No. 19-01

In the
Supreme Court of the United States

MARY GULDOON,

Petitioner,

v.

LACKAWANNA BOARD OF PAROLE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

TEAM 12

Questions Presented

1. 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.
2. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offender's 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 Case

Appellant Mary Guldoon ("Ms. Guldoon") is a mother, wife and lifelong citizen of the City of Old Cheektowaga in the State of Lackawanna. JA 11. In 2008, Ms. Guldoon achieved her dream of becoming a teacher when she accepted a position at Old Lackawanna High School, her *alma mater*. *Id.* She was in charge of teaching introductory and advanced-level computer science courses. *Id.* In April 2010, two years into her career, Ms. Guldoon went on maternity leave to prepare for the birth of her daughter. JA 12. Tragically, after her daughter was born, Ms. Guldoon developed severe post-partum depression. *Id.* In order to cope with her depression, a physician prescribed Prozac, but it only improved her condition marginally. *Id.* Without appropriate medication and facing the end of her allotted maternity leave, Ms. Guldoon was unable to forego working any longer and returned to teach in September of 2010. *Id.*

That year, Ms. Guldoon met B.B., a student in her Introduction to Computer Science class. *Id.* While a student in her class, B.B. began to seek Ms. Guldoon out for extra help with his computer science class and eventually other courses and personal struggles as well. *Id.* Unfortunately, B.B. suffered a very abusive family life at home with an abusive father and a mother who turned to alcohol and prescription pills in order to cope with it. *Id*. As he felt more comfortable with Ms. Guldoon, therefore, he began to seek her out for the dysfunction he suffered at home as well as his coursework. JA 12.

At the time, unbeknownst to Ms. Guldoon, she was suffering from bi-polar disorder, otherwise known as manic depression, as a result of the Prozac she was prescribed for her post-partum depression. JA 13. During the year that she had B.B. as a student, she was simultaneously suffering from a manic episode characterized by impaired functioning and inappropriate behavior, such as hypersexuality, excessive spending and delusions of grandeur. *Id.* Ms. Guldoon's

physician has determined that it was this manic episode, triggered by the prescribed Prozac, that caused her to begin an inappropriate relationship with B.B. *Id.* Her brief relationship came to an end less than two months after its inception when it was discovered by the principal of Old Cheektowaga High School. JA 12. At that point, Ms. Guldoon was arrested and charged with multiple counts of rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. JA 13.

In order to spare her family and her victim the pain of trial, and in taking full responsibility for her inappropriate behavior, Ms. Guldoon pleaded guilty to one count of each crime. *Id.* Soon after beginning her sentence at the Tonawanda Correctional Facility, she discovered that she was suffering from bi-polar disorder through a physician's diagnosis. *Id.* Since learning of her mental illness, Ms. Guldoon has consistently complied with her treatment and has not suffered any further manic episodes as a result. *Id.* She has even been able to take several post-graduate courses and complete. Master's Degree in Computer Programming through the University of Phoenix's online program. JA 13-14.

At the time of her sentencing, the Lackawanna Board of Parole ("Board") recommended in a Pre-sentence Report that Ms. Guldoon be eligible for parole after a period of ten year's incarceration. JA 2. With regard to parole conditions, the Board only recommended she be subject to general conditions of parole mandated by law at the time, without any recommendation of any additional or special conditions. *Id.*; JA 7. In accordance with the Board's Pre-sentence Report, Ms. Guldoon was sentenced to ten to twenty years of incarceration, to be followed by probation. JA 2.

Ms. Guldoon began serving her sentence in 2011 at the Tonawanda State Correctional Facility. *Id.* In 2016, during her incarceration, the Lackawanna Senate and Assembly passed, and

the Governor signed, the Registration of Sex Offenders Act ("ROSA"). Among other changes, ROSA imposed new registration requirements and special conditions of parole on those convicted of "sex crimes" and therefore deemed "sex offenders," with levels corresponding to their respective crimes. *Id.* For those considered level II or level III "sex offenders," ROSA imposed a mandatory suspension of driving privileges, bans of travel near schools and similar facilities, and bans on accessing the internet. *Id.* These restrictions were not mandatory conditions of parole under Lackawanna law prior to ROSA, and therefore would not have been imposed on Ms. Guldoon under the general conditions of parole originally recommended by the Board. *Id.*

Upon her release on parole in 2017, just six years of her expected ten-to-twenty-year sentence, Ms. Guldoon returned home to live with her family. *Id.* However, the new mandatory conditions of parole required by ROSA were imposed on her. JA 3. These new conditions of parole required her to surrender her driver's license to the Board, prevented her from traveling within 1000 feet of any school or similar facility, and barred her from accessing any "commercial social networking website." *Id.* None of these conditions of parole were part of the Board's Pre-sentence Report, nor were they part of Lackawanna law prior to the enactment of ROSA in 2016. *Id.*

As a result of these retroactive punitive measures, Ms. Guldoon has struggled to find employment because she is unable to apply to most employment opportunities given the expansive restrictions to her internet use. *Id.* This restriction further impairs her family's daily functioning because it prevents her from having any access to internet or any internet-capable telephones in her home. JA 17. This severely hinders her husband's ability to work, as he must be available via various internet sources at all times, and poses a significant barrier to her daughter's ability to effectively complete her school work or interact socially with other students her age. *Id.* The restriction on her ability to travel and the ban on operating a motor vehicle has severely limited

her employment opportunities, leaving her with only one possible job at Plewinski's Pierogi Company plant. JA 15. The plant is only 3 miles away from her home, but she must take an alternative route because of the travel restrictions. *Id.* In order to even arrive or leave from work, however, Ms. Guldoon is forced to ride her bicycle twenty miles along State Highway 10, a two-lane road with a speed limit of 65 miles per hour. JA 16. She risks her life on a daily basis as she is frequently forced off the road by speeding or inattentive drivers. *Id.* These additional measures have nothing to do with the crimes to which Ms. Guldoon pleaded, and constitute a violation of her rights under the First Amendment, Fourteenth Amendment, and the *Ex Post Facto* Clause of the United States Constitution. JA 17.

Summary of the Argument

In considering special conditions of parole, the parole board may nonetheless trample on a parolee's constitutional rights. There are multiprong tests for rights violations, and the Lackawanna statute fails them all. The parole board must consider the individual characteristics of the defendant, which was not done in this case. ROSA is overbroad and unconstitutional.

In looking to prevent recidivism, conditions of parole should reflect methods of deterrence for the parolee to whom it applies, otherwise it is merely punitive. Since ROSA codifies punitive measures that would otherwise be left to the discretion of local parole boards, it mandates punishment in cases where it is unjustified, arbitrary and oppressive. Mrs. Guldoon's case is the perfect example, as she is subjected to additional oppressive and arbitrary legal consequences of legislation enacted after the commission and sentencing of her crime. Therefore, ROSA's retroactive implementation of the additionally punitive registration requirement and mandated special conditions of parole violate the *Ex Post Facto* Clause.

Argument

I. Special conditions for parole must pass a test.

"Today, access to the Internet is considered to be a basic need and one of the most meaningful ways to participate in the essentials of everyday life." *J.I. v. New Jersey State Parole Bd.*, 228 N.J. 204, 220 (N.J. 2017). The internet is ubiquitous and essential. It allows one the ability to access the news, communicate with friends and family, obtain a formal education, engage in commerce, work, and generally learn about the world. This free-flowing exchange of information obviously implicates First Amendment issues, since the transmission of information constitutes speech. U.S. Const. amend. I. The Court has protected internet access under the First Amendment, holding that "in modern society, citizens have a *First Amendment* right to access the Internet." *United States v. Eaglin*, 913 F.3d 88, 96 (2d Cir. 2019) (citing *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)). However, this right is not enjoyed evenly, as "[p]arolees have fewer constitutional rights than do ordinary persons." *In re Stevens*, 119 Cal. App. 4th 1228, 1233 (Cal. Ct. App. 2004). Regardless, *state* parolees still enjoy the protections offered by the First Amendment due to its incorporation under the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Crucial to determining whether internet restrictions are appropriate for parole is an analysis of parole conditions and their purpose.

"The fundamental goal of parole 'is to help individuals reintegrate into society as constructive individuals.'" *Id.* Parole is intended not as an extension of incarceration, but as a supervisory period that allows the inmate to adjust to life after prison. Thus, the restrictions of parole, unlike the restrictions of incarceration, must be individualized – the restrictions must be relevant to the prior crime and supportive of the prior inmate's reintegration. In formulating parole restrictions – in addition to considerations such as offense severity, deterrence, and protection of the public – parole boards are instructed "to provide the defendant with needed educational or

vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D); *United States v. Perazza-Mercado*, 553 F.3d 65, 69 (1st Cir. 2009).

For parole conditions to be legal, they must 1) be reasonably related to the crime committed or reasonably related to future crimes of concern, 2) not deprive the parolee of liberty to a degree greater than necessary, 3) not be vague, 4) be consistent with sentencing guidelines, and 5) be individually justified by the court imposing them. *Eaglin*, 913 F.3d at 94; *United States v. Shannon*, 743 F.3d 496, 500 (7th Cir. 2014); *United States v. Maxson*, 281 F. Supp. 3d 594, 596 (D. Md. 2017); *People v. Navarro*, 224 Cal. App. 4th 1294, 1299, 1301-02 (Cal. Ct. App. 2016); *In re Stevens*, 119 Cal. App. 4th at 1234. The first prong restricts courts from enacting prohibitions against parolees that are arbitrary and capricious. The second prong prevents courts from interfering in a parolee's constitutional rights beyond what is necessary. The third prong protects parolees from vague restrictions that have the potential to confuse parolees (and judges) regarding what conduct is prohibited. The fourth prong promotes consistency by ensuring that judges are deferring to penological policy. The final prong is required for appellate judges and justices to determine whether the trial court's sentence was appropriate and met the prior four criteria.

Further complicating the picture is the additional test to determine whether the parole restrictions violate a constitutional right. In First Amendment cases, the court examines whether the law is "narrowly tailored to serve a significant governmental interest.' In other words, the law must not 'burden substantially more speech than is necessary to further the government's legitimate business interests.'" *Packingham*, 137 S. Ct. at 1736. There must be 1) a compelling state interest and 2) no unnecessary burden on the citizen. Whether this test is conducted under the content-based standard of strict scrutiny or the content-neutral standard of intermediate scrutiny is

irrelevant with regards to internet restrictions imposed on parolees: the results look similar under either test. *Id.*

Broad bans that prevent parolees from accessing the internet *entirely* are typically unconstitutional, with two exceptions: 1) "when use of the Internet was 'essential' or 'integral to the offense of conviction or," 2) when "the defendant had a history of using the Internet to commit other offenses." *Mutter v. Ross*, 240 W. Va. 336, 342 (W. Va. 2018) (quoting *United States v. LaCoste*, 821 F.3d 1187, 1191 (9th Cir. 2016)). Only under extreme circumstances are courts content with restricting parolees from internet access entirely. *See United States v. Voelker*, 489 F.3d 139, 145 (3d Cir. 2007) ("The lifetime ban on all computer equipment and the internet is the functional equivalent of prohibiting a defendant who pleads guilty to possession of magazines containing child pornography from ever possessing any books or magazines of any type during the remainder of his/her life."). Therefore, internet restrictions for parolees must be "narrowly tailored to serve a significant governmental interest" and comply with the five factors of parole listed previously. *Packingham*, 137 S. Ct. at 1736.

II. ROSA fails this test when applied to Guldoon.

In this case, Guldoon's sentence under the Lackawanna "Registration of Sex Offenders Act" (ROSA) violates all five requirements of parole, while also imposing an unnecessary burden on her speech, thus violating her rights under the First and Fourteenth Amendments to the Constitution.

a. The relevant parole restrictions are unescapably vague.

Guldoon is prohibited from accessing a "commercial social networking website" JA 25. This is defined as any site which permits minors to register as users, "for the purpose of establishing personal relationships with other users," and allows them to 1) create a profile page

that is public or shared with other users, 2) utilize a chat room or instant messenger function, *and* 3) communicate with adults. *Id.*

There are several problems with this language. What if minors register for a website for purposes other than establishing personal relationships with other users? Since Snapchat, clearly a social media platform, lacks a profile page function, is it nonetheless prohibited? Since Google now features Google Profiles and Google Hangouts (chat function), can a Gmail user access their email account? Knowing that the Washington Post and New York Times have dedicated comment sections (not to mention direct interfaces with Facebook embedded in their web pages), can a parolee still access the news? What if a parolee *didn't know* that these newspapers had these features and tried to access those websites – would they still be in violation of their parole?

The statute attempts to caveat this definition by adding, "for the purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein." *Id.* Read plainly, it seems to say, "If a website has additional features beyond these three listed above, then it is not a commercial social networking website." If that is the case, is Facebook still a social networking website, since it also features games? How many "other activities" must a website have before it is no longer considered a commercial social networking website?

This problem of vagueness also plagued the North Carolina statute restricting parolees from social media use – a statute ultimately ruled unconstitutional. *Packingham*, 137 S. Ct. 1730. North Carolina used its own multiprong test for defining social media and also included a final confusing caveat intended to release other websites from liability; the North Carolina and the Lackawanna statutes shared extremely similar definitional criteria and exemptions. However, in the case of North Carolina, this Court still found that the definition would nonetheless encompass

many websites not traditionally thought of as social media. "[G]iven the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com." *Packingham*, 137 S. Ct. at 1736. For all of these reasons, the Lackawanna statute at issue in this case is vague, making it easy to violate and raising issues of due process.

b. Even if the restrictions are not vague, they are still overbroad and unnecessarily burdensome.

"[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of *First Amendment* rights." *Id.* at 1737. In *Packingham*, this Court recognized that even if the North Carolina statute wasn't vague – and only banned what it intended to ban – it would nonetheless be overbroad. "With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* at 1732. To ban social media is to ban a significant source of information in people's lives – and worse yet, it bans them from actively participating in the affair, thus restricting their speech rights.

The Court admits that "protecting children from abuse is a compelling state interest," granting one-half of the analysis for constitutional rights restriction. *Id.* at 1740. However, it is the second half of this test that the North Carolina statute failed. "The State has not met its burden to show that this sweeping law is necessary or legitimate to serve its purpose of keeping convicted sex offenders away from vulnerable victims." *Id.* at 1732. The Court urged that there are other, less totalitarian means of keeping sexual predators away from children. Since the statute at stake in this case is so similar to the one struck down in *Packingham*, it is only appropriate for the Court to also strike down ROSA for being overbroad. *Mutter*, 240 W. Va. at 338 (citing *Packingham*,

137 S. Ct. 1730) (finding that a condition of parole more restrictive than that found in *Packingham* warranted invalidation of the parole condition).

Even in cases where ROSA's parole restrictions appear germane – preventing child pornographers from accessing the internet, or interfering with child predators who relied on the internet for their crimes – the court has nonetheless held the restrictions to be unconstitutionally overbroad. *United States v. Wiedower*, 634 F.3d 490, 495 (8th Cir. 2011) (rejecting internet ban for child pornographer); *United States v. Perazza-Mercado*, 553 F.3d 65, 72-74 (1st Cir. 2009) (rejecting internet ban for defendant who relied on internet to engage in sexual contact with a minor); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) (holding internet ban for defendant convicted of possessing child pornography unconstitutional); *United States v. Sofsky*, 287 F.3d 122, 126 (2d Cir. 2002) (holding that a total internet ban inflicted a greater deprivation of liberty than was reasonably necessary for defendant who had downloaded child pornography). Restricting internet access is a tall order for most courts. *Eaglin*, 913 F.3d at 91 ("[T]o consign an individual to a life virtually without access to the Internet is to exile that individual from society."). If various circuits have found an internet ban to be overbroad in the case of child pornographers, it is most certainly overbroad as applied to Mary Guldoon – a woman who has never seen child pornography nor used the internet to prey on juveniles. ROSA's parole restrictions, as applied to Mary Guldoon, are not only overbroad – they are also formulaic, lacking any relationship to Guldoon herself or her prior offense.

c. There is nothing "individually tailored" about Guldoon's parole.

While ROSA fails generally, due to its vagueness and burden, it also fails specifically in this case: none of the ROSA restrictions "reasonably relate" to Guldoon's initial offense. Guldoon had sexual contact with a former underage student. JA 5. While the two did exchange emails incidental to the affair, a computer lacked any instrumental role in the crime. *Id.* Mrs. Guldoon did

not use the internet to lure children into affairs, nor did she traffic in child pornography. While the victim claims to have sent her a naked picture, this was without her request or knowledge. *Id.* at 6. Mrs. Guldoon's phone and computer were searched and no indecent materials were discovered. *Id.* at 5-6. Mary Guldoon had a manic episode, made the terrible choice to sleep with her student repeatedly, and went to prison for this crime. *Id.* at 13. She is not a child predator, a child pornographer, or a habitual child exploiter. The internet restrictions against Mary Guldoon are anything but individually tailored. *Maxson*, 281 F. Supp. 3d at 597 ("[T]he Government's requested special condition rests on nothing more than an unsupported assumption, which is insufficient to justify . . . prohibit[ing] the Defendant from engaging in otherwise lawful conduct.").

d. The trial court did not provide its rationale for the restrictions.

Perhaps most frustrating is the lack of any explanation from the trial court for the imposition of these conditions. Firstly, Guldoon was never given an explanation at her sentencing because ROSA was passed after her sentence was already imposed – an issue addressed under this brief's *Ex Post Facto* contentions. More importantly, Guldoon never received an explanation from the trial court that originally dismissed this case now before the Court. Judicial silence on this issue has left Guldoon wondering why she must comply with restrictions clearly unrelated to her initial offense, while also leaving no rationale for superior courts to scrutinize.

e. ROSA's restrictions actually frustrate the goals of parole.

"The absolute restriction on [defendant]'s access to the Internet may undermine his rehabilitation and hinder his ability to succeed as a free agent in society." *J.I.*, 228 N.J. at 234. If the fundamental goal of parole is to help offenders reintegrate into society, *In re Stevens*, 119 Cal. App. 4th at 1233, then broad internet restrictions are actually counterproductive. *Perazza-Mercado*, 553 F.3d at 71. The internet is such an integral part of modern society that preventing

parolees from accessing it hinders their job prospects, reduces the role of a social support in their lives, prevents them from being informed citizens, and generally precludes them from reaching their full potential. Worse yet, it may even stunt moral growth. *Packingham*, 137 S. Ct. at 1737 ("Even convicted criminals – and in some instances especially convicted criminals – might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.").

On a more pragmatic point, it also limits the jobs available to them, thus increasing their societal burden and hampering economic efficiency. *See Eaglin*, 913 F.3d at 96 ("[T]o search for a job in 2019, the Internet is nearly essential."); *see also Voelker*, 489 F.3d at 145. In the case of Guldoon, the ROSA restrictions obviously (and properly) prevent her from being a teacher at a traditional school in the future, but they overstep their rehabilitative intent by further restricting her from being a teacher at an online school to teach students via distance learning. JA 17. Mary Guldoon, a teacher with a Master's Degree in Computer Programming, is riding her bike twenty miles to work at Plewinski's Pierogi Company. *Id.* at 15. She could be teaching students over the internet, as full of a reintegration into society as is appropriate given her sex offender status, but instead she is languishing away amidst pierogies.

But Mary cannot even get to her pierogi job without risking her life by riding her bicycle on a highway, because her driving privileges have been suspended. By revoking Guldoon's driver's license, the State has deprived her of the opportunity to interview for more suitable employment positions. JA 15. Finding stable employment, *appropriate* to the parolee's skill set and experience, should be a primary goal of parole. This restriction frustrates that goal immensely.

f. *Ex Post Facto* issues aside, Guldoon's parole could be easily amended to be constitutional.

Despite all of the problems with Guldoon's parole restrictions, there is a straightforward way to bring them within constitutional bounds. Notwithstanding all of the problems involved with the similar statute at issue in North Carolina, this Court clarified that narrowly tailored appropriate restrictions on internet use would still be constitutional. *Packingham*, 137 S. Ct. at 1737 ("[T]his opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. . . . Though the issue is not before the Court, it can be assumed that the *First Amendment* permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime . . ."). A broad ban may be appropriate in unique cases, but a less restrictive limitation should be the default. Until the legislature sees fit to craft a less onerous statute, trial judges can modify parole terms to bring them within constitutional limits. *Maxson*, 281 F. Supp. 3d at 600 (quoting *LaCoste*, 821 F.3d at 1191) ("If a total ban on Internet use is improper but a more narrowly tailored restriction would be justified, the solution is to have the district court itself fashion the terms of that narrower restriction.").

And trial judges have many options at their disposal to implement targeted restrictions. "[A]dvances in technology offer courts the tools and flexibility to 'fashion precise restrictions' that would protect the public . . . 'and at the same time reflect the realities of [defendant]'s rehabilitation prospects." *Perazza-Mercado*, 553 F.3d at 73. These restrictions could involve unannounced inspections of computer hard drives, installation of monitoring software on computers, or implementation of firewalls blocking appropriate, specific websites. *See In re Stevens*, 119 Cal. App. 4th at 1239. These conditions and inspections could even be imposed without reasonable suspicion. *United States v. Taylor*, 796 F.3d 788, 794 (7th Cir. 2015) (citing *United States v. Kappes*, 782 F.3d 828, 863 (7th Cir. 2015)). All of these listed suggestions also comport with best practices and sentencing guidelines. U.S.S.G. Manual § 5B1.3(d)(7).

While these above-listed restrictions could be maintained, ROSA's current restriction against accessing social media sites must be removed, since they are unconstitutional. *See Packingham*, 137 S. Ct. 1730. A modified parole such as this one suggested would be clear (as opposed to vague), not constitute an excessive deprivation of liberty, be consistent with sentencing guidelines, and be presumably justified by the trial judge. In this case, said proposed restrictions *may* still not be "reasonably related" to Guldoon's underlying offense – since a computer was not a tool of her crime – but they do not implicate issues of scope or vagueness like ROSA currently does.

II. The Thirteenth Circuit erred in denying Mrs. Guldoon's claim for relief under the *Ex Post Facto* clause.

The United States Court of Appeals for the Thirteenth Circuit, in wholly adopting the opinion of the District Court for the Middle District of Lackawanna, incorrectly held that the ROSA did not violate the *Ex Post Facto* Clause of Article 1, § 10 of the United States Constitution in the case of appellant Mary Guldoon. 999 F.3d 1 (13th Cir. 2019) (affirming 999 F. Supp.3d 1 (M.D.Lack. 2019)). The *Ex Post Facto* Clause explicitly states that "[n]o State shall … pass any… ex post facto Law." U.S. Const. art. I, § 10. The thirteenth Circuit found that the Lackawanna statute's interest in "promot[ing] community safety" and the "formalizing" function of its new conditions did not retroactively increase the measure of Mrs. Guldoon's punishment. 999 F.3d 1 (2019) at 9. In so holding, the court neglected to analyze the retrospective and increasingly punitive nuances of ROSA that qualify it as the sort of arbitrary and oppressive legislation that the *Ex Post Facto* Clause seeks to prohibit. *See, e.g., Weaver v. Graham*, 450 U.S. 24, 29 (1981) ("The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation."); *Beazell v. Ohio*, 269 U.S. 167, 171 (1925) ("[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation."); *California Dep't of Corr.*

V. Morales, 514 U.S. 499, 515 (1995) (Stevens, J., dissenting) ("The Framers viewed the prohibition on *ex post facto* legislation as one of the fundamental protections against arbitrary and oppressive government."). Judge Dawn Skopinski, in her dissenting opinion, correctly noted that the purpose of this clause is to ensure that a citizen may rely on the warning of current laws and their consequences in order to be able to tailor their behavior accordingly. 999 F.3d 1 at 6 (13th Cir. 2019). By retroactively imposing additional legal consequences, the Lackawanna Board of Parole deprived Mrs. Guldoon of her constitutional right to such a warning.

a. Whether a statute violates the *Ex Post Facto* Clause is determined by a two-part test.

In determining that a statute violates the *Ex Post Facto* Clause, a court must reach two conclusions: first, that the law was implemented retroactively, that is, its legal consequences were imposed on an individual whose crimes were committed before the enactment of the law; and second, that the law increases the measure of punishment imposed on said individual. *See Beaver v. Ohio*, 269 U.S. 167, 169-70 (1925) ("It is settled, by decisions of this court . . . that any statute . . . which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as ex post facto."); *Weaver*, 450 U.S. at 29 ("[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."); *Dobbert v. Florida*, 432 U.S. 282, 299 (1977) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer.").

b. ROSA's registration requirement and special conditions of parole were imposed retroactively on Mrs. Guldoon.

The Lackawanna Board of Parole's ("Board") imposition of ROSA's registration requirement and special conditions of parole on Mrs. Guldoon were retroactive because the

enactment and implementation of the statute occurred after the commission and sentencing of her crime. In *Weaver*, the court held that the "critical question" in determining if a law was imposed retroactively is "whether the law changes the legal consequences of acts completed before its effective date." 450 U.S. 24, 31 (1981). In other words, the statute "must apply to events occurring before its enactment." *Id*.

Mrs. Guldoon pleaded guilty to non-forcible sexual conduct with a minor on January 1, 2011. JA 5. Before her sentencing, which occurred on January 31st of the same year, the Board issued a Pre-sentence Report ("Report") recommending "General Conditions of Parole" if Mrs. Guldoon were to be released into parole. JA 7. The Registration of Sex Offenders Act, known as ROSA, was made effective on January 21, 2016, almost exactly five years after Mrs. Guldoon's conviction. *Id. at 19*. ROSA was passed to amend the correction law, the penal law, and the executive law in relation to the protection of people services from convicted sex offenders. *Id.* Among these amendments to the law in place at the time of Mrs. Guldoon's conviction were the following relevant to her status as a level two sex offender: (1) Correction Law § 168-v and executive law § 259-c(16) prohibiting the operation of motor vehicles; (2) Executive Law § 259-c(14) prohibiting the entrance into or upon any school grounds, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen; and (3) Executive Law § 259-c(15) prohibiting the use of internet to access commercial social networking websites. *Id.* at 23-26. Upon her release into parole on January 1, 2017, then, Mrs. Guldoon was subject to these three new conditions that she would not have been required to comply with had she been released before ROSA's enactment. *Id.* at 10. In other words, ROSA created new legal consequences for Mrs. Guldoon not included in the general conditions of parole recommended in her Pre-sentence Report nor required by law before ROSA was passed. *Id.* at 3. These legal

consequences apply directly to events that occurred before its effective date in January 2016 because Mrs. Guldoon's committed and was convicted of her crime in 2010 and 2011, respectively. *Id.* at 5. Thus, ROSA is retroactive as applied to Mrs. Guldoon's conditions of parole.

c. ROSA increased the measure of Mrs. Guldoon's punishment by imposing a registration requirement.

The ROSA registration requirement retroactively imposed on Mrs. Guldoon compels her to face a greater measure of legal consequences than she would have otherwise faced had the statute not been passed. While not all laws imposed retroactively violate the *Ex Post Facto* Clause, such a retrospective law does constitute a violation if it increases the punishment for criminal acts that occurred before its effective date. *Garner v. Jones*, 529 U.S. 244, 249-50 (2000) ("One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission."). In *Morales*, the Court found the "controlling inquiry" of whether a retroactive policy violates the Clause to be whether it creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes." 514 U.S. 499, 509 (1995). However, there is no established formula to determine this increase; it is a question of whether the increase reaches a sufficient substantive degree. *Beazell*, 269 U.S. at 171.

By registering as a level II sex offender, Mrs. Guldoon is forced to divulge highly personal information to the division of criminal justice services ("Division"), who has the power to share appellant's information at its discretion and impose felony charges or revoke parole for failure to register. JA 28-30, 43, 44. Under § 168-b, the Division may release appellant's information to any regional or national registry of sex offenders, the Department of Health, the Department of Insurance, authorized internet entities, and municipal housing authorities. JA 28-30. The Division's ability to release Mrs. Guldoon's information to these entities allows for public shaming

and arbitrary discrimination that does not further the statute's goal of preventing future sex offenses. *Id.* at 19.

The Division's sole discretion in determining which entities may have access to Mrs. Guldoon's information poses a significant risk for arbitrary and oppressive penal consequences, especially since ROSA absolves all officials and agencies of subjugation to civil or criminal penalties for damages their actions cause so long as they acted reasonably and in good faith. *Id.* at 29. By allowing Mrs. Guldoon's information – including her photograph, address, and place of employment – to be shared regionally or nationwide, the facially procedural registry risks substantive penal consequences in releasing private identifying information to anyone with access to them. *Id.* Such exposure is a violation of the already limited right to privacy of sex offenders and subjects them to the significant risk of public shame, job discrimination, and violent targeting. In releasing her information to the Department of Health and the Department of Insurance, Mrs. Guldoon risks being refused access to certain medications and reimbursements for such medications should she be entitled to them under her insurance coverage. *Id.* The denial of medication and access to insurance benefits is an arbitrary and oppressive punishment that in no way furthers the statute's preventative goal. *Id.* at 19. Further, while ROSA severely restricts Mrs. Guldoon's internet access through its special conditions of parole, the Division is authorized to release her registry information to "authorized internet entities." *Id.* at 30. Without specificity in the statute as to what types of entities this includes, this power raises the realized concern that Mrs. Guldoon may effectively be banned from using the internet entirely. Finally, releasing her information to municipal housing authorities subjects Mrs. Guldoon to potential discrimination in applying for and obtaining reasonable housing.

Of particular concern is the Division's discretion in releasing the registry information of level II and level III sex offenders on a subdirectory under § 168-q. *Id.* at 43. In posting this subdirectory online to be made available at all times via the division's homepage, the statute explicitly allows for any person with access to the division's website to access appellant's information without any restrictions. *Id.* This risk is especially likely considering the public awareness campaign the Division is mandated to engage in which notifies the public of the provisions of ROSA, thus informing them of the availability of the webpage and the level of access they have to information about sex offenders in their area. *Id. at 30*. Thus, intentionally advertising the registry to the public allows unfiltered access to Mrs. Guldoon's highly sensitive information and subjects her to the same risks of shame, discrimination, and targeting previously mentioned.

Another matter of substantive penal significance to the registry is the consequence applied to appellant should she fail to register within the specified time limits. Under § 168-t, Mrs. Guldoon could be convicted of a class E felony for the first offense, a class D felony for the second, and in some circumstances a revocation of parole entirely. *Id.* at 44. The risk of additional time of incarceration or additional felonies one appellant's criminal record are substantial legal consequences demonstrating that the registration requirement is a punitive measure rather than procedural. *Id.* Rather than imposing a fine, for instance, ROSA chooses to impose criminal punishment for non-compliance with its registry, demonstrating its penal significance.

d. ROSA increased the measure of Mrs. Guldoon's punishment by imposing special conditions of parole, specifically the conditions limiting her freedom to drive, travel within 1000 feet of a school or similar facility, and access certain internet websites.

Similar to the registration requirement, the ROSA special conditions of parole retroactively imposed on Mrs. Guldoon increased the measure of legal consequences for her crimes by revoking her driver's license, restricting her travel within 1000 feet of a school or similar facility, and

banning her access to commercial social networking websites. *Id.* at 21-23. As mentioned previously, the *Ex Post Facto* Clause bans implementing "greater punishment" for crimes committed prior to the enactment of the applicable law. *See Garner*, 529 U.S. at 249-50; *Morales*, 514 U.S. at 509; *Beazell*, 167 U.S. at 171. The special conditions of parole that Mrs. Guldoon must comply with in order to maintain her parole, however, are both substantively punitive and impose a significant detrimental effect on her and her family. These special conditions are inherently punitive because they do not advance ROSA's goal of reducing recidivism, but rather merely serve to punish appellant for her crimes. JA 20. To reduce recidivism, ROSA aims to monitor sex offenders and protect the public from victimization. *Id.* However, the three aforementioned special conditions arbitrarily imposed on Mrs. Guldoon in no way work to reduce the risk that she will offend again.

1. Since Mrs. Guldoon does not pose a risk of reoffending, the mandatory special conditions of parole do not serve to reduce her risk of recidivism.

ROSA's goal of reducing recidivism among sex offenders is not effectively implemented by the special conditions of parole in Mrs. Guldoon's case. Unlike many offenders, Mrs. Guldoon's case is isolated in nature rather than a pattern of behavior; rather, her crime was a byproduct of the severe mental illness she developed after giving birth to her daughter. *Id.* at 12. To cope with the post-partum depression she suffered after her daughter was born in May 2010, Mrs. Guldoon was prescribed Prozac. *Id.* Unfortunately, the Prozac was marginally effective and did not help her recuperate before returning to teach in September 2010 at the end of her maternity leave. *Id.* Not appropriately medicated for her illness, Mrs. Guldoon unknowingly developed bi-polar disorder, otherwise known as manic depression, from the Prozac she was taking. *Id.* at 13. The Prozac triggered a manic episode characterized by hypersexuality, excessive spending and delusions of grandeur, which lasted throughout the duration of her relationship with her student.

Id. Since given her diagnosis while incarcerated in Tonawanda, Mrs. Guldoon has not experienced any further manic episodes. *Id.* In other words, she has not suffered from such an episode nor the inappropriate behavior it causes in more than two years. Were it not for the manic episode caused by the Prozac she was prescribed, Mrs. Guldoon would not have engaged in any inappropriate relationship with her student. While she has admitted to and taken full responsibility for her crime in pleading guilty to all charges, Mrs. Guldoon has also proven through this medical evidence that this behavior was an unforeseen symptom of her mental illness that she is currently treating.

Given the isolated nature of Mrs. Guldoon's crimes and the minimal, if not nonexistent, risk that she will reoffend, the mandatory special conditions of parole do not further ROSA's goal of reducing recidivism and are therefore merely additional punitive legal consequences. First, revoking appellant's license has no deterrent impact because appellant's use of a motor vehicle was only incidental to her crimes, but not a primary tool to complete them. 999 F.3d 1 (13th Cir. 2019) at 7 (Skopinski, J., dissenting). Further, it was not the motor vehicle but rather her mental illness that prompted the relationship to begin and develop. JA 13. Since revoking her license does not serve as a deterrent on the risk that Mrs. Guldoon will reoffend, then, it is only punitive in nature and detrimental to her safety. Second, the 1000-foot is an extraordinary consequence that is unnecessary to deter Mrs. Guldoon from reoffending. While she is not at risk for recidivism in the first place, merely preventing her from obtaining employment in a school facility or entering the facility itself would be appropriate. Adding the 1000-foot perimeter around any such educational facility is an excessive punishment that only serves to restrain Mrs. Guldoon's employment prospects and subject her to hazardous, life-threatening commuting conditions. *Id.* at 15. Finally, the restriction on "commercial networking websites" is unrelated to the details of her crime and therefore serves no deterrent purpose. Mrs. Guldoon only used electronic devices to communicate

with her student via text and email, not through any other networking website or function. *Id.* at 6. Further, there was no pornography of any kind involved in this offense. *Id.* In fact, Mrs. Guldoon refused to comply with the students request for nude photos of herself and never solicited nor received any pornographic materials from him. *Id.* Therefore, this ban is excessively punitive.

2. The prohibition on the use of a motor vehicle is detrimental to her employment prospects and physical safety.

Without the ability to drive, Mrs. Guldoon has suffered from limitations on employment opportunities and must face a life-threatening commute on a daily basis. *Id.* at 15. First, in going through the job process her inability to drive left her with few options because she was unable to arrive at her interviews. *Id.* Since most interviews are scheduled during typical work hours and her husband's job falls within that timeframe, she was forced to forego those employment opportunities and left with only one option: a night shift at the Plewinski's Pierogi Company plant. *Id.* Further, she must ride her bike to work every day as it is too far to walk with her travel restrictions and public transportation is infrequent. *Id*. Due to the mandated travel restrictions, Mrs. Guldoon must make the 20-mile commute to work via bike on State Highway 10, which is a two-lane road with a speed limit of 65 miles per hour. *Id.* at 16. Riding a bicycle on this road is very risky, and forces her to face these risky conditions to and from her night shift, in daylight and darkness, and in all types of weather conditions. *Id.* During the winter months, she must bike 20 miles under these conditions and in less than 30 degrees. *Id.* Thus, revoking her ability to drive is not only merely punitive but also unduly detrimental to her physical safety.

3. The prohibition against traveling within 1000 feet of a school or similar facility exacerbates the detrimental impact to her employment and safety.

Even if the mandatory prohibition on Mrs. Guldoon's use of a motor vehicle were permissible, the 1000-foot travel restriction places further limits on her employment opportunities

and places her life at risk. Under ROSA, Mrs. Guldoon is prohibited from coming within 1000 feet of any school. *Id.* Without being allowed to enter into an educational environment, she is barred from her chosen career of teaching. *Id.* Mrs. Guldoon is also barred from any non-teaching job opportunity that falls within 1000 feet of a school or similar facility. Since the definition of such a facility is broadly defined, these travel restrictions also bar her from finding employment in or around any organization dedicated primarily in any manner to educating children under eighteen, even if they also provide other services. *Id.*

In addition to severely restricting her employment potential, the one job she was able to find under her parole conditions also, as previously stated, subjects her to life-threatening circumstances every day. *Id.* These life-threatening dangers she faces every time she commutes to or from work would not exist were the 1000-foot travel restriction not in place because she could travel on more direct routes that do not force her to ride her bicycle on a highway. *Id.* While it is understandable to prevent Mrs. Guldoon from returning to her original position of employment, this restriction would easily be satisfied by simply prohibiting her from teaching children under eighteen years of age. The supplemental restriction on travel 1000 feet around any sort of educational institution, on the other hand, is arbitrary and unduly detrimental.

4. The prohibition against accessing computer social networking websites effectively bans Mrs. Guldoon and her family from all internet access, thus detrimentally impacting her husband's job and daughter's education.

Under executive law § 259-c(15), Mrs. Guldoon is barred from accessing any "commercial networking site," which is defined as:

> "[A]ny business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real

time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age."

Id. at 25. This expansive prohibition on Mrs. Guldoon's internet access is so expansive that it limits her ability to engage in online professional networking on sites such as LinkedIn or even enjoy online entertainment on sites such as Netflix or Hulu. *Id.* at 16. On top of being unable to use the internet to find employment, Mrs. Guldoon is also limited in that she is unable to pursue her teaching career online, rendering her education and professional skills useless in finding a job. *Id.* Since most websites now include some form of networking or connect to a networking site, this condition effectively operates as a complete ban on Mrs. Guldoon's internet access. *Id.* The detrimental impact of such a ban, however, also extends to her husband and her daughter because it prevents her family from having any internet access nor internet-capable telephones in their home. *Id* at 17. Without these tools, her husband is unable to effectively perform his job since he is required but unable to be available to his employer by telephone, text, and email at all times. *Id.* Further, this ban inhibits her daughter's education as she is unable to access online textbooks, assignments, research online or participate fully in the life of a young person without the ability to participate in very popular social media outlets. *Id.* Without the full right for her or her family to access employment and education – a punishment wholly unrelated to the circumstances of her crime –, this ban is oppressive and arbitrarily detrimental.

e. The punitive nature and detrimental effects of the registration requirement and special conditions of parole are arbitrary and oppressive in Mrs. Guldoon's case.

In looking to prevent recidivism, conditions of parole should reflect methods of deterrence for the parolee to whom it applies, otherwise it is merely punitive. Since ROSA codifies punitive measures that would otherwise be left to the discretion of local parole boards, it mandates punishment in cases where it is unjustified, arbitrary and oppressive. Mrs. Guldoon's case is the

perfect example, as she is subjected to oppressive and arbitrary legal consequences of legislation enacted after the commission and sentencing of her crime. Therefore, ROSA's retroactive implementation of the additionally punitive registration requirement and mandated special conditions of parole violate the *Ex Post Facto* Clause.

Conclusion

For the above stated reasons, appellant respectfully requests that the United States Supreme Court reverse the Thirteenth Circuit's denial of declaratory and injunctive relief that allowed for the continued violation of appellant's constitutional rights under the First Amendment, Fourteenth Amendment and the *Ex Post Facto* Clause.