

No. 19-01

In The United States Supreme Court

MARY GULDOON,

Petitioner,

v.

STATE OF LACKAWANNA
BOARD OF PAROLE,

Respondent.

On Writ of Certiorari to The United States Supreme Court
From the Thirteenth Circuit Court of Appeals

BRIEF FOR PETITIONER

TEAM 11

QUESTIONS PRESENTED

- I. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

- II. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act and imposed on Petitioner constitute violations of the Ex Post Facto Clause of the United States Constitution.

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STATEMENT OF THE FACTS

Mrs. Guldoon is a wife and mother to her beautiful daughter. R. at 11. She was born and raised in Old Chektowaga, Lackwanna, where she now lives with her family. *Id.* Mrs. Guldoon dreamed of being a teacher and she fulfilled that dream when she became a high school teacher at her alma mater. R. at 11. After a few years of teaching, she became pregnant with her daughter. *Id.* However, following the pregnancy, she faced serious health complications. R. at 12. Mrs. Guldoon suffered from postpartum depression and was prescribed medication. *Id.* Although there was miniscule improvement, Mrs. Guldoon returned to work when her maternity leave concluded. R. at 11.

When Mrs. Guldoon returned to school after her maternity leave, while still undergoing treatment for depression, she met B.B. R. at 12. B.B. was a fifteen-year-old student in her class, whom Mrs. Guldoon developed a relationship with. R. at 5. The relationship did not start out as a sexual one. R. at 12. Mrs. Guldoon provided B.B. extra help with his classes *Id.* From there, B.B. began opening up to Mrs. Guldoon about his troubled home life. *Id.* It was at this point Mrs. Guldoon's sympathies took over and the relationship became physical. *Id.* The sexual conduct mainly took place in Mrs. Guldoon's classroom, while on a few occasions it took place in her car or at her home. R. at 5-7.

To spare B.B. and her family, Mrs. Guldoon pleaded guilty to rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. R. at 2. During Mrs. Guldoon's time at Tonawanda State Correctional Facility her psychiatrist discovered the medicine she was taking for her postpartum depression unmasked her Bi-polar Disorder. R. at 13. In her professional opinion, the psychiatrist determined Mrs. Guldoon's crimes were a direct result of

her manic depressive episodes. *Id.* She was referred for treatment that appears to be a successful remedy for her manic episodes. *Id.*

During Mrs. Guldoon's time at Tonawanda State Correctional Facility, Lackawanna passed the Registration of Sex Offenders Act (ROSA). R. at 2. As a result of ROSA, new registration requirements and special conditions of parole, that were not a part of Mrs. Guldoon's original sentence, were put into effect. *Id.* The adoption of ROSA imposed the following special conditions for parole on Mrs. Guldoon: (1) registration as a Level II sex offender; (2) prohibition from entering a school zone, defined as knowingly traveling within 1,000-feet of a school; (3) prohibition from internet access, including viewing pornographic material or accessing a commercial social networking website; and (4) surrender of driver's license. R. at 9-10.

ROSA's special conditions of parole have severely handicapped Mrs. Guldoon's ability to integrate back into society. R. at 14-17. Mrs. Guldoon can no longer teach since she must refrain from traveling within 1,000-feet of a school. R. at 15. Other than traveling to work, Mrs. Guldoon is essentially a prisoner in her own home because she lives within a mile of two schools, in a very rural area with few roads. R. at 3. Mrs. Guldoon obtained a night shift job at Plewinski's Pierogi Company Plant, and although it is only three miles from her house by direct route, she has to take the alternative route - twenty miles each way - to avoid coming within 1,000 feet of a school zone. R. at 15-16. In addition to the extra time and mileage, Mrs. Guldoon must ride her bike to and from work in dangerous driving conditions, often at night, putting her life in jeopardy. R. at 16. There have been numerous times Mrs. Guldoon has been forced off the two-lane road by speeding and inattentive drivers. *Id.*

ROSA's internet conditions also put a wrench in the Guldoons' normal life. R. at 16-17. Mrs. Guldoon is essentially prohibited from using the internet even though she never used

the internet as a means of soliciting B.B., nor did she use it in the commission of her criminal conduct. R. at 5-6. The only evidence of such internet use in the record is that Mrs. Guldoon used the school's emailing system to occasionally email B.B. and her cell phone to occasionally text him. *Id.* No pornographic or sexual material was found, yet, she is prohibited from most internet websites. *Id.* This makes it extremely difficult for Mrs. Guldoon to seek employment in today's technology driven society. R. at 3. Not only does it punish Mrs. Guldoon, but it also punishes her innocent family because they cannot have access to the internet at their home. R. at 16-17. As a result, Mrs. Guldoon's daughter is restricted from completing her school work, and her husband is restricted from doing any work at home. *Id.*

The special condition imposed on Mrs. Guldoon through ROSA prohibiting her from obtaining a driver's license disables her ability to travel because she cannot drive, and her alternate options of travel are hindered. R. at 15. Mrs. Guldoon's husband works during the day and, therefore, cannot drive her anywhere while he is at work. *Id.* Public transportation is also a faulty alternative for Mrs. Guldoon because her home is located in a very rural area where public transportation is scarce. *Id.* Thus, Mrs. Guldoon's opportunity for employment is also obstructed because of her inability to drive. R. at 3.

Mrs. Guldoon's way of life has been flipped upside down from how it was supposed to be when she was sentenced. R. at 2. This is a direct result of Lackawanna's adoption of ROSA which enforced a slew of special conditions not originally imposed on Mrs. Guldoon. R. at 9-10. These restrictions have had a negative impact on Mrs. Guldoon's ability to reintegrate into society. R. at 3.

SUMMARY OF THE ARGUMENT

This Court should VACATE the judgment of the United States District Court for the Middle District of Lackawanna and the judgment of the Court of Appeals for the Thirteenth Circuit because the registration requirements and the special conditions required by Lackawanna's Registration of Sex Offenders Act (ROSA) violate the First and Fourteenth Amendments of the United States Constitution, as well as the Ex Post Facto Clause.

The special conditions of ROSA as imposed on Mrs. Guldoon are unconstitutional for two reasons. First, the special conditions violate Mrs. Guldoon's constitutional rights. Parole restrictions imposed on a parolee must be tailored to their prior criminal conduct, further the government's interest, and not be arbitrary or capricious. Prohibiting Mrs. Guldoon from having access to the internet or a driver's license is not tailored to her prior criminal conduct because neither the internet nor a vehicle were used in the commission of her crime. Therefore, imposing these restrictions will not promote protection of the public, or prevent Mrs. Guldoon from engaging in subsequent criminal conduct, nor will the restrictions rehabilitate Mrs. Guldoon; the special conditions only prevent Mrs. Guldoon from becoming a productive member of society.

In addition, Mrs. Guldoon's First and Fourteenth Amendment protections were infringed on by the implication of ROSA's special conditions. The condition preventing Mrs. Guldoon from accessing the internet violates her freedom of speech because it significantly hinders her ability to engage in the free flow of ideas. The additional special conditions infringe on Mrs. Guldoon's due process rights. For example, requiring Mrs. Guldoon to register as a sex offender violates her fundamental right of privacy because the list grants the world access to the most personal and private areas of her life. The special condition prohibiting Mrs. Guldoon from knowingly coming within 1,000-feet of any school zone is void for vagueness because it

promotes arbitrary and capricious enforcement. Mrs. Guldoon is also prohibited from acquiring a driver's license in violation of her right to travel, which is imperative in today's world.

Second, the special conditions of ROSA as imposed on Mrs. Guldoon are in violation of the Ex Post Facto Clause (“Clause”). This Court should focus on the two main purposes behind the implementation of the Clause to determine whether ROSA imposes punishment. The special conditions implemented under ROSA constitute punishment as imposed on Mrs. Guldoon because it’s retroactive application failed to provide her fair notice and has allowed the government to implement arbitrary and vindictive legislation. Additionally, the text of ROSA and its effect upon Mrs. Guldoon support a punitive intent. Therefore, ROSA’s application to Mrs. Guldoon disregards the purposes of the Clause, essentially rendering it meaningless.

ROSA is both retroactive and functions to the detriment of Mrs. Guldoon. The requirements and conditions implemented under ROSA are retroactive because they were implemented subsequent to the occurrence of Mrs. Guldoon’s offense. ROSA’s requirements and conditions are detrimental as they increase the punishment imposed upon Mrs. Guldoon. ROSA requires Mrs. Guldoon to surrender her driver's license, forbids contact with minors, from obtaining employment at a facility where minors are present, from being within 1,000 feet of a school, from accessing the internet, and requires her to register as a Level II Sex Offender. None of these penalties were required prior to the passing of ROSA, therefore, the Act functions to significantly increase the punishment imposed on Mrs. Guldoon. Accordingly, this Court should VACATE the judgment of the Court of Appeals for the Thirteenth Circuit.

ARGUMENT

This Court should VACATE the Circuit Court's decision for two reasons. First, the special conditions set forth in ROSA violate the individual rights of free speech and due process

afforded by the First and Fourteenth Amendments. Second, the special conditions as applied to Mrs. Guldoon are retroactive and punitive, therefore violating the Ex Post Facto Clause.

I. The special conditions imposed by ROSA do not further the government's interest and infringe on Mrs. Guldoon's constitutional rights.

The special conditions of parole imposed on Mrs. Guldoon violate her constitutional rights and should be rendered unenforceable. The United States Constitution affords all citizens with fundamental rights. *McDonald v. City of Chicago*, 561 U.S. 742, 818 (2010). Although parolees are subject to some liberty restraints, *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972), the parole classification does not negate a parolee's fundamental constitutional protections under the First and Fourteenth Amendments. *United States ex. rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970). Special conditions imposed on parolees are upheld when reasonably related to parolee's prior criminal conduct, are not arbitrary and capricious, and are reasonably related to the government's interests. *Robinson v. N.Y. State*, 2010 U.S. Dist. LEXIS 144553 at *14 (N.D.N.Y. 2010). Under 18 U.S.C. § 3553(a), parole restrictions must be imposed to further the government's interest to punish, deter, protect the public, or rehabilitate. Therefore, "special conditions on a parolee's rights are upheld where they are reasonably and necessarily related to the interest that the Government retains after his conditional release." *Muhammad v. Evans*, No. 11-cv-2113, 2014 U.S. Dist. LEXIS 48256, at *22 (S.D.N.Y. Aug. 15, 2014).

The special conditions as applied to Mrs. Guldoon violate her constitutional rights for four reasons. First, in this case, the special condition that prohibits Mrs. Guldoon from accessing "any commercial social networking website" is a substantial infringement on her freedom of speech. Without access to the internet and social media in this modern age, she has no platform to express her views and opinions or to gather those of others. Second, the special condition

requiring Mrs. Guldoon to register as a sex offender violates her fundamental right to privacy under due process. Third, prohibiting Mrs. Guldoon from knowingly traveling within 1,000-feet of a school is void for vagueness because it emboldens enforcement in an arbitrary and capricious manner. Additionally, the special condition requiring Mrs. Guldoon to forego her driver's license infringes on her right to travel, violating due process and lacking the furtherance of a legitimate government interest. Therefore, the special conditions are unconstitutional.

A. The special condition prohibiting Mrs. Guldoon from accessing the internet is a violation of her freedom of speech under the First Amendment.

The First Amendment protects Congress from “abridging the freedom of speech.” U.S. CONST. amend I. To ensure protection of this freedom, it is fundamental “that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). At present, the most important place to gain access to the free flow of ideas is the internet. *Packingham*, 137 S. Ct. at 1735. Thus, not even registered sex offenders can be prohibited from accessing social media on the internet. *Yunus v. Robinson*, No. 17-cv-5839, 2018 U.S. Dist. LEXIS 110392, at *79-80 (S.D.N.Y. June 29, 2018).

For a content-neutral law that burdens speech to pass constitutional muster, it must survive intermediate scrutiny. *Id.* at *80. For a law burdening speech to survive intermediate scrutiny it must: (1) be narrowly tailored, (2) serve a significant government interest, and (3) “must not burden substantially more speech than is necessary to further the government’s legitimate interests.” *Id.* A restriction on a parolee’s speech is narrowly tailored when it is specifically tailored to the history or specific crime of the parolee. *Packingham*, 137 S. Ct. at 80-

81. In essence, the state may not “suppress lawful speech” as an attempt to “suppress unlawful speech.” *Yunus*, 2018 U.S. Dist. LEXIS at 80-81.

In *Packingham* the Supreme Court held that a total ban on access to social media prevents an individual from exercising their constitutional right to free speech. *Packingham*, 137 S. Ct. at 1737. In that case, the plaintiff engaged in sexual activities with a minor. *Id.* at 1734. As a result, the petitioner was required to register as a sex offender and forfeit her right to access commercial social networking sites. *Id.* The court found the restriction was content neutral and applied intermediate scrutiny. *Id.* at 1736. Although the government has a strong interest in protecting children from sexual abuse, the court stated that it does not automatically open the door in every case to give the government free rein to impose constitutional restrictions. *Id.* Rather, restrictions imposed on sex offenders must be narrowly aimed at preventing recidivism of the crime they were convicted of. *Id.* at 1737. The court placed great importance in having access to the internet because in this modern era, social media platforms host a vast array of ideas and communication for every topic imaginable. *Id.* at 1735-36. The Court concluded the all-encompassing prohibition on “the most powerful mechanisms available to private citizens to make his or her voice heard” was too broad to pass the narrowly tailored requirement. *Id.* at 1737-38. Although the government had a significant interest in protecting children, the internet restrictions placed on plaintiff were not narrowly tailored to achieving that interest. *Id.* Thus, the state “suppress[ed] lawful speech as a means to suppress unlawful speech.” *Id.* at 1738.

In contrast, a total ban will be upheld where there is a direct connection between the ban and the conduct of the defendant. *United States v. Brigham*, 569 F.3d 220, 234 (5th Cir. 2009). In *Brigham*, the plaintiff had a special condition of supervised release that prohibited him from “possess[ing] or utiliz[ing] a computer or internet connection device.” *Id.* at 224. The

Court held the special condition was narrowly tailored to the government interest in protecting children because the plaintiff used the internet to post and receive images of child pornography. *Id.* at 233-34. A total ban on internet usage is constitutional when the offender, as in *Brigham*, used the internet as a vehicle to commit the crime. *Id.* at 234. Because the plaintiff used the internet to engage in his criminal conduct, a complete ban on his internet usage was upheld. *Id.*

Mrs. Guldoon's special condition prohibiting her from accessing "any commercial social networking website" is unconstitutional under the First Amendment. This special condition imposed on Mrs. Guldoon prevents her from being heard on "the most powerful mechanism[] available to private citizens to make...her voice heard." *Packingham*, 137 S. Ct. at 1737. Even if the restriction is content-neutral, as in *Packingham*, it still cannot survive intermediate scrutiny. Although the government has a significant interest in protecting children from sexual abuse, see *Packingham* and *Brigham*, the restriction is not narrowly tailored to Mrs. Guldoon.

For the special condition in this case to be narrowly tailored it must be tailored to the history or specific crime of Mrs. Guldoon. The sexual relations between Mrs. Guldoon, an individual with Bi-Polar Disorder and manic depression, and her former adolescent student, B.B., took place mainly at school, with few other occasions at her home. R. at 5, 12-13. Differing from the circumstances in *Brigham*, Mrs. Guldoon never utilized the internet to entice B.B. R. at 5-6. Nor was there any evidence of pornographic or sexual communications discovered on a phone or computer. *Id.* The evidence indicated their relationship involved in-person conduct. R. at 5. Despite this, however, Mrs. Guldoon's internet access has been completely prohibited. R. at 16-17. It is well settled that a total ban is applicable when the internet was used to commit the sexual misconduct, therefore, a total ban on Mrs. Guldoon's internet usage is unconstitutional. As in *Packingham* this condition is unconstitutional because, differing from

Brigham, this suppression on speech is over inclusive since there was no internet usage involved. Further, this condition does not serve the state's interest to deter or rehabilitate because the nature of the conduct was the result of Mrs. Guldoon's mental illness. R. at 12.

In addition, the special condition prohibiting access to "any commercial social networking website" substantially impacts Mrs. Guldoon's innocent family. R. at 17. Not only is this an infringement on Mrs. Guldoon's First Amendment right, but on her family's as well. Because this special condition prevents Mrs. Guldoon from having internet access, it hinders her husband and daughter's internet access. *Id.* Limiting Mrs. Guldoon's internet access is directly adverse to the purpose of the statute, which is to only "specifically target types of offenses on the internet while not making it impossible for such offenders to successfully integrate into society." R. at 21. Rather, than making it possible for Mrs. Guldoon to reintegrate into society, the special condition has prevented her from obtaining access to job listing platforms. R. at 15.

B. The special conditions violate Mrs. Guldoon's due process rights under the Fourteenth Amendment.

The Fourteenth Amendment prohibits the state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV. Parolees subject to special conditions of parole are nevertheless still entitled to due process. *Pollard v. United States Parole Comm'n*, No. 15-cv-9131, 2016 U.S. Dist. LEXIS 73332 at *10 (S.D.N.Y. June 6, 2016). Although the rights that are due to a criminal defendant are not reciprocated to parole revocations, "due process interests are nonetheless implicated by such terminations." *Id.* at *10. While a parolee is subject to conditions, these conditions should impose very minor infringements on their liberty in comparison to those while imprisoned. *Robinson*, 2010 U.S. Dist. LEXIS 144553, at *22. Special conditions of parole are constitutional when "reasonably

related to the nature and circumstances of the parolee's offense or the parolee's history." *Id.* at *3. To prove a liberty interest violation, there must be a showing that the parole board acted in an arbitrary and capricious manner. *Boddie v. Chung*, No. 09-cv-04789, 2011 U.S. Dist. LEXIS 48256, at *5 (E.D.N.Y. May 2, 2011).

1. *Requiring Mrs. Guldoon to register as a sex offender violates her right to privacy and is unconstitutional under due process.*

Sex offender status implicates due process because there is "a liberty interest in being free from socially stigmatizing consequences that status carries with it." *Meza v. Livingston*, 607 F.3d 392, 402 (5th Cir. 2010). Two elements are required to prove a substantive due process claim. *Wash v. Glucksburg*, 521 U.S. 702, 720-21 (1997). First, there must be an asserted right. *Id.* Second, that asserted right must qualify as a fundamental right that is deeply rooted in history and tradition and would eliminate liberty and justice if one was to forgo that right. *Id.*

The Supreme Court has not determined whether substantive due process rights are implicated to protect sex offenders from being required to register. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003). Although it is well established that "mere injury to reputation... does not constitute the deprivation of a liberty interest," *id.* at 6-7, there is a clear fundamental right in protection of privacy and personal autonomy. *Roe v. Wade*, 410 U.S. 113, 152 (1973). The right of privacy is founded in the Fourteenth Amendment's protection of personal liberty. *Id.* at 153. When regulations infringe on fundamental rights, such as privacy, the regulation must be narrowly tailored to achieve a compelling state interest. *Id.* at 155.

Mrs. Guldoon has a right of privacy and personal autonomy. *Id.* The right to have protection of privacy is a well-established fundamental right. *Id.* To require Mrs. Guldoon to register as a sex offender, gives the world an insight into an extremely private part of her life; her

sex life. Therefore, registering as a sex offender violates her fundamental right to privacy under the Fourteenth Amendment and must survive strict scrutiny. Although the state has a compelling interest in protecting children, the regulation is not narrowly tailored to achieve that interest because the parole board failed to consider the significant impact that Mrs. Guldoon's mental state had on her actions. Thus, the special condition violates Mrs. Guldoon's privacy rights.

2. Prohibiting Mrs. Guldoon from traveling within 1,000-feet of a school zone is void for vagueness and is unconstitutional under due process.

A component of due process is the void for vagueness doctrine. *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006). A statute that does not make it clear to a reasonable person what is prohibited and what is not will be struck down as void for vagueness. *Id.* at 485. There are two ways that a petitioner can demonstrate that a statute is vague. *Hill v. Colo.*, 530 U.S. 703, 732 (2000). First, a statute may be vague if the statute “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Id.* at 732. Or second, by showing the statute “authorizes or even encourages arbitrary and discriminatory enforcement.” *Id.* at 732. Special conditions of parole are susceptible to review under the void for vagueness doctrine. *LoFranco v. United States Parole Comm'n*, 986 F. Supp 796, 808-809 (S.D.N.Y. 1996). Therefore, special conditions must be clear and not vague to ensure the parolee is on notice of what could return him to prison. *Yunus*, 2018 U.S. Dist. LEXIS at *65.

Restrictions prohibiting a parolee from residing in a school zone, defined as within 1,000-feet of a school, is constitutional where the restrictions define how to measure the 1,000-feet. *Yunus v. Lewis-Robinson*, No. 17-cv-5839, 2019 U.S. Dist. LEXIS 5654 at * 40-41 (S.D.N.Y. Jan. 11, 2019). However, where the condition imposes a restriction on where a

parolee can travel, the condition may be unconstitutional for a lack of notice or encouragement of arbitrary enforcement. *Id.* at *40.

In *Yunus*, the plaintiff was required to register as a sex offender. *Yunus*, 2018 U.S. Dist. LEXIS at *1. The plaintiff was convicted of kidnapping and because his victims were minors, the crime subsequently rendered him a sex offender under the state's statute. *Id.* Once the plaintiff was released on parole, one of his special conditions prevented knowingly coming within 1,000-feet of a school where minors were present. *Id.* at *15. The court held this condition triggered both the void for vagueness doctrine, and arbitrary and capricious application, because it virtually made any parolee who "happens to be present on most sidewalks, streets, restaurants, stores, parking lots, parked vehicles and parks...during school hours" a violator. *Id.* at *70. The statute also implicated overly broad language by using the words "shall refrain from knowingly *entering into or upon* any school grounds." *Id.* at *71. As a result, the court held the plaintiff had a valid claim of void for vagueness. *Id.* at *72-73.

The decision in *Yunus* was affirmed on appeal. *Yunus*, 2019 U.S. Dist. LEXIS at *41-42. Although the court acknowledged defendant's argument that the condition could not be vague because the mens rea element prevents unintentional violations, it concluded the condition still fell within the encouragement of arbitrary and capricious enforcement. *Id.* at *41. Therefore, the court focused on the more "important aspect of void for vagueness doctrine... the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at *41-42 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Without minimal guidelines, law enforcement is free to arrest the parolee for traveling almost anywhere, even for innocent conduct. *Yunus*, 2019 U.S. Dist. LEXIS at 42-43. This practically traps the plaintiff inside his own home. *Id.* at 42. Thus, the court concluded that because of the arbitrary

enforcement, the condition prohibiting the plaintiff from traveling within 1,000-feet of a school zone was void. *Id.* at 43; *but see Matter of Williams v. Dept. of Corr. & Cmty. Supervision*, 979 N.Y.S.2d 489, 505-06 (2014), (holding the condition is reasonably related to the legitimate state interest in protecting children; brushing aside the mens rea requirement argument finding it will either be hard for the state to prove or the parolee could make prior arrangements).

A second special condition imposed on Mrs. Guldoon is the prohibition from “knowingly entering into or upon any school grounds.” R. at 9. This restrains Mrs. Guldoon from coming within 1,000-feet of any school’s “real property boundary line.” R. at 45. As a result of the condition, Mrs. Guldoon, similar to the plaintiff in *Yunus*, is practically a prisoner in her own home because she lives within a mile of two schools. R. at 3. She also can no longer carry out her passion of being a teacher. R. at 15. In addition, the condition has imposed a heavy burden of having to drive a long route of 20 miles each way to work even though Mrs. Guldoon's work is located only three miles from her house. R. at 15-20.

Although this special condition is reasonably related to Mrs. Guldoon's prior criminal conduct, it is still arbitrary and capricious. Obstructing Mrs. Guldoon's traveling capabilities and prohibiting her from entering a parameter within 1,000-feet of a school is a vague condition and should be struck down as void. As in *Yunus*, Mrs. Guldoon cannot go anywhere without knowingly entering a school zone, especially in the rural area where she lives with limited alternate routes. R. at 15-16. Anytime Mrs. Guldoon happens to be on any sidewalk, street, or park during school hours she is inherently a violator as the court found the plaintiff to be in *Yunus*. The constant probability of a parole violation makes it incredibly difficult for a reasonable person to know or anticipate which locations are prohibited and which ones are not. Further, this special condition is also void for vagueness because it encourages arbitrary and

capricious enforcement. As the court concluded in *Yunus*, there are no clear guidelines for enforcing this special condition. Therefore, Mrs. Guldoon can be a violator even by engaging in innocent conduct such as driving to work or going for a walk.

3. *Prohibiting Mrs. Guldoon from obtaining a driver's license infringes on her right to travel and is unconstitutional under due process.*

The Fourteenth Amendment encompasses the right to travel, although it is unenumerated. *United States v. Benevento*, 633 F. Supp. 2d 1170, 1210 (D. Nev. 2008). Individuals have a fundamental right to travel, or “right to free movement.” *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 100 (2d Cir. 2009). Any law that places an unreasonable burden on one’s right to travel will be analyzed under strict scrutiny. *Benevento*, 633 F. Supp. 2d at 1210.

Prohibitions on obtaining a driver's license will be upheld when it is rationally related to a legitimate governmental interest in protecting the public from future harm. *Yunus*, 2019 U.S. Dist. LEXIS at *67. Although the plaintiff in *Yunus* was not convicted of sexual misconduct, the plaintiff was convicted of kidnapping a minor which required him to register as a sex offender. *Id.* at *2. As part of parole, the plaintiff was subject to a special condition which prohibited him from obtaining a driver's license. *Id.* at *67. Plaintiff challenged this condition and claimed his parole officers acted arbitrarily and capriciously, violating his due process rights under the Fourteenth Amendment. *Id.* at *60. However, because the plaintiff had used his car to commit the crime, the court held this condition was not arbitrary and capricious. *Id.* at *67. “When an individual used a vehicle in the commission of their crime, a parole condition limiting their access to such vehicles... is not unreasonable.” *Id.*

As in *Yunus*, Mrs. Guldoon is prohibited from obtaining a driver's license. R. at 2. Not having a driver's license is a huge burden on Mrs. Guldoon's right to travel. She lives in a very

rural area where there is no public transportation. R. at 15. Mrs. Guldoon's husband also works during the day, eliminating the alternative of having him drive her to work and elsewhere.

Id. Because of her scarce access to transportation, Mrs. Guldoon has had to miss interviews and forfeit employment opportunities. *Id.* Applying strict scrutiny, this condition should not be upheld unless it is related to promoting a compelling government interest. Here, it is not.

Although the government has an interest in protecting children from harm, Mrs. Guldoon's conduct differed from the plaintiff's conduct in *Yunus*, and did not exclusively involve using a vehicle in the commission of her crime. R. at 7. Mrs. Guldoon's sexual misconduct mainly took place at the school where she worked and B.B. attended. *Id.* There were only a few occasions when the sexual misconduct took place at Mrs. Guldoon's home where she subsequently used a vehicle to drive B.B. home. *Id.* Differing from *Yunus*, Mrs. Guldoon did not *need* a vehicle in the commission of her offense, it was only used on rare occasions as a means of transportation after the encounters. *Id.* Unlike *Yunus*, Mrs. Guldoon did not use a vehicle during the offense, thus prohibiting her from obtaining a driver's license under these circumstances is too attenuated to serve the government's legitimate interest.

In sum, the special condition fails because it does not prevent recidivism, rehabilitation, or promote protection of the public. Further, the special condition results in Mrs. Guldoon's parole officers acting in an arbitrary and capricious manner. The special conditions as applied through ROSA are not tailored to Mrs. Guldoon's prior criminal conduct and violate her First and Fourteenth Amendment rights. Consequently, these conditions are unconstitutional and should be unenforceable as to Mrs. Guldoon.

II. The registration requirements and special conditions of parole required by ROSA constitute a violation of the Ex Post Facto Clause.

Ex Post Facto laws are forbidden under Article 1, Section 10 of the United States Constitution. U.S. CONST. art. 1, § 10. Applying only to penal statutes, to establish a violation the Court must first determine whether the legislature intended to implement a civil procedure or a criminal punishment. *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir. 1997); *Smith v. Doe*, 538 U.S. 84, 92 (2003). A civil intent may be negated “if the statutory scheme is so punitive either in purpose or effect.” *Smith*, 538 U.S. at 92. The statute must also be both retroactive and to the disadvantage of the wrongdoer. *Weaver v. Graham*, 450 U.S. 24, 29, 31 (1981); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). First, the registration requirements and special conditions of ROSA are punitive in effect. Second, ROSA is both retroactive and detrimental as applied to Mrs. Guldoon. Therefore, the Ex Post Facto Clause has been violated through the imposition of the requirements and conditions of ROSA on Mrs. Guldoon.

A. ROSA is punitive in both purpose and effect, and violates the Ex Post Facto Clause as retroactively applied to Mrs. Guldoon.

Lackawanna’s Registration of Sex Offender’s Act has a punitive effect as imposed upon Mrs. Guldoon. The United States Supreme Court has instructed the courts to focus on the two main purposes behind the implementation of the Clause to determine whether a retroactively imposed burden constitutes “punishment”. *Pataki*, 120 F.3d at 1273. The Clause was intended to promote government restraint and to prevent “arbitrary and vindictive legislation.” *Weaver*, 450 U.S. at 29, 30. The Clause also ensures the public is given fair notice of the punishment prescribed to each offense and the opportunity to tailor their conduct accordingly. *Id.* at 28.

More recently, the Court has articulated a two-part inquiry to determine whether legislation is punitive. *Pataki*, 120 F.3d at 1274. First, the court must determine whether Congress expressly or implicitly indicated a preferred label. *Id.* This preference may be

illustrated by the act's preamble, legislative history, transcripts from floor debates, and the overall text and structure. *Id.* at 1276-1277. Second, if Congress' expressed intent is civil, the court must determine whether the statute's purpose or effect is so punitive as to nullify that intent and render the statute penal. *United States v. One Assortment*, 465 U.S. 354, 363 (1984). In addition, there are other considerations such as implementation of an affirmative restraint, whether the statute promotes the traditional aims of punishment, whether an alternative purpose may be rationally connected, and whether the requirements appear excessive in relation to the purpose. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

The Second Circuit Court of Appeals in *Pataki* reviewed a state's sexual offender statute and analyzed the legislative intent as well as the ultimate effect of the statute's notification requirement. 120 F.3d 1263, 1276-1280. The main purpose of this inquiry was to determine whether the state's sexual offender statute was punitive or non-punitive. *Id.* at 1265. A review, as in *Pataki*, is a common response to political pressure because the legislature is often tempted to enforce retroactive legislation as a means of retribution against unpopular groups or individuals. *Id.* at 1273. In *Pataki*, the court began by evaluating the text and structure of the statute to determine whether it was consistent with a non-punitive intent. *Id.* at 1278.

In review, the *Pataki* court determined the statute's notification requirement was carefully restricted based on the offender's risk of re-offense. *Id.* at 1278. The statute utilized several factors to determine the individual's risk level. *Id.* For example, the lower the risk of re-offense, the less detailed the public notification. *Id.* Likewise, the extent of the notification was also carefully controlled because the scope of notification was based upon the individual's risk of re-offense. *Id.* The statute also included protections against the misuse of information obtained through the statute's notification requirement, such as the unauthorized release of any

information constituting a class B misdemeanor. *Id.* Under these circumstances, the court concluded the statute's text and structure supported the legislature's non-punitive intent. *Id.*

The court next evaluated whether the burdens accompanying the notification requirement were so punitive in effect to negate the legislature's non-punitive intent. *Pataki*, 120 F.3d at 1278. The effects of notification were found to be non-punitive because the court was unpersuaded that the incidents resulting from notification were consequences imposed by the statute. *Id.* at 1279. The court concluded that the information was already publicly available and that any incidents were either the result of third-party acts or the underlying conviction, rather than the notification requirement. *Id.* at 1280.

Additionally, the court in *Pataki* found the notification requirements were not excessive. The statute contains several provisions which limit the extent of notification and may potentially relieve the offender from notification altogether. *Id.* at 1282. Although the statute subjects low level offenders to notification, the extent of that notification is extremely narrow and notification for offenders unlikely to re-offend is even more strict. *Id.* Finally, the *Pataki* court evaluated the notification requirement in relation to the goals of criminal law. *Id.* at 1283. Most significantly, the court determined any detrimental effect on the offender's ability to rehabilitate and rejoin society was speculative. *Id.* After evaluating legislative intent and the effects on the offender, the *Pataki* court determined the statute was non-punitive. *Id.* at 1284.

In the case at bar, the State of Lackawanna implemented ROSA during a time of political pressure following nationwide societal trends of implementing varying degrees of Megan's Laws. Our Nation's Founding Fathers enacted the Ex Post Facto Clause to prevent this precise form of retroactive legislation. ROSA is nothing more than Lackawanna's attempt to use retroactive legislation as a punitive measure against an unpopular group of offenders, such as

Mrs. Guldoon. To impose ROSA against Mrs. Guldoon would be to loosen the restraint inhibiting an arbitrary government from administering vindictive legislation. To impose ROSA upon Mrs. Guldoon would deprive her of every citizens' constitutional right to fair notice. To subject Mrs. Guldoon to the arbitrary regulations implemented under ROSA would disregard the very purpose behind the prohibition of ex post facto laws.

Unlike in *Pataki*, the text and structure of ROSA support a punitive intent. As opposed to *Pataki*, ROSA's registration requirements are not narrowed depending on the offender's risk of re-offense. ROSA consistently mentions "dangerous" and "violent" offenders and the danger of recidivism. R. 19, 20. However, Mrs. Guldoon is not a violent offender and has very little, if any, risk of reoffending. Unlike *Pataki*, despite Mrs. Guldoon's low risk level, ROSA imposes the same extreme regulations without implementing any factors to determine her risk of re-offense. R. 2. Mrs. Guldoon is a well-educated wife and mother, who has been diagnosed with Manic Depression, and as a result, made the unfortunate mistake of involving herself in a consensual relationship with a student. R. 11, 13. In the event that ROSA included elements for consideration in determining the individual's risk, the court would have labeled Mrs. Guldoon as low risk and the regulations imposed would have been significantly less burdensome.

Dissimilar from *Pataki*, ROSA fails to provide safeguards protecting the information Mrs. Guldoon is required to register. Nor does ROSA allow Mrs. Guldoon the opportunity to petition the court to have her registration requirements lifted. ROSA's failure to provide these opportunities eliminates the element of control in the statute analyzed in *Pataki*. Instead, the text and structure of ROSA fail to limit the extent of the registration or provide the safeguards and opportunities seen in *Pataki*. Therefore, despite the *Pataki* holding, ROSA's text supports the intent to further punish offenders.

Even if this Court were to determine the legislative intent as non-punitive, ROSA has a punitive effect grave enough to negate that intent and render the statute punitive. Unlike in *Pataki*, the burdens upon Mrs. Guldoon are not the result of third parties or a result of her underlying conviction. R. 15. Mrs. Guldoon has not struggled to find a job because of her conviction. *Id.* Mrs. Guldoon struggled to find a job because of the 1,000-foot restriction, the revocation of her license, and the inability to access networking websites, all of which are hindrances imposed directly under ROSA. *Id.*

Unlike *Pataki*, the restrictions imposed upon Mrs. Guldoon are excessive in relation to the legislative purpose. ROSA bans internet access to prevent predators from accessing victims online. R. 21. However, Mrs. Guldoon never interacted with B.B. over the internet. R. 17. The prohibition of all internet access, including access by her husband and daughter, is excessive and therefore, punitive, rather than preventative. R. 16. Further, as opposed to simply confining Mrs. Guldoon to the State of Lackawanna, the Act goes further to entirely revoke her license. R. 14. As opposed to *Pataki*, ROSA goes beyond requesting the offender's information for registration in order to protect the public. Instead, ROSA imposes excessive restraints that have hindered Mrs. Guldoon's rehabilitation in a manner unrelated to protecting the public and preventing re-offense. The registration requirements and special conditions of ROSA have retroactively penalized Mrs. Guldoon in excess of any rationally related purpose, and therefore, are in violation of the Ex Post Facto Clause.

B. ROSA's registration requirements and special conditions are both retroactive and detrimental because they substantially alter Mrs. Guldoon's punishment.

Lackawanna's Registration of Sex Offender's Act is both retroactive and to the material detriment of Mrs. Guldoon, and therefore, is in violation of the Ex Post Facto Clause. The

Constitution prohibits retroactive laws which function to the detriment of the wrongdoer.

Lindsey, 301 U.S. at 401. An act is retroactive when “it makes more burdensome the punishment for a crime, after its commission.” *Beazell v. Ohio*, 269 U.S. 167, 169 (1925). An increase in the possible punishment for a crime is detrimental to the wrongdoer and thus a violation of the Ex Post Facto Clause. *Lindsey*, 301 U.S. at 401. Eliminating the possibility of a lesser punishment is also prohibited as it inflicts a more burdensome regulation than originally prescribed. *Id.*

A minor alteration in the penal provision, even if afforded by the grace of the legislature, may be in violation if both retrospective and detrimental. *Weaver*, 450 U.S. at 30. The petitioner in *Weaver* challenges the constitutionality of a statute altering the availability of “gain time for good conduct” as a violation of the Ex Post Facto Clause. *Id.* at 25. The petitioner was convicted and sentenced on May 13, 1976. *Id.* at 26. Nearly three years after the petitioner’s conviction a new provision was enacted. *Id.* at 27. This provision cut the gain time from five to three days the first two years, from ten to six days the next two years, and from fifteen to nine days for the remaining years. *Id.* at 26. Thus, it extended the prison stay by over two years. *Id.* at 27.

Reversing the decision of the State Supreme Court, this Court held the provision was void as applied to the petitioner. *Weaver*, 450 U.S. at 36. The Court reasoned that even if a statute merely alters punitive provisions, it violates ex post facto if it is both retrospective and more burdensome than the law in effect on the date of the crime. *Id.* at 31-32. The state court failed to recognize that it is not the form of the law, but rather its effect that determines whether it is ex post facto. *Id.* at 31. The new provision was clearly retrospective, implemented years after the petitioner’s offense. *Id.* at 32. Also, the adjustments are clearly to the material disadvantage of the petitioner by inhibiting the opportunity to earn gain time. *Id.* at 33. Both

retrospective and more burdensome of a punishment, the new provision was found to be in violation of the petitioner's constitutional rights. *Id.* at 36.

The petitioner in *Lindsey* challenged the constitutionality of a statute which took what was once the maximum allowed punishment and made it the mandatory required punishment. 301 U.S. at 400. At the time of petitioner's wrongdoing, the statute authorized those convicted of larceny to be sentenced up to fifteen years, or any lesser period. *Id.* The subsequent provision removed the opportunity for a lesser sentence and mandated the full fifteen-year sentence. *Id.* Although petitioner may have received the maximum sentence regardless, this Court found that eliminating the possibility of a lesser sentence operates to the offender's substantial detriment. *Id.* at 401. The Court determined it need not decide whether the subsequent statute technically increased the punishment associated with the crime. *Id.* Instead, the petitioner was placed at a substantial disadvantage simply by not allowing her the opportunity of a lower sentence, prescribed to her by law at the date of her crime. *Id.* at 401-402. This Court held the new statute, as applied to petitioner, was ex post facto in violation of the Constitution. *Id.* at 402.

In this case, similar to the provision in *Weaver*, ROSA retroactively inflicts more burdensome punishment upon Mrs. Guldoon than was prescribed by law at the time of her offense. At the time of Mrs. Guldoon's offense in 2011, Lackawanna state law required her to report regularly to her parole officer, to forfeit her right to travel outside of Lackawanna, and her right to keep firearms. R. 6. In 2016, nearly five years subsequent to Mrs. Guldoon's conviction, ROSA was enacted. R. 2.

Under ROSA, Mrs. Guldoon is required to register as a Level II Sex Offender and to surrender her driver's license. *Guldoon v. State of Lackawanna Board of Parole*, 999 F.3d 1, 6 (2019). Additionally, ROSA forbids Mrs. Guldoon from having any contact with minors, to be

employed in a facility where minors are present, to go within 1,000-feet of any school where minors may be present, and from accessing any social networking website. *Id.* None of these additional conditions of parole were mandatory prior to the implementation of ROSA, nor were they included in Mrs. Guldoon's Pre-Sentence Report. R. 3. Therefore, ROSA's newly enacted conditions and requirements are retroactive as applied to Mrs. Guldoon.

The additional penalties are extremely detrimental to Mrs. Guldoon in her attempts to re-enter society. R. 14-16. In *Weaver* this Court concluded that even a mere alteration in a statute's punitive provisions is an ex post facto violation. The changes created under ROSA surpass those in *Weaver*, as ROSA does not simply minimize the opportunity for less punishment but affirmatively increases the punishment imposed on Mrs. Guldoon. R. 2. ROSA's ban on accessing "any commercial networking websites" has made it nearly impossible for Mrs. Guldoon to seek or apply to employment opportunities requiring online applications or email correspondence. R. 3. Additionally, ROSA's revocation of Mrs. Guldoon's driver's license further impedes her ability to gain employment as she can only travel on foot or by bicycle. *Id.*

In addition to restricting Mrs. Guldoon's travel to bike or foot, ROSA's restrictions on travel within 1000-feet of a school has also proven extremely burdensome. R. 3. Mrs. Guldoon and her family live within one mile of two schools, in a rural area, with limited roads or access to public transportation. R. 3, 15. Although unlike in *Weaver* these additional punishments did not extend Mrs. Guldoon's physical incarceration, they have essentially made her a prisoner in her own home. R. 3.

After overcoming extreme difficulty obtaining a job, Mrs. Guldoon now must subject herself to extreme danger to maintain it. R. 5. Eager to work, Mrs. Guldoon accepted the only position she could find under her frustrated parole circumstances working the nightshift at

Plewinski's Pierogi Company Plant. *Id.* Although the plant is located only three miles from her home, due to ROSA's 1000-foot restriction, Mrs. Guldoon can take neither the fastest nor second fastest routes to work. *Id.* Instead, Mrs. Guldoon is forced to bike nearly 20-miles each way, at night, during all weather conditions, along a two-lane hazardous road. R. 6. Mrs. Guldoon has been forced off the road numerous times by speeding and inattentive drivers. *Id.* These exacerbated and unnecessary conditions have forced Mrs. Guldoon to risk her life every day, simply to have the opportunity to work.

Similar to *Lindsey*, although Mrs. Guldoon's license may have been revoked prior to ROSA, the new conditions have taken what was once only the maximum allowed punishment and made it mandatory. R. 2. ROSA's license revocation requirement has eliminated Mrs. Guldoon's opportunity at a lesser punishment, and therefore, this Court should oblige by the holding in *Lindsey* by determining that ROSA imposes a substantial detriment upon Mrs. Guldoon. In conclusion, ROSA satisfies the two-prong inquiry by being both retroactive and detrimental constituting a clear infringement on Mrs. Guldoon's constitutional rights.

CONCLUSION

For the aforementioned reasons, Petitioner, Mary Guldoon, respectfully requests that the judgment of the Court of Appeals for the Thirteenth Circuit be VACATED.

Respectfully submitted,
Counsel for Petitioner

CERTIFICATE OF SERVICE

We, Team 11, hereby certify on this 13th day of March, 2019, that we served a copy of the Brief for the Petitioner, Mary Guldoon, to Respondent's Counsel.

Counsel for Petitioner