No. 19-01

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

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The Brief of the Petitioner

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QUESTION PRESENTED

The petition for writ of certiorari is granted as to the following questions:

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 State 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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STATEMENT OF FACTS

Mary Guldoon ("Ms. Guldoon") is a lifelong resident of the state of Lackawanna. R. at 11. In 2011, when she was twenty-four years old, Ms. Guldoon pleaded guilty to one count each of statutory rape in the third degree (Lackawanna Penal Law section 130.25); criminal sexual act in the third degree (Lackawanna Penal Law section 130.40) and sexual misconduct (Lackawanna Penal Law section 130.20) stemming from the non-forcible and consensual sex with one of her students, B.B., at Old Cheektowaga High School, where she taught computer science. R. at 2, 12. While their relationship was occurring, Ms. Guldoon primarily communicated with B.B. via text messages and the school's internal email system. R. at 5.

Following the birth of her daughter in May of 2010, Ms. Guldoon began suffering from severe postpartum depression, for which she was prescribed Prozac. R. at 12. Ms. Guldoon diligently adhered to her scheduled prescription but noticed very little improvement in her general mood. *Id.* Although she continued to suffer through the depression after her maternity leave had expired, she returned to teaching in September of 2010. *Id.* It was during this time that she met B.B., who was a student in her Computer Science class. *Id.* After B.B. began coming to her office for help with his assignments, the two began developing rapport based on their mutual mental distress. R. at 6, 12. Ms. Guldoon admits that rather than maintain a professional distance from B.B., she for some reason allowed herself to form a physical relationship. R. at 6.

Following the investigation by the Old Cheektowaga Police Department, Ms. Guldoon pleaded guilty and the Respondent recommended that she be incarcerated for a period of no less than twenty years, with at least ten years of probation following her incarceration. R. at 2. As part of its recommendation, the Respondent also suggested that Ms. Guldoon should be eligible for probation after serving at least ten years of her sentence but did not require her to register as a sex

offender or suggest any other special conditions to her sentence or parole. *Id.* In accordance with this agreement, Ms. Guldoon began her sentence at Tonawanda State Correctional Facility ("TCF") in 2011. *Id.*

It was not until Ms. Guldoon entered TCF that she was properly diagnosed with Bi-polar Disorder ("BPD"), also known as Manic Depression. R. at 13. Individuals with BPD suffer from recurrent, uncontrollable episodes of depression as well as at least one episode of mania that interferes with functioning. *Id.* These manic episodes are usually characterized by extreme bouts of emotion which can be expressed through otherwise inappropriate behavior, such as excessive spending, delusions of grandeur, and most importantly, hypersexuality. The TCF psychiatrist that diagnosed Ms. Guldoon determined that the Prozac previously prescribed to her for her postpartum depression unmasked Ms. Guldoon's BPD. *Id.* In fact, Ms. Guldoon's psychiatrist determined that were it not for Ms. Guldoon's untreated BPD, she would not have had sex with B.B. *Id.* Since being properly diagnosed, Ms. Guldoon has been treated with lithium, and has suffered no further manic episodes. *Id.* Ms. Guldoon completed her sentence without incident, and in fact, excelled during her incarceration. While she continued to be treated for her depression and manic episodes, Ms. Guldoon enrolled in the University of Phoenix online program, where she earned a master's degree in Computer Programming. She hoped to use her new degree to obtain employment once she was released from prison. R. at 13-14.

In 2015 or 2016, during the period of time that Ms. Guldoon was incarcerated, the Lackawanna Senate and Assembly enacted the Registration of Sex Offenders Act, Executive Law § 259-c ("ROSA"). R. at 2, 14. Most pertinent to Ms. Guldoon's case, ROSA imposes new conditions of parole on anyone found guilty of committing a sex offense involving a victim under the age of eighteen. *Id.* Under ROSA, such offenders may not come within one thousand feet of

any school or location principally designed to house minors, and furthermore, ROSA prevents offenders from accessing the internet to view pornographic material, communicate with minors or to use *any* commercial social networking websites. Finally, ROSA calls for a provision that prevents any affected by the law from operating a motor vehicle for a period of twenty years after being released, or until the individual is no longer required to be registered as a sex offender.

Ms. Guldoon was released from TCF in 2017 and returned to her home and family in Old Cheektowaga. R. at 14-15. Upon her release, she agreed to the normal conditions of her parole that were previously described to her but was also forced to agree to the additional conditions provided by ROSA. R. at 8-10, 14. Such conditions have made Ms. Guldoon's life dreadful.

Due to the debilitating nature of ROSA's restrictions, Ms. Guldoon and her family -- who have been convicted of no crimes -- have been made prisoners within their own homes. In order to comply with ROSA, Ms. Guldoon's entire family is forced to relinquish internet access in their homes and cannot own internet capable cell phones, preventing them from completely many daily functions. R. at 15. Furthermore, since Ms. Guldoon is no longer allowed within one thousand feet of any school, she may no longer perform the profession that she spent so many hours preparing for in her undergraduate and postgraduate studies. R. at 15.

Compounding the issue, ROSA's restrictions on Ms. Guldoon's ability to operate a motor vehicle seriously hampers her ability to find work. R. at 15. Ms. Guldoon's home is located on Nine Mile Road in Old Cheektowaga, which is a mile and half west of the Old Cheektowaga Elementary School, and One Mile South of the Old Cheektowaga High School. R. at 18. This is a rural area where public transportation is infrequent, forcing Ms. Guldoon to travel by bicycle when her husband is out at work, all the while taking extremely long and inconvenient routes to avoid coming within one thousand feet of the two school so close to her home. R. at 14. This inability to

travel efficiently or use the internet effectively has forced Ms. Guldoon to forego several acceptable employment opportunities due to her inability to get to the employer's facility for an interview. R. at 15.

Given her circumstances, Ms. Guldoon was forced to accept employment at the Plewinski Pierogi Company Plant, located only three miles from her home. *Id.* However, because both the direct route and second most direct route to the plant would take Ms. Guldoon near one of the schools, she must take a roundabout route that involves traveling on her bicycle down the local highway for twenty miles alongside other motorists traveling at more than sixty-five miles per hour. R. at 15-16.

The United States District Court for the Middle District of Lackawanna granted summary judgment to the Respondent, and the United States Court of Appeals for the Thirteenth Circuit affirmed. This Court granted Cert.

SUMMARY OF THE ARGUMENT

The State of Lackawanna's ROSA Act is not narrowly tailored to advance the States interest. The State has no evidence to support any reasonable restrictions on Ms. Guldoon's fundamental right to travel and freely access the internet. Furthermore, ROSA's restrictions are overly broad, affecting those who have not even committed crimes.

Even if ROSA is found to be reasonable, applying it retroactively to Ms. Guldoon who committed and pleaded guilty to her crimes five years before ROSA's enactment is a clear Ex Post Facto violation. ROSA is both retroactive and punitive in its effect on Ms. Guldoon. ROSA's language clearly indicates a punitive intent over that of rehabilitation but even if the legislator's intent is found to have been civil, its effect on Ms. Guldoon are so punitive that it still constitutes a clear Ex Post Facto violation.

ARGUMENT

I. The additional regulations and punishments imposed by Lackawanna's ROSA act constitute overbroad restrictions on Ms. Guldoon's First and Fourteenth Amendment rights and are not narrowly tailored to the nature and circumstances of Ms. Guldoon's offenses.

Although it is generally accepted that the liberty rights of parolees are lesser than that of normal citizens, such parolees do not have the entirety of their constitutional rights stripped from them. *United States ex rel Sperling v. Fitzpatrick,* 426 F.2d 1161, 1164 (2d Cir. 1970). In fact, contrary to the district Court's interpretation, this Court has held that a parolee's due process interests are implicated upon revocation of their parole. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Expanding upon this idea, there has been a growing sentiment that due process rights also attach to additional special conditions of parole. *See United States v. Green*, 618 F.3d 120, 122 (2d Cir. 2010); *Meza v. Livingston,* 607 F.3d 392, 402 (5th Cir. 2010) (holding that a parolee's due process rights are violated when he is subjected to sex offender registration without first undergoing a hearing. "Courts are in agreement that imposing a sex offender registration requirement and treatment affects a substantial right, because it compels a serious deprivation of liberty and creates stigmatizing consequences"); *Coleman v. Dretke*, 395 F.3d 216, 222 (5th Cir. 2004) ("[T]he sex offender conditions placed upon [the plaintiff's] parole present such a dramatic departure from the basic conditions of parole that the Due Process Clause of the Fourteenth Amendment mandates procedural protections"). To that end, the District Court and Thirteenth Circuit opinion on the nature and measure of Ms. Guldoon's liberty interests is both flawed and misinformed. As an example, in as early as 1969, this Court determined that an individual right to travel is fundamental and protected by the United States Constitution. *See Generally, Shapira v. Thompson,* 394 U.S. 618, 630 (1969) ("The constitutional right to travel from one State to another occupies a position

fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."); *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 99 (2d Cir. 2009). Furthermore, it has been clearly established that restricting one's internet, cable, or other such access in any way requires a First Amendment fundamental right analysis. *See Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) (access to the internet is an equally protected liberty interest under the First Amendment, and restricting said rights - even for criminals - is unconstitutional); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, (2000) (The government holds the burden of showing that any provision restricting speech or access to it was the least restrictive means of achieving its goal); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (content-based blanket restrictions on speech cannot properly be viewed under intermediate scrutiny form, time, place, or manner analysis).

Under such a First Amendment analysis or any analysis involving fundamental rights, the Court should analyze the issue under strict scrutiny, which requires the government to show that its law, statute, or provision is narrowly tailored to advance a compelling government interest. *Johnson v. California*, 543 U.S. 499, 504 (2005). That is, the State's ordinance must be the least intrusive means of regulating the conduct, leaving open ample alternatives for those affected. *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989). Still, it is reasonable that the Government's interest in ensuring its citizens safety allows it to impose *some* restrictions on the parolee that are reasonably and necessarily related to the interest the government retains. *Birzon v. King*, 469 F.2d 1241, 1243(2d Cir. 1972).

The State of Lackawanna's idealistic ROSA act does not impute what one would describe as reasonable restrictions, and neither is it the least intrusive way to advance the state's interest. While on paper ROSA's stated purpose may possibly reflect a compelling state interest, in practice,

ROSA's regulations are so vague and overly broad that it substantially impedes on the rights of Lackawannan citizens while actively preventing offenders from being properly rehabilitated.

A. The State's failure to narrowly tailor ROSA has made Ms. Guldoon a prisoner within her own home.

Although the threat of imprisonment serves as a form of deterrent for criminal behavior, this Court has routinely held that one of the principal purposes of such sentences concerns the rehabilitation of the offender. 18 U.S.C. 3582; *Tapia v. United States*, 131 S.Ct. 2382, 2384 (2011) ("For nearly a century, the Federal Government used an indeterminate sentencing system premised on faith in rehabilitation". Judges should consider retribution, deterrence, incapacitation, and rehabilitation in sentencing). As such, although the state has a legitimate interest in protecting its citizens from any potential recidivism from sex offenders, it also maintains an interest in doing its best to reform said individuals. With that said, although the aims of restrictions on internet access or usage of a motor vehicle may have innocent goals, such restrictions are anything but reasonable given how modern society functions.

First, ROSA's restrictions on operating motor vehicles significantly hampers Ms. Guldoon's ability to participate in ordinary aspects of life. *App. p. 14-16.* It is not uncommon for many Americans to live in areas of the country - like the town of Old Cheektowaga - that have limited means of public transportation. In these locations, motor vehicles are not a convenience, but a necessity to engage in life. Even if such additional punishment was the aim of ROSA, for Ms. Guldoon, being restricted from driving has substantially frustrated her ability to find employment. Due to her travel limitations, Ms. Guldoon has been forced to forego acceptable employment opportunities simply because she could not possibly make it to an interview.

In fact, the only employment that Ms. Guldoon could find that she could reasonably travel to was a at the Plewinski Pierogi Company plant - located in an area that still requires her to ride

her bicycle for more than twenty miles each way on a busy highway to avoid coming within 1000 feet of one of the two schools that surrounds her home. *App. p. 14-16.* Not only is such a position a complete waste of her time and education, but if, for whatever reason, Ms. Guldoon were to lose her position at the plant, she would be left little to no option but to sell her home and move away. While the State may believe that preventing individuals like Ms. Guldoon from traveling independently would prevent recidivism, such overbroad and poorly reasoned regulations only serve to prevent parolees from properly rehabilitating and reentering normal society.

If that were not enough, ROSA's second section restricts offenders from accessing any pornographic material, access commercial social networking sites, or even use the internet to communicate with individual under the age of eighteen in any capacity. ROSA **§** 2**.** Section 2 of ROSA defines a commercial social networking website as "any business, organization, or entity operating a website that permits person under eighteen years of age to be registered users" including any websites that allow users to "create web pages or profiles . . . engage in direct or real time communication with other users . . . and communicate with person over eighteen years of age." ROSA **§** 2**.** The problem with this definition, is that it is so vague, that it may as well completely prevent offenders from accessing the internet at all.

In fact, these words display a clear misunderstanding of the nature of the internet. While ROSA is aimed at large commercial social networking websites such as Facebook, or Twitter, one would find it more difficult to identify a website or application that didn't feature user profiles, chat systems, or disallow individuals under the age of eighteen to participate. Be it reading the news or searching for employment opportunities, ROSA's restrictions prevent offenders from accessing a large portion of the internet, even if it is just to participate in daily activities such as finding employment, sending an email, or reading the news within the confines of one's home.

For Ms. Guldoon, not only is her ability to find employment substantially frustrated, but she is completely prevented from pursuing her career in education, as any online avenue for teaching - even for classes aimed at adults - would effectively violate ROSA's restrictions. Due to this inability to perform basic functions to find employment, combined with her inability to travel properly, Ms. Guldoon is effectively forced to work at the nearby plant, as it is the only job that is available to her.

B. ROSA's overbroad internet regulations have improperly punished Ms. Guldoon's family for crimes that they did not commit.

To prevent Ms. Guldoon from accessing certain internet websites on someone else's phone, laptop, or other such device, her husband and daughter have also been deprived of any access to the internet or internet capable smartphones in their own home. Naturally, this leads to issues. Ms. Guldoon's husband must be available to his employer by telephone, text, and email at all times, and the restrictions placed upon Ms. Guldoon substantially frustrates Mr. Guldoon's ability to perform his job duties. Similarly, Ms. Guldoon's daughter requires internet access for online textbooks, assignments and research for school. Even if this court were to consider the loss of the pure entertainment value of the internet a necessary evil for the rehabilitation of Ms. Guldoon, it cannot deny ROSA's overbreadth in prevent the entire Guldoon family from operating appropriately in modern society.

Were ROSA narrowly tailored in a sufficient manner, the law would function to only punish the offenders it was meant to effect, or at most, only indirectly hamper the lives of those around offenders like Ms. Guldoon. However, ROSA's direct and substantial impact on the lives of those who live with offenders like Ms. Guldoon creates unconstitutional restrictions that simply cannot be remedied without prying Ms. Guldoon from her legal home.

C. Even if this Court does not find the regulations impermissibly vague or overly broad, ROSA's regulations are not reasonably related to the nature and circumstances of Ms. Guldoon's offenses.

This brief has already discussed how parolees not only retain their due process rights after being released, but that those rights are implicated upon revocation or the application of special conditions on their parole. *Fitzpatrick,* 426 F.2d at 1164; *Morrissey*, 408 U.S. 471 (1972); *Green,* 618 F.3d at 122; *Meza,* 607 F.3d at 402; *Coleman,* 395 F.3d at 222. Various federal circuits have begun to expound upon this idea, stating that to be valid, release restrictions must be designed, in light of the crime committed, to promote the defendant's rehabilitation and to insure the protection of the public". *United States v. Reaves,* 591 F.3d 77, 82-83 (2d Cir. 2010) (holding that conditions of parole requiring defendant convicted of possessing child porn to notify parole officer when entering any significant relation as unconstitutional); *United States v. Loy*, 237 F.3d 251, 270 (3d Cir. 2001) (holding that a condition forcing the defendant, who was convicted of possessing child porn, from accessing all forms of porn must be clarified properly); *Bagley v. Harvey*, 718 F.2d 921, 925 (9th Cir. 1983). Defendant's special parole conditions were only valid because he was confronted specifically with evidence supporting the parole conditions). In other words, the restrictions imposed upon the parolee must be reasonably related to the nature and circumstances of the parolee's offenses. *Id.*

i. ROSA's restrictions on internet access is unrelated to Ms. Guldoon's relationship with B.B.

ROSA's restrictions on Ms. Guldoon are merely tangentially related to the nature and circumstances of her offenses, and almost completely unrelated to the state's desired interest of rehabilitating her and preventing her from conducting similar actions.

In regard to ROSA's ban on Ms. Guldoon's internet access, the State cannot reasonably show that Ms. Guldoon's relationship with B.B. was the product of any sort of access to a

"commercial social media website". Although the state has a valid interest in protecting its citizens from criminal sexual conduct, the undisputed facts show that the only internet usage involved in Ms. Guldoon's relationship with B.B. was the usage of the school's internal email system to communicate locations to meet - actions that only occurred after the two had already begun their sexual relationship. In fact, most of Ms. Guldoon's contact and conversation with B.B. occurred at the school - with only a few small sentences exchanged over email or text. Furthermore, Ms. Guldoon never asked for or received any sexually explicit photos, videos, or other content from B.B.

Despite this, as punishment for actions that had little to no impact on Ms. Guldoon and B.B.'s relationship, ROSA has placed upon her what can only be seen as a complete and total ban on most, if not all forms of internet access. Various circuits have already demonstrated that such blanket bans are only constitutional if the defendant's conduct warranted imposing such a strong ban. *Johnson v. Owens,* 612 Fed. Appx. 707, 714 (5th Cir. 2015) (Intrusive restrictions on computers, photography, and internet use have upheld only where there was a connection between the offender or offense and improper use of computers or internet . . ."); *United States v. Lombardo,* 546 F. App'x 49 (2d Cir. 2013) (holding that a prohibition on sexually explicit conduct was warranted where the defendant's problem with pornography addiction was found to be a primary element in obtain child pornography); *United States v. Brigham,* 569 F.3d 202, 5th Cir. 202 (5th Cir. 2009) (upholding a three-year ban on possession of pornography where the defendant was convicted of receiving and keeping child pornography and the defendant's counselor testified that even adult pornography could trigger the defendant); *United States v. Boston,* 494 F.3d 660 (8th Cir. 2007) (upholding a ban on sexually explicit conduct where court found that it served a deterrent effect on the defendant, who was convicted of producing child pornography).

In each of these situations, the State's interest in keeping the parolee from engaging in the collection of viewing of child pornography warranted these vague bans on internet access, but what sets Ms. Guldoon's case apart from those listed is that her usage of the internet was completely unrelated to her crime. Courts have continued to deny such situations where the State has presented no evidence to show a connection between the ban and the defendant's conduct. *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009); *United States v. Armel*, 585 F.3d 182 (4th Cir. 2009); *United States v. Voelker*, 489 f.3d 139 (3d Cir. 2007). Here, the State has presented no evidence to show any sort of connection between Ms. Guldoon's conduct and access to the social networking websites, besides a few email messages exchanged between her and B.B.

ii. ROSA's restrictions on the usage of motor vehicles is only tangentially related to Ms. Guldoon's offenses, and unrelated entirely to her mental illness.

Even less related to her crime was the operation of motor vehicles. While the undisputed facts show that Ms. Guldoon did transport B.B. to her home at times, they also show that operation of a motor vehicle was unnecessary for the relationship. Ms. Guldoon's relationship with B.B. was a direct result of her interaction with him at school and in her classroom, a place easily accessible to both of them. If the state wanted to prevent Ms. Guldoon from committing similar crimes, it only needed to limit who was allowed in her vehicle.

Additionally, even if ROSA's motor vehicle usage and internet access provisions could tangentially relate to Ms. Guldoon's offense, ROSA's restrictions could in no way, shape, or form relate to Ms. Guldoon's mental illness, which was the cause of her actions. It is in fact true that Ms. Guldoon shares in being a victim, as the Prozac previously prescribed to her to treat her postpartum depression unmasked her latent BPD, and the manic episode that accompanied it. Per the testimony of her Psychiatrist, but for Ms. Guldoon suffering from this hypersexual state of

mind, she would not have had any sexual relations with B.B., or any other minor. Even if ROSA's restrictions mentioned mental illness in any way, Ms. Guldoon's BPD has been successfully treated and under control since her entry into the TCF in 2011. Ms. Guldoon poses no threat of recidivism.

For these reasons, Ms. Guldoon prays that this Court find in her favor and reverse the decisions of the District and Appellate courts.

II. The additional Registration requirements and special conditions of Parole required by Lackawanna's ROSA act enacted after Petitioner was convicted and sentenced constitutes a violation of the Ex Post Facto Clause in article 1 Section 10 of the United States Constitution.

"[A]ny statute which . . . makes more burdensome the punishment for a crime, after its commission is prohibited as ***ex post facto***." *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 68 (1925) (no Ex Post Facto violation for Ohio Statute that affected only the manner in which the trial of those jointly accused was to be conducted). This Court made a statement that rings true today, that is there exists a very present threat that the legislator might "disfavor certain persons after the fact" and this is so even within the parole context. *Garner v. Jones*, 529 U.S. 244, 253, 120 S. Ct. 1362, 1369 (2000). Through the Ex Post Facto prohibition, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 964 (1981) (this Court held that a prisoner was disadvantaged by legislation that reduced chance to shorten his time in prison through good conduct). This Court in *Weaver* went on to reason that "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id.* Thus, this Court concluded that even if the statute in question simply alters any penal provisions it will be a violation of the

Ex Post Facto clause so long that it is both retrospective and "more onerous than the law in effect on the date of the offense." *Weaver*, 450 U.S. at 965. Essentially a law that increases the "quantum of punishment for a crime committed before its enactment will be a violation of Ex Post Facto. *Weaver* at 966 (See also *Dobbert v. Florida*, 432 U.S., at 293-294). Such a law "can be constitutionally applied to petitioner only if it is not to his detriment." *Id*. In *Miller* this Court held that no *ex post facto* violation occurs if a change is merely procedural and does not affect "substantial personal rights." *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446 (1987).

The effects ROSA have and continue to have on Ms. Guldoon alter what undoubtedly are substantial personal rights. It is undisputed that ROSA has had a tremendous detrimental effect on Ms. Guldoon. It is also undisputed that ROSA is more onerous than the law that was in effect when she committed her crimes. Ms. Guldoon was given absolutely no notice that she would be forced to register as a level II sex offender and that she would have other special requirements imposed on her by ROSA including the revocation of her driver's license, ban on her internet usage, and not being able to travel within 1000 feet of any school.

A. The new Requirements imposed by ROSA are punitive in nature and constituted an increase in the potential penalty to be levied on Ms. Guldoon and thus are Ex Post Facto.

In *Lindsey*, this Court established the proposition that the Constitution "forbids the application of any new punitive measure to a crime already consummated." *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S. Ct. 797, 799 (1937) (the new statute made mandatory what was before only the minimum sentence, and this was found to be a violation of the Ex Post Facto violation). This Court also held in *Morales* that "an impermissible increase in the punishment for a crime may result not only from statutes that govern initial sentencing but also from statutes that govern parole or early release." *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 518, 115 S. Ct. 1597, 1607 (1995)

(concluding that decreasing the frequency of parole suitability hearings did not change the applicable sentencing range, and only created the *most speculative* and *attenuated possibility* of increasing the measure of punishment for covered crimes).

The first step for a court in its analysis of an Ex Post Facto issue is to examine the text and structure of the legislative act, whether there exists evidence of an express or implied intent for the imposition of punishment. *Smith v. Doe*, 538 U.S. 84, 107, 123 S. Ct. 1140, 1155 (2003) (statute that required registration and publication did not violate Ex Post Facto) (See *United States v. Ward*, 448 U.S. 242, 248-249, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963). In making this determination the "the statute's text and its structure" are to be considered. *Smith* 538 U.S. at 92. In *Blakemore*, the court held that when the offender was convicted of a "class C felony sexual misconduct with a minor, no statute required him to register as a Sex Offender." *Blakemore v. State, 925 N.E.2d 759, 763 (Ind. Ct. App. 2010).* Therefore, the Court concluded, "application of the current version of the Sex Offender Registration Act to Blakemore "imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed," and is unconstitutional." *Id*. Finally, if this Court finds the intent behind ROSA to be punitive then the ACT must be both retrospective and it must disadvantage the offender affected by it. *Weaver,* 450 U.S. at 29.

The facts of this case are nearly identical to those that existed in *Blakemore*. ROSA was created with punitive intent and unlike the statute that was under scrutiny in *Lindsey* the punitive effects of ROSA on Ms. Guldoon are the farthest thing from speculative and much more than a simple attenuated possibility. The punitive effects of ROSA are very real and have, without question, increased the quantum of punishment. In analyzing the text of ROSA, the first sentence

of the statute states, "AN ACT to amend the *correction* law, the ***penal*** law, and the executive law . . ." *Appendix* at 19. Both the terms "correction" and "penal" show intent on the part of the legislator to punish. Moreover, ROSA claims to be about protecting society from the danger of recidivism "posed by sex offenders who commit predatory acts against children. . ." yet ROSA makes no attempt to ascertain who actually poses a danger. ROSA makes no attempt nor provides any method of properly identifying an offender as dangerous or not. ROSA also mentions protecting society from high risk sex offenders, but again provides no plan or direction what so ever at distinguishing between who may be a high risk.

As it pertains to internet use, the text of ROSA claims the law to be falling behind in this aspect as "there is no such mandatory prohibitions to prevent offenders from victimizing children in cyberspace." *Appendix* at 20. Not only does this show an intent to punish offenders who use the internet in such a way, it is also incredibly over broad. ROSA acknowledges that 200,000,000 adults use the internet for various legal reasons, including finding employment, which reduces the changes of re offending according to the studies cited in ROSA itself. ROSA goes on to say that any restriction must be "tailored to specifically target the types of offenses committed *on the internet* while not making it i*mpossible* for such offenders to successfully reintegrate back into society." *Id*. ROSA's retroactive application to Ms. Guldoon directly contradicts the language just quoted because it has made finding gainful employment essentially impossible. Ms. Guldoon used email for a fraction of her communication with B.B. Therefor it is clear that a total ban on any social media website, which by its overly broad definition in the statute includes all job listing sites, is evidence that ROSA was enacted to punish. ROSA authorizes sentencing courts to impose "reasonable limitations on sex offender's internet use." The problem with this is threefold; first, ROSA is not mentioned in Ms. Guldoon's sentencing guidelines; second, ROSA's effect on Ms.

Guldoon's internet use is, in no way, reasonable; and third, the internet ban on Ms. Guldoon serves no other purpose other than to punish as it was intended to do by the legislator.

Finally, ROSA and its additional requirements that were arbitrarily imposed on Ms. Guldoon were enacted years after Petitioner committed and pleaded guilty for her crimes. Because ROSA was drafted by the legislator with punitive intent, and because ROSA has a clear punitive effect, its application to Ms. Guldoon is a clear violation of the Ex Post Facto clause of the United States Constitution and therefore this Court should find that it cannot be applied retroactively to Ms. Guldoon.

B. Even if this Court finds ROSA to be civil in intent the effect of ROSA on Ms. Guldoon is so punitive that it negates the States intent to deem it civil.

If this Court finds the intent behind ROSA to be civil, then the second step for the courts analysis is to examine "whether the law is "so punitive either in purpose or effect to negate [the State's] intention' to deem it 'civil."' *Smith, 538 U.S* at 92 (See also *Ward* at 248-249)). The party challenging the law must show by "the clearest of proof" that the statute is so punitive in nature and affect as to deem it criminal no matter the intent. *Smith, 538 U.S* at 251. Justice Souter, in his concurrence stated that "this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction." *Smith,* 538 U.S. at 107 (Souter concurring).

Furthermore, in determining whether a sanction that was intended to be as non-punitive is punitive that it violates the ex post facto prohibition "is a highly specific matter." *DOE v. PATAKI*, 120 F.3d 1263, 1275 (2d Cir. 1997). For the second step in the analysis, this Court in *Smith* stated the factors with the most relevance as being "has [the effect of the statute] 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, 538 U.S* at 97 (See also *Kennedy v. Mendoza-Martinez,* 372

U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963)). In applying the Mendoza factors the 9th circuit was analyzing a statute that it said was indistinguishable from the one in *Smith*. *ACLU v. Masto*, 670 F.3d 1046, 1056 (9th Cir. 2012). That is, a statute that expanded the scope and registration and notification requirements of sex offenders. *Id*.

The issue for Supreme Court of Alaska was whether the sex offender statute (ASORA) in question violated the Ex Post Facto clause of the constitution, and the court answered in the affirmative. *Doe v. State*, 189 P.3d 999, 1000 (Alaska 2008). The ASORA statute "require[d] persons convicted of sex offenses to register and periodically re-register with the Alaska Department of Corrections, the Alaska State Troopers, or local police, and disclose detailed personal information, some of which is not otherwise public." *Id*. The court, in applying the Mendoza factors, concluded that held that "ASORA imposes burdens that have the effect of adding punishment beyond what could be imposed when the crime was committed." *Id*. The court held ASORA would not apply to anyone who committed their crimes before its enactment. *Id*.

The first factor to be considered is the historical form of punishment. *Smith, 538 U.S* at 97. While the registration and publication provisions have ties to shaming punishments, this alone is insignificant. *Id*. This Court held that while the publicity may cause "mild" embarrassment for a convicted offender, "the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Smith, 538 U.S* at 99. The second factor is an "affirmative disability or restraint." *Id*. The inquiry here is how "the effects of the Act are felt by those subject to it." *Smith, 538 U.S* at 100. This Court further posited that if the restraint is "minor or indirect" then the statute is likely not punitive. *Id*. In *ALCU* the court reasoned the statute in question "does not limit the activities that registrants may pursue or limit registrants' ability to change jobs or residences." *ACLU* 670 F.3d at 1056. In *Smith* this Court held the statute did not

limit offenders in going somewhere they just had to report when they did. *Smith,* 538 U.S at 100. In *State v. Letalien* the Supreme Judicial Court of Main found a statute that required in-person verification at a local police station, within five days of receiving a notice in the mail placed "substantial restrictions on the movements of lifetime registrants and may work an "impractical impediment that amounts to an affirmative disability." *State v. Letalien, 2009 ME 130, 985 A.2d 4.*

The third factor leads a court to evaluate the "traditional aims of punishment – i.e., deterrence and retribution." *ACLU* 670 F.3d at 1057. A small amount of deterrent effect is not dispositive. *Id.* The fourth factor in what this Court in *Smith* called "a most important factor" is the "rational connection to a nonpunitive purpose." *Smith,* 538 U.S. at 100-103. This Court's reasoning regarding registration and publication requirements at issue in *Smith* was that there existed a legitimate purpose of public safety in mind. *Id.* This Court held that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id*. Finally, the fifth factor to be considered in the Ex Post Facto context is the "excessiveness in scope." *Id*. This Court in *Smith* stated the "ACT" imposes the "minor condition of registration" *Id*; and "the notification system is a passive one: an individual must seek access to the information." *Smith,* 538 U.S. at 105. The test is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id*. In *Smith* and *ACLU* the statutes registration and publication requirements in question satisfied this test. *Id*; *ACLU*, 670 F.3d at 1057.

Even when the statute is just a Reporting and publication statute, there is still debate about the punitive nature of simple registration and publications statues. Writing in dissent, Justice Ginsburg believed the touchstone of the ACT's obligation was "past crime alone, not current dangerousness." *Smith, 538 U.S* at 116 (Ginsburg dissenting). Justice Ginsburg concluded that

"[h]owever plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation." *Smith, 538 U.S* at 177 (Ginsburg dissenting).

Respondents will likely compare this case, and ROSA to the statutes at issue in the Supreme Court's decision in *Smith*, the 9th Circuit's decision in *ACLU,* and the Second Circuits decision in *Doe*. The Respondents would be misguided to rely on cases so distinguishable from the present case as demonstrated below. ROSA was intended to be punitive, but in the event this Court finds the intent behind ROSA to be civil, its effect on Ms. Guldoon is clearly punitive. In *Smith*, *ALCU,* and *DOE,* the statute's restrictions on the offenders were merely notification and potentially, publication of already public information. Ms. Guldoon's restrictions include the revocation of her driver's license, the forfeiture of her and her families use of the internet, and the inability to travel within certain footage of schools requiring massive detours taken on a bicycle or by walking only to go a few miles away. All of the restrictions just mentioned have been imposed on Ms. Guldoon by ROSA for a crime Ms. Guldoon committed five years before its enaction, making clear that ROSA goes beyond the simple, and by comparison, moderate requirements imposed by the statutes in *Smith*, *Doe*, and *ACLU*. The restrictions imposed on Ms. Guldoon go so far beyond that of registration and publication that a substantial punitive effect is undisputed. These effects mean even with civil intent, ROSA is so punitive in character that it is a clear violation of Ex Post Facto.

When applying the first factor to this case the outcome should be different than that of *Smith* and *ACLU*. This is because ROSA requires significantly more than registration and publication. While the registration and publication requirements do have a history of serving the purpose of punishment, they have a civil purpose as well that this Court has repeatedly found. The

addition of the revocation of Ms. Guldoon's driver's license, the ban to go within 1000 feet of any school, and the ban from any social media website on the internet should tip the scale on the punitive side. There is little to no historical context for the added requirements that ROSA, especially the internet ban. In today's society however, internet use access to a vehicle are necessities and ROSA's restrictions on internet and vehicle are clearly punitive.

The second factor this Court may analyze is "affirmative disability or restraint." It is indisputable that this factor weighs heavily in the favor of Ms. Guldoon. Beyond registration and publication, Ms. Guldoon was forced to surrender her driver's license, cannot travel within 1000 feet of any school, and cannot access any social media website effectively banning her from the internet. To start with the revocation of Ms. Guldoon's driver's license, Ms. Guldoon is literally restrained in her ability to travel to the distance she can ride on a bicycle or walk. Factoring in the potential for harsh weather which makes traveling via bicycle or walking either impossible all together or at the least, extremely dangerous. Not being able to be within 1000 feet of a school is also a clear affirmative disability on Ms. Guldoon's ability to move. This added requirement by ROSA requires Ms. Guldoon to ride her bicycle 20 miles each way in detours in order to get to work when, her job is about three miles away from her home. Finally, the ban on Ms. Guldoon's internet use is also a clear disability. This is because the ban has made finding gainful employment nearly impossible as she cannot apply for most jobs because access to job search websites is forbidden, and she is not allowed to have an email address.

The third factor leads the court to analyze the "traditional aims of punishment." This Court made clear in *Smith* that the reporting requirement did not establish retributive intent. However, factoring in the added requirements listed above it would be difficult to reason that there exists no retributive intent. As prevalent and useful as the internet has become, a ban that makes using the

internet impossible while not considering the specific crimes committed, must be seen as punitive and retributive. ROSA makes no attempt to ascertain whether a particular offender should be subjected to its requirements which also supports punitve intent. The fourth factor is the "rational connection to a nonpunitive purpose." ROSA cannot be said to even be a close fit, much less a perfect fit towards its non-punitive aim of "public safety" especially when considering the specific context of Ms. Guldoon's crimes such as the fact that Ms. Guldoon was dealing with undiagnosed Bi-Polar Disorder that caused hyper sexuality when she committed her crimes. Moreover, Ms. Guldoon only used email sporadically to communicate with B.B. and it was by no means how they communicated on a regular basis. That was by cell phone, but ROSA did ban the use of the cell phone, just the use of the internet. The added requirements imposed on Ms. Guldoon have no rational connection to Ms. Guldoon's crimes.

Finally, the fifth factor relevant in Ex Post facto analysis is the "excessiveness in scope." This factor weighs heavily in favor of Ms. Guldoon. The scope of ROSA essentially encompasses the gambit of possible restraints, and punishments all under the guise of "protection of safety." But for many years the registration and publication requirements have served that purpose more than adequately. To go from registration and publication to the revocation of driver's license, the ban of internet use, and the requirement to not go within 1000 feet of any school requiring massive and time-consuming detours by foot or bicycle, clearly is excessive in its scope. ROSA's excessiveness is a blatant violation and should not be applied to Ms. Guldoon because doing so is a clear Ex Post Facto violation.

When taken together with the "clearest proof" these factors show the true punitive effect that ROSA has. Even with civil intent behind it, if the Court finds that to be the case, that is not enough to negate the true nature of ROSA, that is a wholly punitive one.

CONCLUSION

ROSA's application to Ms. Guldoon is a clear violation of her First and Fourteenth Amendment rights. These rights include her fundamental right to travel, access the internet, and her right to be free of punitive measures enacted after the commission of her crimes. ROSA's restrictions are excessively broad and leave those like Ms. Guldoon without avenues to successfully rehabilitate themselves. For Ms. Guldoon specifically, she would have to give up her home at the very least in order to both comply with ROSA and support her family.

WHEREFORE the Petitioner prays that this Court reverses the lower court's decision and finds ROSA unconditional or in the alternative, finds that it simply cannot be applied to the Petitioner.