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 OF THE RESPONDENT

TEAM 23
Counsel for Respondent

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 Registration of Sex Offenders Act and imposed on Petitioner constitute violations of the *Ex Post Facto* Clause of the United States Constitution.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Thirteenth Circuit is available at 999 F.3d 1 (13th Cir. 2019). The Decision and Order of the U.S. District for the Middle District of Lackawanna is available at 999 F. Supp. 3d 1 (M.D. Lack. 2019).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fourteenth Amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

Sections the *Ex Post Facto* Clause provide: "No bill of attainder or ex post facto law shall be passed . . . . No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. Const. art. I §§ 9-10.

STATEMENT OF THE CASE

Mary Guldoon ("Petitioner") is a sex-offender who pled guilty to numerous offenses arising from her sexual abuse of a former fifteen-year-old student (the "victim") over the course of a six-month period. J.A. at 5, 7; 999 F. Supp. 3d 1 (M.D. Lack. 2019) [hereinafter "Dist. Ct. Op."].

In 2008, Petitioner began teaching computer science courses at Old Lackawanna High School (the "School"). J.A. at 11. In a sworn affidavit, Petitioner admits that she knew that the victim was

a distressed and vulnerable child experiencing significant issues at home. *Id.* at 6, 12. The victim began visiting Petitioner in her classroom during free periods and after school to seek help with school work and, later, to discuss his home issues. *Id.* at 6. During one such visit in October 2010, Petitioner—who admits that she failed to maintain a professional distance—complained to the victim of back pain, received a "back rub" from him, and then performed oral sex on him in her classroom. *Id.* at 5, 7, 12. The following day, Petitioner began engaging in sexual intercourse with the victim. *Id.* at 7.

Nearly six months later, in May 2011, the School's principal discovered Petitioner sexually abusing the victim in her classroom and had her arrested by Old Cheektowaga Police Department ("OCPD"). *Id.* at 7. Despite later claiming that she pled guilty "to spare [her] family and [the] victim the pain of trial," in a voluntary confession to OCPD, Petitioner provided that she engaged in sexual acts with the victim on multiple occasions in her classroom, car, and home. *Id.* at 5, 13. The victim reported that the abuse occurred "at least thirty times" and that Petitioner used her vehicle to drive him to and from her home to abuse him. *Id.* at 7. OCPD's investigation also revealed that Petitioner utilized text-messaging and the School's email system to communicate and arrange sexual encounters with the victim. *Id.* at 5. While OCPD did not recover any explicit sexual communications, it found that text-messages and emails had been deleted, and the victim stated that he had sent Petitioner naked photos of himself, which, given his age, would constitute child pornography. *Id.* at 5-6. The victim also reported that he "realizes 'she was just using [him]'" and that, likely as a result of the abuse, he no longer trusts adults and is unable to develop relationships within his own age group. *Id.* at 6.

Petitioner was charged with ten counts of third-degree rape, five counts of a third-degree criminal sexual acts, and nine counts of sexual misconduct, and pled guilty to one count of each

charge. *Id.* Respondent, the Board of Parole (the "Board"), recommended she be incarcerated for at least twenty years, be eligible for parole after serving ten years, and be given at least ten-years' probation after release. *Id.* at 5. Petitioner received "an indeterminate sentence of ten to twenty-years' incarceration" of which she served only six years before being released in 2017 "to serve five year's (sic) parole." Dist. Ct. Op. at 2. After receiving parole, Petitioner returned to live with her family in Old Cheektowaga, where she works at Plewinski's Pierogi Company, approximately three miles from her home. J.A. at 14-15. In addition to the usual parole conditions, the Board imposed "special conditions" required by the Registration of Sex Offenders Act ("ROSA"), which the Lackawanna legislature enacted in 2015. Dist. Ct. Op. at 2. These special conditions include prohibitions on Petitioner accessing "commercial social networking website(s)" ("Condition 12(c)") and the surrendering of her driver's license ("Condition 12(d)"). *Id.* at 2-3.

In January 2019, after having served nearly two years of her parole, Petitioner brought the instant action in U.S. District Court for the Middle District of Lackawanna seeking declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that (1) ROSA's restrictions violate her rights under the First and Fourteenth Amendments, and (2) ROSA's the registration requirement and parole conditions violate the *Ex Post Facto* Clause. J.A. at 4. The District Court granted the Board's motion to dismiss the Petitioner's Complaint under Fed. R. Civ. P. 12(b)(6). Dist. Ct. Op. at 3. The U.S. Court of Appeals for the Thirteenth Circuit affirmed. *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1, 1 (13th Cir. 2019). This Court then granted certiorari. *Guldoon v. State of Lackawanna Bd. of Parole*, 999 U.S. 1 (2019).

SUMMARY OF THE ARGUMENT

The registration requirements and special conditions of parole imposed on Petitioner under ROSA do not violate her First and Fourteenth Amendment rights or right to travel because they

are not arbitrary and capricious and are well-founded in case law. Moreover, the registration requirements and mandatory parole conditions do not violate the *Ex Post Facto* Clause of the U.S. Constitution because legislative intent indicates that ROSA is a civil statute. Lastly, even if this Court determines that ROSA is not a civil statute, this Court should affirm that the statute does not apply retrospectively nor significantly disadvantage the Petitioner.

ARGUMENT

The Fourteenth Amendment's Due Process Clause protects individuals against "arbitrary and capricious" deprivations of constitutional liberties by the government. *Daniel v. Williams*, 474 U.S. 327 (1986); *see also* U.S. Const. amend. XIV. Relatedly, the *Ex Post Facto* Clause's main purpose is to prevent "arbitrary and potentially vindictive legislation" directed toward disfavored groups, *Weaver v. Graham*, 450 U.S. 24, 29 (1981), and to give fair warning of penal acts. *Doe v. Pataki*, 120 F.3d 1263, 1273 (2d Cir. 1997). The appropriate standard for evaluating whether a government action is arbitrary and capricious is determined by the "precise nature of the government function involved as well as the private interest that has been affected." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). This Court has also long held that legitimate government interests that may justify restrictions on individual liberties include preventing recidivism and protecting the public's safety. *See United States v. Knights*, 534 U.S. 112, 120 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *Birzon*, 469 F.2d at 1241.

Further, rather than the "absolute liberty" that most citizens are entitled to, parolees enjoy only "conditional liberty," which inherently includes significant restrictions of their constitutional rights. *Griffin*, 483 U.S. 868, 874 (1987) (citing *Morrissey*, 408 U.S. at 480); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963); *see also United States v. Polito,* 583 F.2d 48, 54 (2d Cir. 1978) ("A parolee is a convicted criminal who has been sentenced to a term of imprisonment and . . . allowed

to serve a portion of that term outside prison walls."); *United States v. Knights*, 534 U.S. 112, 119 (2001) ("Probation is one point . . . on a continuum of possible punishments ranging from solitary confinement . . . ."). Notably, a parole restriction's impact on a parolee's ability to pursue a chosen career—especially where that career facilitated the underlying crime—does not deem the restriction unreasonable. *See United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999).

The Sex Offender Registration & Notification Act imposes a requirement and minimum standards on all U.S. states to establish sex-offender registries. 34 U.S.C. § 20901 (2012). This Court has previously held that such registries are constitutional, and that due process does not entitle defendants to subsequent hearings beyond their conviction for a sexual offense. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *H. v. D.*, 491 U.S. 110, 120 (1989) (plurality opinion). Moreover, no party to this case nor the courts below raised this issue. *See generally*, J.A.

Because the registration requirements and special conditions of parole imposed on Petitioner under ROSA were not arbitrary or capricious and did not violate her rights, this Court should affirm the Thirteenth Circuit and District Court holdings and uphold them as reasonable.

I. The special parole conditions imposed under ROSA do not violate Petitioner's First and Fourteenth Amendment rights because parolees have only conditional liberty interests and the restrictions at issue were not arbitrary and capricious.

Under the Fourteenth Amendment, a special condition of parole does not infringe on a parolee's due process rights unless they show the parole board acted in an "arbitrary and capricious manner" in imposing a challenged restriction. *Boddie v. Chung*, No. 09-CV-04789, 2011 WL 1697965, at *2 (E.D.N.Y. 2011) (internal citation omitted); *Pena v. Travis*, No. 01-CV-8534, 2002 WL 31886175, at *12 (S.D.N.Y. Dec. 27, 2002); *Walker v. Mattingly*, No. 09-CV-845, 2012 WL 1160772, at *1 (W.D.N.Y. Apr. 5, 2012). Given the conditional liberty to which parolees are entitled, as discussed above, a parole board does not act in an arbitrary and capricious manner—

and special conditions of parole must therefore be upheld—so long as a restriction is "reasonably and necessarily related" to a legitimate government interest. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972); *Bostic v. Jackson*, No. 9:04-CV-676, 2008 WL 1882696 at *2 (N.D.N.Y. Apr. 24, 2008); *Boddie*, 2011 WL 1697965, at *2.

Special conditions of parole which restrict First Amendment rights and the right to travel fall well-within a parolee's Fourteenth Amendment due process rights and must be upheld so long as they satisfy this Court's "reasonable and necessary" inquiry. *See Morrissey*, 408 U.S. at 471; *Birzon*, 469 F.2d 1241; *Bostic*, 2008 WL 1882696 at *2, * 4-5; *Pena*, 2002 WL 31886175, at *12. Therefore, because the special conditions prohibiting Petitioner from accessing certain websites and possessing a driver's license are reasonably and necessarily related to Lackawanna's legitimate interests in preventing her recidivism and protecting the public's safety, Petitioner's constitutional rights were not violated, and the conditions must be upheld.

A. The special condition prohibiting Petitioner from accessing "commercial social media websites" does not violate her rights because it reasonably and necessarily relates to preventing her from using such websites to sexually abuse another child.

The special condition prohibiting Petitioner from accessing "commercial social media websites," as defined under ROSA, does not violate her First or Fourteenth Amendment rights. A special parole condition is constitutional when it restricts a sex-offender parolee who committed a sexual offense with the use of internet communication from accessing commercial social media websites because it reasonably and necessarily relates to furthering the government's legitimate interests in preventing recidivism and protecting the public. *See United States v. Rock*, 863 F.3d 827 (D.C. Cir. 2017); *United States v. Ramos*, 763 F.3d 45 (1st Cir. 2014); *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006); *Birzon*, 469 F.2d at 1241; *Yunus v. Robinson*, No. 17-CV-5839, 2018 WL 3455408 (S.D.N.Y. June 29, 2018); *Cooper v. Dennison*, No. 08-CV-6238, 2011

WL 1118685 (W.D.N.Y. Mar. 24, 2011).

Special parole conditions may restrict internet access and use so long as they reasonably and necessarily relate to a substantial government interest. *See Johnson*, 446 F.3d 272. The Second Circuit recently upheld a special condition of supervised release which it deemed an "absolute internet ban," underscoring that such special conditions were "related to sentencing purposes and . . . impose[d] no greater restraint on liberty than is reasonably necessary to accomplish" them where a sex-offender had sexually explicit conversations with minors online. *Id.* (internal citation omitted); *see also Cooper*, 2011 WL 1118685, at *2, *11 (upholding special conditions which included prohibitions against the parolee owning a cell phone or computer, deeming them reasonably and necessarily tailored to his prior parole violations—showing a coworker a nude photo of himself and exposing himself to a parole officer).

Perhaps most notable is that at least seven federal jurisdictions have upheld special conditions imposing partial or total restrictions on internet access. *See id.* (upholding an "absolute internet ban")*; United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003) (ban on unauthorized internet access); *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003) (ban on owning photographic equipment, computers, printers, and internet service); *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (ban on internet access); *United States v. Paul*, 274 F.3d 155 (5th Cir. 2001) (ban on computer access); *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001) (ban on unauthorized internet access); *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999) (same).

Special conditions of parole restricting internet access or use are only not reasonably related to a government interest where they implicate rights wholly irrelevant to the underlying crime for which the parolee was sentenced. For example, the district court in *Yunus* found that a special parole condition prohibiting access to commercial social networking sites was not reasonably

related to the underlying crime because the record contained "absolutely no evidence of any sexual misconduct" or illegal internet use and the state court found that there was "virtually no likelihood that [he] will commit a sex crime ever (sic)." 2018 WL 3455408 at *6, *32; *see also Ramos*, 763 F.3d at 45 (deeming a special condition prohibiting internet access invalid because, though the defendant aided in producing child pornography, his role there and in prior crimes did not involve internet use); *United States v. Erwin*, 299 F.3d 1230, 1233 (10th Cir. 2002) (finding that a special condition prohibiting fishing stemming from a weapons charge was unreasonably related).

Special conditions of parole restricting internet access or use are only unnecessary to further a government interest where they are either impermissibly vague or reach well-beyond an individual's parole-status. For example, in *Rock*, the D.C. Circuit Court recently upheld a special condition prohibiting the defendant from using internet capable devices without prior approval while distinguishing and striking down two other conditions, one of which required reporting "significant romantic relationships." 863 F.3d at 831-32. The court found this condition impermissibly vague because, contrary to the government's argument, even "the two persons involved might not agree as to whether they had such a relationship." *Id.* at 832-33; *see also United States v. Heckman*, 592 F.3d 400, 405-06 (3rd Cir. 2010) (citing *Crandon*, 173 F.3d at 125-28) (finding that a lifetime ban on internet access was overly restrictive while specifically distinguishing *Crandon*, discussed above, as sufficiently necessary to further the government's interests because that condition was limited to the defendant's time in custody).

Notably, though this Court recently recognized for the first time that social media websites are constitutionally protected places of speech under the First Amendment, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), similar to other fundamental rights, "the freedom of speech is not absolute . . . and states may exercise police power to punish those who abuse this freedom by

utterances inimical to the public welfare." *Gitlow v. New York*, 268 U.S. 652, 667 (1925); *see also Birzon*, 469 F.2d at 1243 (upholding a restriction on "associat[ion] with persons having criminal records" given the government's well-established power to infringe on First Amendment rights); *United States v. Bortels,* 962 F.2d 558 (6th Cir. 1992) (same). Moreover, in striking down a North Carolina statute prohibiting registered sex-offenders from accessing social media websites, the *Packingham* majority repeatedly noted its particular difficulty with that law's inclusion of those under a status which "can endure for thirty years or more" while no longer subject to the Government's supervision.[1] *Id.* at 1732, 1734; *see also Rock*, 863 F.3d at 831-32 (distinguishing *Packingham* as inapplicable to those still in custody in upholding a special condition prohibiting internet access).

The special condition imposed on Petitioner prohibiting her from accessing commercial social media websites is reasonably and necessarily related to furthering Lackawanna's legitimate interests. First, the Lackawanna legislature clearly provided its specific purpose for enacting ROSA—from which Condition 12(c) arises—as addressing "the danger of recidivism posed by sex-offenders who commit predatory acts against children, and the protection the public from these offenders," *See* J.A. at 20, which are well-established legitimate government interests for restricting parolees' constitutional rights. *See Knights*, 534 U.S. at 120.

Second, Condition 12(c) is reasonably and necessarily related to furthering these interests. In direct relation to Petitioner's crimes and reliance on the internet—through the School's own email system—to facilitate and further those crimes, the Board imposed conditions restricting her access to "commercial social media websites," which ROSA narrowly limits to those where minors may

[1] Notably, while deeming the statute overbroad, the three-justice concurrence underscored that the majority's language should not be interpreted to mean that "states are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites." *Id.* at 1742.

create personal profiles and engage in direct communication with adults. J.A. at 25. Given that jurisdictions throughout the U.S.—including Lackawanna—impose restrictions on not just parolees', but all sex-offenders' access to *physical* areas frequented by children, such as schools and public playgrounds, it follows the same should apply on the internet. Moreover, unlike physical places, the internet provides sex-offenders with access to minors online all over the world and, as noted in ROSA's enacting legislation, an opportunity to evade supervision given its promise of anonymity. *Id.* at 20. Notably, given another special condition prohibits her from entering physical places frequented by children, Petitioner is even further incentivized to turn to the internet if she were to seek to abuse another minor.

Third, Condition 12(c) is well-founded in case law. *See Johnson*, 2011 WL 1118685, at *2. In prohibiting Petitioner from accessing specific websites, Condition 12(c) aligns perfectly with—and imposes an even narrower restriction than—that in *Johnson*, where the court upheld an "absolute internet ban" for a sex-offender who had sexually explicit conversations with minors online. *Id.* Condition 12(c) is also even more closely related to Petitioner's offenses then those in *Cooper*, where the court upheld a prohibition on a parolee's ownership of a cell-phone or computer simply because he showed a nude photo of himself to a co-worker. 2011 WL 1118685, at *2.

Lastly, Petitioner's arguments as well as that of and the dissent below misconstrue and misapply the facts and law at issue. While the dissent below provided only that Condition 12(c) is not sufficiently related to Petitioner's underlying offenses because they did not utilize a social networking site, specifically, this argument misconstrues and misapplies long-standing jurisprudence throughout the U.S. which, as discussed, has consistently held that any internet use in the underlying offense is sufficient in routinely uphold restrictions just as—if not more—restrictive than Condition 12(c). *See Johnson*, 446 F.3d at 274; *Rearden*, 349 F.3d at 611; *Fields*,

324 F.3d at 1026; *Zinn*, 321 F.3d at 1085; *Paul*, 274 F.3d at 157-58; *Walser*, 275 F.3d at 983; *Crandon*, 173 F.3d at 124.

Petitioner's argument that Condition 12(c) prevents her from working within her chosen career fails as a matter of law because, as discussed, such an impact does not deem a condition invalid. *See Crandon*, 173 F.3d at 127-28; *Peete*, 919 F.2d at 1181. Finally, Petitioner's claim that Condition 12(c) prevents her from satisfying other parole conditions—primarily her ability to secure employment—simply misconstrues the facts because she currently works at Plewinski's Pierogi Company in a position she obtained without reliance on social media sites. J.A. at 15.

Accordingly, the special condition of Petitioner's parole prohibiting her from accessing social media websites does not violate her First or Fourteenth Amendment rights and should be upheld.

B. The special condition requiring Petitioner to surrender her driver's license does not not implicate her right to travel and, regardless, properly furthers Lackawanna's interest in preventing her from sexually abusing another child with use of an automobile.

The special parole condition requiring Petitioner to surrender her driver's license did not violate her right to travel or due process rights. In general, restrictions on the right to obtain a driver's license do not implicate the fundamental right to travel. *See Dixon v. Love*, 431 U.S. 105, 112-16 (1977); *Matthew v. Honish*, 233 F. App'x 563, 564 (7th Cir. 2007); *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999); *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972). Moreover, a parolee's right to travel is extinguished by their conviction and subsequent imprisonment and is not revived upon parole. *See Doe v. Penn. Bd. of Probation & Parole*, 513 F.3d 95, 114 (3rd Cir. 2008); *United States v. Gaensel*, 912 F.2d 470, 473 (9th Cir. 1990); *Bagley v. Harvey*, 718 F.2d 921, 924 (9th Cir. 1983).

Notably, however, a special condition requiring the surrender of a parolee's driver's license would not violate the parolee's right to travel or due process rights because such conditions

reasonably and necessarily relate to the legitimate government interests of preventing recidivism and harm to the public. *See Pollard v. U.S. Parole Comm'n*, 693 F. App'x 8 (2d Cir. 2017); *Trisvan v. Annuci*, 14-CV-6016, 2016 WL 7335609, at *3 (E.D.N.Y. 2016); *Cooper*, 2011 WL 1118685, at *2; *Rizzo v. Terenzi*, 619 F. Supp. 1186 (E.D.N.Y. 1985); *Berrigan v. Sigler*, 358 F. Supp. 130 (D.D.C. 1973), *aff'd*, 499 F.2d 514 (D.C. Cir. 1974).

Restrictions on an individual's possession of a driver's license, in general, do not implicate the fundamental right to travel. *See Dixon*, 431 U.S. at 112-16. In *Dixon*, this Court specifically declined to extend the right to travel to encompass the right to possess a driver's license, ultimately holding that states may summarily suspend or revoke such licenses when motorists are relatedly convicted of traffic offenses. *Id.* Otherwise, states could not sufficiently enforce their substantial interest in regulating travel through the most common motor vehicle regulations, including requirements of a driver's license and vehicle safety inspections. *Id.*; *see also Mathew*, 233 F. App'x at 564 (underscoring that the denial of a driver's license is only a denial of "a single mode of transportation - in a car driven by himself," which does not impermissibly burden the right to travel); *Miller*, 176 F.3d at 1205 ("[Plaintiff has no] fundamental right to drive a motor vehicle."); *Monarch Travel Servs.*, 466 F.2d at 554 ("A rich man can choose to drive a limousine; a poor man may have to walk. [His] lack of choice in his mode of travel . . . is not unconstitutional.").

Regardless, a parolee's right to travel is extinguished by their imprisonment following conviction and is not revived upon parole. *See Bagley*, 718 F.2d at 924. In *Bagley*, the Ninth Circuit dismissed a parolee's argument that his parole board's decision to parole him to one particular state violated his right to travel because this right was extinguished by his imprisonment and, given his ongoing custody-status, was not revived upon parole. *Id.* This principle has also been recognized and applied consistently throughout the U.S. *See Penn. Bd. of Prob. & Parole*, 513

F.3d at 114; *Gaensel*, 912 F.2d at 473; *Pelland*, 317 F. Supp. 2d at 91; *Rizzo*, 619 F. Supp. at 1189; *see also Pollard*, 2016 WL 4290607, at *10 (citing *Pena*, 2002 WL 31886175, at *12 n.5) ("[A] travel restriction . . . would not demonstrate a constitutional violation.").

However, had it existed, a parolee's right to travel would not be violated by a special condition requiring the surrender of their driver's license because it reasonably and necessarily relates to the legitimate government interests of preventing recidivism and harm to the public. *See Birzon*, 469 F.2d at 1243 (providing the "reasonable and necessary" standard"). In *Berrigan*, the court looked to the broad discretion vested to parole officers in finding that the public's interest and the nation's welfare is a legitimate government interest which justifies restricting the travel of parolees. 358 F. Supp. at 135-37; *see also Rizzo*, 619 F. Supp. at 1189 ("The viability of the parole system depends on . . . the ability to monitor and control travel . . . . [The restriction was] neither arbitrary nor capricious because it rested on legitimate government interests in supervising and rehabilitating parolees."); *Trisvan*, 284 F. Supp. 3d at 297 (upholding a special condition restricting a parolee from obtaining a driver's license). Notably, the district court in *Cooper* found that, even where a parolee's underlying crime—exposing himself to a coworker and parole officer—did not directly involve a vehicle, a special parole condition prohibiting vehicle ownership was reasonable because it was necessary to controlling his movements and he had no liberty interest in avoiding such conditions. 2011 WL 1118685, at *11.

The special condition of Petitioner's parole requiring her to surrender her driver's license did not violate her right to travel. Fundamentally, Condition 12(d) would not violate Petitioner's right to travel even if she were not a parolee because it only restricted her *mode* of travel—specifically, her ability to operate an automobile—and restrictions on access to an automobile do not implicate this right, as this Court first held in *Dixon*, 431 U.S. at 112-16, and as since held by lower courts

throughout the U.S. Moreover, Petitioner is a parolee who—given her ongoing status as a prisoner within Lackawanna's custody who has simply been allowed to serve a portion of her sentence outside of prison—forfeited her specific right to travel upon her imprisonment, and this right was not revived upon parole. *See Bagley*, 718 F.2d at 924. Regardless, Condition 12(d) would not have violated Petitioner's right to travel had it existed because, as discussed, the Lackawanna legislature enacted ROSA—from which this condition arises —specifically to prevent recidivism and harm to the public's safety, which directly relies on its ability to monitor and control the travel of parolees. *Rizzo*, 619 F. Supp. at 1189; *Trisvan*, 284 F. Supp. 3d at 297.

Finally, neither Petitioner nor the dissent below offer any substantive legal basis for deeming Condition 12(d) unconstitutional. Petitioner relies entirely on the argument that, given the location of her home, this condition creates an unsafe travel condition and, relatedly, the dissent below argues that Condition 12(d) is unconstitutional because motor vehicles have become a modern necessity. However, as the court in *Monarch Travel Servs.* articulated, a lack of access to convenient and comfortable modes of travel may be unfortunate, but it is not unconstitutional. 466 F.2d at 554. Further, Petitioner elected to reside with her husband and child on her own accord. While certainly preferable, this housing arrangement was neither required nor encouraged by the Board, and Petitioner is welcome to change her place of residence if she finds the current travel conditions truly unacceptable.

Lastly, the dissent below seeks to deem Condition 12(d) unconstitutional as applied to Petitioner specifically because the use of an automobile was "incidental to her abuse of the child." Dist. Ct. Op. at 5. However, notwithstanding the fact that Petitioner's access to an automobile actually facilitated multiple offenses—particularly those that involved her abusing the victim in her car and transporting the victim to her home to abuse him—parolees' underlying crimes need

not actually involve automobiles to restrict their access to them given the government's substantial interest general in monitoring and controlling their travel. *See Cooper*, 2011 WL 1118685, at *11.

Accordingly, the special condition of Petitioner's parole requiring her to surrender her driver's license does not violate her Fourteenth Amendment rights, including the right to travel, and must be upheld.

II. The registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act does not violate the *Ex Post Facto* Clause of the U.S. Constitution.

The *Ex Post Facto* Clause of the United States Constitution prohibits the government from enacting penal laws that apply retroactively. *See* U.S. Const. art. 1 §§ 9-10; *see also Garner v. Jones*, 529 U.S. 244, 249 (2000). It serves to prohibit "any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925). Its main purpose is to prevent "arbitrary and potentially vindictive legislation" directed toward disfavored groups, *Weaver v. Graham*, 450 U.S. 24, 29 (1981), and to give fair warning of penal acts. *Pataki*, 120 F.3d at 1273. Neither of these concerns arise here. Consequently, ROSA does not violate the *Ex Post Facto* Clause and is constitutional both on its face and as applied to the Petitioner.

A. ROSA is a civil statute that does not present an Ex Post Facto Clause issue because the Lackawanna legislature enacted ROSA to monitor dangerous sexual offenders and protect the public from harm.

The *Ex Post Facto* Clause only applies to penal statutes and will not invalidate a statute that is civil, procedural, or regulatory in nature. *See Garner*, 529 U.S. at 255; *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Courts determine whether a statute is civil or criminal in

nature by examining legislative intent. *See Smith v. Doe*, 538 U.S. 84, 91 (2003); *see also Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). However, a statute's civil characterization may be negated only by showing that the statute has a punitive effect. *See Smith*, 538 U.S. at 9; *see also Hendricks*, 521 U.S. at 361; *Ward*, 448 U.S. at 248-49.

i. Intent

The Lackawanna legislature clearly intended ROSA to be interpreted as a civil statute. Legislative intent may be established with either an express label or by demonstrating an implied preference that the act be interpreted as a civil nonpunitive scheme. *See Smith*, 538 U.S. at 91, 93; *Seling v. Young*, 531 U.S. 250, 261 (2001); *Ward*, 448 U.S. at 248.

If a legislature does not expressly label a statute as civil or regulatory, a court may infer a civil categorization by examining legislative findings, purpose, text, and structure. *See Smith*, 538 U.S. at 92 (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960); *Pataki*, 120 F.3d at 1273. For example, in *Pataki*, the Second Circuit determined that a statute was a civil statute because the legislature made findings about the danger of sex-offender recidivism, the need to support swift law enforcement action to prevent such crimes, and the government's interest in protecting vulnerable populations from harm. 120 F.3d at 1276; *see also Doe v. Snyder*, 834 F.3d 696, 700 (6th Cir. 2016) (analyzing the Michigan legislature's purpose statement in its sex-offender registration act).

The Lackawanna legislature stated legislative findings and purpose demonstrate that it enacted ROSA as a civil statute. As in *Pataki*, section 1 states that the legislature is concerned about the danger of sex-offender recidivism and community protection. *See Pataki*, 120 F.3d at 1276; J.A. at 19. Additionally, section 1 states the statute's purpose is to "monitor sex-offenders and protect the public from victimization." J.A. at 20. This Court has held that statutes restricting sex-offenders and requiring them to register are civil in nature based on a legislative intent to monitor and protect

the public. *See Smith*, 538 U.S. at 93. ROSA's legislative findings and purpose do not indicate that the statute was intended to punish individuals subjected to it. J.A. at 19-21. Based on ROSA's identified purpose, the Lackawanna legislature clearly intended for the statute to be a civil and regulatory scheme and it is thus not subject to the *Ex Post Facto* Clause whatsoever.

ii. Punitive Effect

ROSA is not so punitive in effect as to negate its civil nature. A court will only find that a civil regulatory statute violates the *Ex Post Facto* Clause if it is so punitive "either in purpose or effect as to negate the State's intention to deem it civil" and thus amounts to punishment. *Smith*, 538 U.S. at 91; *see Kansas v. Hendricks*, 521 U.S. at 362; *Snyder*, 834 F.3d at 699; *Doe v. Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014). This analysis is highly context-specific, and "only the clearest proof" will override legislative intent to turn a civil remedy to a criminal penalty. *Smith*, 538 U.S. at 92; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *Pataki*, 120 F.3d at 1274.

A statute's civil characteristic will not be negated simply because an individual suffers a harsh consequence as a result of it. *See Hendricks*, 521 U.S. at 361. For example, in *Hendricks*, this Court held that civil commitment of sex-offenders with "mental abnormalities" was nonpunitive because nothing indicated that the legislature sought to do anything other than to protect the public. *Id. See, e.g.*, *Cuomo*, 755 F.3d at 112 (changing registration requirement from ten to twenty years is not an *Ex Post Facto* violation because it reflects a reasonable legislative judgement with regulatory aims of promoting public safety). This Court has also recognized occupational disbarments as harsh consequences that do not give rise to a punitive effect. *See Smith*, 538 U.S. at 100 (citing *Hawker v. New York*, 170 U.S. 189 (1898)) (revoking a medical license).

This Court has provided factors that courts should look at when determining whether the statute is punitive in effect. *See Mendoza-Martinez*, 372 U.S. at 168-69; *Smith*, 538 U.S. at 105 (stating

that five of the seven *Mendoza-Martinez* factors are influential in sex-offender registration context). However, the *Mendoza-Martinez* factors are not a mandatory test, and courts must ultimately look to the determinantal effect of the statute. *See Smith*, 538 U.S. at 97 (citing *Ward*, 448 U.S. at 249).

The first *Mendoza-Martinez* is whether the law has historically been regarded as punishment. *See Smith*, 538 U.S. at 97; *Mendoza-Martinez*, 372 U.S. at 168. In *Smith*, this Court rejected a comparison of sex-offender registration requirements with "shaming punishments of the colonial period," emphasizing that such laws are intended to "disseminate accurate information about offenders for public safety purposes" and not to "publicly disgrace individuals." *ACLU v. Masto*, 670 F.3d 1046, 1055 (9th Cir. 2012) (quoting *Smith*, 538 U.S. at 97-99).

The second factor is whether the law imposes an affirmative disability or restraint. *See Mendoza-Martinez*, 372 U.S. at 168; *Smith*, 538 U.S. at 97. When analyzing this factor, courts look to how the effects impact the offenders who are subject to the law. *See id.* at 99-100. The "paradigmatic affirmative disability" is "the punishment of imprisonment." *Id.* at 100. In *Smith*, this Court reasoned that because the conditions did not impose a physical restraint similar to imprisonment, the statute did not impose an affirmative disability or restraint. *Id.* at 100.

The third factor is whether the law "promote[s] traditional aims of punishment." *Mendoza-Martinez*, 372 U.S. at 167; *see Smith*, 538 U.S. at 97. For this factor, courts look to whether the statute promotes traditional goals of punishment such as deterrence, specific and general retribution, and incapacitation. *See Masto*, 670 F.3d at 1057; *Snyder*, 834 F.3d at 704. *But see Smith*, 538 U.S. at 102 ("Any number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal . . . would severely undermine the Government's ability engage in effective regulation.").

The fourth factor is whether there is "a rational connection to a nonpunitive purpose." *Mendoza-Martinez*, 372 U.S. at 167; *see Smith*, 538 U.S. at 97. For this factor, courts look to the legislative reasoning behind the statute and whether the text of the statute indicates that it accomplishes these professed goals. *See, e.g., Smith*, 538 U.S. at 97, 102-03 (explaining that the statute has a legitimate nonpunitive purpose of public safety that is "advanced by alerting the public to the risk of sex-offenders in their community"); *Snyder*, 834 F.3d at 704 (finding that the statute at issue did not support the legislatively determined goals); *see also Masto*, 670 F.3d at 1057 (discussing connection between sex-offender recidivism risk and the legitimate public safety interest in monitoring sex-offenders in the community).

The fifth factor is whether the statute is "excessive with respect to [its] purpose." *Mendoza-Martinez*, 372 U.S. at 167; *see Smith*, 538 U.S. at 97; *see also Snyder*, 834 F.3d at 705 (opining that the statute at issue was excessive because it required time-consuming, in-person reporting and too severely restricted where people could live and work). In analyzing this factor, "the test is not 'whether the legislature has made the best choice possible,' but rather 'whether the regulatory means chosen are reasonable in light of the nonpunitive objective.'" *Masto*, 670 F.3d at 1057 (quoting *Smith*, 538 U.S. at 105).

ROSA's conditions are not punitive in effect, especially when considering that this Court has recognized much harsher conditions as nonpunitive. In *Hendricks*, the conditions associated with the statute were harsher than the mandatory parole conditions under ROSA because, there, the designated class of sex-offenders were subject to a deprivation of liberty because they were civil committed. 521 U.S. at 361-62. By contrast, ROSA only imposes restrictions on the Petitioner's exercise of certain constitutional rights—such as internet and motor vehicle use, as discussed—and do not physically confine her. J.A. at 19-26. Additionally, ROSA conditions are less

prohibitive of Petitioner's employment than occupational disbarment because they do not explicitly prevent an individual from practicing in a particular field, as occupational disbarment does, and the ROSA conditions are merely inconveniences working in certain fields. *See* J.A. 23-26; *See Smith*, 538 U.S. at 100 (citing *Hawker*, 170 U.S. at 195). Furthermore, ROSA's registration requirement does not have punitive effect because courts have consistently held that sex-offender registration is not so detrimental to the offender to become punitive. *See, e.g.*, *Smith*, 538 U.S. at 93; *Cuomo*, 755 F.3d at 112 (extending registration requirement from ten to twenty years).

Applying the *Mendoza-Martinez* factors to ROSA demonstrates that the statute is not so punitive as to create a penal statute. For example, registration, notification, and sex-offender related provisions are not traditionally regarded as punishments. *See Masto*, 670 F.3d at 1055 (stating that sex-offender registration laws do not shame registrants, but rather "disseminate accurate information about offenders for public safety purposes"); *see also Smith*, 538 U.S. at 97-99 (providing sex-offender information on the internet does not resemble colonial public shaming). Further, the registration, notification, travel, and internet conditions do not create an affirmative disability or restraint on offenders subject to ROSA because the conditions do not even remotely resemble the conditions that imprison or physically restrain offenders. *See Smith*, 538 U.S. at 100.

Moreover, ROSA does not promote a traditional aim of punishment. *See Masto*, 670 F.3d at 1057. While it has the potential for a deterrent effect, its primary purpose is to address recidivism, which is a legitimate purpose for civil regulation. *See Smith*, 538 U.S. at 102. Additionally, the mandatory parole conditions are not intended as retribution, as clearly indicated by the legislature's explicit attempt to balance the offenders rights and public safety interests. J.A. at 21.

ROSA's registration and restrictive conditions are also rationally connected to a nonpunitive purpose. *See id.* at 102. As discussed, monitoring sex-offenders and "alerting the public to the risk

of sex-offenders in their community" is a "legitimate non-punitive purpose." *Id.* at 102-03. Therefore, ROSA is reasonable and rationally connected to the nonpunitive purpose of protecting the public and monitoring sex-offenders. *See Masto,* 670 F.3d at 10567.

Lastly, ROSA is not excessively broad because the conditions are directly related to the risk sex-offenders pose to the public. *See Smith*, 538 U.S. at 103. Given its promise of anonymity, the internet is a pervasive means for sexual predators to interact with potential children victims while avoiding detection. *See* J.A. at 25. Therefore, ROSA's mandatory conditions and registration requirements are sufficiently tailored to the nonpunitive purpose of protecting the public and monitoring sex-offenders. *See* J.A. at 19-26.

Taken together, the above factors demonstrate that this Court should affirm that ROSA's registration requirements and mandatory parole conditions do not constitute punishment and do not negate ROSA's civil characterization.

B. Even if the Court determines that ROSA is a criminal or penal law, ROSA does not violate the Ex Post Facto Clause because it does not facially significantly disadvantage affected offenders or as applied to Petitioner.

Even if this Court determines that ROSA is not civil in nature, this Court should still affirm that the statute does not violate the *Ex Post Facto* Clause because it does not facially significantly disadvantage affected offenders or as applied to the Petitioner. When a penal law applies retroactively, courts will only find an *Ex Post Facto* violation when there is a detrimental effect on the impacted parties and a significant risk of increased punishment. *See Peugh v. United States*, 559 U.S. 530 (2013); *Garner*, 529 U.S. at 255; *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 508-09 (1995); *Weaver*, 450 U.S. at 29; *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

A retroactive penal law is only sufficiently detrimental to the offender if it explicitly increases years of incarceration. *See, e.g.*, *Peugh*, 569 U.S. at 544 (using the 2010 Sentencing Guidelines

instead of the 2009 version violated the *Ex Post Facto* clause because it created a "sufficient risk of a higher sentence"); *see also Carmell v. Texas*, 529 U.S. 513, 534 (2000) (explaining that a defendant charged with increased punishment likely feels greater pressure to plead guilty). For example, in *Weaver*, this Court held that the statute violated the *Ex Post Facto* Clause because it decreased the ability of certain prisoners to reduce their sentences through good conduct. 450 U.S. at 32. This substantially altered the "quantum of the punishment" because the statute's effect lengthened the time an affected prisoner would be incarcerated. *Id.*; *see also Lynce v. Mathis*, 519 U.S. 433, 445 (1997) (noting that retroactive alterations of provisions governing the initial sentence implicate the *Ex Post Facto* Clause because they alter the offender's prison term).

The *Ex Post Facto* Clause is not violated when there is only a speculative and attenuated risk of increased punishment. *See Morales*, 514 U.S. at 509. For example, in *Morales*, this Court found no *ex post facto* violation because the changed frequency of parole board hearings applied only to a class of prisoners who had a very remote chance of being released, it was narrowly tailored, and the parole board had broad discretion. *See id.* at 510-12. Additionally, to determine the risk of increased punishment, courts look at the change's whole effect to determine whether it is detrimental enough. *See United States v. Ramirez*, 846 F.3d 615, 623 (2d Cir. 2017); *Berrios v. United States*, 126 F.3d 430, 433 (2d Cir. 1997) (finding no *ex post facto* violation where the amendment's net effect to the sentencing guidelines favored the defendant).

If the detrimental effect of the retroactive penal statute is not discernible on its face, a court must conduct a thorough analysis and develop the record to determine whether there is a significant risk of increasing that particular offender's sentence. *See Garner*, 529 U.S. at 255-56 (conducting an as applied analysis to examine whether the change lengthened the prisoner's "actual imprisonment" after determining that there was not a facial constitutional violation).

ROSA does not have a detrimental effect on sex-offenders subject to it. Unlike *Peugh* where the length of sentence increased, ROSA does not increase the affected sex-offenders' parole terms. *See Peugh*, 569 U.S. at 544; J.A. at 2. Similar to *Morales*, ROSA is narrowly tailored to apply to a specific group of offenders. *See* 514 U.S. at 510-12; J.A. at 23-26 (referring to classifications of sex-offenders). As in *Morales*, where the Court determined that the punishment's change was speculative,14 U.S. at 509, the mandatory conditions here are speculative because parole boards have broad discretion in setting parole conditions. *See id.* at 512. Accordingly, ROSA simply ensures that the Board is imposing certain conditions and does not guarantee—on the face of the legislation or otherwise—that prisoners will experience increased punishment. *See* J.A. at 23-26.

As a whole, the Petitioner was not impacted more significantly under ROSA than she otherwise would have been. *See* Dist. Ct. Op. at 9; *Ramirez*, 846 F.3d at 623. The Record indicates that the registration requirements and conditions imposed on her under ROSA do not violate the *Ex Post Facto* Clause because they did not amount to a punishment given that she was released from incarceration after serving only seven of her ten-to-fifteen years and had already been sentenced to a parole term of ten years before ROSA's enactment. J.A. at 2; *see also Garner*, 529 U.S. at 255. Additionally, many of the conditions imposed on her under ROSA would have been imposed through other means—such as surrendering her driver's license, for example—and therefore the conditions do not risk imposing a significant or new punishment. *See* Dist. Ct. Op. at 9.

Accordingly, this Court should affirm that the District Court and Thirteenth Circuit's holdings that ROSA does not violate the *Ex Post Facto* Clause.

CONCLUSION

For the foregoing reasons, the registration requirements and special conditions of parole imposed on Petitioner under ROSA do not violate her First or Fourteenth Amendment rights, and

do not violate the *Ex Post Facto* Clause. This Court should therefore affirm the Thirteenth Circuit and District Court holdings.

Respectfully submitted,

Team 23

Counsel for Respondent

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