No. 19-01

In the
Supreme Court of the United States

Mary Guldoon,
Petitioner,

v.

State of Lackawanna Board of Parole,
Respondent.

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

BRIEF FOR PETITIONER

Team 22
Counsel for Petitioner

QUESTION PRESENTED

I. Do the First and Fourteenth Amendments prohibit statutorily mandated probation conditions which do not allow persons convicted of certain crimes to access pornographic or social networking websites, to operate motor vehicles, or to be present within one thousand feet of the real property boundary line of school grounds without regard to the circumstances of the crime committed or the attributes of the offender?

II. Does the Ex Post Facto Clause prohibit the imposition of new parole requirements when parolees were not subject to such requirements upon the commission of their offenses and when said requirements imposed a detrimental effect on parolees?

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STATEMENT OF THE CASE

Mary Guldoon began teaching at Lackawanna High School in 2008. (J.A. at 11). After giving birth to her daughter in May 2010, Guldoon began suffering from severe post-partum depression. (J.A. at 12). Guldoon was prescribed Prozac, but unfortunately, the Prozac provided Guldoon with little improvement and unmasked her then undiagnosed Bi-Polar Disorder. (J.A. at 12-13). Those living with Bi-Polar Disorder often experience episodes of mania, which can result in inappropriate behavior such as hypersexuality. (J.A. at 13).

Because her maternity leave expired, Guldoon returned to teach in September 2010 despite her continued depression. (J.A. at 12). Upon returning, Guldoon developed a close relationship with B.B., one of her fifteen-year-old students. (J.A. at 5, 12). The two began a sexual relationship in October 2010, which lasted until they were discovered by the school's Principal in December. (J.A. at 5-7, 12). The sexual misconduct occurred both at the school, in Guldoon's car, and at Guldoon's home. (J.A. at 5). Guldoon and B.B. communicated with each other via text and e-mail but no pornographic or sexual communications were recovered. (J.A. at 5-6).

Guldoon was arrested and charged with multiple counts of Rape (Third Degree), Criminal Sexual Act (third Degree), and Sexual Misconduct. (J.A. at 13). To spare her family and B.B. the pain of going to trial, Guldoon pled guilty to one count of each offense. (J.A. at 2, 13). The Board of Parole recommended Guldoon serve a sentence of incarceration for no less than ten years, for which she would be eligible for parole after ten years, and serve a period of probation of at least ten years. (J.A. at 5). The Board recommended Guldoon be subject only to the General Conditions of Parole in her Presentence Report. (J.A. at 7).

Guldoon was officially diagnosed with Bi-Polar Disorder when she began serving her sentence at Tonawanda Correctional Facility and began receiving proper treatment, since which she has experienced no manic episodes. (J.A. at 13). Along with treatment, Guldoon improved herself by completing several post-graduate courses for which she received a Master's Degree in Computer Programming. (J.A. at 13-14).

In 2016, Lackawanna enacted the Registration of Sex Offenders Act (ROSA), which amended the correction law, penal law, and executive, expressing interests in public safety and deterrence of recidivism. (J.A. at 19). ROSA implemented a new registration system for sex offenders and imposed new parole requirements that were previously only considered Special Conditions. (J.A. at 2, 19). These requirements included registration as a sex offender based on the offense of conviction without individual assessment, prohibiting sex offenders from entering within 1,000 feet of any school, and surrendering driver's licenses. (J.A. at 9-10). Another requirement restricted access to pornographic and commercial social networking websites. (J.A. at 9).

Upon her release on parole, Guldoon became subject to these new conditions, which were neither recommended nor mandatory upon her sentencing. (J.A. at 2-3). Since release, Guldoon struggled to find suitable employment, another requirement of parole, because of restrictions on her ability to drive and access to the internet. (J.A. at 3). These internet restrictions have further affected Guldoon's family, as they are unable to access the internet because they reside in the same home as Guldoon. (J.A. at 16-17). Guldoon cannot even teach in a school online, rendering useless all of her studies in computer science and teaching. (J.A. at 17).The only employment Guldoon found was at the Plewinski's Pierogi Company plant, which required travel by bicycle on a perilous route because the only direct routes crossed within 1,000 feet of school grounds.

(J.A. at 15-16). The location of Guldoon's home has also practically confined her because it rests between two nearby schools. (J.A. at 14).

Guldoon filed a complaint against the Lackawanna Board of Parole with the United States District Court in the Middle District of Lackawanna. (J.A. at 1). The First Claim for Relief alleged that ROSA's restrictions violated her First and Fourteenth Amendment Rights under the United States Constitution, including her right to free speech, her right to freedom of travel, and her right to substantive due process. (J.A. at 4). The Second Claim for Relief alleged that ROSA's registration requirements and mandatory conditions of parole violated her rights under the Ex Post Facto Clause of the United States Constitution. (J.A. at 4). As relief, Guldoon sought a declaratory judgment declaring ROSA unconstitutional and a permanent injunction restraining Lackawanna from enforcing ROSA. (J.A. at 4).

Lackawanna then filed a motion to dismiss for failure to state a claim, attaching Guldoon's Pre-sentence Report in support. Guldoon responded by submitting an affidavit. These actions transformed the motion to dismiss into a motion for summary judgment. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1 (M.D. Lack. 2019). The district court granted Lackawanna's motion for summary judgment to dismiss the complaint. *Id.* at 10. The United States Court of Appeals for the Thirteenth Circuit then affirmed the judgment. *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1 (13th Cir. 2019). Guldoon petitioned for a writ of certiorari which was granted by this Court.

SUMMARY OF THE ARGUMENTS

The American criminal justice system allows certain offenders to re-enter society once punishment has been served. Parole allows authorities to continue monitoring offenders once released and assists in ensuring parolees properly re-integrate into society. At this stage, offenders receive their second chance and often work on re-building their lives while subject to the supervision of the court system. While parolees are not apprised of the full range of rights held by the bulk of the American citizenry, they are not without rights altogether.

While parole conditions may infringe on rights which would otherwise be constitutionally protected to a fuller extent, the Fourteenth Amendment forbids state or federal governments from imposing such conditions when they infringe on fundamental rights unless the conditions are narrowly tailored so as not to infringe on those rights more than is necessary to achieve the government's legitimate purpose. While the state's purpose here is legitimate (preventing recidivism and protecting potential future victims), the conditions which prohibit internet use, prohibit the use of a motor vehicle, and prohibit presence within a thousand feet of a school ground infringe upon the fundamental rights of expression and travel far more than is necessary to achieve that purpose.

The crimes for which Mrs. Guldoon was convicted are connected to motor vehicle and internet use in so attenuated a manner as to render any relation between those them unreasonable. While barring entry onto school grounds by a person convicted of crimes of this nature seems to be reasonable at first blush, the statutory definition of the term "school grounds" is so broad as to render even that prohibition unreasonable. Because the mandatory parole conditions challenged here bear no reasonable relation to the crimes for which Guldoon was convicted, they are arbitrary and capricious and thus unconstitutional as applied. Therefore they must be invalidated.

The process of reintegration can be difficult considering the stigma attached to those convicted of a crime. However, if state governments and the federal government are permitted to enact laws increasing the burden on parolees, the goalposts often shift and make this re-integration immensely more difficult. The Ex Post Facto Clause of the United States Constitution protects against this threat by forbidding the passage of laws that apply retroactively to past conduct and impose a detrimental effect on the accused. A law is retroactive if it increases the punishment for crimes already committed and carries a detrimental effect if it was enacted as a penal mechanism. Even a law enacted as part of a civil regulatory scheme can create a detrimental effect if it imposes undue burdens on those subject to the legislation, effectively transforming it into a penal mechanism.

Yet the State of Lackawanna Board of Parole enacted this kind of retroactive legislation through the Registration of Sex Offenders Act (ROSA). This legislation applied retroactively to Mary Guldoon, who had been convicted and sentenced well before the enactment of the legislation. At the time of her sentence, probation recommended she be subject to the General Requirements of Parole. However, when released on parole, Guldoon became subject to new parole requirements that were not mandatory when she was sentenced.

These new requirements further imposed a detrimental effect on Guldoon. There is evidence to suggest Lackawanna enacted the legislation as a penal mechanism. ROSA amended corrections law and penal law, both associated with criminal proceedings. Further, ROSA adjusted the requirements of parole, another criminal measure. While the State expressed a public safety interest in this legislation, plenty suggests ROSA was intended to serve as a penal mechanism.

Even if ROSA were implemented as a civil regulatory scheme, the undue burdens placed on those subject to its requirements certainly transform ROSA into a penal mechanism. ROSA restricts Guldoon from travelling or working within certain areas and effectively banishes her from society by prohibiting internet usage. Travel and internet restrictions severely limited Guldoon's job opportunities and confined her to her home. Additionally, ROSA served traditional aims of punishment such as deterring recidivism and incapacitating offenders. The legislature further provided no support as to the effectiveness of ROSA's policies in relation to nonpunitive goals or interests. The new parole requirements were therefore excessive and imposed undue punishment.

ROSA is a blatant violation of the Ex Post Facto Clause. The district court erred in granting Lackawanna's motion for summary judgment because Guldoon only needed to present a genuine dispute of material fact to proceed to trial. Guldoon deserves her day in court to combat this legislation on behalf of herself and all other similarly situated parolees simply trying to rebuild their lives and rejoin society.

ARGUMENT

I. Standard of review.

A court's decision granting a motion for summary judgment is reviewed de novo. The decision granting the motion should be reversed if the court finds that a genuine issue of material fact exists. *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 545 (2d. Cir. 2010). Such a dispute exists if a reasonable jury could reasonably find in favor of the plaintiff. All reasonable inferences are made in favor of the non-moving party. *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir. 2000).

II. There is a genuine dispute of material fact as to whether the parole conditions imposed on Guldoon violate the rights protected by the First and Fourteenth Amendments to the United States Constitution.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. Const. amend. I. This Court held nearly a century ago that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The parole condition requiring that Guldoon refrain from accessing any commercial social networking website exceeds the limitations placed upon the State of Lackawanna by those Amendments.

The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This provision has long been held to protect fundamental rights, other than those enumerated in the Bill of Rights, from infringement by government at any level. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965). One of these fundamental rights is the right to travel. *Attorney Gen. of*

N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986). The parole conditions forbidding Guldoon from operating a motor vehicle or from entering within 1,000 feet of school grounds exceed the State's ability to infringe upon that fundamental right. Because these conditions are more excessive than necessary, they violate the Fourteenth Amendment.

A. Lackawanna's requirement preventing parolees from accessing pornographic websites or commercial social networking websites violates the First Amendment both facially and as applied.

Parolees registered as sex offenders are prohibited from using the internet to access pornographic materials or commercial social networking websites. (J.A. at 46). Commercial social networking websites are broadly defined to include any website where persons under eighteen years of age are permitted to register. (J.A. at 3). This broad definition not only encompasses those websites usually considered social networks such as Facebook and Twitter but also encompasses websites with online employment applications or email services. (J.A. at 3, 16).

This Court held less than two years ago that a similar, but less restrictive, statute in North Carolina was unable to withstand First Amendment analysis even under intermediate scrutiny. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1734-1737 (2017). In that case, the statute in question prohibited registered sex offenders from accessing commercial social networking websites. Websites meeting the following four criteria were considered commercial social networking websites: (1) they must be "operated by a person who derives revenue" from the site, through advertising or membership fees, for example; (2) they must facilitate social contact between users; (3) they must "allow users to create . . . personal profiles that contain information such as the name or nickname of the user [or] photographs placed on the personal Web page by the user;" and (4) they must provide "mechanisms to communicate with other users." *Id.* at 1733-34. Sites primarily designed

for commercial transactions were exempted. *Id.* This Court held that because the First Amendment requires that "all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more," and that cyberspace has become "the most important place[] . . . for the exchange of view," such a broadly formulated prohibition was necessarily more burdensome than necessary to serve even such a legitimate interest as protecting children from sexual predators. *Id.* at 1735-37.

The question of whether Lackawanna's internet prohibition is too broad has already been answered by this Court's ruling in *Packingham*. The primary distinction remaining which could save Lackawanna's statute is that it explicitly applies only to parolees and persons otherwise conditionally released from incarceration, while the North Carolina statute applied even to "persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system." *Id.* at 1737. (J.A. at 45-46). However, the fact that the North Carolina statute was applicable to such persons was not taken into consideration in the reasoning of either the majority or concurrence. *See generally Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). This seems to indicate that it would have made no difference to the Court whether Packingham had been a parolee or, as he was, a person whose sentence had been served.

Assuming *arguendo* that Guldoon's status as a parolee is relevant to the analysis, the mandatory parole condition imposed is unconstitutional as applied because it is not reasonably related to Lackawanna's interests in imposing parole conditions. While parolees have significantly less of a right to liberty under the Fourteenth Amendment than the normal citizen, they are not entirely without such rights. *See United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d, 1161, 1164 (2d Cir. 1970). For example, due process is implicated

in revocation of parole. *Morrisey v. Brewer*, 408 U.S. 471, 480 (1972). While such cases rarely come to this Court, lower courts routinely hold that parole conditions must be reasonably related to the state's interests in protecting potential victims and preventing recidivism. *See Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972); *United States v. Bello*, 310 F.3d 56, 62 (2d Cir. 2002); *United States v. Loy*, 237 F.3d 251, 270 (3d Cir. 2001).

Guldoon's crimes did not involve use of the internet in any way, nor did they involve access to pornography. (J.A. at 5-6). The illicit relationship in which she was involved took place in person and long-distance communications, for the most part, took place over the phone via text message. (J.A. at 5-6). Some communications may have occurred via email. *Guldoon v. Lack. Bd. Of Parole*, 999 F. Supp. 3d 1, 1 (M.D. Lack. 2019). However, such communications in no way justify such an expansive prohibition on access to "the most important place[] . . . for the exchange of views." *Packingham*, 137 S. Ct. at 1735. The parole board's written conditions offer no explanation of any need for such a condition. (J.A. at 8-9). As this condition bears no relation to Guldoon's crimes, this prohibition cannot stand. Because the State has offered no explanation as to why such a condition is related to its interests, summary judgment should not have been granted.

B. Lackawanna's mandatory parole condition forbidding use of a motor vehicle violates the Due Process Clause of the Fourteenth Amendment as applied.

While parolees are not possessed of the full range of constitutional rights held by the bulk of the American citizenry, they are not without rights altogether. *See Martin v. United States*, 183 F.2d 436, 439 (4th Cir. 1950), cert. denied, 340 U.S. 904 (1950); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970). The release of parolees may of course be accompanied by various conditions, but those conditions must be reasonable. *See United States v. Knights*, 534 U.S. 112, 119 (2001). Lower courts have

repeatedly held that when a fundamental right is implicated by a condition of parole or supervised release, that condition must be narrowly tailored to serve the State's interests without infringing upon that right any more than is reasonably necessary. *E.g. United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005); *Goings v. Ct. Servs. & Offender Supervision Agency*, 786 F. Supp. 2d 48, 70 (D.D.C. 2011). To reiterate, one of these fundamental rights is the right to travel. This right is certainly implicated by a total prohibition on the operation of what "in our modern world, . . . have become a necessity" of travel. *Guldoon v. Lack. Bd. of Parole*, 999 F.3d 1, 5 (13th Cir. 2019).

In the present case, Guldoon was convicted of one count each of third degree rape, third degree criminal sexual act, and sexual misconduct. (J.A. at 5). As with the internet condition, the record shows some indication that the use of a motor vehicle was somewhat involved in the commission of Guldoon's crimes. (J.A. at 5).

As the Thirteenth Circuit below noted, Guldoon's "use of a motor vehicle was incidental to her" crimes. *Guldoon*, 999 F.3d at 5. Such incidental connection cannot reasonably justify a total prohibition on the operation of a motor vehicle. This is especially true given the fact that "[t]o be deprived of [motor vehicle] use is to render one essentially house-bound." *Id.* This is an even more compelling observation under the present facts, considering Guldoon lives in a rural area where public transport is infrequent. (J.A. at 15). This condition has created a situation where the only sufficient employment Guldoon found was at a pierogi factory near her home during the night shift. (J.A. at 15). Because direct routes to her job cross within 1,000 feet of school grounds, the route Guldoon must take requires a round trip of approximately forty miles. (J.A. at 5-6).

Lackawanna's interest in imposing parole conditions is to prevent recidivism and protect other potential victims. However, forbidding a parolee, whose previous use of a motor vehicle bore little relation to the crimes for which she was convicted, from operating a motor vehicle serves neither purpose. Further complicating this issue is the fact that the prohibition lasts until either twenty years have elapsed or the person subject to the prohibition is no longer required to register as a sex offender. (J.A. at 46). In the case of a level two sex offender such as Guldoon, registration is a life-long requirement. (J.A. at 35). Given all of this, Guldoon will be subject to the driving prohibition for twenty years following her release, despite the fact that she is only required to serve five years as a parolee. *Guldoon*, 999 F. Supp. 3d at 2.

As this Court noted in *Packingham*, parole conditions which "impose[] severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system" are "troubling." *Packingham*, 137 S. Ct. at 1737. Because this parole condition bears no reasonable relation to Lackawanna's interests in imposing parole conditions, and because this condition will continue to severely restrict Guldoon's activities long after she has ceased to be under court supervision, it violates her right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

C. Lackawanna's mandatory parole condition forbidding the entry of parolees from entering school grounds is not reasonably related to Lackawanna's interests in monitoring parolees.

Parolees are also prohibited from entering upon "school grounds." This term includes not only what the average person would likely consider to be school grounds, but also any "sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants" which happen to be within a thousand feet of any school's real property boundary line. (J.A. at

45). While it seems that "public places" is somewhat narrowly defined (it doesn't include post offices, hospitals, or churches, for example), the inclusion of streets and parking lots broadens its applicability significantly. For instance, many hospitals are entirely surrounded by a parking lot, and every hospital, post office, or church that does not requires the use of a street to access it.

Admittedly, access to school grounds played a significant role in the crimes for which Guldoon was convicted. A substantial part of her criminal activity took place on school property, and she had access to her victim through their mutual presence in the classroom. The interests of protecting potential new victims and of preventing recidivism thus are served by preventing such a parolee's entry onto school grounds. However, the definition given to the term "school grounds" in the statute is far broader than necessary to serve those interests, which could be fulfilled "merely by barring her from entry in [school] buildings." *Guldoon*, 999 F.3d at 5.

There is no need to forbid presence in public areas within a thousand feet of a school's real property boundary line. As discussed above, this "public places" prohibition is extremely broad. With Guldoon's case in particular, she is forced to make a twenty-mile trek on a bicycle along a high-speed roadway at night just to get to her job, and there is no provision of the statute which allows for an exception for such a circumstance. (J.A. at 16).

A parole condition prohibiting parolees from being present in any public place within a thousand feet of the real property line of a school is not reasonably related to Lackawanna's interests here, and the statute is thus unconstitutional as applied to Guldoon. There may be some circumstance where such a condition would not be overbroad. For example, there could be a case where the parolee subject to the statute had accessed public

buildings near to school grounds for purposes of stalking a victim or potential victim. Yet, nothing in the record shows that Guldoon is such a parolee.

To the extent that the parole condition prohibiting Guldoon's presence on school grounds also forbids her from being present in any public place that is near or adjacent to school grounds, her right to travel is infringed. Because that fundamental right is implicated, the condition must be narrowly tailored so as not to infringe upon that right any more than is reasonably necessary to serve Lackawanna's interest in preventing recidivism and protecting potential victims. Since this condition is not narrowly tailored to serve those interests, it is unconstitutional as applied to Guldoon.

III. A genuine dispute of material fact exists as to whether Lackawanna's Registration of Sex Offenders Act constitutes retroactive legislation in violation of the Ex Post Facto Clause of the United States Constitution.

Article I, Section 10 of the United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law . . . ." U.S. Const. art. 1, § 10, cl. 1. This clause protects citizens from arbitrary and vindictive legislation while also providing notice as to what conduct will be penalized and how. *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981). For legislation to violate the Ex Post Facto Clause, it must (1) be retroactive and (2) impose a detrimental effect on the accused. *Id.* at 29 (citing *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). If the legislation is retroactive and penal in nature, it automatically violates the Ex Post Fact Clause. However, if the legislation is civil, the court must determine whether it has been effectively "transformed" into penal legislation through the punishments imposed. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

Guldoon has enough to show a genuine dispute of material fact that Lackawanna's Registration of Sex Offenders Act (ROSA) constitutes an ex post facto law. First, the parole requirements were imposed retroactively, as Guldoon was not subject to the requirements upon

her sentencing. Second, these requirements imposed a detrimental effect upon Guldoon. ROSA operates as penal legislation but even if determined to be civil, the parole requirements effectively transform it into a penal mechanism. Considering these arguments and the fact that all reasonable inferences are made in Guldoon's favor, the decision granting Lackawanna's motion for summary judgment should be reversed, and Guldoon should be allowed to present her case at trial.

A. The parole requirements imposed by ROSA are retroactive because they were not mandatory upon Guldoon's sentencing.

Legislation can be retroactive in three ways: (1) the statute punishes an act as a crime although it was innocent when committed; (2) the statute increases the punishment of a crime after its commission; or (3) the statute deprives a defendant of a defense that was available when the crime was committed. *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). Retroactive legislation does not provide notice as to what conduct is penalized and what punishments will result from engaging in such conduct. *Dobbert v. Florida*, 432 U.S. 282, 298 (1977). Without proper notice, citizens do not have the opportunity to properly alter their conduct in compliance with the law. Knowing the legislature may implement some new law or statute is not sufficient to put citizens on proper notice, as the State improperly argued. *Miller v. Florida*, 482 U.S. 423, 431 (1987). Even retroactive changes to parole can violate the Ex Post Facto Clause provided the changes risk increasing the punishment for crimes to which they are attached. *Garner v. Jones*, 529 U.S. 244, 250 (2000) (citing *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995)).

Clearly, ROSA is retroactive legislation because it increased the punishment for Guldoon's crime well after its commission. Guldoon pled guilty to her sexual misconduct in 2011 and began serving her sentence that same year. (J.A. at 2). ROSA was not enacted until 2016, while Guldoon was incarcerated. (J.A. at 2). When Guldoon was released on parole in

2017, she was subjected to the new parole requirements implemented by ROSA. (J.A. at 2-3). Yet, Lackawanna suggested Guldoon be subject only to "General Conditions of Parole" and made no recommendation as to any special conditions in Guldoon's Pre-sentence Report (PSR). (J.A. at 2, 7). Because Guldoon was not subject to these conditions upon sentencing, ROSA is retroactive.

The district court erred in concluding ROSA was not retroactive just because it codified certain parole requirements and made them mandatory. While it was possible for Guldoon to have been subject to these requirements upon her sentencing, they were not mandatory at the time. (J.A. at 8-10). In *Lindsey v. Washington*, 301 U.S. 397, 400 (1937), this Court declared a statute ex post facto because it "[made] mandatory what was before only the maximum sentence." ROSA accomplished the same goal by making special parole requirements, which would be considered the maximum parole requirements, mandatory. These parole requirements increased the punishment for sex offenses, the crimes to which the requirements were attached.

B. Guldoon has suffered a detrimental effect from the requirements implemented by ROSA.

When determining the effect of retroactive legislation on the accused, courts must look to what kind of mechanism the legislature intended to impose. *Smith v. Doe*, 538 U.S. 84, 92 (2003). If the legislature intended to impose punishment, the inquiry ends, and the legislation is ex post facto. *Id.* However, if the legislature intended to impose a civil regulatory scheme, it must be shown that the legislation is so punitive as to override the intention to deem the legislation civil. *Hendricks*, 521 U.S. at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). The legislation does not need to impair a "vested right" to be considered punitive. *Weaver*, 450 U.S. at 29.

1. Lackawanna intended to impose penal legislation with ROSA.

Courts consider the express and implied purposes of the statute, manner of codification, and enforcement procedures in determining the legislative intent behind the statute. *Smith v. Doe*, 538 U.S. at 93-94. No one factor will be entirely dispositive, but all are at least probative. *Id.* at 94. For example, the codification of certain provisions in a State's criminal procedures can certainly indicate a punitive purpose, but this will not be enough to fully transform a legislature's civil intent to punitive intent. *Id.*

The Ninth Circuit conducted a thorough analysis of legislation imposing requirements on sex offenders in *American Civil Liberties Union of Nevada v. Masto*, 670 U.S. 1046 (9th Cir. 2012). The legislative intent was to further public safety by expanding on a national registry of sex offenders. *Id.* at 1053. Legislative history and structure of the statute evinced the desire to enact a civil regulatory scheme. *Id.* at 1054. Mere codification in "Procedure in Criminal Cases" was not enough to overpower the civil intent. *Id.* Overall, the legislation merely expanded a public safety-oriented system and this expansion did not override the legislature's intent nor indicate it was a penal mechanism. *Id.*

Unlike the legislation in *Masto*, there is evidence to suggest Lackawanna intended to implement a penal mechanism by enacting ROSA. ROSA amended Lackawanna's correction law, penal law, and executive law. (J.A. at 19). Correction law and penal law directly relate to how crimes are punished. In addition, ROSA was not enacted as an expansion of a sex offender registry, it was the beginning of one. (J.A. at 2). While Lackawanna implemented the legislation as a measure of public safety due to the alleged dangers of recidivism posed by sex offenders, it was done so by altering the requirements of parole, an instrument attached to criminal matters. (J.A. at 3, 19). ROSA should not be treated similarly to statutes only imposing registration as it

requires far more for those subject to its measures. (J.A. at 19-21). A reasonable inference could be made that Lackawanna intended to impose a penal mechanism when enacting ROSA.

2. Even if ROSA was found to be a civil mechanism, the heavy burdens imposed effectively "transform" it into a penal statute.

To override legislative intent and show legislation is penal, clear proof of punishment imposed by the statute must be shown. *Hudson v. United States*, 522 U.S. 93, 100 (1997). While this standard may be difficult, it is not impossible. *Doe v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016). This Court has indicated a number of factors to determine whether a civil mechanism has been effectively transformed into a penal mechanism. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The factors include "whether . . . the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith v. Doe*, 538 U.S. at 97. Similar to determining legislative intent, no one factor will be entirely dispositive. *United States v. Ward*, 538 U.S. 242, 249 (1980).

The Sixth Circuit analyzed how these factors applied to Michigan's Sex Offender Registration Act (SORA) in *Snyder*. SORA retroactively imposed a number of requirements on sex offenders, including: (1) providing information to a public registry; (2) prohibiting registrants from working, living, or loitering within 1,000 feet of a school; (3) dividing registrants into tiers according to dangerousness based solely on the offense of conviction; and (4) requiring immediate appearance in person to update information such as new vehicles or internet identifiers. *Snyder*, 834 U.S. at 697-98.

Although SORA's restrictions were not identical to traditional punishments, they shared similarities to banishment and public shaming while also being structured similarly parole and

probation. *Id.* at 703. SORA's restrictions regarding the ability to pass within 1,000 feet of a school and requiring in-person updates regarding addresses and internet identifiers were found to be effective disabilities or restraints. *Id.* Punishment goals including incapacitation and deterrence were met though the court afforded this factor little weight because these goals could also be described as civil and regulatory. *Id.* at 704. Regarding the final two factors, the court acknowledged the reasoning for the legislation's implementation was properly discernable as a civil purpose. However, the record reflected no data or support as to how SORA would accomplish the civil goals. Therefore, the restrictions imposed were excessive and outweighed the State's interest in the legislation. *Id.* at 704-05. Because the legislation was retroactive and imposed punishment, the application of the statute to the plaintiffs was ex post facto. *Id.* at 706.

ROSA shares many similarities to SORA and Guldoon can show a genuine dispute of material fact as to whether ROSA is effectively punitive. Much like SORA, ROSA shames parolees by sorting them into classifications based on offense without any individualized assessments of potential recidivism. (J.A. at 14). This asserts more shame upon offenders than sole conviction would. Further, ROSA imposes geographic restrictions consistent with punishments such as banishment while also imposing harsh internet restrictions, which can be considered a modern form of banishment. ROSA's requirements are therefore consistent with historic forms of punishment. (J.A. at 14).

As to affirmative disability or restraint, ROSA greatly impacts parolees and their freedoms. In this factor, courts look to how effects of the legislation impact those subject to it. *Doe v. Miami-Dade Cnty.*, 846 F.3d 1180, 1185 (11th Cir. 2017). Guldoon has felt severe effects from the restrictions imposed by ROSA. Because Guldoon's home is located between two schools, her movement must be tailored around these areas; the movement restrictions have

imposed an effective confinement of Guldoon to her own home. (J.A. at 3). Restricting Guldoon from driving only further prohibits her movement. These two restrictions alone prevented Guldoon from seeking suitable employment, another mandatory condition of her parole. (J.A. at 3, 15). The only employment Guldoon was able to attain required her to take a hazardous, indirect route on bicycle due to her movement restrictions. (J.A. at 15-16).

Guldoon has also been effectively disabled because ROSA prevented her from accessing commercial social networking websites. (J.A. at 16). While this would not seem too restrictive a prohibition, many websites with job postings fall within the meaning of commercial social networking websites under the statute. (J.A. at 16). Not only did this prohibit Guldoon from working for a school online, which is the profession she is trained for, but she was further prohibited from searching and applying for jobs online. (J.A. at 17). Guldoon's family even suffered the effects of this prohibition simply by living in the same home as Guldoon, which has greatly impaired Guldoon's husband and daughter from fulfilling their own work and school responsibilities. (J.A. at 17).

ROSA's requirements certainly serve traditional goals of punishment such as deterrence and incapacitation. By preventing parolees from coming within 1,000 feet of school grounds, driving, or accessing social networking websites, Lackawanna sought to incapacitate parolees through ensuring the opportunities to commit such offenses would be dramatically decreased. (J.A. at 20-21). The strict parole requirements would also likely deter the commission of sex offenses. (J.A. at 21). Retribution may also be served because parolees are punished based entirely on the crime of conviction without consideration of individual factors. (J.A. at 14).

Although these goals may also be described as civil and regulatory, ROSA provides no support for its implementation of these provisions. Much like SORA, Lackawanna presents no

evidence the measures implemented properly carried out the goals of the statute. Because there is no specialized assessment of risk, there is doubt the restrictions properly accomplish the deterrence of recidivism. For one, there is no evidence Guldoon's offenses involved the use of a social networking website, so applying this restriction only complicated her life and family. (J.A. at 17). Lackawanna even acknowledged this restriction would increase the burden on parolees attempting to find employment, despite employment being integral to reducing recidivism. (J.A. at 20). Guldoon's use of a vehicle was also merely tangential to the offense, so restricting Guldoon's driving also appears excessive considering ROSA's prescribed goals. (J.A. at 5). The measures implemented by ROSA are clearly excessive in light of Lackawanna's alleged nonpunitive goals and impose an undue burden on parolees.

CONSCLUSION

The lower courts' grant of summary judgment should be reversed. Mary Guldoon has presented genuine disputes of material fact as to whether the Registration of Sex Offenders Act (ROSA) violates the Ex Post Facto Clause, and whether the parole conditions mandated by ROSA violate the First and Fourteenth Amendments to the United States Constitution. The case should proceed to trial because the legislation is retroactive and imposes undue punishment on all those subject to its restrictions, and because the conditions it imposes infringe upon fundamental rights protected by the Fourteenth Amendment more than is reasonably necessary to fulfill the State's legitimate purposes. Lackawanna may have had noble intentions in enacting the legislation, but that does not excuse its interference with constitutional rights.

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