F.3d at 1049; *accord Bear*, 769 F.3d at 1229; *United States v. Smith*, 606 F.3d 1270, 1284 (10th Cir. 2010) (concluding that special conditions restricting a probationer's contact with their children can be imposed "only in compelling circumstances").[3] Other circuits have applied a similar standard to such probation conditions. *See United States v. Loy*, 237 F.3d 251, 269–70 (3d Cir. 2001) (narrowing broad probation conditions restricting contact with children generally to exclude the defendant's own children where the record didn't support that restriction); *United States v. Davis*, 452 F.3d 991, 994–96 (8th Cir. 2006) (requiring the showing of a compelling interest to override a parent's familial association interest with respect to their child); *United States v. Voelker*, 489 F.3d 139, 153–55 (3d Cir. 2007) (remanding for a finding of whether there was a compelling need to restrict a parent's access to their own child).

¶29 Likewise, divisions of our court of appeals have also recognized that a probation condition that infringes upon a probationer's right to associate with

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[3] In the Tenth Circuit, even where a special condition of probation doesn't implicate "a constitutional interest, the district court must still support the special condition with a statement of generalized reasons." *Pacheco-Donelson*, 893 F.3d at 760; *see also United States v. Martinez-Torres*, 795 F.3d 1233, 1238 (10th Cir. 2015) ("Although we are not hypertechnical in requiring the court to explain why it imposed a special condition of release—a statement of 'generalized reasons' suffices, *see Smith*, 606 F.3d at 1283—the explanation must be sufficient for this court to conduct a proper review.").

their own children must be supported by specific findings regarding compelling circumstances and the lack of less restrictive means. *See Cooley*, ¶ 36, 469 P.3d at 1226; *Forsythe*, 43 P.3d at 654 (evaluating the constitutionality of a probation condition that restricted a probationer's unsupervised contact with her children). Relying on decisions from various courts across the country,[4] the *Cooley* division held that, unless the need for such restrictions is self-evident, "conditions of probation that infringe on a defendant's fundamental constitutional rights must be supported by a specific finding that (1) compelling circumstances require their imposition and (2) less restrictive means are not available." ¶ 36, 469 P.3d at 1226; *cf. Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 786 (Colo. 1985) ("Where a

[4] *See, e.g.*, *United States v. Doyle*, 711 F.3d 729, 733 (6th Cir. 2013) (holding that a trial court procedurally errs "if it fails, at the time of sentencing, to state in open court its rationale for mandating a special condition of supervised release"); *United States v. Hobbs*, 710 F.3d 850, 854 (8th Cir. 2013) (explaining that, while conditions requiring defendants to receive permission from a probation officer before contacting their own children are permissible, "an 'individualized inquiry,' and a 'particularized showing' of need for the condition, is required in each case" (quoting *United States v. Springston*, 650 F.3d 1153, 1156 (8th Cir. 2011))); *United States v. Wolf Child*, 699 F.3d 1082, 1089–94 (9th Cir. 2012) (requiring the trial court to make "enhanced" findings before imposing a special condition implicating the probationer's constitutional rights); *Simants v. State*, 329 P.3d 1033, 1039 (Alaska Ct. App. 2014) (stating that "the constitutional importance of a person's right to maintain familial relationships" required the trial court to affirmatively demonstrate that the defendant was a danger to her children before restricting familial contact as a condition of probation).

fundamental right is affected, the state has the burden of establishing that the act is necessarily related to a compelling governmental interest.").

¶30 All of these cases demonstrate that probation conditions that limit a sex offender probationer's right to familial association with their own children must be supported by specific findings regarding the compelling circumstances that justify the limitation. But to what extent have courts recognized a probationer's right to familial association with respect to minors who are members of their extended biological family? We address that question next.

### 2. Conditions that Implicate the Right of a Person Sentenced to Sex Offender Probation to Associate or Live with Other Family Members

¶31 Probationers are also entitled to certain familial association rights with their extended family members. *Cooley*, ¶ 36, 469 P.3d at 1226. The parameters of these non-parental rights, however, are "less well-defined." *White*, 782 F.3d at 1139.

¶32 Some federal courts have, nonetheless, addressed those parameters with respect to extended family members.[5] For instance, in *White*, the court considered

[5] *See, e.g.*, *Johnson v. City of Cincinnati*, 310 F.3d 484, 499–501 (6th Cir. 2002) (holding that a grandmother had a due process right to familial association with her grandchildren, noting that she had been an "active participant in the lives and activities of her grandchildren"); *Ellis v. Hamilton*, 669 F.2d 510, 512–14 (7th Cir. 1982) (ruling that a plaintiff who was a child's great-aunt, adoptive grandmother, de facto mother and father, and custodian had a right to associate with the child). *But see Miller v. California*, 355 F.3d 1172, 1175–76 (9th Cir. 2004) (ruling that grandparents had no familial association right to grandchildren because they had not formed a family unit, the grandchildren were effectively wards of the state,

a sex offender probationer's challenge to a condition that "den[ied] him unfettered contact with his minor grandchildren and nieces." *Id.* at 1138. Noting the importance the Supreme Court has placed on the parent-child relationship, the court concluded that "a non-custodial grandparent's right to familial association is entitled to less constitutional protection." *Id.* at 1139–40. The panel directed the trial court to consider on remand "the degree to which [White's relationship with his grandchildren and nieces] resemble[d] a parental one and impose conditions of supervised release accordingly." *Id.* at 1140. And "[i]f a parent-like right is impacted," the panel elaborated, "the conditions must be supported by express findings of compelling circumstances." *Id.* at 1141.

¶33 Importantly, the panel instructed that it would be the probationer's burden "to demonstrate the nature of his relationship to his grandchildren and nieces." *Id.* at 1140; *cf. Melnick v. Raemisch*, No. 19-cv-00154-CMA-KLM, 2021 WL 4133919, at *11 (D. Colo. Sept. 10, 2021) (dismissing a parolee's claim to familial association rights with his nephew because he hadn't "alleged any type of parental or custodial arrangement with his nephew or any other minors in his family, and

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and the grandparents' interests conflicted with that of the children's mother); *Mullins v. Oregon*, 57 F.3d 789, 796 (9th Cir. 1995) (rejecting the grandmother's argument that she had a constitutional interest in the adoption of her grandchildren where she had only maintained occasional contact with them and lacked any emotional, financial, or custodial history with them).

d[id] not describe his relationship with them"); *Osborne v. Cnty. of Riverside*, 385 F. Supp. 2d 1048, 1054 (C.D. Cal. 2005) (rejecting the notion that grandparents have familial association rights with their grandchildren "by virtue of genetic link alone," and instead focusing on whether the grandparents have "a long-standing custodial relationship" with the grandchildren).

¶34 Similarly, in *United States v. Jenks*, 714 F. App'x 894, 898 (10th Cir. 2017), the sex offender probationer challenged a condition restricting his contact with all minor children, including family members. Reviewing for plain error, the court upheld the condition, reasoning that Jenks didn't "cite any authority supporting the idea that he has a significant liberty interest in associating with any minor child to whom he is related, regardless of custodial status or affinity." *Id.* at 898–99. The court acknowledged that Jenks "might be able to assert a significant liberty interest in the care, custody, and control of his own or other children with whom he has a custodial relationship." *Id.* at 899. But because Jenks didn't show that he had a parental or custodial relationship with his minor family members, and "it [was] not clear that a non-custodial relationship with a minor relative entails a significant liberty interest," the court discerned no plain error. *Id.*; *see also Smith*, 606 F.3d at 1284 (treating probation conditions that prohibit contact with a probationer's "own child or minor siblings" differently from conditions that prohibit contact with minor children generally).

¶35 In *Pacheco-Donelson*, the probationer contended that the trial court erred by prohibiting him from associating with his two foster brothers without making particularized findings describing the compelling circumstances that justified the condition. 893 F.3d at 760. Also reviewing for plain error, the court disagreed with Pacheco-Donelson, explaining that, while the Tenth Circuit "ha[d] recognized the right to familial association between siblings," *see Trujillo*, 768 F.2d at 1189, the court had "not decided whether the relationship between foster siblings entails a protected liberty interest." *Pacheco-Donelson*, 893 F.3d at 760. Assuming "[f]or the sake of argument . . . the possibility of a right to familial association between foster siblings," the court maintained that "this theory would require proof, for the constitutional protection of familial relationships stems from 'the emotional attachments that derive from the intimacy of daily association.'" *Id.* (quoting *Smith*, 431 U.S. at 844). And because "Pacheco-Donelson provided no evidence of a close familial relationship between himself and the two foster brothers," the panel concluded that the trial court "did not plainly err by failing to make particularized findings justifying the condition with compelling circumstances." *Id.*; *cf. Melnick*, 2021 WL 4133919, at *11 (A sex offender's "contact with children is generally not authorized absent a close familial relationship.").

¶36 But not all courts have evaluated a sex offender probationer's right to familial association with an extended family member based on the nature of the

relationship between the probationer and the minor child. In *United States v. Lonjose*, 663 F.3d 1292, 1302 (10th Cir. 2011), the court considered a sex offender probationer's challenge to conditions limiting his contact "with his [six] year old son and other minor male relatives." Noting that Lonjose's "conviction was based on sexual encounters with an underage female," the court concluded that the probation conditions restricting his contact with male family members constituted "an impermissible infringement of [Lonjose's] ability to freely associate with his family." *Id.* at 1303. Significantly, unlike the other cases decided by the Tenth Circuit over the next decade, the court's analysis didn't hinge on whether Lonjose had a parental or custodial role with his minor male relatives or whether he demonstrated a degree of affinity with them. *Id.* Rather, the court reversed the probation conditions with respect to both "his son and other minor male family members" because, in the court's view, they were overbroad and not supported by the record. *Id.* The court's decision turned on its apparent conclusion that, since Lonjose offended against an underage female, he posed no risk to minor male family members.

¶37 These cases do not articulate a mechanical, bright-line rule that identifies every type of relationship and every set of circumstances that give rise to a right to familial association. Given the diverse makeup of families throughout the country and the fact that families are formed in so many different ways, that's not

surprising. *See Troxel*, 530 U.S. at 63 (describing "[t]he composition of families" throughout the United States as "var[ying] greatly from household to household"). From these cases, however, a throughline emerges: Courts have looked to the nature of the relationship in question to determine whether a probationer has established a right to familial association with an extended family member. Why the nature of the relationship? Because the right to familial association is rooted in the objective characteristics of a given relationship. That is what determines where on a spectrum—from the most intimate to the most attenuated—of personal attachments the relationship lies. *See U.S. Jaycees*, 468 U.S. at 620. It is this analysis that ultimately governs the level of constitutional protection a familial relationship must be afforded, if any.

¶38 With these principles in mind, we turn to the probation conditions at issue in this case.

## D. A Probationer Must Demonstrate the Nature of Their Relationship with an Extended Family Member to Establish a Right to Familial Association with that Family Member

¶39 Salah contends that the trial court violated his constitutional right to familial association by prohibiting him from contacting or living with his minor nephew.[6] We perceive no constitutional violation.

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[6] Salah claims that the probation conditions imposed in this case also violate his right to live with his sister. But Salah's probation conditions didn't prohibit him

¶40 As discussed, most courts that have addressed whether a sex offender probationer has a fundamental right to associate with an extended family member have considered, as an initial matter, whether the probationer presented evidence demonstrating the nature of their relationship with the family member. Courts vary, however, on precisely what evidence a probationer must present to establish a liberty interest with the extended family member. Most courts require the probationer to show that the relationship with the extended family member resembles a parental or custodial one. *See, e.g.*, *White*, 782 F.3d at 1140; *Jenks*, 714 F. App'x at 898; *Melnick*, 2021 WL 4133919, at *11. At least one court seemed to suggest that the probationer may have associational rights if they demonstrate a "close relationship" with the extended family member. *See Pacheco-Donelson*, 893 F.3d at 760. But with only one exception, *see Lonjose*, 663 F.3d at 1303—which is at odds with the more recent cases out of the Tenth Circuit—Salah points to no case suggesting, let alone holding, that a probationer is entitled to familial association rights with an extended family member regardless of whether the

from living with his sister. Indeed, the conditions expressly permitted him to associate with his siblings, regardless of their age. Thus, we focus our analysis on whether the conditions violate his alleged right to associate with his minor nephew.

probationer presents evidence demonstrating the nature of their relationship with that family member.[7]

¶41 We are persuaded, in light of these authorities, that the question of whether a probation condition prohibiting contact with an extended family member implicates a probationer's right to familial association depends, as a threshold matter, on whether the probationer presents evidence demonstrating the nature of their relationship with that family member. We emphasize that the probationer bears the burden of demonstrating the nature of this relationship. *White*, 782 F.3d at 1140. Without this evidence, a trial court reviewing a claim of familial association has no way to determine where on the spectrum of protection the relationship falls.

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[7] Salah argues that *Smith* "held that the right to familial association applied to the defendant's relationship with his 'minor siblings,'" *see Smith*, 606 F.3d at 1283–84. Even so, the trial court revoked Salah's probation because he was living with his nephew, not his sister. And, importantly, *Smith* doesn't stand for the proposition that the familial association right applies equally to all familial relationships, so long as the probationer is biologically related to the family member. To the contrary, the *Smith* court upheld the probation conditions restricting the defendant's contact with children generally, reversing only those conditions that applied to the defendant's own children or siblings. *Id.* at 1284.

*Frank v. State*, 192 N.E.3d 904, 908 (Ind. Ct. App. 2022), doesn't support Salah's position either. The *Frank* court reversed an incarcerated person's probation conditions prohibiting his contact with his daughter, nephews, and nieces on the ground that the conditions weren't "reasonably related to his rehabilitation or protecting the public." *Id.* at 908. Notably, the court didn't conduct a familial association analysis.

¶42 In the proceedings below, Salah didn't present any evidence demonstrating the nature of his relationship with his nephew. True, Salah's cousin testified that "blood relatives in a Somali family," like Salah's, "protect each other when [they] need help." And Salah's counsel argued at the revocation hearing that, "in this particular community, in this particular family, Mr. Salah would have had a parent like role as it related to his young nephew." But these broad, general statements about practices in Salah's community shed little, if any, light on the actual nature of his relationship with his nephew. The evidence at the hearing didn't, for instance, show that Salah had a parental or custodial role with his nephew. *See White*, 782 F.3d at 1140. Nor did the evidence suggest that he personally had a "close familial relationship" with his nephew or that they enjoyed an "'emotional attachment[] that derive[d] from the intimacy of daily association.'" *Pacheco-Donelson*, 893 F.3d at 760 (quoting *Smith*, 431 U.S. at 844). This is all to say that Salah failed to establish a right of familial association with his nephew. As a result, the trial court didn't err by prohibiting him from contacting or living with his nephew or by failing to make specific findings regarding the compelling circumstances justifying these conditions. *See Cooley*, ¶ 36, 469 P.3d at 1226 (requiring the trial court to enter specific findings only if the probation conditions "infringe on a defendant's fundamental constitutional rights").

¶43 But what of Salah's assertion that "a blood relationship is dispositive of constitutional protection"? In his view, a trial court must make specific findings justifying a probation condition that prohibits association with any blood relative, regardless of whether the probationer presents evidence demonstrating the nature of that relationship. Salah principally relies on the *Moore* decision in support of this argument. But his reliance on *Moore* is misplaced.

¶44 *Moore* involved a constitutional challenge to a city zoning ordinance that prohibited a grandmother from continuing to live with her son and two grandsons, who were cousins. 431 U.S. at 497–98. The ordinance defined the term "family" narrowly, requiring households to be comprised of essentially only parents and their children. *Id.* at 496. After the grandmother refused to remove one of her grandsons from the home, the city filed criminal charges against her. *Id.* at 497. In its plurality opinion, the Court struck down the ordinance, concluding that it violated the grandmother's familial association right to live with her grandsons. *Id.* at 505–06. In so concluding, the Court rejected the city's argument that the right to familial association protects only members of the nuclear family, instead holding that the right entitles extended family members to live together as well. *Id.* at 502–04.

¶45 To be sure, *Moore* speaks to the fundamental rights of family members, including extended relatives, to live together. But there are three significant

problems with Salah's reliance on *Moore*. First and foremost, the principles in *Moore* on which Salah relies were adopted by a four-member plurality of the Supreme Court—thus, those principles are not binding on us. Second, there is no question that the right to familial association as described in *Moore* is not absolute. *Id.* at 499 ("Of course, the family is not beyond regulation."); *see also Chambers v. Sanders*, 63 F.4th 1092, 1097 (6th Cir. 2023) ("The contours of [the right of extended family members to live together] are guided by history and tradition, and they are not absolute . . . ."). And third, *Moore* "was a case about breaking up an existing family unit, not a case about creating an entirely new one." *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995).

¶46 Thus, contrary to Salah's assertion, the right to familial association isn't determined simply by whether two people share a biological connection. Instead, the determination of whether a sex offender probationer has a right to familial association with respect to an extended family member (and, thus, whether a sentencing court may limit the offender's contact with that family member) is a fact-intensive inquiry that requires the party claiming associational rights to demonstrate the nature of that relationship. *Cf. U.S. Jaycees*, 468 U.S. at 619 (explaining that "the constitutional shelter afforded [highly personal] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others"); *Smith*, 431 U.S. at 844 ("[T]he importance

of the familial relationship, to the individuals involved and to the society, *stems from the emotional attachments that derive from the intimacy of daily association . . . .*" (emphasis added)).

¶47 Salah cites to no case interpreting *Moore* as expansively as he does. And to the extent other courts have interpreted *Moore*'s breadth since it was announced, they have done so narrowly. *See Mullins*, 57 F.3d at 794 (concluding that no authority, including *Moore*, "support[s] the proposition that a grandparent, by virtue of genetic link alone, enjoys a fundamental liberty interest in the adoption of her grandchildren"); *Miller v. California*, 355 F.3d 1172, 1176 (9th Cir. 2004) (limiting *Moore*'s reach and noting that it didn't involve circumstances where a relative was potentially unfit to care for the child); *Osborne*, 385 F. Supp. 2d at 1054–55 (agreeing that *Moore* doesn't establish a fundamental right in the relationship between grandparents and grandchildren "by virtue of genetic link alone" (quoting *Mullins*, 57 F.3d at 794)); *Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir. 1982) (describing *Moore* as "surely relevant" but not "control[ling in] this case even if we treat the plurality opinion as stating the view of the whole Court"); *Rees v. Off. of Child. & Youth*, 744 F. Supp. 2d 434, 445 (W.D. Pa. 2010) (interpreting *Moore* narrowly and noting that the circumstances there didn't pertain to issues involving the welfare and safety of children); *Bazzetta v. McGinnis*, 902 F. Supp. 765, 770 (E.D. Mich. 1995) (declining to read *Moore* as giving an incarcerated person

a fundamental right to visit with minor relatives). As these cases demonstrate, *Moore* doesn't support the proposition that the right to familial association depends solely on whether two people share a common ancestry.

¶48 Determining whether a probationer has presented evidence sufficient to establish a right to associate with an extended family member is necessarily a fact-intensive inquiry. In conducting this inquiry, trial courts—consistent with the Supreme Court's guidance—must "careful[ly] assess[] . . . where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *U.S. Jaycees*, 468 U.S. at 620. But, for the trial court to conduct this inquiry, the probationer must meet their initial, threshold burden of demonstrating the nature of the relationship with an extended family member that they claim gives rise to a right to familial association.

## III. Conclusion

¶49 In sum, we hold that whether a probation condition implicates a probationer's right to associate with an extended family member depends, as a threshold matter, on whether the probationer has demonstrated the nature of their relationship with the family member. Once this threshold showing is made, a trial court can determine where on the spectrum of protection the relationship falls. Here, because Salah didn't present any evidence demonstrating the nature of his relationship with his nephew, his right to familial association wasn't implicated,

and the trial court therefore didn't err by prohibiting him from contacting or living with his nephew or by failing to make specific findings regarding the compelling circumstances justifying the imposition of these probation conditions.

¶50 Accordingly, we affirm the division's judgment.