No. 19-01

SUPREME COURT OF THE UNITED STATES

MARY GULDOON

Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE,

Respondent.

On Appeal from the United States Court of Appeals
Thirteenth Circuit

BRIEF FOR THE PETITIONER

Team 20
Counsel for the Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ISSUES PRESENTED FOR REVIEW

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

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

STATEMENT OF THE CASE

Petitioner Mary Guldoon was born and raised in Old Cheektowaga, Lackawanna, which is where she presently resides with her husband and their daughter. Complaint at 11, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). In 2008, she was able to fulfil a life ambition of becoming a teacher at her alma mater, Old Lackawanna High School. *Id.* In April 2010, Mrs. Guldoon went on maternity leave after the birth of her daughter. *Id.* at 12. Despite the excitement of motherhood, Mrs. Guldoon suffered from severe post-partum depression and as a result, she was prescribed Prozac for minimal improvement. *Id.* However, since then, Mrs. Guldoon has been diagnosed with Manic Depression and the Prozac triggered her manic episodes, which causes expansive emotion that marks inappropriate behavior, such as hypersexuality. *Id.* at 13. Since being treated, she has experienced no further episodes. *Id.*

Despite the continuous suffering from her depression, Mrs. Guldoon was forced to return to work at the end of her maternity leave the following September. *Id.* at 12. Upon her return, she developed a relationship with B.B., a student in her class. *Id.* Their relationship developed in the classroom during free periods and after school, when B.B. sought additional help in school and his troubles in his home life. *Id.* at 6, 12. While Mrs. Guldoon and B.B. communicated through

text message and the school's email system, evidence was not recovered of communications consisting of a sexual or pornographic nature. *Id.* at 5–6.

In October 2010, B.B. and Mrs. Guldoon began a physical relationship that spanned several months until they were discovered by the Principal of Old Cheektowaga High School, Ed Rooney. *Id.* at 6–7, 12–13. On that day, December 7, 2010, Mrs. Guldoon was arrested. *Id.* at 7. Much like the development of their relationship, their physical relationship primarily occurred in Mrs. Guldoon's classroom. *Id.*

On January 1, 2011, Mrs. Guldoon pleaded guilty to three charges to spare her family and B.B. the pain of trial; these charges consisted of rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. *Id.* at 2, 5, 13. On January 31, 2011, Mrs. Guldoon was formally sentenced to ten to twenty years in accordance with the Pre-sentence Report. *Id.* at 2, 5. The Board of Parole (the "Board") also recommended ten years of probation to follow her sentence and eligibility for parole after ten years served. *Id.* at 5. However, the Board chose not to recommend any additional conditions of parole other than the general conditions. *Id*. at 7. Ms. Guldoon began serving her sentence at Tonawanda State Correctional Facility. *Id.* at 2.

On July 21, 2015, the Governor approved and signed the Registration of Sex Offenders Act ("ROSA"), which became effective January 21, 2016; this was all while Mrs. Guldoon was serving her sentence at Tonawanda. *Id.* As a result, ROSA imposed new registration requirements and new conditions of Ms. Guldoon's parole that departed from the general conditions of parole in place at the time of her sentencing. *See id.* at 2–3, 9–10, 14–17. In 2017, Mrs. Guldoon was released on parole and returned home to live with her family. *Id.* at 2; *see also id.* at 9–10.

The first change resulting from ROSA required Mrs. Guldoon to register as a Level II Sex Offender. *Id.* at 2, 14. Additionally, ROSA imposed harsher new parole conditions for those

considered "sex offenders" under ROSA. *Id.* at 2; *see also id.* at 9–10. The special conditions included: (1) a bar from entering into or on any school grounds or similar facilities or travel within 1,000 feet of such facilities, (2) surrendering her driver's license, and (3) a bar from accessing any commercial social networking websites. *Id.* at 9–10. As a result of these changes, they have caused a lot of hardship for Mrs. Guldoon. *See id.* at 14–17.

First, the Guldoon home is located within three miles directly from Mrs. Guldoon's new job; however, because an elementary school and high school are within that direct route, Mrs. Guldoon's only alternative route causes her to go an additional seventeen miles both ways. *Id.* at 14–16. In addition to the time and length of this route, she is required to travel by foot or by bike in the dark, as she can only work the night shift, and in any weather condition; this is due to ROSA requiring her to surrender her license and the lack of public transportation in this rural part of Old Cheektowaga. *Id.* at 3, 14–17. Moreover, this alternative route forces her to use the highway, which is two lanes and has a speed limit of sixty-five miles per hour; this imposes a danger to her life, as she is consistently forced off the road by inattentive or speeding drivers. *Id.* at 16.

Second, Mrs. Guldoon has struggled to find work as a result of these conditions. *See id.* at 14–17. Her hardship is two-fold: her inability to access platforms where employment opportunities are posted and her inability to drive to interviews or work. *Id.* Many employers now use social networking sites, including LinkedIn, Craigslist, Facebook, Indeed, etc. *See id.* at 15. However, Mrs. Guldoon is not permitted to use commercial social networking sites. *See id.* at 9. Additionally, she was forced to forgo a lot of acceptable employment opportunities because she cannot drive herself to interviews and Mr. Guldoon works in the day so he could not drive her unless it was outside of his work hours. *Id.* at 15. As a result, she was only able to find one position at Plewinski's Pierogi Company plant. *Id.* While she is solely trained in computer

science and teaching, her inability to access the internet has virtually cut off any chance at teaching in an online setting. *Id.* at 17.

Lastly, the Guldoon family as a whole is facing the consequences of the new ROSA conditions. *Id.* at 16–17. Because Mrs. Guldoon is barred from accessing any commercial networking site, the whole household cannot have this access. *Id.* Because most websites have some type of networking, the household cannot have internet access or any internet-capable telephones. *Id.* Mr. Guldoon is required to be available by his own employer by telephone, text, and email at all times, but the home is not able to accommodate this requirement because of ROSA's conditions. *Id.* at 17. Moreover, their daughter cannot use the internet to access online textbooks, assignments, or research. *Id.*

SUMMARY OF THE ARGUMENT

The special conditions imposed by ROSA violate Mrs. Guldoon's constitutional rights. By barring her access to the internet, the condition has infringed upon Mrs. Guldoon's right to free speech guaranteed by the First Amendment. By forcing her to surrender her license, the condition has infringed upon Mrs. Guldoon's right to travel guaranteed under the Fourteenth Amendment. Moreover, the government has failed to satisfy its burden to prove that these conditions were reasonably related rather than an arbitrary punishment. Therefore, this Court should vacate these conditions.

The special conditions imposed by ROSA violate the Ex Post Facto Clause. By increasing punishment for Mrs. Guldoon's crime after the commission of those crimes the state has retroactively harmed her. Therefore, this Court should find that ROSA violates the Ex Post Facto Clause.

STANDARD OF APPELLATE REVIEW

Guldoon v. Lackawanna Board of Parole presents questions of law which are resolved by summary judgment and by judgment as a matter of law; this Court should review these issues *de novo*. See *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250–51 (1986) (stating *de novo* standard is proper because the standards for summary judgment and motion for judgment as a matter of law "mirror" each other). Therefore, this Court owes no deference to the lower courts and because the Thirteenth Circuit decided both issues incorrectly, Mrs. Guldoon respectfully requests that this Court reverse the Thirteen Circuit's judgment.

ARGUMENT

I. The Registration of Sex Offenders Act Violate the First and Fourteenth Amendment of the United States Constitution

a. The Internet Access Conditions Imposed are an Infringement on Mrs. Guldoon's First Amendment Rights

The Importance of the Internet and its First Amendment Implications

ROSA's special conditions involve a great deprivation of liberty than is reasonably necessary for the purpose of Mrs. Guldoon's punishment. Access to the internet has become a protected liberty interest under the First Amendment. *See Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). *See United States v. Holm,* 326 F.3d 872 (7th Cir. 2003); *United States v. Voelker*, 489 F.3d 139, 145 (3d Cir. 2007) ("The ubiquitous presence of the internet and the all-encompassing nature of the information it contains are too obvious to require extensive citation or discussion."); *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001) ("Computers and internet access have become virtually indispensable in the modern world of communications and information gathering.").

In *Packingham v. North Carolina*, the Supreme Court was asked to look at a North Carolina statute that made it a felony for sex offenders to use a number of websites. *Packingham*, 137 S.Ct. at 1733. The Court noted that a fundamental principle for the First Amendment is "that

all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Id.* at 1735. In modern society, internet access provides these types of platforms for people to speak and be heard. *See id.* The Court said, "[w]ith one broad stroke, North Carolina bars access to what many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thoughts and knowledge." *Id.* at 1732. As a result, the Court held that the North Carolina law was too broad; it recognized that sexual abuse of a child is repugnant, but that it is necessary to narrowly tailor when First Amendment rights are at stake. *Id.* at 1736-38. In effect, today there is no town square; now these websites allow a person "to become a town crier with a voice that resonates farther." *Id.* at 1737.

Not only do these types of statutes need to be closely scrutinized, but the Court also recognized the danger in foreclosing internet access for those convicted of sexual offenses. *See id.* at 1732. "Foreclosing access to social media all together thus prevents users from engaging in legitimate exercise of First Amendment rights. Even convicted criminals . . . might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives."

Similarly, the Lackawanna legislature itself has pointed out how important the use of internet has become today. "The legislature is mindful that more than 200,000,000 American adults use the internet for employment purposes, to access educational opportunities, communicate with family and friends, manage finances and pay bills, stay informed of news and current events, and shop." Registration of Sex Offenders Act (ROSA), Pub. L. No. 2016-1. Moreover, the Legislature recognized how important the internet has become to the job application process, while those who hold the status of a sex offender already have difficulties finding job opportunities.

> "[P]ersons on parole . . . currently face many barriers to employment and educational opportunities as a result of having a criminal record. Studied indicate that access to employment, and education greatly reduces the risk of recidivism by ex-offenders. Therefore, any measure that restricts an offender's use of the internet must be tailored to specifically target the types of offenses committed on the internet while not making it impossible for such offenders to successfully reintegrate back into society."

Registration of Sex Offenders Act (ROSA), Pub. L. No. 2016-1.

Pursuant to Lackawanna Executive Law § 259-c (2018), a "commercial social networking website" means:

> 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, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct o real time communication with other users, such as a chat room or instant messengers; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

This definition matches the sweepingly broad definition discussed in *Packingham v. North Carolina*. This definition has made it nearly impossible to seek employment because of the inability to access any type of website that companies now use for employment opportunities. Complaint at 16, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). Additionally, Mrs. Guldoon's entire family has to suffer the consequences and they are not the ones on parole; they cannot access the internet for their own academic or employment goals. *Id.* at 16–17. As the *Packingham* Court acknowledged, the internet is virtually impossible to avoid in today's age. Mrs. Guldoon's First Amendment right has been infringed upon once the special conditions removed her platform to speak and be heard.

Special Conditions Prohibiting Internet Access Must Have Evidence of its Connection

ROSA's special condition prohibiting Mrs. Guldoon from accessing the internet violates her right to free speech protected under the First Amendment. Special conditions that ban access

to the internet have been consistently overturned when the lower courts have not been presented with evidence demonstrating the connection between the ban and the parolee's conduct. *See United States v. Shannon*, 743 F.3d 496 (7th Cir. 2014) (the court vacated a special condition that prohibited the parolee from possessing any "material containing 'sexually explicit conduct'" after he pled guilty to possessing child pornography. The parolee argued that the ban on *all* sexually explicit material is not reasonably related to his conviction of materials relating to children.); *United States v. Armel*, 585 F.3d 182 (4th Cir. 2009) (after Armel was convicted of threatening the FBI, he was given the special condition prohibiting possession of any pornography, entry into establishments where pornography is available, and contact with children; the court vacated the special condition because the district court provided no explanation for the necessity of these conditions in the case.); *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007) (Voelker pled guilty to receipt of material depicting sexual exploitation of a minor and was given the special condition prohibiting possession of any sexually explicit materials; Voelker argued that this violated his First Amendment rights and the court vacated the special condition because the lower court failed to explain its reasons.).

In *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009), a parolee had pled guilty to sexual contact with a minor and as a special condition, the court imposed a total ban on his use of the internet at his home and all pornography of any kind. *Id.* at 66. The parolee challenged the special condition on the grounds that it was not reasonably related to his offense and it was a greater deprivation of his liberty than was reasonably necessary for the circumstances. *Id.* The court noted that "[u]nduly harsh conditions would, instead of 'facilitat[ing] an offender's transition back into the every day of life of the community,' be a 'significant barrier to a fully reentry into society.'" *Id.* at 71 (internal citations omitted). The court recognized that the prohibition of the internet in the home was not a total ban because he

was still able to access it at the library, a friend's home, and most importantly, in a job setting. *Id.* However, the court recognized the importance of the internet in the modern world. It said:

> An undue restriction on internet use "renders modern life . . . exceptionally difficult. . . . In light of the "ubiquitous presence" of the internet and the "all-encompassing nature of the information it contains," a total ban . . . seems inconsistent with the vocational and educational goals. . . .
> Prohibiting Perazza-Mercado from logging onto the internet from home, without substantial justification for doing so, would be an excessive deprivation of liberty if it prevented him from engaging in this kind of educational and vocational training required for the transition from his prior employment as a teacher into a new and appropriate career.

Id. at 72 (internal citations omitted).

Mrs. Guldoon's case is analogous to *United States v. Perazza-Mercado*. Here, she is given a complete ban on internet usage because of the broad sweeping language of the Lackawanna Executive Law § 259-c. Mrs. Guldoon was convicted of substantially similar crimes and also has a complete ban on her internet usage, except she cannot access it in its entirety. Complaint at 1–3, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). Unlike in *Perazza-Mercado*, she is unable to access the internet outside the home and in a work setting. *See id.* at 14–17. In *Perazza-Mercado*, the court recognized how important access is for the rehabilitation of an offender for educational and vocational trainings. *Perazza-Mercado*, 553 F.3d at 72. Much like Perazza-Mercado, Mrs. Guldoon was also a teacher; however, she is unable to access the internet to serve the goal of "transitioning from [her] prior employment . . . into a new and appropriate career." *Id.* Just like the *Perazza-Mercado* court, this court should recognize the detrimental effects of an absolute ban on Mrs. Guldoon's internet access.

Special Conditions Banning Full Internet Access Will Only be Upheld When There is Evidence that it was Required.

However, we do not deny that there are circumstances when the courts may decide it is necessary to ban all access to the internet. However, special conditions that ban full access to the internet have been upheld only where the trial court has been presented with evidence or the trial court has made finding that show that the parolee's conduct required imposition of a broad ban. *See United States v. Brigham*, 569 F.3d 220 (5th Cir. 2009); *United States v. Boston*, 494 F.3d 660 (8th Cir. 2007) (upholding a special condition where after a conviction of producing child pornography, defendant was prohibited from full internet access because it was not absolute and the lower court found evidence that he used the computer to produce the child pornography); *United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003) (upholding a special condition prohibiting pornographic material because there was evidence that defendant videotaped his sexual acts upon victims and he was evaluated as a high risk for violent recidivism without treatment).

In *United States v. Brigham*, 569 F.3d 220 (5th Cir. 2009), Brigham was convicted on one count of receiving child pornography. As part of his supervised release, the court imposed a special condition that defendant shall not possess any pornographic materials, enter places where that material is available, nor possess or use a computer or internet during the period of supervised release. *Id.* at 223–24. Brigham challenged these conditions on the grounds that these conditions were unconstitutionally vague and overbroad. *Id.* at 224. The court upheld these conditions and found they were reasonably related. *Id.* at 233. It reasoned that the prior conduct underlying the conviction involved posting and displaying a significant number of images of child pornography. *Id.* at 233–34. Additionally, the court considered the testimony of Brigham's counselor who stated that images such as these would reinforce the same type of behavior that caused his conviction and the use of the internet would enable this. *Id.* at 234. The court said that the lower court's decision "is not unreasonable given the reprehensibility of child pornography,

the harm to society's children that results therefrom, and the undisputed likelihood of recidivism." *Id.* at 234.

Brigham is distinguishable to Mrs. Guldoon's case. There is no evidence of recidivism in Mrs. Guldoon's Pre-sentence report nor has she communicated with B.B. through the internet since. Complaint at 9–10, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). Unlike in *Brigham*, there is no overwhelming evidence of "undisputed likelihood of recidivism." *Brigham*, 569 F.3d at 234. Further, the use of the internet was minuscule in terms of her crime; she had at some point used the school email system to communicate. *See* Complaint at 9–10, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). This was not a facilitator of the crime in the way that a computer was used in *Brigham*. *See id.* Moreover, B.B. himself said that the relationship was primarily based in the classroom and that was how their relationship developed. *See id.* There is minimal evidence to support the finding that this special condition is rationally related to Mrs. Guldoon's crimes. Therefore, the Court should see how Mrs. Guldoon's case is distinguishable and the use of internet access is not reasonably related to her crime or behavior.

In conclusion, the Court should find that ROSA's special condition has resulted in the absolute bar of Mrs. Guldoon's internet access. As a result, it has infringed upon her First Amendment rights and the government has failed to prove any reasonable relation between this condition and Mrs. Guldoon's conviction and character. Therefore, the Court should vacate ROSA's special condition that bars Mrs. Guldoon from accessing the internet.

b. The Travel Conditions Imposed on Mrs. Guldoon are not Reasonably Related

ROSA's special conditions amount to a violation of substantive due process guaranteed under the Fourteenth Amendment because they infringe upon Mrs. Guldoon's fundamental right to travel. Although the word "travel" is absent from the United States Constitution, the

constitutional right to travel "is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999). *See also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902–03 (1986) ("[I]n light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision. Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases.") This right is so fundamental that it can be asserted against private or governmental actors and it is a "virtually unconditional personal right, guaranteed by the Constitution to us all." *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)). *See also Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) ("'[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'") (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966)).

The right to travel discusses three different components: (1) the right of one state's citizen to enter and leave another state, (2) the right to be treated as a welcomed visitor when temporarily in another state, and (3) for those who choose to become permanent residents, the right to be treated like the other citizens of that state. *Saenz v. Roe*, 526 U.S. 489, 501 (1999). While the Supreme Court has not distinguished intrastate travel from interstate travel, many courts have recognized the constitutional protection of a right to travel intrastate. *See Selevan v. New York Thruway Authority*, 584 F.3d 82, 100 (2d Cir. 2009); *Johnson v. City of Cincinnati*, 310 F.3d 484, 496–98 (6th Cir. 2002); *Lutz v. City of York, Pennsylvania*, 899 F.2d 255, 268 (3d Cir. 1990); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646, 647–48 (2d Cir. 1971). *But see Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255–56 (1974) ("Even were we to draw a constitutional distinction between interstate and intrastate travel. . . . What would be unconstitutional if done directly by the State can no more readily be accomplished by a

county at the State's direction."). In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986), the Court explained the implication of this right as:

> A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses "any classification which serves to penalize the exercise of that right." Our right-to-migrate cases have principally involved the latter, indirect manner of burdening that right.

(internal citations omitted).

As discussed above, the special conditions imposed must be reasonably related to Ms. Guldoon's prior conduct or the government's interest in rehabilitating her prior conduct. Here, the special conditions in terms of Mrs. Guldoon's travel restrictions are not reasonably related to her rehabilitation. First, the restriction on her driver's license is an egregiously excessive condition when the use of the car was merely incidental rather than facilitating. *See* Complaint at 9–10, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). *See also Pollard v. United States Parole Commission*, 693 Fed.App'x. 8, 12 (2d Cir. 2017); *Fassler v. Pendleton*, 110 Fed.App'x. 749, 751 (9th Cir. 2004); *Bagley v. Harvey*, 718 F.2d 921, 925 (9th Cir. 1983); *Canton v. P.G. Smith*, 486 F.2d 733, 735 (7th Cir. 1973) . B.B. himself stated that the relationship was primarily based in the classroom and very scarcely involved an automobile. Complaint at 7, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). While we concede that automobiles have not been used since the beginning of time, they have quickly become a necessity in the modern age.

Moreover, this Court upheld the right to "use highway facilities and other instrumentalities of interstate commerce." *See United States v. Guest*, 383 U.S. 745, 757 (1966). In *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002), the court stated the importance of this right as:

> In light of these cases, we find that the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage. In addition to its solid historical foundation, the tremendous practical significance

> of a right to localized travel also strongly suggests that such a right is secured by substantive due process. The right to travel locally through public spaces and roadways—perhaps more than any other right secured by substantive due process—is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function.

Given this importance, Mrs. Guldoon is prohibited from accessing "instrumentalities" of public transportation. Mrs. Guldoon is unable to access roadways from any type of automobile due to ROSA and she is unable to use public transportation due to the rural community. *See* Complaint at 14–17, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). This "right of function" is withheld from her because of ROSA's special conditions.

In *Florida Action Committee, Inc. v. Seminole County*, 212 F.Supp.3d 1213 (M.D. Fla. 2016), a non-profit organization that represented registered sexual offenders alleged that a city ordinance violated their right to intrastate travel. *Id.* at 1219–20. The city ordinance established a 1,000 foot "exclusion zone" around every school, daycare, park, and playground within the county; it prohibited registered sexual offenders from traveling through or remaining within these zones. *Id.* at 1220. The court held that the ordinance limited sex offenders' right to travel within Florida. *Id.* at 1228–29. The court looked at the number of exclusion zones and the breadth of each zone; it reasoned that these forced many defendants to be unable to move within their neighborhoods or leave their own homes if they were within the zones, and it would limit those who would ordinarily travel through the county on their way to other parts of the state. *Id.* at 1228.

ROSA's special conditions have made Mrs. Guldoon's case analogous. Because of her home's location between the two schools, Mrs. Guldoon is severely limited in her movements. *See* Complaint at 9–17, Guldoon v. Lackawanna Bd. of Parole, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). The rural location has forced her to move by foot or bicycle and as

such, these similar exclusion zones have forced her to take significantly longer and more dangerous routes to work. *Id.* at 14–17. In the interest of rehabilitation, it is in her best interest to continue working; however, the special conditions have made it egregiously burdensome and puts her life at risk every night that she goes to work. If these special conditions were not in place, she would be able to ride directly to work on a three-mile route and in safer conditions. *See id.* Similar to the ordinance in *Florida Action Committee v. Seminole County*, ROSA's 1,000-foot special condition should be struck down as unconstitutional.

In *Formaro v. Polk County*, 773 N.W.2d 834 (Ia. 2009), Formaro challenged Iowa's "2,000-foot rule," which placed limits of where sex offenders could live within the state. *Id.* at 837. Formaro was found guilty as a juvenile of sexual abuse in the second degree against another minor. *Id.* When he was paroled, he was informed that he could not live in his parents' home because of this rule and subsequently, he suffered hardship trying to find another place to live. *Id.* at 837–38. The court held that the 2,000-foot rule did not impede on Formaro's freedom of travel. *Id.* at 840. The court reasoned that the rule only dictated where Formaro could reside, but it did not create a barrier or forbid him from passing through the protected zones. *Id.* Formaro was still permitted to attend political meetings, religious services, or other gathers inside the protected zones. *Id.* While *Formaro* upheld the 2,000-foot rule in Iowa, this case is distinguishable from Mrs. Guldoon's situation. Unlike Formaro, Mrs. Guldoon is not permitted to pass through or travel through these zones. *See* Complaint at 14–17, Guldoon v. Lackawanna Bd. of Parole, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)). If she were, her ride would be less dangerous and less onerous.

In *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), the court noted how burdensome and untraditional sex offender registration acts are in terms of punishment. The court noted that these restrictions essentially banish sex offenders. *Id.* at 701. As a result, the geographical restrictions

are very burdensome. *Id.* "Sex offenders are forced to tailor much of their lives around these school zones, and . . . they often have great difficulty in finding a place where they may legally live or work." *Id.* at 702. This has been the case for Mrs. Guldoon. These restrictions made her job eligibility very scarce because she was unable to commute to work or interviews. "The travel restrictions imposed by ROSA fail to [protect the public and aid in the rehabilitation of the parolee] in this case: her lack of car has made her a prisoner in her own home, and the 100-foot rule has put her in danger of death or serious injury." *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1, 5 (13th Cir. 2019) (Skopinski, J., dissenting). Therefore, this Court should strike down ROSA's special conditions that infringe upon Mrs. Guldoon's right to travel.

II. The Registration of Sex Offenders Act Violates the Ex Post Facto Clause of the United States Constitution

If this court finds that the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act did violate Mrs. Guldoon's rights under the First and Fourteenth Amendments to the United States Constitution, the court should hold that those conditions constitute violations of the Ex Post Facto Clause of the United States Constitution.

It is the position of the Petitioner that this law violates the Ex Post Facto Clause of the United States constitution. The Registration of Sex Offenders Act is a retroactive law that disadvantages Mrs. Guldoon. ROSA increases punishment for Mrs. Guldoon and those similarly situated to her. After analyzing the factors established by this Court in *Kennedy,* it is clear that ROSA increases the punishment for crimes already committed, therefore making it unconstitutional.

Litigation on the Ex Post Facto Clause of the United States Constitution dates back to the beginning of the nation. This Court ruled on its first case involving the Ex Post Facto Clause in

1798. In *Calder v. Bull*, 3 U.S. 386 (1798), this Court had to determine the legal meaning of the Ex Post Facto Clause. This Court found that the Constitutions limitation of Ex Post Facto laws does not eliminate all retroactive lawmaking, but only those laws that retroactively punish an individual. *Id*. at 388. The Court listed what it determined to be Ex Post Facto laws as:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; an punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390. These classifications have remained consistent throughout modern Ex Post Facto litigation. *See, Weaver v. Graham*, 450 U.S. 24 (1981); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Beazell v. Ohio*, 268 U.S. 167 (1925).

In *Weaver*, this Court sought to further explore the goals the Framers had when drafting and incorporating this clause in the Constitution. It was found from case law that the Framers wanted to guarantee to citizens that laws that their Congress enacted gave fair warning to individuals so they may rely on that language to direct their daily conduct. *Dobbert v. Florida*, *supra*, at 298; *Kring v. Missouri*, 107 U.S. 221, 229 (1883); *Calder v. Bull*, *supra*, at 387. The Framers also wanted to limit government by disallowing their legislative bodies to enact arbitrary and potentially vindictive legislation. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915); *Kring v. Missouri*, *supra*, at 229; *Calder v. Bull*, *supra*, at 395, 396. With these purposes in mind, this Court determined that two elements must be present for a criminal or penal law to be considered ex post facto. The law must apply to events that occurred before its enactment and that it must disadvantage the offender. *Weaver v. Graham*, *supra*, at 29.

However, as this Court in *Calder* pronounced, not every retroactive law violates the Ex Post Facto Clause. The ex post facto protection extends to the four categories of laws which the

Court described. The Court clarified in *Beazell v. Ohio*, *supra*, at 171, that the Ex Post Facto Clause was designed to protect substantial personal rights against arbitrary and oppressive legislation, not the legislative branch's ability to enact laws that change procedures that do not affect "matters of substance". And the Court in *Dobbert* stated that a procedural change is not ex post facto even if it works to the disadvantage of a defendant. *Dobbert v. Florida*, *supra*, at 293.

Thus, the distinction of a procedural and substantive changes in a law was born. This distinction makes decisions easier for courts, because once a court finds that a change in a law was procedural that court can end its analysis and find that the law was not ex post facto. However, courts have found it difficult to easily distinguish between matters of mere procedure and matters of substance. *See, Miller v. Florida*, 482 U.S. 423 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981). This Court in *Miller* found that changes affecting the penalty may easily be disguised as procedural enactments. *Id* at 433.

In *Miller*, the defendant committed a crime during a time which would have resulted in a three and a half to four-and-a-half-year sentence. *Id*. at 424. However, before he was sentenced Florida's sentencing guidelines had been adjusted. *Id.* at 425. As a result of this adjustment the defendant was instead subject to guidelines that established a five and a half to seven sentence. *Id*. The judge then sentenced the defendant to seven years in prison. *Id*. When this case was in front of the Florida Supreme Court, that court reasoned that this modification was merely procedural. And due to the holding in *Dobbert* the Florida Supreme Court determined that an ex post facto application was unnecessary. *Id*. at 428. This Court reversed because it found that revising the sentencing law was retroactive and substantial. *Id*. at 430. Citing to *Weaver*, *supra*, at 31 this Court stated that a law is retrospective if it "changes the legal consequences of acts completed before its effective date." This Court also found the change in law was not procedural because it increased the punishment of the defendant. *Id*. at 433. Because the sentencing

guidelines were amended between the guilty plea and sentencing, the defendant was the victim of an ex post facto law. A procedural change in law caused the defendant to be substantially harmed.

Similarly, Mrs. Guldoon pleaded guilty to three counts in January 2011 and was sentenced to spend ten to twenty years in prison. At the time of her sentence the Board of Parole prepared a pre-sentence report. In this report the Board of Parole recommended that Mrs. Guldoon be subject to "General Conditions of Parole." Those conditions included: continuous reporting as directed; to permit her parole officer to enter her home and search at any time; not to travel outside of the state without permission; to not fraternize with known convicted persons; not possess controlled substances among other minor conditions.

While serving her sentence the Lackawanna legislature enacted ROSA in 2016, this act substantially changed the guidelines that she would be forced to follow after her sentenced had ended. As a result of ROSA Mrs. Gludoon would be forced to submit to new requirements that she was not subject to when she pleaded guilty in January 2011. Due to the enactment of ROSA Mrs. Guldoon was subject to the following conditions, that were not included anywhere in the presentence report as possible conditions: she was required to register as a sex offender; she was required to surrender her driver's license; she could not travel within 1000 feet of any school or similar facility; and she was barred from accessing any "commercial social networking website." Complaint at 8-10, *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-001(O)).

Due to a procedural change enacted by statute both Mrs. Guldoon and the defendant in *Miller* faced an increased punishment, one they would not have faced retroactively had the statute been passed after the commission of their crimes. Both defendants faced increased punishments beyond what was prescribed when the crime was consummated. *Weaver v.*

Graham, *supra*, at 30. And both defendants were subject to a law applied to events that occurred before its enactment and were disadvantaged by it. *Id*. at 29.

On the other hand, the court of appeals and district court sought to rely on rulings that are distinguishable from Mrs. Guldoon's circumstances. Although we do not challenge the accuracy of those rulings, we encourage this Court to find they do not relate to the factual circumstances in this case.

The district court cited to *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995) in stating that the controlling inquiry is whether the retroactive application of a policy creates "a significant risk of increasing the measure of punishment attached to the covered crimes." *Id*. at 509. It found that Lackawanna's Registration of Sex Offenders Act (ROSA) does not increase the measure of punishment because a "substantially similar" act was upheld in the Second Circuit. *Doe v. Pataki*, 120 F.3d 1263 (2nd Cir. 1997). However, Lackawanna's version of ROSA is distinguishable in a number of important ways.

In *Doe v. Pataki*, the court reviewed a law that the New York State legislature enacted called the Sex Offender Registration Act (SORA). This act required sex offenders to register their locations and whereabouts with the police every 90 days. *Id*. at 1266. Three plaintiffs brought the lawsuit alleging that SORA violated the Ex Post Facto Clause because they were being retroactively punished. *Id*. at 1265. However, unlike Mrs. Guldoon's case, these plaintiffs were only required to register as sex offenders and notify the police of their whereabouts every few months.

Due to the fact that sex offenders were only required to comply with registration and notification the court found that the new requirements were civil and nonpunitive in nature due to the legislative intent of the New York State legislature. *Id*. at 1277. Since the legislative intent showed that these requirements were not punitive, the criminal defendants had the burden of

establishing by "the clearest proof" the burden accompanying those new notification requirements are nonetheless "so punitive in form and effect" as to negate the legislature's nonpunitive intent. (citing *United States v, Ursery*, 518 U.S. 267 (1996)) *Doe v. Pataki*, *supra*, at 1278. Ultimately, the court found that the duty to register in person for a minimum period of ten years is inconvenient but not severe enough to transform the measure to a punitive on. *Id*. at 1285.

However, the requirements required in the *Pataki* case are tamer than those Mrs. Guldoon is subject to. Mrs. Guldoon is subject to those same requirements as the sex offenders in the *Pataki* case and many other life altering punishments. (Cite) Due to the extreme nature of the requirements imposed on Mrs. Guldoon the comparison with *Pataki* is difficult.

The district court also cites to *Smith v. Doe*, 538 U.S. 84 (2003), a case where this Court reviewed the Alaska Sex Offender Registration Act as an ex post facto law. The Alaska Sex Offender Registration Act required that convicted sex offenders register with law enforcement and much of the information given to law enforcement is then made public. *Id*. at 89. Similar to *Pataki*, this Court found that its responsibility was to ascertain whether the legislature meant to establish civil proceedings or if the statute was intended to impose punishment. (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)) *Smith v. Doe*, *supra*, at 92. And this Court determined that the intent of the Alaska legislature was to create a civil, nonpunitive regime. *Id*. at 96. After this determination, criminal defendants are required to show that the effects of the Act were punitive despite the claimed intent. *Id*. at 92. To analyze the effects the Court looked towards factors established by *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), which include if the regulatory scheme: "has regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the tradition aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id*. at 97. And

after finding that the requirements of registration and notification do not harm a person or are excessive in nature this Court ruled that the Alaska Sex Offender Registration Act does not violate the Ex Post Facto Clause. *Id*. at 95.

However, neither of these cases are controlling in Mrs. Guldoon's case because the requirements imposed upon her go much farther than in scope than just mere registration and notification. While *Doe v. Pataki* and *Smith v. Doe* do allow states to implement registration and notification requirements the Lackawanna Act requires much more stringent requirements making ROSA a violation of the Ex Post Facto Clause because it does punish Mrs. Gludoon and those similarly situated. The Sixth Circuit has ruled on a case that is "substantially similar" to the facts of Mrs. Guldoon's case and the restrictions placed by ROSA.

The Sixth Circuit in *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016) takes a much different view of the issue of sex offender registries and the Ex Post Facto Clause. Like the other cases, the plaintiffs in this case are convicted sexual offenders who are required to register according to the Sex Offender Registration Act in their state. *Id*. at 698. However, unlike the previous cases the plaintiffs in this case are subject to strict travel and school zone restrictions, many have trouble finding a place to legal live or a job where they can legally work, and reporting to law enforcement when they wish to travel for more than seven days and buy or cease to own a vehicle. *Id*. However, much like the Alaska Legislature in *Smith* the state legislature in Michigan included a statement of purpose in their legislation that clearly shows no punitive intent. *Id*. As a result the court must examine those same factors set out in *Kennedy v. Mendoza-Martinez*, however, this court comes to a much different final conclusion than the Court in *Smith* did.

The first factor that the court finds in favor of the plaintiffs was "Does the law inflict what has been regarded in our history and traditions as punishment?" *Snyder, supra*, at 701. The court reasoned that the Michigan Act resembles punishment by banishment, this is because the

Act places geographic restrictions like the school restriction. *Id*. These restrictions make it more difficult for offenders to find places to live and work and even damage attendance and their own children's school functions. *Id*. at 702. This Act also resembles the punishment of parole/probation. While not every sex offender is still on parole or probation those who aren't still having to comply with the same kinds of restrictions and practices as one on parole/probation. *Id*. at 703.

The second factor that the court finds in favor of the plaintiffs was "Does it impose an affirmative disability or restraint?" The court found that the Act requires much more from the plaintiffs than the statute did in *Smith*. *Id*. The court found that the regulation of where a sex offender can live, work and "loiter" to be most significant and far stricter than the act in *Smith*, leading another factor in the plaintiffs' factor.

The third factor that the court finds in favor of the plaintiffs was "Does it have a rational connection to a non-punitive purpose?" As in *Smith*, the legislative purpose is readily available, that the body wants to protect the public and cut down on recidivism among sex offenders. *Id*. at 704. However, the court is suspect about whether or not the Act is actually achieving the goals it sets out.

> One study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals. *See* Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003). Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism. [R. 90 at 3846-49]. In fact, one statistical analysis in the record concluded that laws such as SORA actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities. *See* Prescott & Rockoff, *supra* at 161. Tellingly, nothing the parties have pointed to in the record suggests that the residential restrictions have any beneficial effect on recidivism rates.

Id. at 704, 705. While the court acknowledges that some offenders are dangerous around children, they criticize the Act for not conducting individualized assessments to make that determination. *Id*. at 705.

The final factor that the court finds in favor of the plaintiffs was "Is it excessive with respect to this purpose?" In court's view this is obvious on the face of the law, because of the restriction on where a person can work, live, or "loiter. *Id*. However, the court's strongest point is that many states who have been confronted with the similar law and issue currently in front of the court have said "yes." *See, e.g., Doe v. State*, 167 N.H. 382 (N.H. 2015); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Starkey v. Oklahoma Department of Corrections*, 305 P.2d 1004 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999 (Alaska 2008).

The court recognizes that states have the freedom to pass retroactive sex offender registration laws. And that those challenging the laws will need to prove by the "clearest proof" that the statute does increase punishment. *Snyder, supra,* at 705. However, it was not an impossible task because the court ruled that the Michigan Act did violate the Ex Post Facto Clause.

This case, unlike the others presented by the District Court and Court of Appeals, is the most closely analogous case to the facts and circumstances of Mrs. Guldoon. Mrs. Guldoon was subject to similar laws under ROSA, that were even more strict than those created in other jurisdictions. However, ROSA much like the Michigan Act in *Snyder* was a form of punishment because of the level of restraint it placed upon Mrs. Guldoon and was excessive in nature because of harsh restrictions it placed on her. And without proof that the legislative purpose is actually being carried out by this law, the legislative intent is nothing but empty promises.

As the court in *Snyder* noted, "nor should *Smith* be understood as writing a blank check to states to do whatever they please in this arena." *Id*. States should not be able to pass laws like ROSA that impose such retroactive punishment on individuals for already committed acts. We ask this court to hold that the Registration of Sex Offenders Act violated the Ex Post Facto Clause of the United States Constitution.

CONCLUSION

The Thirteenth Circuit erred in finding that ROSA's special conditions did not violate Mrs. Guldoon's First and Fourteenth Amendment rights. The lower courts failed to find provide any findings that demonstrate that these special conditions were reasonably related to Mrs. Guldoon's convictions, character, and punishment. Rather, these conditions are arbitrary and egregious punishments that violate Mrs. Guldoon's constitutional liberties.

The Thirteenth Circuit erred in finding that ROSA did not violate the Ex Post Facto Clause. In light of *Snyder*, the strict conditions placed on Mrs. Guldoon are not mere procedural changes, but instead punitive punishments that have no rational connection to community safety. Even if this Court were to find that there was a rational connection, Mrs. Guldoon's conditions are still inflict an affirmatively restraint here and such conditions are excessive as many other states have found. Consequently, this Court should reverse the Thirteenth Circuit's ruling.

Respectfully submitted,

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Team 20
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