IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

Case No. 19-01

MARY GULDOON, Petitioner, v. STATE OF LACKAWANNA BOARD OF PAROLE Respondent.	)	On appeal from the UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT Case No. 19-01

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.
2. Whether the registration requirements and special conditions of parole required by Lackawanna's Registrations of Sex Offenders Act and imposed on Petitioner constitute violations of the Ex Post Factor Clause of the United States Constitution.

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STATEMENT OF THE CASE

I. Statement of the Facts

In December of 2010, Mary Guldoon was arrested for engaging in sexual activates with a minor. The child was a student of Mrs. Guldoon's at Old Cheektowaga High School, where Mrs. Guldoon taught computer science. Guldoon Aff. ¶ 4. The two met in Mrs. Guldoon's class and engaged in a sexual relationship for approximately three months before the principal caught Mrs. Guldoon performing sexual acts to the child, B.B. *Id*

During the three months that Mrs. Guldoon victimized B.B., she engaged in sexual activities with him "dozens of times." Guldoon Aff. Ex. A. Mrs. Guldoon took advantage of B.B.'s trust in her as his teacher. B.B. sought Mrs. Guldoon's help for multiple school courses, as well as her advice on his problems at home. *Id*. B.B.'s mother was an alcoholic at the time, and his father abused his mother. *Id.*

Mrs. Guldoon sent B.B. emails, many of which were deleted and unrecoverable. The emails that were not deleted contained details on how the two would meet to engage in their sexual activities. The exchanges were frequent and consisted of messages like "I miss you," and "I will see you after school," and "are you free now?" Guldoon Ex. A, at 5. B.B. even attested that some of the emails contained pornographic images of himself. *Id* at 6.

While many of the encounters between Mrs. Guldoon and B.B. happened in the classroom, occasionally Mrs. Guldoon would use her car to drive B.B. to her home, where the two engaged in sexual activities. Guldoon Aff. This was not a common occurrence as Mrs. Guldoon's husband and baby daughter were often at home, and she had to hide her relationship with her student. Guldoon Aff. ¶ 2.

Subsequent to her arrest, Mrs. Guldoon plead guilty to three charges: rape in the third degree, criminal sexual act in the third degree, and sexual misconduct in January of 2011. Compl. ¶ 6. She was sentenced to ten to twenty years of incarceration and ten years of probation. Guldoon Aff. ¶16.

In July of 2016, the Lackawanna Legislature enacted the Registration of Sex Offenders Act, or ROSA. This law imposed new conditions of parole on anyone found guilty of a sex offense involving a victim under the age of 18. *Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1 (M.D.Lack. 2019). The restrictions prohibited parolees from coming within 1000 feet of a school, and from using the internet to access a commercial social networking website. §168 (2016). A commercial social networking site is any site which allows users under the age of 18 to engage in instant messaging with adult users. The stated purpose of ROSA was to protect the public from future victimization. §168 (2016). ROSA applies to sex offenders who commit predatory acts. ROSA also helps aid law enforcement efforts by keeping track of all sex offenders through the registration requirement. *Id.*

II. Procedural Background

Mrs. Guldoon brought suit against the Lackawanna Parole Board claiming the registration requirements and special conditions of parole imposed by ROSA violated both her rights under 42 U.S.C. §1983 and the Ex Post Facto Clause of the United States Constitution. The district court granted the Parole Board's motion for dismissal for failure to state a claim on both issues. Mrs. Guldoon appealed, and the court of appeals affirmed the lower court's decision. Mrs. Guldoon again appealed to the Supreme Court and certiorari was granted.

SUMMARY OF THE ARGUMENT

The case concerns a parole board's right to grant conditions it sees fit in order to protect the community and prevent recidivism. Mrs. Guldoon incorrectly asserts that the ban on her internet usage violates her First Amendment freedom of speech. She also incorrectly asserts that the travel ban imposed by ROSA violates her Fourteenth Amendment freedom to travel.

When determining if a parole condition is permissible, the court must weigh the parolee's limited interests with the governmental interests of preventing recidivism and protecting the public. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). The parolee's interest in freedom is limited in this instance because there is no right to parole, and the parolee might be kept in incarceration rather than enjoying the luxury of parole, no matter how restrictive it might be. *Williams v. Dept. of Corrections and Community Supervision*, 24 N.Y.S.3d 18, 31 (N.Y. App. Div. 1st Dept. 2016). In this case, Mrs. Guldoon's freedom of speech is not infringed upon through the limitation on the internet access. Additionally, a parole board may broadly restrict a parolee's freedom of travel and has not impermissibly done so in this case.

The registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act (ROSA) does not violate the Ex Post Facto Clause of the United States Constitution. The Ex Post Facto Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995). ROSA does not alter the definition of any crime; thus, ROSA can only be in violation of the Ex Post Facto Clause if it increases punishment for criminal acts under its purview.

In determining if ROSA increases punishment, courts must first look at the intent of the legislature and then at the effects of the statute. The intent of the Lackawanna Legislature was to

create civil regulations to protect the public, not criminal penalties. To negate the civil intent of the legislature, a party must demonstrate by the "clearest proof" that the effects of the statute effectively transform a civil remedy into a criminal penalty. *Hudson v. United States*, 522 U.S. 93, 100 (1997). Mrs. Guldoon has failed to do this. By applying the *Mendoza-Martinez* factors, it is clear ROSA does not increase the punishment of offenders. ROSA does not invoke traditional punishment, does not impose an affirmative disability or restraint, does not promote the traditional aims of punishment, has a rational connection to a nonpunitive purpose, and is not excessive with respect to its nonpunitive purpose. Therefore, ROSA does not increase the punishment of offenders and does not violate the Ex Post Facto Clause.

This brief will first examine the constitutional issues of the First and Fourteenth Amendments, then the Ex Post Facto considerations. The Lackawanna Parole Board asks the Court to affirm the decisions of both the Court of Appeals and the District Court.

ARGUMENT

A. The Court of Appeals Correctly Decided That Parole Board Lawfully Restricted Mary Guldoon's Access to Otherwise Lawful Activities and Therefore Mrs. Guldoon failed to State a Claim for Relief Pursuant to U.S.C. §1983.

Mrs. Guldoon is seeking to have the conditions of her parole declared unconstitutional. She claims the parole imposed by the Lackawanna Parole Board violated her rights under the First and Fourteenth Amendments to the Constitution. *Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1 (M.D.Lack. 2019) at 2. Specifically, Mrs. Guldoon asserts that the revocation of her license violates her right to travel and the condition disallowing her from some internet access violates her right to free speech as secured by the First Amendment. Id. 42 U.S.C. § 1983 contains the legal standard for infringement of a person's rights and in pertinent part states "Every person who … subjects, … any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." In order to prove entitlement to relief under §1983 a person must show that (1) the challenged conduct was under color of state law; and (2) such conduct deprived the person of rights, privileges, or immunities secured by the Constitution of the United States. *Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010). The Government concedes that Parole Board's conditions are imposed under color of state law, so the first prong is satisfied there is no need for further discussion. The only issue on appeal in this instance is if the Parole Board's conditions deprived Mrs. Guldoon of the rights, privileges, or immunities secured by the US Constitution.

A parole board has broad discretion when setting the terms of parole. "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which

significantly confine and restrain his freedom." *Jones v. Cunningham*, 371 U.S. at 243. Parolees have no constitutional right to be granted parole, *Williams v. Dept. of Corrections*, 24 N.Y.S.3d at 31. Paroles still maintain some constitutional rights however; they are subject to additional restrictions not applicable to non-parolee citizens. *Morrisey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These additional restrictions must be reasonably related to the state statute, in this case ROSA, and must not deprive more liberty than is reasonably necessary to "deter future crime, protect the public, and rehabilitate the defendant." *United States v. Thieleman*, 575 F.3d 265, 272 (3d Cir.2009). District courts have consistently been required to set forth factual findings to justify special conditions of parole. *United States v. Voelker*, 489 F.3d 139, 144 (3d Cir.2007). Finally, the Court may affirm the conditions if it determines a viable basis for the restriction on its own accord. *Id*.

Mrs. Guldoon's constitutional freedoms were not improperly restricted by her parole conditions. As such, she has failed to prove her claim. The Court should affirm the lower courts' decisions in granting the Parole Board's motion for summary judgment dismissing Mrs. Guldoon's complaint. The first prong requiring the restrictions to be reasonably related to the state statute will not be discussed, as the restrictions are exactly the state statute.

I. The Parole Board did not violate Mrs. Guldoon's First Amendment rights when restricting her access to social networking websites.

The First Amendment does not prohibit restrictions on Internet access as a special condition of parole. *U.S. v. Scott*, 316 F.3d 733 (7th Cir. 2003). Additionally, courts have consistently upheld restrictions on contact with minors. *See U.S. v. Paul*, 274 F.3d 155, 160 (5th Cir. 2001). *See e.g., United States v. Loy*, 237 F.3d 251, 267-69 (3d Cir.2001), *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999). In some instances, the court has found that

lifetime bans on computer use and internet access were not narrowly tailored or that a parole condition prohibiting the parolee from any internet access was too broad. *See U.S. v. Voelker*, 489 F.3d 139 (3d Cir. 2007), *see also U.S. v. Heckman*, 592 F.3d 400 (3d Cir. 2010). However, that is not the case in Mrs. Guldoon's parole conditions. The relevant condition of Mrs. Guldoon's parole bars access to only social media networking sites where minors can create an account. This condition is not barred by the First Amendment nor is it overly broad.

In *Paul*, the court upheld the parole conditions which barred the parolee from owning a computer or having direct or indirect contact with a minor. 274 F.3d at 165. Paul was convicted of several crimes, including distributing child pornography. He used his email account in the furtherance of his crimes. The court held that Paul clearly used the computer and Internet to facilitate criminal conduct and victimization the directly injured minors. The needs to prevent recidivism and to protect the public were enough to ban a parolee's access to the internet and a computer. Paul's argument that this restriction was overbroad was unpersuasive as his interests did not outweigh the need to protect the public. *Id.* The Court should weigh the government's interest in preventing recidivism and protecting potential victims with a parolee's interest in their freedom.

In *Scott*, the court declined to hold a ban on internet access unconstitutional. 316 F.3d 736. Scott plead guilty to fraud and was given 3 years parole after serving time in prison. A condition of Scott's parole prohibited him from accessing the internet because child pornography was found on his computer. Scott was not convicted of child pornography and appealed the parole requirement on grounds that included the First Amendment. The court found Scott's First Amendment argument unreasonable. *Id*. However, the court did find the ban unreasonable

because Scott was not convicted of child pornography. *Id.* A convicted felon's interest in freedom of speech does not prima facie preclude any internet bans as a condition of parole.

The court decided that a lifetime ban on all internet access without exception was too broad in *Heckman* 592 F.3d 400. Heckman was convicted of distributing child pornography and the court found it unlikely that he would use the internet to lure a minor into engaging in sexual activity, as it is something he has never done. *Id* at 409. As such, the lifetime ban on internet access did not properly weigh the interest of protecting the public and reducing victimization with Heckman's interest in access to the internet. Instead, the court suggested a monitoring condition. *Id.* Any conditions imposed on a convicted person must be narrowly tailored and no greater than what is necessary to protect the public and prevent recidivism.

Finally, in *Crandon*, the court has upheld a full ban on internet usage throughout the duration of parole. 173 F.3d 122. Crandon used the internet and an email account to develop a relationship with a minor. He then kidnapped her and took pornographic images of her, which he shared. The court found that the internet was related to his offense and that the government's interest in preventing recidivism and protecting the public outweighed Crandon's employment opportunities as well as his freedoms of speech and association. The "condition was narrowly tailored and directly related to deterring Crandon and protecting the public." *Id* at 128. A three-year ban on all internet usage is not overly broad as the timing limitation is narrow enough.

Therefore, a ban on internet usage is not unconstitutional as long as the court weighs the potential of recidivism and interest in protecting the public with the parolee's rights. An internet ban may be broad as long as it's justifiable and has time restrictions.

The ban on Mrs. Guldoon's internet access is narrowly tailored. Similar to the crimes of child pornography committed in *Paul, Crandon,* and *Heckman*, Mrs. Guldoon used the internet

to further her crimes by using an email server to have communication with her victim. Mrs. Guldoon sent her victim emails of times to meet up. The government is merely protecting children from the threat of contact by Mrs. Guldoon. Additionally, this restriction will help Mrs. Guldoon to lead a lawful life. The parole board is within their purview to restrict her access to the internet.

Mrs. Guldoon asserts that she in unable to find a job due to her inability to obtain an email address. Like in *Crandon*, the Court should find this argument unpersuasive. Mrs. Guldoon should be more than capable to seek employment in person, and additionally, Mrs. Guldoon's interest in owning an email address is not greater than the government's interest in protecting children from the threat of contact by a predator.

Unlike the lifetime ban in *Crandon* or the full internet ban in *Heckman*, the restriction imposed on Mrs. Guldoon only affects social media networking sites and only lasts as long as Mrs. Guldoon is on parole. Mrs. Guldoon will likely be on parole for a short 4 years. Mrs. Guldoon may not be able to create a Facebook account, but her freedom to do so is not worth the risk of Mrs. Guldoon using the internet to lure minors into sexual activities, as she has done in the past. Moreover, Mrs. Guldoon can still access the internet to visit news sites, perform general knowledge searches, listen to music, and watch movies. Granted, a full internet ban would effectively remove Mrs. Guldoon from the virtual society, however, the restrictions imposed by ROSA are related to the sex crimes committed, as such, the limited restrictions on Mrs. Guldoon's internet access are constitutional and valid. In fact, these restrictions are so narrow that Mrs. Guldoon still has the ability to be a law-abiding, productive member of the internet's virtual society.

The Court should find the internet access to be narrowly tailored and with sufficient reasoning. As such, it should be upheld. Mrs. Guldoon used the internet in furtherance of her crime and in the interest of preventing her from committing a similar crime, she should have restricted internet access.

II. While Mrs. Guldoon possesses a right to travel, it is not absolute, and a parole board may restrict it. Additionally, no right to a driver's license exists.

The Fourteenth Amendment protects a person's right to interstate travel. *See Saenz v. Roe*, 526 U.S. 489 (1999). The Supreme Court has failed to comment on the distinction between interstate and intrastate travel. *See Meml. Hosp. v. Maricopa County*, 415 U.S. 250, 251 (1974). Even if intrastate travel is treated as a fundamental right, as some districts do, a parolee does not enjoy an absolute right to travel. *See first King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 647 (2d Cir. 1971); *see also People v. Hale*, 714 N.E.2d 861 (N.Y. 1999). The appropriate test is whether the infringement of the parolee's rights is rationally related to a permissible goal. *See King*, 442 F.2d at 648. The infringement of Mrs. Guldoon's interest to be within 1000 feet of a school and to have a driver's license is rationally related to the goal of preventing recidivism and protecting minors.

In *Williams v. Dept. of Corrections and Community Supervision*, 24 N.Y.S.3d 18 (N.Y. App. Div. 1st Dept. 2016), the felon was convicted of rape of a minor and later released on parole. Parolee was restricted from living within or knowingly traveling closer than 1000 feet of a school ground. The standard of review used was lenient in that the government must prove the parole condition had a rational relationship to the legitimate government interest it seeks to advance. The government created the 1000-foot barrier from a school to prevent the parolee from being at large around children. The restriction was temporary and ended upon the completion of

his parole. *Id.* This restriction even required Williams to move out of the group home where he resided at the time. *Id.* The court held the special condition did not unreasonably infringe upon any constitutionally protected interest of the parolee." *Id.*

In *People v. Coleman*, 812 N.Y.S.2d 857, 859 (N.Y. Sup. Ct. 2006), the parolee was barred from entering the city during the duration of his parole. The court held that his crime took place in the city and as such was reasonably related to the city. The restriction on travel to and within the city was valid because a parole board is authorized to impose a variety of conditions in a conditional discharge to ensure the parolee will lead a law-abiding life. *Id* at 859. The interest to stop recidivism outweighs the limited right the parolee possesses to travel. *Id.*

Finally, in *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999), the court failed to create a "right to drive" within the right to travel. Miller was denied a driver's license for failure to provide a social security number on religious grounds. *Id* at 1207. Miller did not have "a fundamental right to drive a motor vehicle" and the government did not impede his right to travel by denying him a driver's license. *Id.*

Therefore, a parolee's right to travel may be restricted in the interest of preventing recidivism and protecting potential victims. Additionally, no right to a driver's license exists and the government may deny a person the license on any grounds.

Like the ban in *Williams*, Mrs. Guldoon also faces a 1000-foot barrier from schools. Mrs. Guldoon met her victim as her capacity as a teacher at a school, so the government has a vested interest in protecting children and helping Mrs. Guldoon lead a law-abiding life.

Finally, Mrs. Guldoon's interest in owning a driver's license is without precedent. The government holds the absolute right to deny any person a driver's license and has done so for a multitude of reasons. The government can take away driver's licenses for unrelated offenses like

not paying a variety of fines. In this instance, Mrs. Guldoon used her car to drive B.B. to a secondary location where she would rape him. As a result, the government has a great interest in preventing Mrs. Guldoon from repeating such egregious behavior. The Parole Board feels revoking Mrs. Guldoon's driver's license prevents her from committing the crime again as well as helps protect children and the judgment of the board should be upheld.

Mrs. Guldoon's final argument against the travel restriction is that she lives within a mile of a school. This argument is poor. The government has an interest in preventing her from accessing school grounds and in fact, could prevent her from living that close to a school. Mrs. Guldoon argues that her access is limited. In fact, there is a route Mrs. Guldoon can still use to leave her neighborhood and there is no reason she needs more than one. This argument is unpersuasive.

In conclusion, Mrs. Guldoon's freedom to travel is a weak freedom and one that the Parole Board can, and often does, impede upon. The interest of protecting the community and preventing recidivism is enough to restrict a parolee's freedom of travel.

B. The registration requirements and special conditions required by Lackawanna's Registration of Sex Offenders Act do not violate the Ex Post Facto Clause of the United States Constitution

The United States Constitution contains two Ex Post Facto Clauses which prohibit both the Federal Government and the States from enacting laws with certain retroactive effects. *See* U.S. Const. art. I, §9, cl. 3; U.S. Const. art. I, §10, cl. 1. Justice Chase, in *Calder v. Bull*, stated the common law definition of ex post facto to be:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and 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.

3 U.S. 386, 390 (1798); *See also Peugh v. United States*, 569 U.S. 530, 538 (2013).

The Ex Post Facto Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995). The analysis is the same when determining whether a law violates the Ex Post Facto Clause of the Federal Constitution or violates the ex post facto provision of a state constitution. *Doe v. Town of Plainfield*, 893 N.E.2d 1124, 1133 (Ind. Ct. App. 2008). For a criminal law to fall within the ex post facto prohibition, two critical elements must be present: (1) it must be retrospective, i.e., it must apply to events occurring before its enactment; and (2) it must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 430 (1987). Following the four categories enunciated by Justice Chase in *Calder v. Bull*, "[a] statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a

more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence." *In re Contempt of Henry*, 765 N.W.2d 44, 61 (Mich. Ct. App. 2009).

However, not every law which disadvantages a defendant retrospectively is an ex post facto law. *See U.S. v. Aranda-Hernandez*, 95 F.3d 977 (10th Cir. 1996). The Supreme Court in *Collins v. Youngblood*, 497 U.S. 37 (1990), narrowed the meaning of "disadvantaged" in ex post facto analysis by overruling *Kring v. Missouri*, 107 U.S. 221 (1883), which quoted a jury charge of "an ex post facto law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, *or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage*." *Id.* at 228-29 (emphasis added). *Collins* went on to state:

> The holding in *Kring* can only be justified if the Ex Post Facto Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases.

Collins, 497 U.S. at 50.

Collins effectively went on to state that the focus of an ex post facto inquiry is not on whether the legislative change produces some ambiguous sort of disadvantage but on whether any such change alters the definition of criminal conduct or increases the penalty for a crime. 497 U.S. 37.

In the ex post facto analysis, the critical issue here is whether the registration requirements and the special conditions of parole required by ROSA have disadvantaged Mrs. Guldoon by effectively increasing the punishment of the crimes that she has pleaded guilty to. Because ROSA does not make a previously innocent act illegal, does not aggravate the seriousness of an offense, and does not allow a prosecutor to convict on less evidence, the only

way ROSA can violate the Ex Post Facto Clause is if ROSA increases the punishment of the crimes found under its purview.

The framework for determining whether a sex offender registration law constitutes retroactive punishment, thus violating the Ex Post Facto Clause, is well established. First, the court must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). Because courts "ordinarily defer to the legislature's stated intent," *Id.*, "'*only the clearest proof*' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997) (emphasis added).

If it is determined that the legislative intent was to enact a regulatory scheme that is civil and nonpunitive, the court then must determine whether the statute is "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *United States v. Ward*, 448 U.S. 242, 248-49 (1980). In determining the effects of a statute, the seven factors enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), provide a useful framework. These seven factors are:

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

Id. at 168-69 (numbers added for clarity).

The above factors are designed to apply in a variety of constitutional contexts, thus they are "neither exhaustive nor dispositive," *Ward*, 488 U.S. at 249, but only "useful guideposts." *Hudson*, 522 U.S. at 99.

I. The intent of the Legislature was to enact a regulatory scheme that is civil and nonpunitive.

Whether a statutory scheme is civil or criminal "is first of all a question of statutory construction." *Id.* The Court must consider both the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). The first step is to determine "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson*, 522 U.S. at 99. Other attributes that are probative of the legislature's intent are the manner of the statute's codification or the enforcement procedures it establishes. *Hendricks*, 521 U.S. at 361.

The retroactive Alaska Sex Offender Registration Act (Act) was upheld as constitutional in *Smith v. Doe*, 538 U.S. 84 (2003). When determining the intent of the legislature, the Court first looked to the text of the statute. *Id.* at 93. The Alaska Legislature expressly stated that "sex offenders pose a high risk of reoffending," and identified "protecting the public from sex offenders" as the "primary governmental interest" of the law. *Id.* (quoting 1994 Alaska Sess. Laws ch. 41, § 1). Additionally, while the registration requirements of the act were codified in Alaska's criminal procedure code, the Court stated that "the location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Id.* at 94. Ultimately, the Court concluded that the intent of the Alaska Legislature was to create a civil, nonpunitive regime. *Id.* at 96.

In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Court found a statute requiring forfeiture of unlicensed firearms to be a remedial civil sanction rather than a criminal punishment. *Id.* at 364. In so holding, the Court stated that the forfeiture provision furthered the broad remedial aims of the statute. *Id.* Congress "was concerned with the

widespread traffic in firearms…contrary to the public interest" and sought to "control the indiscriminate flow" of firearms. *Id.* The Court stated that "keeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive." *Id.*

The explicitly stated intent of a legislature to deem a statute as civil and regulatory in nature is not negated by the placement of the statute in a criminal provision. The Lackawanna Legislature has clearly intended ROSA to be a civil and regulatory scheme. In ROSA, the legislature has explicitly stated that "the danger of recidivism posed by sex offenders…and…the protection of the public from these offenders is of paramount concern or interest to government." Registration of Sex Offenders Act, L.C.L. § 168 (2016). The legislature goes on to state that "registration will provide law enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly." *Id.* ROSA continues in stating that laws prohibiting high risk sex offenders from entering upon school grounds and preventing access to social networking websites have "enhanced the state's ability to protect the public and prevent further victimization, sexual abuse and exploitation." *Id.*

The language used in ROSA, which establishes the Lackawanna Legislature's intent, is almost an exact replica of the language used in the Alaska Sex Offender Registration Act—an act that the Supreme Court upheld as constitutional and upheld the intent of the Alaska Legislature to be civil and regulatory, not punitive. Additionally, the registration requirements and regulation of sex offender activities implemented by ROSA are comparable to the remedial goals found in *89 Firearms*. The forfeiture of unlicensed firearms to "control the indiscriminate flow" of firearms and the regulation of sex offenders to "protect the public and prevent further

victimization" are both valid governmental interests that are civil and regulatory in nature, not punitive.

The argument that ROSA is punitive because it has been placed in Lackawanna Correction Law § 168, has no support. As discussed *supra*, "the location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." 538 U.S. at 94. The Court found that "codification of the Act in the State's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive." *Id.* at 95. *See also U.S. v. Hinckley*, 550 F.3d 926 (10th Cir. 2008) (invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive). Additionally, in *89 Firearms*, the forfeiture provision was found to be a civil sanction even though the statute was found in the criminal code. 465 U.S. at 364-65.

Because the intent of ROSA has been expressly stated as to protect the public and prevent further victimization, and because the placement of ROSA in a correctional law is not a dispositive determination of a punitive intent, the intent of ROSA should be found as civil and regulatory in nature.

II. The effects of ROSA do not negate the regulatory and nonpunitive intent of the Legislature.

Once the intent of ROSA is established to be civil, only the "clearest proof" will override that civil intent and turn ROSA into a criminal penalty. *See Hudson*, 522 U.S. at 100. The *Mendoza-Martinez* factors can be used as "useful guideposts" in attempting to establish this clearest proof.

Referring again to the Alaska Act in *Smith v. Doe*, the Act applied retroactively and not only required a sex offender to register with law enforcement, but also required the sex offender

to provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history; along with his photograph and fingerprints. 538 U.S. at 90. A large amount of this information was made available to the public, including the offender's date of birth, place of employment, photograph, address, physical description, license plate numbers, and more. *Id.* The Court found the requirements of the Act did not equate to public shaming and did not impose physical restraint. *Id.* at 98-101. Ultimately, using the *Mendoza-Martinez* factors, the Court found the effects of the Act did not negate, by the clearest proof, the intention to establish a civil regulatory scheme. *Id.* at 105.

Additionally, the U.S. Court of Appeals for the Second Circuit has upheld similar sex offender registration laws on multiple occasions. The court in *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), held the registration and notification requirements of New York's Sex Offender Registration Act (SORA) were not so punitive in form and effect as to transform them into punitive sanctions and found they did not constitute punishment for purposes of the Ex Post Facto Clause. *Id.* at 1284. *See also Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997) (holding that the notification policy of Connecticut's Office of Adult Probation does not constitute punishment for purposes of ex post facto analysis); *Doe v. Cuomo*, 755 F.3d 105 (2d Cir. 2014) (retroactive amendments to SORA that extended the registration requirement for level-one sex offenders from ten to a minimum of twenty years and also eliminated the ability of level-one sex offenders to petition for relief from registration did not transform SORA into a punitive statute.)

The requirements of ROSA are similar to the requirements found in SORA. These include the requirement that the offender provide their name, date of birth, sex, race, height,

weight, eye color, driver's license number, home address, description of the offense of conviction, the date of conviction, and the sentence imposed, as well as a photograph and fingerprints. *See Doe v. Pataki*, 120 F.3d at 1267. Additionally, the Supreme Court has applied very similar reporting requirements to the *Mendoza-Martinez* factors and has held that the effects of these requirements do not negate, by the clearest proof, the intention to establish a civil regulatory scheme. *See Doe v. Smith*, 538 U.S. 84. Thus, the effects of the registration and notification requirements of ROSA do not negate the civil intent of the legislature.

The main question is whether the special conditions required by ROSA would effectively negate the civil intent of the legislature. Namely, the mandatory suspension of driving privileges, the ban on travel near schools, and the ban on accessing commercial social networking websites. When analyzing the special conditions under the *Mendoza-Martinez* factors, the most important factors for our analysis are whether the conditions: have been regarded in our history and traditions as a punishment; impose an affirmative disability or restraint; promote the traditional aims of punishment; have a rational connection to a nonpunitive purpose; or are excessive with respect to this nonpunitive purpose.

Looking to our history and traditions of punishment, some colonial punishment were intended to inflict public disgrace. Humiliated offenders were required "to stand in public with signs cataloguing their offenses." AJ Hirsh, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 Mich. L. Rev. 1179, 1226 (1982). Nothing in ROSA looks to publicly shame or stigmatize Mrs. Guldoon. Any stigma that could occur would be the result of her guilty plea, which was already public knowledge before ROSA was implemented. More recently, punishment can be seen in terms on incarceration, which also goes to the imposing of an affirmative disability or restraint. ROSA does not impose a constricted physical

restraint; Mrs. Guldoon is able to move about and even hold employment. The conditions of Mrs. Guldoon's parole do not equate to imprisonment, which is the paradigmatic affirmative disability or restraint. *Hudson*, 522 U.S. at 104.

Regarding the traditional aims of punishment, the special conditions of parole imposed by ROSA could be seen as applying a deterrent effect to future offenders. Of course, deterrence is one of the traditional aims of punishment. However, this does not automatically transform ROSA into a penal statute. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal'…would severely undermine the Government's ability to engage in effective regulation." *Id.* at 105. Without more, the possible deterrent effect of ROSA does not negate the civil intentions of the legislature.

A statute's rational connection to a nonpunitive purpose is a most significant factor in a determination on whether a statute's effects are not punitive for ex post facto purposes. *See United States v. Ursery*, 518 U.S. 267 (1996). *See also People v. Superior Court (Myers)*, 50 Cal. App. 4th 826 (2d Dist. 1996) (found no ex post facto violation for commitment of persons acquitted of a crime by reason of insanity because the commitment is imposed, not as punishment, but for the protection of society and of the individual confined.) The legislature has stated that the nonpunitive purpose of ROSA is to protect the public by preventing future victimization and to aid law enforcement. The special conditions imposed by ROSA have a rational connection to these purposes. A child was the victim of Mrs. Guldoon's crimes, and schools are where a person is guaranteed to find children. Specifically, Mrs. Guldoon was a teacher who victimized one of her students while at school. Thus, the requirement to stay at least 1000 feet away from schools bears more than a rational connection to ROSA's nonpunitive purposes.

Regarding the ban on social commercial networking websites, ROSA explains in its text how computers can be used to victimize children—"behind a computer screen, convicted sex offenders are able to hide their identity while attempting to engage children in illicit activity." ROSA, L.C.L. § 168. Again, this ban bears a rational connection to one of the stated purposes of ROSA—protecting the public from future victimization.

The mandatory suspension of Mrs. Guldoon's driver's license also bears a rational connection to protecting the public from future victimization. Mrs. Guldoon used her own personal vehicle during the crimes she plead guilty to by driving B.B. home after she engaged in sexual contact with him. Additionally, vehicles provide an offender with a mobile crime scene; allowing them to take a victim where ever they please.

Finally, the conditions imposed by ROSA are not excessive when applied to the stated purpose of the statute. Using the rational connection argument above, no condition applied by ROSA is excessive when applied to the purpose of protecting the public against future victimizations. Each condition aids in the prevention of allowing a known offender to offend again.

Because application of the *Mendoza-Martinez* factors does not provide the "clearest proof" that the effects of ROSA negate the civil and regulatory purpose, the retroactive application ROSA must be found to not violate the Ex Post Facto Clause.

CONCLUSION

For the above stated reasons, the Lackawanna Parole Board respectfully requests that this Court dismiss Petitioners claims that the parole conditions required by ROSA violated the First and Fourteenth Amendment and the Ex Post Facto Clause of the United States Constitution.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, in the year of 2019, I served upon the Supreme Court of the United States of America and Counsel for the Defendant/ Respondent at the below listed address a copy of this Brief for the Plaintiff/Petitioner by way of personal service.

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Respectfully Submitted,

/s/ Group 21

Group 21