2019-01

SUPREME COURT OF THE UNITED STATES

October Term 2019

Mary Guldoon,

Petitioner,

v.

State of Lackawanna Board of Parole,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Counsel for the Respondent

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

1. Under the First and Fourteenth Amendments of the United States Constitution does the Registration of Sex Offenders Act withstand constitutional scrutiny considering that Petitioner enjoys limited rights as a parolee?

2. Under Article I, Section 10 of the United States Constitution does Lackawanna's application of the Registration of Sex Offenders Act to Petitioner violate the Ex Post Facto Clause when the regulations are not punitive?

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The United States District Court for the Middle District of Lackawanna heard Petitioner's challenges to the Registration of Sex Offenders Act under 42 U.S.C. § 1983. *Guldoon v. Board of Parol*e, 999 F. Supp.3d 1, 2 (M.D.Lack. 2019). The District Court granted the Lackawanna Board of Parole's motion for summary judgment finding that Petitioner failed to assert a deprivation of a protected liberty interest. *Id*. at 6. Petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit and the court affirmed the lower court's decision. *Guldoon v. Board of Parole*, 999 F. Supp.3d 1, 1 (13th Cir. 2019). This Court granted Petitioner's request for a writ of certiorari. *Guldoon v. Board of Parole*, 999 U.S. 1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o state shall … deprive any person of life, liberty or property, without due process of law."

The First Amendment to the United States Constitution provides that "Congress shall make no law … abridging the freedom of speech…."

The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution provides that "No State shall … pass any … ex post facto Law…."

STANDARD OF REVIEW

The Court of Appeals for the Thirteenth Circuit correctly affirmed the decision of the lower court granting Respondent's motion for summary judgment. This Court reviews questions of law de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

STATEMENT OF FACTS

On July 25, 2015, the Lackawanna legislature enacted the Registration of Sex Offenders Act ("ROSA") to address the serious danger of recidivism posed by sex offenders and to protect the community from sexually violent offenders and their predatory behavior. R. 19. Before the enactment of ROSA, Lackawanna law enforcement felt that they did not have enough information about sex offenders to protect the public. R. 19. As a result, the legislature determined that requiring sex offenders to register would assist law enforcement in their efforts. R. 19. In an effort to protect society, the legislature also instituted a prohibition on the operation of a motor vehicle by certain classes of sex offenders. R. 23. The legislature also felt that the laws protecting children were not adequately serving their purpose. R. 20. As a result, the legislature determined that requiring some sex offenders, who used the internet to commit their crimes, to provide their internet identifiers and refrain from some internet uses was necessary to protect the public. R. 20-21. The legislature also added a regulation that prohibits certain sex offenders from entering school grounds. R. 20. ROSA took effect on, January 21, 2016. R. 19.

In October 2010, Petitioner began a sexual relationship with B.B., a student in her class at old Cheektowaga High School. R. 5. Over the course of their "relationship," Petitioner engaged in sexual conduct with B.B. in her classroom at the high school, at her home, and in her car. R. 5. While "Petitioner could not specify how many times they had engaged in such conduct… [she] admitted it could be 'dozens of times.'" R. 5. Petitioner contacted B.B. frequently using the high school's email system and through text messages on her cell phone. R. 5. Their relationship came to an end when the principal of the high school found B.B. and Petitioner engaging in sexual conduct in her classroom. R.12. Petitioner was subsequently arrested. R. 13.

On January 1, 2011, Petitioner plead guilty to three counts. R. 2. Count one was for a violation of Lackawanna Penal Law § 130.25, Rape in the third degree. R. 2. Count two was for a violation of Lackawanna Penal Law § 130.40, Sexual Misconduct. R. 2. Count three was for a violation of Lackawanna Penal Law § 130.20, Criminal Sexual Act in the third degree. R. 2. Petitioner began serving her sentence at the Tonawanda State Correctional Facility in 2011. R. 2.

In 2017, Petitioner was granted parole. R. 2. At that time, ROSA was already in effect. R. 2. Upon release, Petitioner was presented with a copy of the Lackawanna Board of Parole's ("The Board") General and Special Conditions of Parole. R. 2-3. The Board's conditions of her parole included the updated ROSA provisions. R.3. On January 1, 2017, Petitioner signed this document thereby agreeing to comply with all conditions as written. R. 10.

Petitioner's special conditions of parole included (1) registering as a Level II Sex Offender, (2) not entering into or upon any school grounds, (3) not using the internet for certain restricted practices and (4) surrendering her driver's license. R. 9-10.

SUMMARY OF THE ARGUMENT

The Lackawanna legislature enacted ROSA as part of an effort to both protect society and enable law enforcement officers to monitor sex offenders. The legislature balanced the rights of offenders on parole against the state's interest in protecting society. The regulations ROSA instituted are constitutional and only added what was necessary to protect the public from harm.

ROSA's provisions do not implicate the First Amendment, Fourteenth Amendment or the Fundamental Right to Travel. The provision limiting access to the internet for certain sex offenders, does not run afoul of the First Amendment. The *Packingham* decision is inapplicable because the right to internet access does not extend to individuals on parole. Furthermore, even if *Packingham* was extended to apply to parolees, ROSA would survive intermediate scrutiny as it

is applicable only to those who actually used the internet in the commission of their offense, which Petitioner did. Therefore, ROSA survives intermediate scrutiny.

The provisions prohibiting access to school grounds and requiring a driver's license suspension do not violate the Fundamental Right to Travel. This Court has not recognized the existence of a fundamental right to intrastate travel. As ROSA's provisions only implicate travel within the state, they do not violate the fundamental right to travel as recognized. Even if the Court determines that there is a fundamental right to intrastate travel, ROSA's provisions do not violate it as they curtail only one means of transportation and are related to the legitimate state objective of protecting children from predatory sex offenders.

None of the conditions that ROSA imposes on parolees violate the Fourteenth Amendment's Due Process Clause. Petitioner does not have a constitutional right to be free from conditions of parole. Even if there is a recognized Due Process right implicated by parole conditions, the conditions were not imposed by the Board in an arbitrary or capricious manner as they are related both to the underlying offense and the objectives of the statute.

The ROSA amendments applied to Petitioner also do not violate the Ex Post Facto Clause because they fail the applicable test. While under the first prong of the test they are being retroactively applied, they fail the second prong because they do not detrimentally affect her. This Court has said that a "detriment" is caused in four circumstances. The only circumstance arguably applicable to Petitioner is that ROSA increased her punishment.

To determine if a particular law constitutes punishment under the fourth circumstance, this Court has applied the "intent-effects" test. Under the intent prong of the test, a court considers the intent of the legislature in making the law. In this case, Lackawanna enacted ROSA for protection purposes. Thus, the first prong of the test is satisfied because there is a non-

punitive intent for the regulations. Under the second prong of the test, a court considers whether the effect is so severe that it creates a punishment despite the non-punitive intent of the legislature. The regulations applied to Petitioner do not override the non-punitive intent of the legislature because each fails under the seven factors of *Kennedy v. Mendoza-Martinez*. Thus, there is no Ex Post Facto violation.

Despite Petitioner's understanding, the ROSA regulations do not constitute punishment because they did not increase her incarceration. This Court in *Morales* declined to extend Ex Post Facto Clause coverage to a statute that only had a minute chance of increasing the offender's sentence. In this case, the ROSA regulations have no chance of increasing Petitioner's sentence, and thus they do not constitute punishment or violate the Ex Post Facto Clause.

Interpreting the Ex Post Facto Clause in a way that invalidates the regulations of ROSA would impair the ability of legislatures to protect the public from sexually violent offenders. The purpose statement of the Lackawanna legislature did not express an intent to punish offenders. The legislature enacted these amendments based on current data and research. While Petitioner may try to claim that collectively the ROSA amendments, as applied to her, constitute a punishment, the determination of whether a law is considered punitive is not done from the perspective of the offender. Thus, despite some inconvenience to Petitioner, these regulations retain the civil purpose announced by the legislature and do not violate the Ex Post Facto Clause.

In conclusion, ROSA does not violate the First Amendment, Fourteenth Amendment or the Fundamental Right to Travel. Moreover, none of the regulations violate the Ex Post Facto Clause because they do not enhance Petitioner's punishment. Thus, the decision of the lower courts to grant the Board's motion for summary judgement should be affirmed.

ARGUMENT

I. ROSA does not violate the First Amendment, Fourteenth Amendment Due Process Clause, or the Fundamental Right to Travel.

In an attempt to ameliorate the dangers posed to the public by sex offenders and prevent recidivism, the Lackawanna legislature passed ROSA. R. 19. ROSA added special conditions to the existing conditions of release. These regulations do not violate the First Amendment, Fourteenth Amendment Due Process Clause, or the Fundamental Right to Travel because accomplish only what is necessary to prevent to the concerns identified by the legislature.

A. ROSA does not violate Petitioner's Fundamental Right to Travel.

Petitioner's Fundamental Right to Travel was not violated by ROSA's regulations which required Petitioner to surrender her driver's license and prevented her from entering school grounds. First, this Court has not recognized any constitutional right to intrastate travel and the majority of circuit courts have also declined to recognize such a right. Second, these restrictions do not actually curtail Petitioner's right to travel. Even if recognized, the right to travel does not guarantee access to a particular form of travel. Furthermore, the ROSA regulations are rationally related to their goals of protecting society and preventing recidivism by sex offenders.

1. There is no recognized constitutional right to intrastate travel.

Petitioner's Fundamental Right to Travel was not violated as there is no recognized right to free intrastate travel. The "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 758 (1966). However, the "freedom of travel" recognized by this Court is limited to "the right of free interstate migration." *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986). This Court recognized this fundamental right in order to prevent a state from discouraging or penalizing migration into its borders." *Eldridge v. Bouchard*, 645 F.Supp. 749, 753 (W.D. Va.

1986). While the right to locomotion is recognized by this Court, it only protects "the right of a citizen of one State to enter and leave another state." *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

This right of interstate travel "finds no explicit mention in the Constitution" and has been attributed to the Commerce Clause, Equal Protection Clause, Privileges and Immunities Clause of Article IV, Privileges and Immunities Clause of the Fourteenth Amendment and "has [] been inferred from the federal structure of government." *Soto-Lopez*, 476 U.S. at 902. This Court has declined opportunities to designate the source and distinguish between interstate and intrastate travel. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."); *Memorial Hospital v. Maricopa*, 415 U.S. 250, 255-56 (1974) ("Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider…").

The existence of a fundamental right to *interstate* travel "does not necessitate recognizing a fundamental right to *intrastate* travel." *Eldridge*, 645 F.Supp. at 754. Although the exact constitutional location of the Fundamental Right to Travel has been difficult to identify, the various locations offered support finding a "right of interstate travel without recognizing the right of intrastate travel." *Id*. This is because "the protection afforded by the Privileges and Immunities Clause extends only to the state's action toward citizens of another state" and "do[es] not extend to a state's own citizens" so "there is no parallel requirement that a court recognize a new fundamental right of intrastate travel." *Id*. Additionally**,** if the right is to be inferred from the "federal structure of government adopted by our Constitution" that also supports finding only a right to interstate travel as travel between states is what would impede development of a federal union, not travel within the bounds of one state. *Soto-Lopez*, 476 U.S. at 902.

This Court has declined to recognize a right to intrastate travel. When presented with cases where this Court could have recognized a right to intrastate travel, the Court declined to do so. In a case involving restrictions on anti-abortion demonstrators protesting near abortion clinics, this Court did not find a violation of the right to travel. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In doing so, this Court stated that any restrictions on movement "would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth ... to another" and found that "such a purely intrastate restriction does not implicate the right of interstate travel." *Id*. at 277.

The majority of circuit courts have declined to recognize a right to intrastate travel. *Wright v. Jackson*, 506 F.2d 900 (5th Cir. 1975) ("no fundamental constitutional right to intrastate travel…"); *Wardwell v. Board of Education*, 529 F.2d 625, 627 (6th Cir. 1976) ("right to travel cases are not applicable to intrastate travel"); *Andre v. Board of Trustees*, 561 F.2d 48 (7th Cir. 1977) (adopting reasoning of other courts to find no violation of right to travel).

The Fundamental Right to Travel recognized by this Court is the right to freedom of interstate migration, which is not implicated here. Petitioner complains only of restrictions on her means of transportation and routes she can take while traveling locally. R. 3. These types of restrictions do not implicate the Fundamental Right to Travel as recognized by this Court.

2. Even if a right to intrastate travel is recognized, ROSA's school grounds regulation would not violate that right as it is related to the State's legitimate goal of protecting children.

Even if the Fundamental Right to Travel includes intrastate travel, parolees "do not enjoy an absolute right to travel." *Matter of Williams v. Dep't of Corr. and Community Supervision*, 979 N.Y.S.2d 489, 505 (Sup. Ct. N.Y. Cnty. 2014). This is because individuals on parole enjoy only "conditional liberty properly dependent on observance of special parole restrictions."

Morrissey v. Brewer, 408 U.S. 471, 480 (1972). The appropriate test for parolees is whether the restriction is rationally related a permissible goal. *Williams*, 979 N.Y.S.2d at 505.

In *Williams*, the Court upheld the Sexual Assault Reform Act ("SARA") which, like ROSA, prevents sex offenders from "traveling … within 1,000 feet of a school." *Id*. at 492. The court found that "given the nature of petitioner's crime and his status as a parolee, the temporary restriction against entering within 1,000 feet of school is rationally and reasonably related to the permissible and legitimate state objective of protecting children." *Id*. at 506.

The statute at issue in *Williams* contains the same school grounds provision present in ROSA which prohibits sex offenders from "traveling … within 1,000 feet of a school." *Id*. at 492. In *Williams*, the court upheld the statute as being "reasonably related to the permissible and legitimate state objective of protecting children" and the same outcome is mandated in this case. *Id*. at 506. ROSA was designed to "protect the public from the dangers posed by sexual offenders…." R. 21. The goal of this legislation has been recognized as "permissible and legitimate" and therefore, even if a fundamental right to intrastate travel is recognized, it is not violated by ROSA's prohibition on entering school grounds.

3. Even if a right to intrastate travel is recognized, ROSA's driver's license regulation is valid because it restricts one mode of transportation.

Even if a right to intrastate travel is recognized, a driver's license suspension does not implicate the right. The recognized right "does not translate into an inalienable and unconditional right to operate a motor vehicle...." *Weeks v. Johnson*, 2017 U.S. Dist. LEXIS 168139, * 14 (D. Mont. 2017). In general, "burdens imposed on a specific mode of travel … do not implicate the right." *Id*. A statute which "requires the DMV to withhold a delinquent parent's driver's license" does not "infringe the fundamental right to travel" as "it forecloses only one mode of

transportation." *Farley v. Dep't of Child Support Servs.*, 2011 U.S. Dist. LEXIS 117151, *19 (N.D. Cal 2011). The "right of an individual to operate a private automobile cannot be equated with the fundamental [] right to travel" partially due to the fact that an affected individual can "still travel as a passenger." *Tolces v. Trask*, 76 Cal. App. 4th 285, 289 (Cal. Ct. App. 1999).

Lackawanna Correction Law § 168-v, which prohibits use of motor vehicles by certain classes of sex offenders, does not violate the Fundamental Right to Travel as it "forecloses only one mode of transportation." *Farley.*, 2011 U.S. Dist. LEXIS at *19. This section of ROSA does not prohibit Petitioner from traveling as a passenger in a car nor does it foreclose other methods of transportation, such as bicycling and walking. R. 3. Therefore, Petitioner's Fundamental Right to Travel, even if recognized, is not violated by § 168-v as only one mode of transportation is being restricted which does not amount to a deprivation of that right.

B. ROSA's restrictions on internet access do not violate the First Amendment as *Packingham* does not apply to parolees and, even if it does, ROSA's restrictions survive intermediate scrutiny due to their connection to the underlying crime.

Petitioner's First Amendment rights were not violated by ROSA's restrictions on her internet usage. First, the *Packingham* decision is not applicable as it does not apply to parolees. Second, even if *Packingham* does apply, the restriction is still valid as it is related to the underlying crime where the internet was used to facilitate commission of the offense.

1. The standard articulated by this Court in *Packingham* does not apply to ROSA's internet regulations because they apply to parolees.

This Court recognized that there is a protected interest under the First Amendment in access to the internet. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). "In *Packingham*, the Supreme Court decided whether a North Carolina statute making it a felony for a registered sex offender to gain access to numerous websites, including commonplace social

media websites, violates the First Amendment." *United States v. Farrell*, 2018 U.S. Dist. LEXIS 29626, *3 (E.D. Tex. 2018). In *Packingham*, this Court "dealt with a lifetime, statewide statute restricting the access of all registered sex offenders" and "found the statute constituted an unconstitutional infringement on an individual's First Amendment rights." *Id.* at *3-4.

The *Packingham* holding applies in limited situations. The decision "addresses circumstances in which the state has completely banned [] a sex offender's internet access *after* he has completed his sentence." *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018). This is important as "the driving concern of the Court was the imposition of a severe restriction on persons who had served their sentence and were no longer subject to [] supervision []." *Id.*

Several courts have determined that the *Packingham* holding is limited to post-sentence penalties. In *Halverson*, the court found that "*Packingham* does not [] apply to the supervised-release context." *Halverson*, 897 F.3d. at 658. In *Halverson*, a condition of his supervised release prohibited him from "subscrib[ing] to any computer online service" or "access[ing] any Internet service during the length of his supervision." *Id.* at 650. Despite the broad nature of the restriction, the court did not find a violation "because supervised release is part of [his] sentence (rather than a post-sentence penalty)." *Id.* at 658. Similarly, the *Packingham* decision is inapplicable when an individual is on supervised release as he "is serving his criminal sentence, and the Court has broad discretion in establishing the conditions" of release. *United States v. Pedelahore*, 2017 U.S. Dist. LEXIS 173095, *3 (S.D. Miss. 2017).

Similarly, the *Packingham* decision is inapplicable to parole conditions. For First Amendment purposes, federal supervised release and state parole are similar. The parole system involves allowing offenders to "leave prison early … before the end of their sentence." *Morrissey*, 408 U.S. at 477-78. Similarly, supervised release allows offenders to serve criminal

sentences outside of prison. *Pedelahore*, 2017 U.S. Dist. LEXIS at *3. Both of these systems do not implicate the post-custodial restrictions at issue in *Packingham*. The *Packingham* decision does not apply to parole or supervised release conditions because they are not post-custodial like the restrictions imposed by the statute in *Packingham*. *Packingham* does not apply, therefore, Petitioner does not have a protected interest in internet access and no violation can be found.

2. Even if *Packingham* applies, the restrictions are valid as they are related to the underlying crime where the internet was used.

In *Packingham*, this Court proceeded with "the assumption that the statute is ... subject to intermediate scrutiny." *Packingham*, 137 S. Ct. at 1736. In order to pass muster under intermediate scrutiny, a statute must be "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The law can "not burden substantially more speech than necessary to further the government's legitimate interests." *Id*.

Even in jurisdictions that have found the intermediate scrutiny of *Packingham* applies to parole conditions, not all internet use restrictions violate the First Amendment. In applying intermediate scrutiny to conditions which restricted a parolee's access to social media and other websites, the court noted the lack of connection between the restrictions and the crime. *Yunus v. Lewis-Robinson*, 2019 U.S. Dist. LEXIS 5654, *4, *53 (S.D. N.Y. 2019). The court stated that parolee's crime, kidnapping of an unrelated minor, "did not involve the internet, social media, the exchange of electronic messages, cell phones, or computers." *Id*. at *2. Thus, the conditions "burden substantially more speech than necessary" and "fail intermediate scrutiny." *Id*. at *53.

ROSA's restrictions, as applied to Petitioner, survive intermediate scrutiny as they are related to the underlying crime and, therefore, do not "burden substantially more speech than necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486. Petitioner

did use the internet and related technology to facilitate commission of the crime. Petitioner "communicated with the child through the high school's email system, and through text messages on her cellular telephone." R. 5. Therefore, this case is different from *Yunus,* where the crime was completely unrelated to internet access and no form of social media or website was used in commission of the crime. *Yunus,* 2019 U.S. Dist. LEXIS *53. ROSA's restrictions, as applied to Petitioner, withstand intermediate scrutiny because they do not burden more speech than is necessary to ameliorate the dangers of recidivism posed by sex offenders.

C. ROSA's regulations do not violate the Fourteenth Amendment's Due Process Clause because there is no right to be free from conditions of parole and, even if there was, the Board did not act in an arbitrary or capricious manner.

Petitioner's rights under the Fourteenth Amendment's Due Process Clause were not violated by ROSA. First, there is no recognized Due Process right to be free from conditions of parole. Second, even if there is a recognized Due Process right, the conditions imposed by ROSA do not violate it because they were not imposed in an arbitrary or capricious manner.

1. There is no Due Process right to be free from conditions of parole.

The Fourteenth Amendment provides, in relevant part, that no State shall "deprive any person of life liberty, or property without due process of law." U.S. Const., amend. XIV, § 1. While "parolees are [] not without constitutional rights," their liberty interests are limited by their status as parolees. *United States ex rel Sperling v. Fitzpatrick,* 426 F.2d 1161, 1164 (2d Cir. 1970). In cases involving the rights of parolees, courts have found no protected liberty interest. *Barna v. Travis,* 239 F.3d 169, 171 (2d Cir. 2001) ("plaintiffs have no liberty interest in parole."); *Pena v. Travis*, 2002 U.S. Dist. LEXIS 24709, *35 (S.D.N.Y. 2002) ("plaintiff had no liberty interest in early release from parole"). Similarly, there is no "protected liberty interest in being free from special conditions" of parole. *Pena,* 2002 U.S. Dist. LEXIS *37.

Petitioner has no protected liberty interest in being free from the special conditions of parole and, therefore, enjoys no Due Process protections. The purpose of Due Process is to "protect a substantive interest to which the individual has a legitimate claim of entitlement." *Cusamano v. Alexander*, 691 F. Supp. 2d 312, 319 (N.D.N.Y. 2009) (citing *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)). Petitioner has "failed to identify a protected liberty interest" in being free from special conditions of parole and her Due Process claim must necessarily fail. *Id*. at 319.

2. Even if a Due Process right is recognized, it is not violated as the Board did not act in an arbitrary and capricious manner.

Even if this Court recognizes a liberty interest in the imposition of special conditions of parole, those liberty interests are not infringed "in the absence of a showing that the board or its agents acted in an arbitrary and capricious manner." *Boddie v. Chung*, 2011 U.S. Dist. LEXIS 48256, *5 (E.D.N.Y. 2011). The Board retains substantial interests even after "a convict is conditionally released on parole." *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972). While "a parolee should enjoy greater freedom in many respects than a prisoner, we see no reason why the Government may not impose restrictions on the rights of the parolee that are reasonably and necessarily related to the interests that the Government retains after his conditional release." *Id*.

The regulations imposed on Petitioner are "reasonably and necessarily related to the interests the Government retains after … conditional release" and were not imposed in an arbitrary or capricious manner. *Id*. The sex offender registration requirement is related to the Government's interest in "protecting vulnerable populations and … the public, from potential harm." R. 19. Due Process challenges to sex offender registrations requirements have only been successful when the underlying offense is not something thought of as a sex crime. *Yunus v. Robinson*, 2018 U.S. Dist. LEXIS 110392, *62-63 (S.D.N.Y. 2018); *People v. Diaz*, 150 A.D.3d

60, 65-66 (N.Y. App. Div. 2017). Petitioner's crimes are all sex offenses and, therefore, the sex offender registration requirement was not imposed in an arbitrary or capricious manner.

The driver's license suspension was not arbitrary and capricious. In a case where the plaintiff "used a motor vehicle to commit [his crime]" the court found that the Parole Board "did not act arbitrarily and capriciously in imposing [the] conditions" which "prevent[ed] him from obtaining a driver's license [] or being a passenger in a motor vehicle without [] permission." *Yunus*, 2018 U.S. Dist. LEXIS at *106-107. Like the offender in *Yunus*, Petitioner used a car to commit her offenses; sexual misconduct occurred in the car itself and the car was used to transport the victim. R. 5. The condition in *Yunus* was even more broad than the driver's license suspension imposed here and it was still upheld by the court. Therefore, the driver's license suspension imposed on Petitioner was not imposed in an arbitrary and capricious manner.

The ban on certain forms of internet access was not arbitrary and capricious. The legislature recognized that advancements in technology "provide an opportunity for convicted sex offenders on probation or parole to circumvent supervision" by using the anonymity provided by the internet to target minors "thereby undermining their treatment and increasing their risk of recidivism." R. 20. Therefore, the conditions, which target websites used by minors and the "types of offenses committed on the internet," are reasonably and necessarily related to goals of preventing recidivism and harm to the public. R. 20.

The restriction on entering school grounds was not arbitrary and capricious. Courts have found that similar restrictions, which prohibit sex offenders from coming with 1,000 feet of school grounds, are "rationally connected to a legitimate purpose of protecting children." *Williams*, 979 N.Y.S.2d at 502. These types of restrictions "create a buffer around schools" and,

therefore, "lessen [] contact with children." *Id*. at 503. Therefore, this condition furthers the Board's legitimate interest in protecting children and is not arbitrary and capricious.

None of the regulations were imposed by the Board in an arbitrary and capricious manner as they are all related to legitimate interests the State retains "when a convict is conditionally released on parole" like protecting the public and preventing recidivism. *Birzon*, 469 F.2d at 1243. Consequently, Petitioner's Fourteenth Amendment Due Process claim necessarily fails.

II. The ROSA regulations and special conditions of parole are constitutional under the Ex Post Facto Clause because they do not have a detrimental effect as applied to Petitioner.

Article I, Section 10 of the Constitution states that "No State shall… pass any… ex post facto Law." *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995). A law only violates the Ex Post Facto Clause if the law is both retroactive and has a detrimental impact on the individual to which it is applied. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). In *Beazell v. Ohio*, 296 U.S. 167 (1925), this Court determined that the Ex Post Facto Clause applies to laws which: (1) make conduct criminal that was innocent when it occurred, (2) aggravate a crime or make it greater than it was when the crime occurred or (3) change the punishment and inflict a greater punishment than the law when the crime occurred. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

A. None of the ROSA regulations increase the punishment Petitioner received.

The only violation that Petitioner could argue applies to ROSA would be the third category, an increase in punishment; however, the punishment that Petitioner received for her crimes is not increased by the ROSA regulations, and thus there is no Ex Post Facto violation. The Board concedes that ROSA's requirements are being applied to Petitioner retroactively; however, retroactivity is not the end of the inquiry because the law must still have a detrimental effect. An individual is detrimentally affected by a law that causes "the measure of punishment proscribed by the later statute" to be "more severe than that of the earlier statute." *Morales*, 514

U.S. at 505. Therefore, because Petitioner's sentence was not made more severe by the ROSA regulations there is no Ex Post Facto violation.

To determine if a law violates the Ex Post Facto Clause this Court has adopted the "intent-effects" test. *Williams*, 979 N.Y.S.2d at 497 & 499. The test requires a law to have both the purpose and effect of enhancing an individual's sentence before it can be considered to violate the Ex Post Facto Clause. *Id*. Under the first prong, the court considers whether the legislature that enacted the statute intended the statute to be punitive or civil. *Id*. at 497. Under the second prong, the court considers whether the party challenging the statute has provided "the clearest" proof that the regulations are so punitive that they must constitute punishment, despite the legislature's stated purpose. *Id*. at 499. The court considers the seven factors from *Kennedy v. Mendoza-Martinez* when determining if there is a punitive effect, including:

> "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned."

Id.; *Smith v. Doe*, 538 U.S. 84, 97 (2002).

1. Under the intent-effects test, Petitioner's punishment was not enhanced by ROSA's regulation prohibiting her from entering school grounds.

A prohibition from entering school grounds can still be considered civil when some factors weigh toward a punitive intent. For example, in *Williams,* the parolee claimed an Ex Post Facto violation by the retroactive application of a statute that prohibited him from coming within 1,000 feet of school property. *Williams,* 979 N.Y.S.2d at 497. Under the intent prong, the court considered the legislature's purpose in enacting the Sexual Assault Reform Act regulations. *Id*. at 497-99. The legislature's stated purpose showed their intent to protect children. *Id*. at 499. The

law's location within the "penal law" did not automatically make it punitive. *Id*. Under the effects prong, the effect of the statute was not a banishment, and thus no historical punishment arose from the regulation. *Id*. 500-01. While factor one weighed in favor of the offender the level of restraint caused was not enough to make the regulation punitive. *Id*. at 501-02. The fact that the regulation had no effect on the amount of time that the offender spent in prison weighed heavily toward a non-punitive effect. *Id*. at 501. Under factors six and seven, the fact that the regulation only applied to certain sex offenders restricted it enough that it did not override its non-punitive intent. *Id*. at 502-03. After holding that the remaining factors weighed against the offender, the court held that there was no Ex Post Facto violation. *Id*. at 503.

In this case, under the intent prong, the Lackawanna legislature provided a legislative purpose section. R. 19. That section explains that ROSA was intended to enable law enforcement to monitor sex offenders and to protect the public. *Id*. While the ROSA regulations fall within the corrections law, they are still non-punitive. R. 27-44. Under the effects prong, the school zone regulation does cause Petitioner to travel further to work, however, longer travel does not rise to the level of a historical punishment. R. 18. The inconvenient route caused by the regulation is not punitive, especially considering that the regulation had no impact on the time that Petitioner spent in prison. R. 18. This regulation is restricted so that certain requirements only apply to certain types of offenders; thus the effect does not override the intent. R. 33. While factors three and six weigh in favor of Petitioner, factor four weighs toward a non-punitive effect. Overall, this regulation does not punish Petitioner and does not violate the Ex Post Facto Clause.

2. Under the intent-effects test, Petitioner's punishment is not enhanced by ROSA's registration regulation.

Some harshness resulting from a retroactive registration regulation does not automatically make it punitive. For example, in *Doe v. Pataki*, 120 F.3d 1263, 1265 (2nd Cir. 1997), parolees

challenged the retroactive application of a statute that required them to register while on parole. Under the intent prong, after analyzing the act's preamble, the court held that the legislature's purpose in enacting the law was to enhance law enforcement capabilities and to protect the public. *Id*. at 1285. The individual evaluation required to determine the regulation's requirements indicated a non-punitive purpose. *Id*. Under the effects prong, the effect of the law did not overpower the statute's stated purpose. *Id*. Factors two and four also weighed in favor of a non-punitive effect. *Id*. While registration every 90 days for at least 10 years may be difficult, the effect is not so severe that it makes the law punitive. *Id*. Thus, the regulation was not punitive and there was no Ex Post Facto violation. *Id*.

In this case, under the intent prong, the legislative purpose section of ROSA makes it clear that the legislature intended the regulations to enable law enforcement to monitor sex offenders and to protect the public. R. 19. The application of Lackawanna's registration regulation is determined on an individual basis, which evinces the legislature's non-punitive intent. R 33-34. Under the effects prong, the legislature's stated purposes are not overridden by the effect of the regulation partially because factors two and four weigh against it. Moreover, the registration regulation applied to Petitioner is not even as severe as the regulation applied to the offender in *Doe*; thus, the inconvenience to Petitioner does not make this regulation punitive. *Id*. Therefore, the registration regulation is not punitive and there is no Ex Post Facto violation.

3. Under the intent-effects test, Petitioner's punishment is not enhanced by ROSA's internet regulations.

When an internet regulation is intended to protect the public it must be nearly total to still be considered punishment. For example, in *People v. Patton*, No. 341105, slip op at 6 (Mich. Ct. App. Aug. 2, 2018), the parolee argued that there was an Ex Post Facto violation in retroactively applying a statute that required him to provide the parole board with his internet identifiers.

Under the intent prong, the court held that the legislature's purpose was not punitive because the statute's stated purpose was to provide the police with an offender monitoring tool. *Id*. at 7. Under the effects prong, the law was not so punitive that it outweighed the legislature's purpose. *Id*. Factor one weighed toward a non-punitive effect because the offender was not barred from using the internet altogether. *Id*. at 8. Despite some inconvenience to the offender, factor four weighed toward a non-punitive effect. *Id*. 8-9. The regulation was not excessive given that internet identifiers are not updated often. *Id*. Thus, the court held there was no Ex Post Facto violation because the regulation was not punitive. *Id*.

In this case, under the intent prong, ROSA indicates that the regulations were created for the purpose of protecting the public and to aide law enforcement in monitoring sex offenders. R. 19. Under the effects prong, some inconvenience to Petitioner in providing her internet identifiers is not so excessive that it causes the regulation to become punitive. Factor one weighs toward a non-punitive effect because Petitioner is not entirely prohibited from using the internet and she will not need to update her identifiers often. R. 24-25. Factor four weighs toward a non-punitive effect because this regulation is not aimed at retribution or incapacitation. Thus, the registration regulation is not punitive and there is no Ex Post Facto violation.

4. Under the intent-effects test, Petitioner's punishment is not enhanced by ROSA's license suspension regulation.

Despite any inconvenience restrictions on driving are not punitive. For example, in *Mannelin v. Driver of Motor Vehicle Services Branch*, 31 P.3d 438, 447, (Or. Ct. App. Aug. 15, 2001), the parolee argued that retroactive application of a statute lengthening the period of his license suspension violated the Ex Post Facto Clause. Under the intent prong, the court considered the general purpose of the statute and held that the intent of the legislature was to prevent individuals from driving who had shown a disregard for others. *Id*. at 444. The court held

this purpose was civil not punitive. *Id*. Under the effects prong, while not being able to drive is a restraint, prohibition on driving has historically been considered civil not punitive. *Id*. at 445. The punitive effect was not excessive compared to the statute's intent to assure safe travel, especially given that this regulation applied to individuals whose crime involved the use of a motor vehicle. *Id*. Thus, the court concluded there was no Ex Post Facto violation because the regulation was not punitive. *Id*. at 447.

In this case, under the intent prong, the Lackawanna legislature provided a section of ROSA explaining the purpose of the regulations was to enhance law enforcement's ability to monitor sex offenders and to protect the public. R .19. Under the effects prong, while Petitioner not being able to drive is a restraint, prohibiting someone from driving is considered civil, not punitive. Moreover, similarly to the offender in *Mannelin*, the inconvenience to Petitioner of not being able to drive is not so excessive as to cause this civil regulation to become punitive. Notably, Petitioner also used her vehicle in the commission of her crime which makes the application of this regulation even less excessive as applied to her. R. 5. Thus, this regulation is not punitive and there is no Ex Post Facto violation.

In conclusion, requiring Petitioner to avoid entering a school zone is not a punishment because the factors weigh in favor of a non-punitive effect. Likewise, requiring Petitioner to register is not a punishment because it does not cause a heavy burden on Petitioner under the conditions of the Lackawanna regulation. The ROSA regulation requiring Petitioner to provide her internet identifiers is not punitive because it does not eliminate internet use altogether, and thus is not excessive. Lastly, suspending Petitioner's driver's license is not punitive because removing someone's license is civil. Therefore, none of the ROSA regulations applied to Petitioner are punishments for her crimes and there is no Ex Post Facto violation.

B. Petitioner may argue that because these regulations restrict her they constitute punishment, however, that is incorrect because they do not alter the punishment for her crime.

Petitioner may argue that the ROSA regulations are punitive because they limit her freedoms on parole; however, that is irrelevant because her period of incarceration, the punishment in this case, was not increased. Regulations increase punishment when they extend the sentence for a crime. *See Peugh v. U.S.*, 569 U.S. 530, 544 (2013); *Weaver*, 450 U.S. at 35-36 (holding that regulation altering the ability to earn good time credit for early release increased punishment); *Williams*, 979 N.Y.S.2d at 501 (noting that failure of regulation to increase prison time weighed against punitive effect). Thus, because none the ROSA regulations increase the amount of time Petitioner spent incarcerated there is no Ex Post Facto violation.

This Court declined to hold that a statute violates the Ex Post Facto Clause when it lengthens the time between parole hearings because the chance that the punishment would be increased is minute. *Morales*, 514 U.S. at 499-500. In *Morales*, this Court held that there was only a small chance of increasing the amount of time an offender would spend in prison, because the regulation only applied to certain offenders, was limited in scope, and could be removed. *Id*. at 509-12. When a regulation creates only a "speculative and attenuated risk of increasing" the punishment for a crime it does not violate the Ex Post Facto Clause. *Id*. at 514.

In this case, the ROSA regulations cause even less chance that the Petitioner would spend more time in prison than the case in *Morales*. Moreover, the ROSA regulations are only applied to certain offenders, have limitations on their scope and can be removed by the signature of certain individuals. R. 23-26. Thus, the ROSA regulations do not rise to the level of something this Court has recognized as punishment. Thus, there is no Ex Post Facto violation.

C. Reading the Ex Post Facto Clause in a way that causes non-punitive regulations to be in violation would impair legislatures' ability to protect the public.

Prohibiting legislatures from making retroactive legislation to protect society would permit sex offenders, who have been determined to have a high rate of recidivism, to continue to prey on vulnerable individuals. *Pataki*, 120 F.3d at 1266. Statutes like ROSA are often passed to enhance the ability of law enforcement to monitor sex offenders with a risk of recidivism and to protect the public. *Id*. at 1285. A prospective application would allow some offenders to escape monitoring based on their crime date. Thus, interpreting non-punitive regulations, to violate the Ex Post Facto Clause would only impair the ability of state legislatures to protect the public.

1. The Lackawanna legislature carefully considered Lackawanna's need for the ROSA regulations before enacting the statute.

In this case, when the Lackawanna legislature approved ROSA they included a purpose section detailing the considerations that motivated ROSA. R. 19-21. They stated that their purpose was to protect society from recidivism posed by sex offenders' repetitive and compulsive behavior. *Id*. The legislature noted that the ability of law enforcement to protect the public from sex crimes was being impaired by the current laws because they provided officers with little information about sex offenders. *Id*. The legislature considered the rights of offenders, but recognized that those rights are balanced against the state's interest in protecting society. *Id*.

The legislature went on to note that sex offenders with child victims are particularly important to monitor, and thus special regulations for these offenders are necessary. *Id*. at 20. The legislature acknowledged the technological advances, that have allowed sex offenders to prey on children online. *Id*. The legislature again considered the effect of a regulation on offenders and concluded that restrictions on internet use are only appropriate for offenders who use the internet in the commission of their crime. *Id*. at 21. Thus, the legislature considered

society's need for protection, while balancing the effect of regulations on offenders, before determining that Lackawanna needed better protections from sex offenders. *Id*.

2. Petitioner may argue that ROSA is unconstitutional because collectively the regulations are substantial, but that is incorrect because punitive effect is not determined from an offender's perspective.

Petitioner may argue that the ROSA regulations together are such a restriction that they have to be considered punitive, and thus violate the Ex Post Facto Clause. Petitioner may point to the distance that she must travel to work, and the fact that she has to bike this distance, to say that she is being punished by the ROSA regulations. Petitioner may also argue that the internet regulations are so restrictive on her that they have to be considered punishment despite the legislature's stated purpose. Taken together, Petitioner may argue that these regulations as applied to her exemplify how punishment can result from collective regulation.

However, that misunderstands how punishment, and Ex Post Facto Clause application, are considered. The determination of whether a particular law is so punitive as to overcome the legislature's stated purpose is not conducted from the perspective of the offender. *Pataki*, 120 F.3d at 1279. When a statutory scheme has a regulatory purpose that regulatory purpose cannot be overcome just by a harsh impact on the offender. *Id*. Statutes have been held to comply with the Ex Post Facto Clause despite a harsh application to the offender. *Id*. Thus, the inconvenience to Petitioner does not result in a punitive law and there is no Ex Post Facto Clause violation.

CONCLUSION

For the foregoing reasons Respondent respectfully requests that this Court affirm the judgment of the Court of Appeals for the Thirteenth Circuit.