No. 01-463

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 RESPONDENT**

Team # 2

Counsel for Respondent

## QUESTIONS PRESENTED

I. Whether the registration requirements and special conditions imposed under ROSA violate the First Amendment's right to free speech or the Fourteenth Amendment's due process clause; and

II. Whether the registration requirements and special conditions under ROSA violate the Ex Post Facto Clause of Article 1 §10 of the United States Constitution.

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## STATEMENT OF THE CASE

Petitioner Mary Guldoon is a convicted sex offender who brings claims of Constitutional violations against the State of Lackawanna. R. at 2-4. Respondent Lackawanna Board of Parole, in accordance with its duties and obligations under duly-passed Lackawanna Correction Law § 168 and Executive Law § 259, faithfully executed its duty to assign a sex offender classification to Petitioner upon her conditional release from prison. R. at 23-26, 37.

Petitioner now claims that the registration requirements and special conditions imposed by the Registration of Sexual Offenders Act ("ROSA") are a violation of her First and Fourteenth Amendment rights. R. at 4. This presents a challenge to Lackawanna's ROSA as-applied to Petitioner. Specifically, Petitioner claims that her right to free speech, her right to freedom of travel, and her right to substantive Due Process have been violated. *Id*. She also claims that the law itself violates her rights under the Ex Post Facto Clause of the Constitution.

The District Court for the Middle District of Lackawanna, finding no merit in Petitioner's claim, granted Respondent's motion to dismiss for failure to state a claim for which relief can be granted. *Mary Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1, 3 (M.D.Lack. 2019). Because this motion was submitted with the Petitioner's Pre-sentence Report attached as the district court considered the motion as a summary judgment. *Id*. The Court of Appeals for the Thirteenth Circuit affirmed. Petitioner has appealed, seeking an invalidation ROSA. *Mary Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1 (13th Cir. 2019).

## SUMMARY OF THE ARGUMENT

Respondent, comprising sworn officials of the Great State of Lackawanna, adhere to and enforce the duly-passed laws and regulations against convicted sex offenders. The laws and regulations at issue are Correction Law § 168 and Executive Law § 259 ("ROSA"). Both of these sections address Lackawanna's interest in protecting the public form convicted sexual predators. It does so by, among other things, requiring convicted sex offenders to register with the state, restricts their driving privileges, restricts physical access to schools and learning institutions, and prohibits them access to social media websites that allow persons under the age of eighteen to make profile.

Petitioner contests the restrictions contained in ROSA. Under 42 U.S.C. § 1983, she claims that her First Amendment and her Fourteenth Amendment rights have been violated. R. at 4. She also argues that ROSA is a violation of her rights as secured under the Ex Post Facto Clause of the Constitution. *Id.* In her argument, Petitioner claims significant burdens on herself and her family as a result of ROSA's restrictions. R. 15-17. She labels the restrictions imposed upon her as a result of her conviction as unreasonable restrictions. *Id.* As is shown below, her claims against ROSA are without merit.

First, states are permitted to impose greater restrictions on the liberty of parolees than those imposed on citizens generally. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Those restrictions are generally found to be constitutional when they are reasonably related to a legitimate state interest. *See infra* Part IA. Petitioner cannot, therefore, show that the restrictions imposed on her under ROSA are unreasonable given the crime of which she was convicted and the surrounding circumstances. Furthermore, even though Petitioner has failed to show that the restrictions placed on her are unreasonable, ROSA still survives the application of intermediate scrutiny—as is the

standard for this type of statute— and thus, Petitioner's claim that ROSA violated her Constitutional rights as applied to her fails. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Second, Petitioner's Due Process argument is equally meritless. In order to show ROSA violates her Due Process, Petitioner must show that it is not narrowly tailored to service a legitimate government interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973). This she cannot do. Lackawanna has a legitimate interest in preventing adult sexual contact with children as well as the recidivism of sex offenders. ROSA's standards as applied differ based on the classification of the sex offender and the circumstances surrounding the offense. Furthermore, discretion is granted to officers of the prole board to determine when some restrictions should be relaxed. ROSA only restricts those websites that would allow Petitioner clear and easy access to minors. This demonstrates a legitimate interested paired with narrow tailoring.

Third, Petitioner's claim that ROSA violates the Ex Post Facto Clause fails. Petitioner cannot show that the registration requirement and special conditions are punitive as opposed to civil in nature. *Smith v. Doe*, 538 U.S. 84, 97 (2003). The requirement that Petitioner register as a Level II Sex Offender alerts the community and law enforcement of their presence, and aids in preventing recidivism. Moreover, the special conditions limit the sex offender from having access to tools and areas that would most contribute to the petitioner reoffending. In sum, ROSA is a civil remedy that seeks to protect the community while also helping Petitioner adjust to life outside of prison by limiting access to factors that lead to the offenses. For these reasons and as enumerated below, this Court should affirm the lower courts' ruling in favor of Respondent.

## STATEMENT OF THE FACTS

Mary Guldoon ("Petitioner") is a Level II Sex Offender that currently resides in Lackawanna. *Mary Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1 (M.D.Lack. 2019). On December 7, 2010 Mrs. Guldoon was arrested in her classroom at Old Cheektowaga High School after being caught engaging in sexually explicit acts with her student-victim (herein after, "B.B."). R. at 5. On January 1, 2011 Mrs. Guldoon pleaded guilty to rape in the third degree (Penal Law §130.25), criminal sexual act in the third degree (Penal Law §130.40), and sexual misconduct (Penal Law §130.20). *Id.* After pleading guilty, on January 31, 2011 Mrs. Guldoon was given an indeterminate sentence of ten-to-twenty years' incarceration. *Guldoon*, 999 F. Supp.3d at 1-2. After serving six years of her sentence Mrs. Guldoon was released to serve five years' parole. R. at 2.

The acts for which Mrs. Guldoon was convicted spanned over a two-month period starting in October of 2010 and ending with her arrest in December of 2010. R. at 5. During this time Mrs. Guldoon repeatedly sexually assaulted B.B., a 15-year-old student in her class; the assaults occurred in her classroom, in her car, and in her house. *Id*. In the commission of her crimes, Mrs. Guldoon would use her car to help facilitate the sexual encounters, by driving B.B. to and from her house and, at times, engaging in intercourse in the car itself. R. at 7. An investigation conducted by the Old Cheektowaga Police Department determined that Mrs. Guldoon had frequently communicated with B.B. through the high school's email system, text messages, and face-to-face in the classroom. R. at 5. The messages exchanged between Mrs. Guldoon and B.B. were used with the purpose of facilitating the sexual assaults. R. at 5-6.

During Mrs. Guldoon's incarceration, Lackawanna enacted the Registration of Sex Offenders Act, Executive Law § 259-c ("ROSA"). *Guldoon*, 999 F. Supp.3d at 2. The newly

enacted ROSA imposed a registration requirement and applied special conditions on any person found guilty of a sex offense involving a victim that is under the age of eighteen. R. at 2.

Pursuant to §168-f, a sex offender has the duty to register at least ten days prior to the imposition of parole. R. at 33. The special conditions that Mrs. Guldoon is subject to include a restriction on distance she may come within school grounds, recession of driving privileges, and ban from using "commercial social networking sites."

Under distance restriction, Mrs. Guldoon is prohibited from coming within 1,000 feet of a school. *Id.* at 45. Under §259, "school grounds" include any public, private, parochial, intermediate, junior high, vocational, high school, and any area accessible to the public within 1,000 feet. R. at 45. The Driving restriction limits Mrs. Guldoon from operating a motor vehicle for a period of twenty years, or as long as she is registered, whichever is shorter. R. at 23. Lastly, Mrs. Guldoon is prohibited from using commercial networking sites. Commercial networking sites under ROSA includes sites that permit persons under the age of eighteen to be registered users for the purpose of establishing personal relationships. R. at 25. The restriction on using social networking sites extends to sites that allow users to create profiles containing personal information that is available to the public, engage in direct or real-time communications with others, and communicate with persons over the age of eighteen. *Id.*

Mrs. Guldoon contends that the requirements under ROSA violate her First Amendment right to free speech, Fourteenth Amendment's freedom of travel, and right of substantive due process. R. at 4. Further, Mrs. Guldoon claims that ROSA violates the Ex Post Facto Clause of Article 1, §10. *Id*. These claims asserted by Mrs. Guldoon were dismissed on summary judgment by The Middle District Court of Lackawanna. *Guldoon*, 999 F. Supp.3d at 10.

## ARGUMENT

### I. Petitioner's claim fails because she cannot show ROSA unreasonably violates her First Amendment rights

Petitioner claims a violation of her First Amendment rights due to the restrictions imposed on her by ROSA. R. at 3, 4. In particular, she claims the ban on accessing social networking websites is a violation of her right to free speech and presents an unacceptable burden to her family R. at 13-15, 16-17. Her claim fails as a matter of law because ROSA's restrictions upon Petitioner are reasonably related to the state's interests in reducing recidivism and preventing harm to the public. Furthermore, the intermediate scrutiny applied to ROSA does not defeat Lackawanna's legitimate state interest. Finally, her First Amendment claim is meritless due to self-imposed restrictions greater than those levied by ROSA.

#### *A. Parolees may be restricted more than other citizens where those restrictions are related to a state's legitimate interests.*

The state of Lackawanna has an interest that is reasonably related to its promulgation and imposition of the restrictions under ROSA. The Supreme Court has ruled affirmatively on the concept of the limitation of rights of parolees. In *Morrissey v. Brewer*, the Court held that the "[s]tate properly [may subject a parolee] to many restrictions not applicable to other citizens . . . the liberty of a parolee [is] indeterminate." 408 U.S. 471, 482 (1972). *See also. Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

All circuits use a case-by-case standard that recognizes the states' legitimate interests in protecting the public and reducing recidivism when balanced against a parolee's First Amendment rights. *See United States v. Cardona*, 903 F.2d 60, 62 (1st Cir. 1990); *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972); *United States v. Hill*, 967 F.2d 902, 908-09 (3d Cir. 1992); *United States v. Henson*, 22 F. App'x 107, 112 (4th Cir. 2001); *Johnson v. Owens*, 612 F. App'x 707, 711

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Finally, this Court has determined that the specialized nature of the criminal justice system affords or grants significant deference to corrections officials charged with its mission. Because this Court has further described parolees as "still in custody" (*Morrissey v. Brewer*, 408 U.S. 471, 483 (1972), it necessarily follows that the Court should defer to "the choice made by corrections officials—which is, after all, a judgment 'peculiarly within [their] province and professional expertise.'" *Turner v. Safley*, 482 U.S. 78, 92 (1987) (superseded in statute). At the very least, the decision of these corrections officials "should not be lightly set aside." *Id.* It is with these standards in mind that this Court should find Lackawanna's ROSA does not violate Petitioner's First Amendment rights.

***B. The imposition of restrictions under ROSA are reasonably related to the state's interests.***

Courts have found the restrictions imposed by the government "reasonable and necessary" where a connection between the restriction and the crime committed can be established. *See Johnson* at 713 (where prohibition to access computers, the Internet, and photography materials was found to violate the appellant's First Amendment rights because his crime of aggravated rape "had no connection to computers, the Internet, photography, or minors."); *United States v. Bird*, No. 95-20792, 1997 U.S. App. LEXIS 33988, at *50-51 (5th Cir. Sep. 24, 1997) (where the

supervised release conditions requiring parolee to stay 1,000 feet from abortion clinics following his conviction for trespass and intimidation at said clinics was "reasonably necessary" and "a sufficient government interest to justify" the limitation on the parolee's First Amendment rights); *United States v. Henson*, 22 F. App'x 107, 112 (4th Cir. 2001) (where restriction from possessing any sexually-explicit material was appropriate for sex offender convicted of receiving more than 100 images of child pornography); *United States v. Widmer*, 785 F.3d 200, 205-06 (6th Cir. 2015) (where right of association between sex offender and daughter was properly restricted because offender possessed "sadistic images" of "prepubescent children in sexual contact with other adults").

Applied here, it can be established that the restrictions imposed by ROSA were reasonable and necessary in light of the crime to which Petitioner pled guilty and the means employed by Petitioner to execute rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. R. at 5-6, 12-13. That Petitioner initiated sexual conduct with a fifteen-year-old student is not in dispute. The subsequent Pre-sentence Report found several instances of electronic contact between Petitioner and B.B. as well as sexual contact conducted at the school, her home, and in her personal vehicle. R. at 5-6. It can therefore be concluded from the record that Petitioner used electronic mediums to lure B.B. into surreptitious rendezvous; that Petitioner utilized her personal vehicle to meet with—and possibly transport—B.B. to have prohibited sexual contact; and that Petitioner had prohibited sexual contact on school grounds with B.B.. The fact that no pornographic material was found to be exchanged in the text messages or emails is irrelevant in this context because Petitioner used both her professional and private email to establish sexual meetings with her student. Upon release and pursuant to the protections in ROSA, Petitioner was restricted from using social networking websites where individuals under the age of eighteen years

old could also establish profiles. She was also restricted in accessing school grounds and from driving a vehicle. R. at 9-10.

These restrictions are reasonably necessary to Lackawanna's interest in protecting the public and preventing recidivism of Petitioner. Preventing contact between Petitioner and B.B. or, in the alternative, between Petitioner and other vulnerable youths, is both a state interest and a state responsibility. *See Gallo-Loeks v. Reynolds*, 34 F. App'x 644, 649 (10th Cir. 2002). The restrictions placed upon Petitioner are not inapposite from the case in *Johnson*. When—as in *Johnson*—restriction of Internet access is unreasonable where the Internet played no role in the sexual assault, it naturally follows that where the Internet does play a role in the assault—as in the case at bar—an Internet restriction is likely to be reasonable.

***C. ROSA's time, place, manner restriction easily satisfies intermediate scrutiny.***

Even if this Court were to find Petitioner's restrictions are unreasonable, ROSA still meets the requirements laid down as a proper Constitutional restriction on Petitioner's Internet access. A restriction on access to the Internet is a time, place, manner restriction where the law itself is content neutral. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Court has "often noted that restrictions of this kind [where intermediate scrutiny is applied] are valid provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information." *Id.* Buttressing this, the Ninth Circuit deftly applied this standard under very similar circumstances in *Doe v. Harris*. 772 F.3d 563 (9th Cir. 2014). There, the court held that although the Californians Against Sexual Exploitation Act "burdens protected speech, nothing in the Act suggests that the Act's purpose was to disfavor any particular viewpoint or subject matter. We therefore conclude that 'the

appropriate standard by which to evaluate the constitutionality of [the Act] is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.'" *Id*. at 576.

Here, ROSA easily satisfies intermediate scrutiny. First, ROSA makes no distinction as to the content expressed or received in its prohibition of social networking access; rather, ROSA simply restricts access to such sites for those designated as level II sex offender. R. at 24-25. Regardless of the messages Petitioner seeks to express, she is prohibited from accessing sites that would allow her to communicate with persons under the age of eighteen. Second, ROSA restricts access to sites that could also host minors—that is, under the age of eighteen. *Id*. It makes no restrictions against websites or services that do not involve minors making online profiles nor does ROSA focus on the content being hosted. *Id*. Furthermore, it is serving the significant government interest of protecting minors from convicted sex offenders. *See Gallo-Loeks v. Reynolds*, 34 F. App'x 644, 649 (10th Cir. 2002) (holding that protecting children from sexual predation is a "legitimate purpose"). Third, and in conjunction with the second prong, it leaves open ample alternative channels of communication. ROSA does not bar Petitioner from accessing job-seeking websites that do not also host minors. It also does not bar Petitioner from utilizing job-seeking services that are not Internet-based; Petitioner can utilize any building-based job-placement services (provided they are not situated in a school). Similarly, Petitioner is not restricted from accessing social media websites whose clients are exclusively over the age of eighteen. R. at 25. The fact that Petitioner has chosen not to utilize any of these other services does not make ROSA's prohibition a violation of her First Amendment rights nor does it constitute the court imposing an undue burden.

Finally, several circuits have established that "incidental interference with [a right] does not give rise to a constitutional claim if there is 'some justification' for the interference." *Williams v. Wisconsin*, 336 F.3d 576, 582 (7th Cir. 2003) (where a parole restriction interfering with a parolee's time and place of marriage plans was incidental and did not raise a Constitutional question as to his right to marry). *See also Wright v. MetroHealth Med. Ctr.,* 58 F.3d 1130, 1135-36 (6th Cir.1995); *Keeney v. Heath,* 57 F.3d 579, 580-81 (7th Cir. 1995); *Belleau v. Wall,* 811 F.3d 929, 943 (7th Cir. 2016); *Clutchette v. Procunier*, 497 F.2d 809, 813-14 (9th Cir. 1974); *Parks v. City of Warner Robins*, 43 F.3d 609, 613 (11th Cir. 1995). Here, the incidental interference that the Internet restriction has on Petitioner's job search, when weighed against the justification of the State's interest in protecting minors, fails to amount to a violation of her rights.

***D. Petitioner has self-imposed greater restrictions on herself than ROSA; her burdens are not the result of a court sanction.***

Petitioner submits claims of violation of her free speech because of the burdens placed upon her access to the Internet. R. at 25. However, many of the burdens of which she complains are self-imposed restrictions and not a direct result of her classification as a Sex Offender Level II. ROSA clearly defines the restrictions placed upon Petitioner due to her conviction for rape and classification as a Sex Offender, Level II. In pertinent part, ROSA proscribes that (1) Petitioner

> shall be prohibited from using the Internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purposes of promoting sexual relations with person under the age of eighteen, and communicate with a person under the age of eighteen . . . a 'commercial social networking website' shall mean any 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 . . . [and] (i) create webpages or profiles . . . (ii) engage in direct or real time communication . . . and (iii) communicate with persons over eighteen;

and (2) Petitioner "shall refrain from knowingly entering into or upon any school grounds . . . . " R. at 23-25. "School ground" is defined as "(a) in or on or within any building . . . or (b) any area

accessible to the public located within 1,000 feet of the real property boundary line comprising any such school . . . . " R. at 45.

Focusing on the Internet provisions, ROSA clearly delineates the limited and specific types of restrictions on Petitioner's Internet access. ROSA restricts those websites which could facilitate communication between Petitioner and under-aged persons who, in the eyes of the parole board, are at risk of being exploited by Petitioner. R. at 9. Nothing in ROSA can be construed as imposing a comprehensive ban on Internet use by Petitioner. Petitioner complains, however, that her restriction from social networking websites has led her and her family to forego all Internet access in the home and Internet-capable telephones. R. at 17. She further complains of the burden on her husband and daughter for their work and school requirements, respectively. *Id.*

That Petitioner and her family have decided to implement their own blanket-ban on Internet in their household is not an imposition placed on them by ROSA or the State of Lackawanna. Courts do not find merit where the burdens are not the result of restrictions imposed by the court itself. *Piasecki v. Court of Common Pleas*, No. 16-4175, 2019 U.S. App. LEXIS 5979, at *16 (3d Cir. Feb. 27, 2019). ROSA imposes a reasonable restriction upon Petitioner to not use social networking websites; however, this does not limit her husband or her daughter from having full access to the Internet for their own purposes and it certainly does not result in a court-imposed burden. *Id*.

Even if this Court were to determine that ROSA was the cause of Petitioner's family being subjected to restricted Internet access, Petitioner cannot validly assert a violation of their rights in her petition to this Court. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982) ("[P]laintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties") (citation

omitted); *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) ("Federal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons not parties to the litigation"). Therefore, Petitioner's affidavit decrying the burden of her family should not be considered as evidence supporting her First Amendment claim.

Petitioner has claimed that the restrictions imposed by ROSA and her status as a Level II Sex Offender have burdened her by causing her to take a circuitous route to her place of employment and forcing her to brave the dangers of a highway on a bicycle. This argument fails for two reasons. First, Petitioner and her family have made the conscious decision to live in an area that is flanked to the east and northeast by schools. R. at 18. No living restrictions are imposed upon Petitioner other than to provide updates to the parole authorities upon a change in address. R. at 30. Petitioner cannot reasonably complain about an enhanced restriction where she herself has voluntarily acted in a way that makes the effect of that restriction more pronounced.

Secondly, and for the same reasons as enumerated in Respondent's argument against a First Amendment violation, the unintended or incidental effects on Petitioner that results in her taking a longer route to work are collateral to her conviction and do **not** give rise to a constitutional claim if there is "some justification" for the interference. *See supra* Part IC. The incidental effects of Petitioner's route to work being less expeditious or more hazardous are not enough to invalidate the restrictions where these restrictions are serving legitimate state interest.

For the foregoing reasons, Petitioner's challenge of ROSA as a violation of her First Amendment necessarily fails.

## II. Petitioner's Due Process argument fails because ROSA is narrowly tailored to service a compelling state interest.

ROSA is narrowly drawn to serve a significant state interest. The Supreme Court has held that challenges for substantive Due Process affecting a fundamental right—such as the one at bar—

means that the regulation must serve a "compelling state interest" and be "narrowly drawn to express only the legitimate state interests at stake. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *see also Stanley v. Georgia,* 394 U.S. 557, 564 (1969) (establishing the First Amendment as a "fundamental right"). Here, these requirements are easily met.

### *A. ROSA does not violate Petitioner's Due Process rights because it is narrowly tailored to serve a State interest*

ROSA easily satisfies the standards as set forth above. First, Lackawanna has a compelling interest in safeguarding the public from those who would perpetrate illegal and unspeakable acts upon the State's youth. *See Gallo-Loeks v. Reynolds*, 34 F. App'x 644, 649 (10th Cir. 2002) (showing that protecting children from sexual predation is a "legitimate purpose"). Lackawanna, fearing the inexorable pace of technology in facilitating such predation, enacted ROSA to help keep convicted sex offenders as far from the State's youth as possible. R. at 20-21. The Internet restrictions in ROSA are designed to limit the Internet contact between sexual predators and children; the driving restrictions are tailored to ensure that Level II Sex Offender parolees—such as Petitioner—cannot utilize motor vehicles in the commission of furthering their sexual predation against minors; the registration requirements assist the public with information about sexual predators in their respective communities. R. at 23-26. All of the requirements complained of by Petitioner, while inconvenient for her, are serving the legitimate interest of protecting the public and youth from convicted sexual offenders.

ROSA is also narrowly tailored. First, the Internet restriction does not prohibit all Internet usage; rather, it prohibits Petitioner from accessing social networking websites that could be used to further prey on those under the age of eighteen. R. at 24-25. The restrictions of sexual offenders entering school grounds are limited to 1,000 feet and are waivable upon the discretion of a parole officer. R. at 24. Finally, most of the restrictions in ROSA are tailored to the level of "Sex

Offender" as determined by the parole board and influenced by the Pre-sentence Report. R. at 23-25. In this case, the parole board found the surrounding circumstances sufficient to warrant Sex Offender Level II status conferred upon Petitioner. R. at 5-6. The board found that Petitioner used personal and school electronics to facilitate Third-Degree Rape upon B.B.; Petitioner was also found to have engaged in sexual acts with B.B. in her car, in her home, and on school grounds. Had these circumstances not been present, the court may well have labeled Petitioner a Sex Offender Level I status, meaning only a restriction on her use of a car would be imposed upon parole. This discretion allows a court to tailor the parole restrictions to the crimes committed on a case-by-case basis. Here, the restrictions were clearly necessary.

Petitioner has attempted to argue that her seduction and third-degree rape of B.B. was brought on by a combination of depression and prescribed medication. R. at 13-14. In this argument, Petitioner attempts to assert that her actions were a "one-time" crime and that she is no longer a danger to Lackawanna's youth—that because she no longer poses a threat the restrictions placed upon her by ROSA are unreasonable. This is disingenuous in two respects. First, the standard for determining a restriction's Constitutional implications, as shown above, is not whether the parolee has the internal motivation to repeat the crime; rather, it is a balance between protecting the public from recidivism and limiting the access of the offender to the criminal means. Second, Petitioner offers no evidence—other than conclusions—that her methods of confronting the stresses in her personal life have evolved beyond victimizing youths. Petitioner has demonstrated a proclivity for responding to stress by taking advantage of under-aged students whom she is otherwise charged with guiding and protecting. And while Petitioner may now claim a steadier and manageable life, she has offered no conclusive evidence that a return of her depression or like circumstances would not also lead to a return of her victimization of Lackawanna's youths.

Having shown that ROSA is both serving a legitimate state interest of safeguarding the public from sexual offenders and that its means are narrowly tailored, both the District and the Appellate Courts properly granted summary judgment in favor of Lackawanna. The Supreme Court should affirm the lower courts' holding.

For the foregoing reasons, Petitioner's claims of violations of her First Amendment and Fourteenth Amendment rights fail. Accordingly, this Court should affirm the decision of the district and circuit courts for summary judgment in favor of Respondent.

## III. Lackawanna's Registration of Sex Offenders Act ("ROSA") does not violate Article 1 §10 Ex Post Facto Clause of the United States Constitution.

Lackawanna's Registration of Sex Offenders Act ("ROSA") does not violate the Ex Post Facto Clause of the United States Constitution by retroactively punishing prior criminal acts of sex offenders in Lackawanna. In order for criminal law to violate the Ex Post Facto Clause it must retrospectively apply to events occurring before indictment, and punishes the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The clause itself "is aimed at laws that . . . alter the definition of crimes or increase the punishment for criminal acts." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995).

### *A. The requirement that paroled sex offenders register with Lackawanna is civil in nature, therefore, the registration requirement under ROSA does not violate Ex Post Facto Clause.*

The requirement that the Petitioner register as Sex Offender Level II does not violate the Ex Post Facto Clause. In order for a law to violate the Ex Post Facto Clause it must "be retrospective, applying to events occurring before its indictment, and must disadvantage the offender affected by it." *Weaver,* 450 U.S. at 24. In determining whether a law is retroactive in its punishments, courts look at whether "the legislature [intended] the statute to establish civil

proceedings . . . [or] whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith v. Doe*, 538 U.S. 84 (2003).

In determining whether a proceeding is civil or criminal courts inquire into the statutory construction. *Allen v. Illinois*, 478 U.S. 364, 368 (1986). If it is determined that the legislature initially intended to establish that a matter is a civil proceeding the court will normally "defer to the legislature's stated intent." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). Since legislative intent is given a high level of deference, "an ostensibly civil and regulatory law . . . does not violate the Ex Post Facto clause unless the plaintiff can show "by the clearest proof" that "what has been denominated a 'civil remedy' is, in fact, 'a criminal penalty.'" *Smith,* 538 U.S. at 85.

In *Smith v. Doe* the court employed a five-factor test to determine whether Alaska's Sex Offender Registration Act had punitive effects contrary to the legislature's intent. *Id*. 97. The five factors that provide a framework over whether a statute is punitive in nature include:

(1) Whether the law inflicts what has been regarded in our history and traditions as punishment;
(2) Whether it imposes an affirmative disability or restraint;
(3) Whether it promotes the traditional aims of punishment;
(4) Whether it has a rational connection to a non-punitive purpose; and
(5) Whether it is excessive with respect to this purpose?"

*Id.* 97. Sex offender registration statutes are of recent historical origin. *Id.* 97. The statutes themselves, which have become common across the United States, are intended not to punish or shame, but rather inform the public of the risks the individual poses to society. It is also material that the information that is required through registration is public record that it is available through a simple background check. The United States' judicial system "does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. *Id.* 98. Lackawanna's registration requirement simply creates an efficient system for the state to keep track of dangerous sex offenders through information that is already available to the public. Thus,

the State's method in addressing registration of sex offenders has not been historically regarded as a punishment.

Lackawanna's registration requirement does not impose an affirmative disability or restraint. In this inquiry courts look at how the effects of the statute are felt by those subject to it, and whether the effects are direct or indirect. *Id*. 99-100. In the present case, Petitioner is not physically restrained by the registration. Though the requirement may impose a stigma on the Petitioner, such effect has not been regarded as a disability or restraint. *Id.* at 98. In sum, the registration requirement does not impose any affirmative disabilities on the Petitioner that would not have been experienced otherwise.

ROSA does not promote the traditional aims of punishment. Traditionally, the aims of punishment include incapacitation, retribution, and specific and general deterrence. *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016). The fact that a core tenant of ROSA is to prevent recidivism does not render the statute as promoting the traditional aims of punishment. The Supreme Court has stated that "the mere presence of [deterrence as a purpose] is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" *Hudson v. U.S.,* 522 U.S. 93, 105 (1997). Lackawanna's goal of deterring future unlawful sexual abuses does not render the registration requirement in ROSA a punishment.

In connection with the previous point, ROSA has numerous non-punitive goals that are rationally connected to its purpose. The Ex Post Facto Clause does not stop states "from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith,* 538 U.S. at 103. The registration requirement in Lackawanna aims to prevent recidivism, aid law enforcement, and protect the public. R. at 19-20The Petitioner's argument that the statute is not rationally connected to its non-punitive goals is without

merit. A statute is not deemed punitive because it lacks a close or perfect fit to the non-punitive goals it aims to advance. *Hendricks*, 521 U.S., at 371. The existence of inconsistencies between the means and ends of the statute is immaterial. ROSA seeks to prevent recidivism and protect the public through registration of sex offenders, both of which are rationally connected.

Lastly, ROSA is not excessive in regard to its purpose because it is narrowly tailored to prevent recidivism through a specific reporting system. The inquiry into the excessiveness of ROSA is not meant to determine "whether the legislature has made the best choice possible to address the problem it seeks to remedy," but instead it looks at the reasonableness of the regulation in light of its nonpunitive objective. *Smith,* 538 U.S. at 105. It has been demonstrated that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 33 (2002). ROSA seeks to curb this high rate of recidivism through a detailed registration plan that helps law enforcement and the community. ROSA's system of registration is similar to that of many states and jurisdictions. The requirement that the Petitioner register does not increase her punishment, nor is it excessive in the procedures it employs.

Just because the procedural change imposed by ROSA disadvantages the Petitioner does not mean that it is a violation of the Ex Post Facto Clause. *Dobbert v. Fla.,* 432 U.S. 282 (1977). It is clear that Lackawanna's intent in enacting ROSA was civil and non-punitive. Further, placement of the law in the criminal code is not dispositive. *Smith,* 538 U.S. at 94, see. *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 360 (1984) (where the Court held that a forfeiture provision to be a civil sanction even though the authorizing statute was in the criminal code). Therefore, the retroactive application of ROSA on the Petitioner does not violate the Ex Post Facto Clause.

### *B. The Special conditions imposed by ROSA do not violate the Ex Post Facto Clause*

The special conditions of ROSA do not violate the Ex Post Facto Clause. The Ex Post Facto Clause is not violated when "the change effected is merely procedural and does not increase the punishment or change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Weaver,* 450 U.S. at 24. Furthermore, not all legislative changes that have a conceivable risk of affecting a prisoner's punishment violate the Ex Post Facto Clause. *Morales*, 514 U.S. at 499.

Similar to the previous inquiry over the registration requirement, the determining factor of whether a law violates the Ex Post Facto Clause is if the legislature intended to establish civil proceedings, or the law is punitive in nature. *Smith*, 538 U.S. at 84. Generally, when a statutory scheme serves a regulatory purpose it is not considered punishment under the Ex Post Facto Clause even if it may bear harshly on the individual affected. *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997).

The first condition challenged by the Petitioner is the suspension of driving privileges for a period of twenty years, or as long as the offender is required to remain registered. Record at 23. This restriction is civil and enacted for the purpose of protecting the public from victimization and limiting access to a tool that would allow sex offenders to easily reoffend. The Petitioner would likely have been required to surrender her license as a condition of her parole regardless of the change because she used the car to facilitate the commission of sexual assault on B.B. *Guldoon*, 999 F. Supp.3d at 9. The Lackawanna legislatures creation of these conditions helped formalize the procedure of taking away the licenses of particular sex offenders and eliminates any ambiguity.

The second restriction that the Petitioner challenges is the ban on sex offenders knowingly entering upon any school ground or coming within 1,000 feet of such areas defined in §259-c (14). Here since the special condition "only [applies to] the conduct undertaken by convicted sex

offenders after its enactment, it does not violate the Ex Post Facto Clause." *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018). The conditions imposed after the release of the Petitioner are prospective, meaning that the conditions "merely create new, prospective legal obligations based on a person's prior history." *Vasquez*, 895 F.3d at 520.

Similar to the Petitioner's case, the court in *Vasquez v. Foxx* looked at whether a special condition requiring a sex offender from "knowingly maintaining a residence within 500 feet of a child day-care home" violated the Ex Post Facto Clause. *Id*. 520 The court held that the residency requirement did not implicate the Ex Post Facto Clause because it was nonpunitive in nature and that it created prospective legal obligations. *Id*. 520-521 The special condition in dispute in the present case follows the same line of reasoning. The requirement that the Petitioner not come within 1,000 feet of a school is a new prospective legal obligation created by the Petitioner's past conduct. The condition is nonpunitive in that it keeps child sex offenders from living close to schools but does not force them to leave their communities. *U.S. v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011). The imposition of this regulation creates prospective obligations and does not violate the Ex Post Facto Clause.

The last special condition that the Petitioner disputes is the restriction on accessing "commercial social networking sites" defined in §259-c(15). Limiting the access to social networking sites does not violate the Ex Post Facto Clause because Lackawanna enacted the condition for civil purposes. Lackawanna's intent in imposing the special condition was to protect children that use social media platforms, and limit access to tools that would allow sex offenders to easily commit unlawful acts. Prohibiting access to commercial social networking sites is similar to the special condition pertaining to schools. In both of these situations the special condition seeks to protect children where they are likely to congregate. The ability of sex offenders to victimize

children extends beyond the confines of school grounds and may be easily done over social media sites.

Petitioner asserts that the ban on social networking sites has made it "impossible for [her] to seek or apply to most employment opportunities." R. at 3. Though the ban may have some negative affect on the Petitioner, such negative effect is not sufficient to render it unconstitutional via the Ex Post Facto Clause. *Dobbert,* 432 U.S. at 282. Further, the Fifth Circuit, Tenth Circuit, and Eleventh Circuit, have all upheld some form of general prohibition, or restrictions on paroled sex offenders use of the Internet for the purpose of protecting the public and preventing recidivism. *U.S. v. Zinn*, 321 F.3d 1084, 1092 (11th Cir. 2003) *see. United States v. Paul*, 274 F.3d 155, 169–70 (5th Cir.2001), *United States v. Walser,* 275 F.3d 981, 988 (10th Cir.2001). In the present case, the restriction on using commercial social networking sites is not punitive and does not violate the Ex Post Facto Clause.

The Petitioner seeks to rely on the circuit split decision in *Does v. Snyder*, which invalidated a statutory scheme similar to Lackawanna's. In *Snyder*, the court held that Michigan's recently enacted Sex Offender Registration Act violated the Ex Post Facto Clause because the special conditions were punitive. *Snyder*, 834 F.3d at 701. SORA required that registered sex offenders may not loiter within 1,000 feet of a school and that the classification system was punitive because it applied solely to the crime of conviction. *Id*. 698.

The ruling in *Snyder* is erroneous and stands in contradiction to many other circuit court's rulings. In *Shaw v. Patton*, a statute similar to Lackawanna's prohibits a sex offender from living within 2,000 feet of a school. *Shaw v. Patton*, 823 F.3d 556, 570 (10th Cir. 2016). Relying on Supreme Court precedent in *Smith v. Doe* the court held that the residence requirement may impose some burdens, but such additional burdens do not amount to a punitive effect. *Id*. 570. Further the

Petitioner states that effects of her parole adversely affect her family. Though the Petitioner's family may face negative repercussions from her parole such inquiry is immaterial because the "[e]x post facto clause applies only to penal statutes which disadvantage offender affected by them. *Pataki*, 120 F.3d at 1263. Therefore, the conditions imposed by ROSA are non-punitive and do not violate the Ex Post Facto Clause.

## CONCLUSION

For the foregoing reasons, the Appellate Court's holding in favor of Respondent should be affirmed. ROSA serves a compelling state interest; is neutral in its application as to the First Amendment; is narrowly tailored to the state's compelling interest in protecting the public; and does not violate Ex Post Facto because it is neither criminal nor punitive in nature. Therefore, this Court should affirm the dismissal and resulting summary judgment in favor of Respondent.

Respectfully submitted,

Team 2
*Counsel for Respondent*

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