No. 19-01

In the

Supreme Court of the United States

MARY GULDOON,

Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Team Number: 27

QUESTIONS PRESENTED

I. Should this Court affirm the United States Court of Appeals for the Thirteenth Circuit's holding that Lackawanna's Registration of Sex Offenders Act's registration requirements and additional conditions of parole are non-violative of the First Amendment's freedom of speech protections and the Fourteenth Amendment's substantive due process protections when its: (1) commercial social networking site condition both protects the public from sexual harm and imposes no greater deprivation of speech than necessary; and (2) its travel conditions implicate no fundamental right?

II. Should this Court affirm the United States Court of Appeals for the Thirteenth Circuit's holding that ROSA's registration requirements and additional conditions of parole are non-violative of the Ex Post Facto Clause when they: (1) do not increase sex offenders' statutory punishment; (2) were crafted by the State to protect the public from recidivistic predatory behavior attributable to sex offenders; and (3) advance the State's interest by ensuring sex offenders are monitored and restricted from preying on the public?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Rules and Regulations

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS:

Petitioner Mary Guldoon (Guldoon) is a twenty-four-year-old married mother with manic hypersexual tendencies. (R. 7, 13.) Well-educated in the subject of internet technology, Guldoon holds her master's degree in Computer Programming and was previously employed as a computer science teacher at Old Cheektowaga High School. (R. 11, 13-14.)

A. Guldoon's sexual exploitation of her fifteen-year old student

In 2010, Guldoon's employment with the school was terminated after Old Cheektowaga High School's principal discovered her performing a sexual act on B.B., Guldoon's fifteen-year-old student (B.B.). (R. 5.) Guldoon was arrested following this sexual act. (R. 5.) She confirmed a seven-month-long sexual exploit with B.B., beginning in October 2010 and ending in May 2011, which, by B.B.'s estimate, included over thirty instances of sexual conduct occurring in Guldoon's classroom, residence, and car. (R. 5, 7.) When the sexual conduct occurred in Guldoon's residence, which was located near the high school, Guldoon transported B.B. home in her car. (R. 7.) Following her arrest, Guldoon depicted her view of the exploit: "I love him and he loves me. What's wrong with that?" (R. 5.)

Further investigation by the Old Cheektowaga Police Department revealed that Guldoon used both the school's email system and her cell phone to seduce B.B. (R. 5.) Guldoon sent frequent emails and text messages to B.B., which consisted of statements like "I miss you" and "Are you free now." (R. 5.) Still, many more files had been deleted from Guldoon's cell phone and email system. (R. 6.) Sexual or pornographic communications, such as "naked pictures" of B.B., were not recovered; although B.B. suggested Guldoon had received such pictures from him. (R. 5, 6.)

Following Guldoon's arrest, B.B. was held in a residential facility for counseling, where a Lackawanna Parole Officer interviewed him on behalf of respondent, the Lackawanna Board of Parole (Lackawanna). (R. 6.) B.B. recapped how he initially reached out to Guldoon for help in school, trusted Guldoon, and eventually confided in Guldoon regarding his "troubl[ing]" home life, including his abusive father and drug and alcohol addicted mother. (R. 6, 12.) Because of Guldoon, B.B. indicated that he no longer trusts adults. (R. 6.) This lack of trust is founded upon his realization that, although he previously thought Guldoon "loved" him and he "loved her," he now knows Guldoon "was just using" him. (R. 6.) Yet, despite B.B.'s current understanding of Guldoon's manipulative tactics, he was still in possession of a Valentine's Day note Guldoon gave him months prior and stated that he still wishes to see Guldoon again. (R. 6.)

B. Guldoon's post-conviction sentence

Guldoon was charged with ten counts of rape in the third degree, five counts of criminal sexual act in the third degree, and nine counts of sexual misconduct. (R. 6.) She pled guilty to one count of each charge. (R. 6.) Lackawanna recommended that Guldoon be sentenced to a period of incarceration of no less than twenty years, followed by a period of ten years' probation. (R. 5.) At the time of sentencing, Lackawanna expressed no recommendation as to any special conditions of parole. (R. 5.) The District Court sentenced Guldoon to an indeterminate sentence of ten to twenty years, followed by parole. (R. 2.) Guldoon's sentence began in 2011. (R. 2.)

C. Enactment of the Registration of Sex Offenders Act (ROSA)

In 2016, Lackawanna enacted the Registration of Sex Offenders Act (ROSA) to protect the public from the danger of recidivism posed by sex offenders who commit repetitive, compulsive, and predatory acts on children. (R. 19.) With its fundamental goal of protecting the public from victimization in mind, ROSA imposes additional, special conditions of parole on sex offenders to advance that purpose. (R. 19-21.)

First, ROSA imposes a sex offender registration system, which requires sex offenders to register and release certain information to the public, such as the offender's home address, expected place of domicile, and driver's license number. (R. 19, 20.) This registration system is designed to aid law enforcement agencies' efforts when conducting sexual abuse and exploitation investigations, apprehending offenders, and protecting communities. (R. 19.)

Second, ROSA prohibits high risk sex offenders from entering upon school grounds or any other facility or institution primarily accessed by children under the age of eighteen. (R. 24.) An exception to this condition applies if the sex offender is an employee at such grounds, facility, or institution and procures written authorization to be present from the sex offender's parole officer and from the location's chief administrator. (R. 24.)

Third, ROSA prohibits high risk sex offenders from using the internet to access pornographic material or commercial social networking websites to restrict communications or predatory advances on minors. (R. 20, 25.) A commercial social networking website is defined by ROSA as any business, organization, or other entity that allows individuals under eighteen to access and make profiles that possess their personal information, communicate directly and in real time in chat rooms, or communicate with individuals over eighteen. (R. 25.) The legislature demonstrated its reasoning for crafting this prohibition in first section of ROSA (legislative purpose or findings): (1) the internet provides a clear and present danger to the general public in the hands of sexual predators because more than two hundred million adults and tens of thousands of sex offenders use the internet and because the internet is easily accessible to minors who may be subjected to obscene, unlawful, and predatory advances from adults; (2) the inherent secrecy provided by the internet, combined with the manipulative and deceptive characteristics of sex offending behavior, presents a vehicle for sex offenders to violate parole and circumvent

supervision, thereby increasing the risk of recidivism; and (3) past legislation has failed to keep up with the rapid advancement of the internet. (R. 20-21.)

Fourth, ROSA prohibits high risk sex offenders from operating motor vehicles. (R. 26.) An exception to this condition applies if the sex offender procures written authorization to operate a motor vehicle from the sex offender's parole officer and from the commissioner of the department of motor vehicles. (R. 25-26.)

D. How ROSA applies to Guldoon

In 2017, contingent upon her early release from prison, Guldoon accepted general conditions of parole as well as ROSA's additional special conditions. (R. 10.) Among her general conditions of parole, Guldoon was required to report directly to Lackawanna and make written reports when requested, notify Lackawanna upon any change to her home address, and refrain from possessing firearms or drug paraphernalia. (R. 8.) Among her special conditions of parole, Guldoon had to both register as a Level II sex offender with Lackawanna and abide by new parole conditions. (R. 9-10, 14.) These new conditions required her to turn over her state driver's license, banned her from traveling within one thousand feet of schools or similar facilities, and banned her from accessing some aspects of the internet vis-à-vis commercial social networking websites and internet-based pornographic material. (R. 9-10.)

Since her release from prison, Guldoon has found the additional ROSA requirements troublesome. (R. 14-17.) First, Guldoon states that she has found it difficult to find employment because she lacks the ability to drive to work. (R. 15-16.) Yet, despite a more difficult job search, Guldoon is employed at a local food processing plant. (R. 15.) Second, Guldoon states that she must take an unpreferable route to work to avoid local schools because of the condition restricting her from coming within one thousand feet of any school or similar facility. (R. 15-16.) Third, Guldoon states that her failure to find employment in teaching and her family's decision to

terminate internet access results from her condition restricting access to social networking websites. (R. 16-17.)

II. STATEMENT OF THE PROCEDURAL HISTORY:

On January 1, 2019, Guldoon filed a Complaint, naming Lackawanna, in the United States District Court for the Middle District of Lackawanna. (R. 4.) The Complaint requested that the District Court: (1) issue a declaratory judgment in favor of Guldoon on the grounds the additional parole conditions imposed by Lackawanna's Registration of Sex Offenders Act violate 42 U.S.C. § 1983 and, therefore, are unconstitutional as applied to Guldoon under the First and Fourteenth Amendments of the United States Constitution and under the Ex Post Facto Clause; (2) issue a permanent injunction restraining Lackawanna, its employees, agents, or successors from enforcing ROSA; and (3) grant other relief where equitable. *Guldoon v. Lack. Bd. of Parole*, 999 F. Supp. 3d 1, 2-3 (M.D. Lack. 2019). In response, and pursuant to Fed. R. Civ. Pro. 12(b)(6), Lackawanna filed a motion to dismiss Guldoon's claim, supported by the case's pre-sentence support, on the ground Guldoon failed to state a claim. *Id.* at 3. In opposition, Guldoon submitted her own affidavit. *Id.*

After careful review, the District Court treated Lackawanna's motion as one for summary judgment, pursuant to Fed. R. Civ. Pro. 12(d), and granted Lackawanna's motion to dismiss. *Id.* at 6. The District Court based this decision on the overarching conclusion that Guldoon had failed to state a claim under 42 U.S.C. § 1983. *Id.* at 4. The court supplied two findings: (1) The additional parole conditions imposed upon Guldoon by Lackawanna were made under the color of state law; and (2) the parole conditions imposed upon Guldoon by Lackawanna did not deprive Guldoon of any protected rights, privileges, or immunities, secured to her by the Constitution or laws of the United States. *Id.* at 4, 6.

The District Court supported its conclusion by demonstrating why Guldoon failed to assert, under any theory she advanced, a protected right, privilege, or immunity to be free from ROSA's additional conditions of parole. *Id.* at 4-6. First, the First and Fourteenth Amendments allow Lackawanna to impose ROSA's conditions to advance the state's interests in protecting minors, reducing recidivism, and preventing harm to the public so long as the conditions are reasonably related to the state's interests and not imposed arbitrarily or capriciously. *Id.* at 6-7. Further, Guldoon failed to meet her burden in supplying facts sufficient to establish that ROSA's conditions did not satisfy the two preceding requirements. *Id.* at 7. Second, Lackawanna may place restrictive measures upon dangerous sex offenders if done to support a legitimate, nonpunitive governmental interest, without violating the Ex Post Facto Clause. *Id.* at 8-9. Guldoon failed to demonstrate that ROSA's conditions were imposed ex post facto because they were neither imposed retroactively nor were punitive in nature. *Id.* at 9-10.

Satisfied with the District Court's analysis, the United States Court of Appeals for the Thirteenth Circuit affirmed the District Court's ruling. *Guldoon v. Lack. Bd. of Parole*, 999 F.3d 1, 1 (13th Cir. 2019). One dissenting opinion noted that ROSA's conditions violated the First and Fourteenth Amendments and the Ex Post Facto Clause. *Id.* at 1 (Skopinski, J., dissenting). Following the Thirteenth Circuit's affirmation, Guldoon filed a writ of certiorari in this Court, asking this Court to determine the constitutionality of ROSA's registration requirements and additional parole conditions under the First and Fourteenth Amendments or the Ex Post Facto Clause.

SUMMARY OF THE ARGUMENT

I.

Lackawanna's Registration of Sex Offenders Act (ROSA) violated neither Guldoon's First nor Fourteenth Amendment rights by imposing registration requirements and special conditions of parole on sex offenders. Content-neutral conditions are lawful when they serve a substantial government interest and are narrowly tailored to serve that interest. *Doe v. Shurtleff*, 628 F.3d 1217, 1223 (10th Cir. 2010). ROSA's content-neutral commercial social networking condition advanced a substantial government interest – protecting the public from potential sexual harm – and was narrowly tailored to fit Lackawanna's interest because prior legislation could not keep pace with the internet's rapid advancements, and the state could only continue protecting minors by enforcing broad conditions. (R. 20-21.) Accordingly, ROSA's condition was constitutional and non-violative of the First Amendment.

Despite ROSA's travel conditions, Guldoon still possesses her substantive due process rights, including her freedom to travel. Prohibitions that implicate no fundamental right only require rational basis review, where the prohibition must rationally relate to the government's interest. *Doe v. Moore,* 410 F.3d 1337, 1345 (11th Cir. 2010). The suspension of Guldoon's driver's license did not implicate her freedom to travel, but rather burdened it. Because Lackawanna advanced a rational interest in protecting the public, Guldoon's Fourteenth Amendment claim must fail. Furthermore, no fundamental right to enter school grounds exists, *see Valenti v. Lawson*, 889 F.3d 427, 430-31 (7th Cir. 2018), and Guldoon once again failed to assert an implicated fundamental right by challenging ROSA's school proximity ban. Thus, this Court should affirm the Thirteenth Circuit's finding that ROSA's travel conditions violated no fundamental rights.

II.

ROSA's registration requirements and additional conditions of parole do not violate the Ex Post Facto Clause because they do not impose punishment retroactively and because they are nonpunitive in nature. First, Lackawanna used its vested discretion to expand upon its preexisting parole procedures in a way that ensured Guldoon would not retroactively serve more time in prison. ROSA did not increase the statutory offense attached to Guldoon's crimes and it provided review and reconsideration procedures from which Guldoon could petition for reprieve. (R. 41.) Guldoon's speculation that ROSA's registration requirements and parole conditions impose a greater punishment than her remaining statutory prison sentence would impose is insufficient. For those reasons, ROSA does not impose punishment retroactively.

Second, ROSA's registration requirements and additional conditions of parole are nonpunitive in nature under this Court's two-prong *Smith* test. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). Under prong one, the Lackawanna legislature crafted ROSA's registration requirements and additional conditions of parole with a nonpunitive intent which is captured by their stated purpose of protecting the public from violent sex offender's recidivistic behavior, their imposition of more onerous restrictions on violent offenders whose high likelihood of re-offense poses a significant danger to the public, and their exceptions which safeguard against the possibility they are more restrictive than necessary. (R. 21, 37, 44.) Under prong two, precedent from this Court establishes that sex offender registration requirements are nonpunitive in their purpose and effect and, when analyzed under this Court's five-factor *Mendoza* balancing test, ROSA's additional conditions of parole also weigh in favor of serving a nonpunitive purpose and effect. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). For those reasons, ROSA's registration requirements and additional conditions do not violate the Ex Post Facto Clause and this Court must affirm the Thirteenth Circuit’s holding.

ARGUMENT

I. LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT VIOLATES NEITHER GULDOON'S FIRST NOR FOURTEENTH AMENDMENT RIGHTS BY IMPLEMENTING REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS OF PAROLE.

A. Lackawanna's Registration of Sex Offenders Act imposes content-neutral conditions on speech that both serve a substantial government interest and are narrowly tailored to serve that interest.

The Registration of Sex Offenders Act's (ROSA) content-neutral prohibition of commercial social networking access was lawful because it both served a substantial government interest and was narrowly tailored to serve that interest. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Laws that burden speech regardless of the views expressed are content-neutral. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643 (1994). Content neutral regulations may impose "reasonable 'time, place, or manner restrictions.'" *Doe v. Prosecutor*, 705 F.3d 694, 698 (7th Cir. 2013) (quoting *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). These regulations are subject to intermediate scrutiny, where the regulation must serve a substantial government interest and be narrowly tailored to serve that interest. *Shurtleff*, 628 F.3d at 1223.

Parole conditions that regulate sex offender conduct while inadvertently interfering with First Amendment speech rights raise a content-neutral inquiry. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (noting that North Carolina's parole condition banning sex offenders from internet access was content neutral); *Prosecutor*, 705 F.3d at 698 (finding an Indiana law preventing sex offender access to certain websites and programs content neutral); *Shurtleff*, 628 F.3d at 1223 (finding Utah's sex offender reporting law content neutral). These conditions satisfy a substantial government interest: Protecting the public – especially minors –

from sex offender recidivism. *See Prosecutor*, 705 F.3d at 698; *Moore*, 410 F.3d at 1347; *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999).

This Court should recognize that the broad application of such a restriction can still satisfy the state's narrowly tailored interest requirement due to the overwhelming danger of sex offender recidivism and the endless opportunities to encounter minors through unlimited internet access. This Court acknowledged the importance of protecting minors in *New York v. Ferber*, stating "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). *See also Valenti*, 889 F.3d at 430 (noting sex offenders' high risk of recidivism and the serious threat they present to minors); *Moore*, 410 F.3d at 1347 (broadening Florida's Sex Offender Act registration requirements to ensure the public's protection from sexual abuses); *United States v. Tome*, 611 F.3d 1371, 1376 (11th Cir. 2010) (upholding a one-year internet ban on a sex offender to deter recidivism and to protect potential child victims); *Crandon*, 173 F.3d at 127-28 (affirming a sex offender's internet ban to ensure "the dual aims of deterring him from recidivism and protecting the public"). Accordingly, legislation may inhibit constitutionally protected rights when it is "aimed at protecting the physical and emotional well-being of youth." *Ferber*, 458 U.S. at 757. A commercial social networking site ban on sex offenders, while broad, would safeguard minors from exposure to threatening individuals that are prone to recidivism.

Courts that have upheld broad internet parole and supervised release conditions on sex offenders have correctly understood the importance of protecting minors from these crimes. In *Crandon*, a thirty-nine-year-old man began communicating with a fourteen-year-old girl on the internet and had sex with her before his arrest. 173 F.3d at 125. Crandon's sentence included a

condition prohibiting him from accessing the internet for the duration of his supervised release. *Id.* He appealed the condition, *id.* at 127, which the Third Circuit then affirmed. *Id.* at 128.

Despite Crandon's contention that the condition infringed upon his liberty interests, the Third Circuit noted that supervised release conditions are lawful where they impose no greater deprivation of liberty than necessary to deter future crimes and protect the public. *Id.* at 127. Because Crandon used the internet to develop a sexual relationship with an underage girl, his internet ban acted as both a recidivism deterrent and a shield for the public. *Id.* at 127-28. Further, the court rejected Crandon's argument that an internet ban would hinder his employment opportunities and freedom of speech, finding that the condition was "*narrowly tailored and directly related* to deterring Crandon and protecting the public." *Id.* at 128 (emphasis added).

Similarly, in *Tome*, the defendant alleged his one-year ban on internet access as a condition of supervised release was unconstitutional. 611 F.3d at 1376. The Eleventh Circuit affirmed the ban, *id.* at 1378, because supervised release conditions may affect a defendant's ability to exercise constitutionally protected rights without unduly restricting them. *Id.* at 1376. *See also Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (noting that parolees do not have the same rights as normal citizens).

Here, ROSA's parole conditions prevent Guldoon from accessing "a commercial social networking website." (R. 2, 3, 9-10, 15.) By enforcing the condition regardless of the type of speech used by sex offenders on these social networking sites, ROSA imposes a content-neutral regulation, *see Turner Broad. Sys.*, 512 U.S. at 643, and Lackawanna can accordingly impose reasonable time, place, or manner conditions. *See Prosecutor*, 705 F.3d at 698. The "place" regulated here is the internet, specifically commercial social networking websites, where convicted sex offenders may wish to speak.

Lackawanna presents a substantial interest in enacting ROSA: "protecting vulnerable

populations and the public from potential harm." (R. 21.) This condition imposes no greater deprivation of liberty than necessary to protect the public. *See Crandon*, 173 F.3d at 127. Advances in computer and internet technology have surpassed existing law, thus jeopardizing the state's ability to protect minors. (R. 20.) Moreover, because sex offenders engage in anonymous, manipulative tactics behind a computer screen and present substantial threats to Lackawanna's vulnerable youth, (R. 20), ROSA's broad social networking site ban imposes the *necessary* deprivation of liberty required for ensuring minors' safety. Thus, ROSA's condition is narrowly tailored to serve its interest in protecting the public.

Also, Guldoon frequently communicated with B.B. through Old Cheektowaga High School's email system to further their sexual relationship. (R. 5, 6.) Furthermore, Guldoon not only taught Advanced Computer Science, (R. 11), but also obtained her master's degree in Computer Programming. (R. 14.) Proficient in these areas, Guldoon could circumvent lighter conditions to resume communication with B.B. through social networking sites or electronic mail. Because social networking sites "pose a clear and present danger to Lackawanners," (R. 20), the broad commercial social networking condition is "*narrowly tailored and directly related*" to Lackawanna's interest in protecting B.B., and other minors, from further sexual harm. *See Crandon*, 173 F.3d at 128 (emphasis added). Therefore, ROSA's social networking ban is lawful, as it satisfies both prongs of the intermediate scrutiny test for content-neutral regulations.

B. Lackawanna's interest in protecting the public from sexual offenses is rationally related to its enforcement of the Registration of Sex Offenders Act conditions that burden Fourteenth Amendment Rights.

This Court must affirm the Thirteenth Circuit's finding that ROSA imposed lawful travel limitations on Guldoon that implicated no substantive Fourteenth Amendment right. The United States Constitution guarantees that "no State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment

"protects fundamental rights that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Moore*, 410 F.3d at 1342-43 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). To trigger substantive due process protection, the regulation must "unreasonably burden" the individual's fundamental rights. *Saenz v. Roe*, 526 U.S. 489, 499 (1999). The inquiry "is whether the individual has been subjected to 'the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'" *Doe v. City of Lafayette*, 377 F.3d 757, 768 (7th Cir. 2004) (quoting *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819)). Infringing on a fundamental right requires a strict scrutiny analysis. *Moore*, 410 F.3d at 1343. However, regulations that do not implicate fundamental rights require only rational basis review, where the regulation must be "'rationally related to legitimate government interests.'" *Id.* at 1345 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)).

This Court has recognized the right to interstate travel as fundamental. *See United States v. Guest*, 383 U.S. 745, 757-58 (1966). The fundamental right to travel protects a person's right to enter and leave another state, to be treated fairly when within another state, and to be treated the same as other citizens of that state when permanently moving there. *Moore*, 410 F.3d at 1348 (citing *Saenz*, 526 U.S. at 500). In *Moore*, sex offenders alleged that a Florida statute inconvenienced their right to travel because it required them to inform officers when they changed residences. *Id.* However, "mere burdens on a person's ability to travel . . . are not necessarily a violation of their right to travel." *Id.* (citing *Saenz*, 526 U.S. at 499). The Eleventh Circuit held that the burdensome parole condition did not violate the sex offenders' fundamental right to travel and then applied rational basis review to the restriction. The court found the condition lawful because Florida's compelling interest, protecting the public from future sexual offenses, was rationally related to enforcing the restriction. *Id.* at 1348-49.

Other circuits have appropriately advanced the compelling interest of protecting the public from future sexual offenses by imposing supervised release conditions that affected sex offenders' right to travel. *See, e.g.*, *Valenti*, 889 F.3d at 430 (enforcing an Indiana statute's purpose of keeping sex offenders away from schools by prohibiting an offender from entering school grounds to vote); *United States v. Stults*, 575 F.3d 834, 853 (8th Cir. 2009) (prohibiting a sex offender from coming within five hundred feet of places used primarily by children).

While this Court has not decided whether the right to intrastate travel is fundamental, *see Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255-56 (1974), sex offenders have failed to successfully assert that parole conditions have implicated that right in United States Circuit Courts. *See Doe v. Miller*, 405 F.3d 700, 713 (8th Cir. 2005) (holding that an Iowa residency restriction preventing sex offenders from living within two thousand feet of schools did not violate the right to intrastate travel); *Lafayette*, 377 F.3d at 773-74 (holding that a parole condition restricting a sex offender's access to public parks did not implicate his right to intrastate travel, as no fundamental right existed). Thus, enforcement of these conditions was rationally related to the states' interest in protecting the public from sexual crimes.

Here, ROSA's parole conditions suspend the driver's license of any sex offender classified as Level Two or higher and prohibit them from travelling within one thousand feet of any school or similar facility. (R. 2, 3, 9-10, 15.) Guldoon first claimed that the suspension of her driver's license violated her fundamental right to travel. (R. 4.) However, this claim is without merit, as the suspension of her driver's license did not implicate Guldoon's freedom to travel. Rather, it burdened it, and mere burdens or inconvenient conditions do not implicate fundamental rights. *See Moore*, 410 F.3d at 1348-49. Guldoon retained the freedom to enter and leave other states, to be treated fairly within other states, and to be treated similarly to other citizens if she moved to another state. *See id.* at 1348. Accordingly, the burden preventing her

from driving was not unreasonable; therefore, it did not implicate her freedom to travel. Because ROSA did not implicate Guldoon's fundamental right to travel by suspending her license, only a rational basis review of the restriction is necessary. *See id.* at 1345.

Lackawanna's compelling interest, "[protecting] the public from the dangers posed by sexual offenders and those convicted of sexual offenses and sexually violent offenses," (R. 27), is rationally related to its ban of sex offender driving privileges. Guldoon's vehicle played a crucial role in her relationship with B.B. She not only drove B.B. home after numerous sexual encounters with him at her residence, but she also had sex with B.B. on multiple occasions in her car. (R. 5, 7.) Removing Guldoon's driver's license greatly reduces the threat she poses to B.B. and other potential victims and furthers Lackawanna's interest in protecting the public from sexual offenses. Thus, ROSA's driver's license ban merely burdens, but does not implicate, Guldoon's fundamental right to travel and is constitutional under a rational basis analysis.

Similarly, Guldoon asserted that ROSA's parole condition prohibiting sex offenders from travelling within one thousand feet of schools and similar facilities violated her fundamental rights. (R. 2, 3, 9-10, 15.) Once again, however, Guldoon's claim fails because no fundamental right to enter school grounds exists. *See Valenti*, 889 F.3d at 430-31. Without the implication of a fundamental right, this Court must again apply rational basis review to Lackawanna's prohibition. *See Moore*, 410 F.3d at 1345. Lackawanna's interest in protecting the public and minors from sexual harm is rationally related to ROSA's condition of banning sex offenders from school property. Satisfying the rational basis test, ROSA enforces a lawful ban on sex offenders from encroaching upon school grounds. Accordingly, Guldoon has failed to assert that either ROSA's driver's license ban or its school proximity ban have implicated her fundamental right to travel, and this Court should affirm the conditions as constitutional.

II. ROSA'S REGISTRATION REQUIREMENTS AND ADDITIONAL PAROLE CONDITIONS ARE NON-VIOLATIVE OF THE EX POST FACTO CLAUSE BECAUSE THEY DO NOT IMPOSE GREATER PUNISHMENT AND THEY ADVANCE THE NONPUNITIVE PURPOSE OF PROTECTING THE PUBLIC FROM VIOLENT SEX OFFENDERS PRONE TO RECIDIVISTIC PREDATORY BEHAVIOR.

The states are prohibited from enacting an ex post facto law. *Garner v. Jones*, 529 U.S. 244, 250 (2000) (citing U.S. Const., Art. I, § 10, cl. 1). An ex post facto law is one that "by retroactive operation, increases the punishment for a crime after its commission." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990). Two elements are required for a law to violate the Ex Post Facto Clause. First, the law must be imposed retroactively, so it punishes events that occurred before the law's enactment. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Second, the law must be punitive in nature, so it disadvantages the defendant affected by it. *See Collins*, 497 U.S. at 41.

The District Court found ROSA's retroactive enactment non-violative of the Ex Post Facto Clause, a decision in line with precedent from this Court addressing analogous statutes, including: (1) *Cal. Dep't of Corr. v. Morales*, 514 U.S. 503 (1995), which found a law that granted a parole board discretion to retroactively defer an inmate's parole rehearing non-violative of the Ex Post Facto Clause because the changes did not increase the inmate's statutory sentence (punishment); and (2) *Garner*, 529 U.S. 244, which found a law that granted a parole board authority to retroactively lengthen the time between an inmate's parole rehearings non-violative of the Ex Post Facto Clause because the statute allowed the inmate to petition for early rehearing by showing "new information," meaning the inmate's punishment was not definitively increased.

Then, the District Court found ROSA to be nonpunitive, a decision in line with precedent set by this Court and a circuit court of appeals, addressing analogous statutes, in: (1) *Smith*, 538 U.S. 84, which found a sex offender statute that imposed registration requirements to be a nonpunitive means of identifying previous offenders for the purpose of protecting the public from offenders' recidivistic behavior; and (2) *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016),

which found a sex offender statute that imposed a two-thousand foot school zone restriction to be a nonpunitive means of protecting children from sex offenders' potential danger. This Court must affirm the Thirteenth Circuit's affirmation of the District Court's holding because it is in line with well-established precedent that demonstrates ROSA is non-violative of the Ex Post Facto Clause.

A. The Thirteenth Circuit correctly held that ROSA's enactment was a retroactive application of law that is non-violative of the Ex Post Facto Clause.

A retroactive law "changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. Yet, not every retroactive law is prohibited by the Ex Post Facto Clause. *See Morales*, 514 U.S. at 509. Instead, a retroactive law is prohibited only if the petitioner provides specific evidence that demonstrates the law presents a significant risk of increasing the petitioner's prison time. *See Garner*, 529 U.S. at 255. Thus, an ex post facto claim founded upon a "speculative and attenuated possibility of . . . increasing . . . punishment" will not suffice. *Morales*, 514 U.S. at 508-09. *See also Garner*, 529 U.S. at 256 (rejecting speculation that granting a parole board discretion to alter parole procedures would increase an inmate's punishment when the law: (1) articulated the maximum level of discretion the parole board could exercise; and (2) defined procedures the petitioner could use to seek review and reconsideration).

Because the Ex Post Facto Clause does not exist to "micromanage . . . an endless array of legislative adjustments to parole . . . procedures" and the "states must have due flexibility in . . . addressing problems associated with . . . release," this Court has refused any "single formula" for ex post facto challenges to parole matters. *Garner*, 529 U.S. at 252 (finding a law that vested discretion in a parole board to adjust parole procedures, but not to modify statutory punishment, non-violative). But, "any application [of the Clause] . . . must draw a distinction between the penalty a person can anticipate for the commission of a particular crime, and opportunities for mercy or clemency that go to the reduction of the penalty." *Id.* at 258 (Scalia, J., concurring).

Guldoon's punishment was not increased following ROSA's enactment because ROSA did not increase her offense's statutory punishment. *See id.* at 255. Rather, the additional registration requirements and conditions of parole imposed by ROSA affected Guldoon only after she received a *lighter* sentence – early release from prison – meaning Guldoon's argument that parole constitutes greater punishment than her remaining fifteen-year prison sentence is speculative (if not ridiculous). (R. 2.) If Guldoon remained in prison for ten-twenty years, as opposed to the six-year sentence she served, the level of restrictions imposed on her in prison would be exponentially higher than her current parole restrictions. Thus, while ROSA may impact Guldoon, this Court must draw the distinction between the penalty she should have anticipated for committing the crime (ten-twenty years in prison) and the less restrictive opportunity for clemency presented to her (six years in prison followed by parole). *See id.* at 258.

Moreover, the additional parole conditions are examples of Lackawanna exercising its discretion to address problems of release associated with recidivistic behavior. *See id.* at 252. Lackawanna first expanded on prior conditions by requiring formal registration of changes in Guldoon's residence or employment. (R. 34.) Second, it expanded on a prior condition that Guldoon refrain from leaving the state absent permission by restricting her ability to enter school grounds or operate a vehicle. (R. 45, 46.) Third, it expanded on prior conditions that Guldoon submit to property inspections and refrain from harming others by prohibiting her from using social media, which she has used to harm a minor. (R. 45.) Using its discretion, Lackawanna did not increase Guldoon's punishment, *see id.* at 256; her six-year parole period did not exceed her maximum twenty-year prison term and review procedures accompanied her restrictions. (R. 41.)

B. The Thirteenth Circuit correctly held that ROSA's sex offender registration requirements and additional parole conditions are nonpunitive in nature.

A law enacted "incident of the State's power to protect the health and safety of its citizens, [thereby] evidencing an intent to exercise that regulatory power [to further some

governmental purpose]" is nonpunitive and non-violative of the Ex Post Facto Clause. *Smith*, 538 U.S. at 93-94. In contrast, a law designed to "affix culpability for prior criminal conduct" or to deter future crimes is punitive. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997). To distinguish between these laws, this court crafted the *Smith* test. Under the *Smith* test, the Court first determines if the legislature's intent in enacting the law was to establish civil proceedings, *Hendricks*, 521 U.S. at 361, or to punish. *Smith*, 538 U.S. at 92-93. If the legislature intended to punish, "that ends the inquiry." *Id. at 92.* But, second, if the Court determines the legislature's intention was to enact a nonpunitive law, the Court "must further examine whether the statutory scheme is so punitive in purpose or effect as to negate [the legislature's] intention." *Id.* Here, the Thirteenth Circuit held correctly; ROSA is nonpunitive in intent and nature under the *Smith* test.

1. Lackawanna's legislature crafted ROSA's sex offender registration requirements and additional parole conditions with a nonpunitive intent.

To determine the legislature's intent at the time of crafting a statute, the first inquiry "one must consider [is] whether anything on the face of the statute suggests the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm." *Hendricks*, 521 U.S. at 361. Second, the statute's other formal attributes, such as the manner of its codification or the enforcement procedures it establishes, must also be balanced to fully grasp the legislature's intent. *See id*. For example, in *Doe v. Pataki*, the court concluded a state's legislature intended a sex offender notification statute to be nonpunitive in nature, despite its codification as a corrections law. 120 F.3d 1263, 1278 (2d Cir. 1997). The statute's procedures served a public protection purpose because their harshness corresponded to the defendant's risk of re-offense and danger to the public. *Id.* Further, the statute provided safeguards to the defendant, ensuring the scheme did not increase the defendant's punishment for prior acts. *Id.*

ROSA's statement of purpose first demonstrates the legislature's nonpunitive intent: "The purpose of this Act is to protect the public from the dangers of recidivism posed by sexual

offenders convicted of sexual offenses." (R. 21.) To help law enforcement protect the public, ROSA monitors and restricts sex offenders likely to reoffend. (R. 19-21.) It is settled law in this Court that public-safety initiatives serve a nonpunitive purpose. *See Smith*, 538 U.S. at 93-94.

Second, the legislature demonstrated its nonpunitive intent by vesting an independent board of experts in the field of *behavior and treatment of sex offenders* with authority to separate applicable sex offenders into three levels. (R. 37.) Unlike a punitive statute which punishes based upon *prior conduct*, ROSA imposes more onerous restrictions upon high-level offenders deemed to pose grave danger to the public and likely to re-offend *in the future*. *See Pataki*, 120 F.3d at 1278. ROSA's enforcement procedures mirror those from *Pataki's* nonpunitive statute.

Third, the legislature demonstrated its nonpunitive intent by providing offenders *Pataki-like* safeguards, including: (1) exceptions to parole conditions; (2) opportunities to petition for relief from, or modification of, parole conditions; and (3) a misdemeanor charge to anyone who misuses or releases an offender's registration. (R. 41, 44, 45-46.) The safeguards ensure ROSA's conditions are not overly restrictive, negating the chance it was crafted with a punitive intent.

2. ROSA's sex offender registration requirements and additional parole conditions are nonpunitive in their purpose and effect.

The State's intention that a law serve a nonpunitive purpose must be upheld unless the "statutory scheme is so punitive either in purpose or effect so as to negate the State's intent." In *Mendoza*, 372 U.S. at 168-69, this Court crafted the following five factor balancing test to determine if a law is punitive or nonpunitive in its purpose and effect:

> (1) Whether the statute involves an affirmative disability or restraint; (2) Whether the statute has historically been regarded as a punishment; (3) Whether the statute operation will promote the traditional aims of punishment -- retribution and deterrence; (4) Whether the statute has a rational connection to a nonpunitive purpose; and (5) Whether the statute appears excessive.

Yet, while these factors provide helpful guideposts, *Hudson v. United States*, 522 U.S. 93, 99 (1997), "even a showing that most of the relevant factors weigh in favor of . . . punishment . . .

may be insufficient[.]" *United States v. Reveles*, 660 F.3d 1138, 1143 (9th Cir. 2011). Given this high burden, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92.

This Court has previously decided sex offender registration statutes are nonpunitive in their purpose and effect; Guldoon's argument to the contrary is wrong. *See Smith*, 538 U.S. at 105-06. State statutes – like ROSA – which require sex offenders to register with state parole boards and authorize those boards to disclose information to the public about the defendant's whereabouts and background, such as the sex offender's name, fingerprints, address, and driver's license number, are nonpunitive for ex post facto purposes. *See id*. ROSA is a carbon copy of the *Smith* statute, (R. 28-30); this Court must uphold its prior decision here.

ROSA's additional parole conditions also weigh in favor of serving a nonpunitive purpose under the *Mendoza* balancing test. Accordingly, they are insufficient to overcome the high burden attached to the legislature's intent that ROSA is nonpunitive.

First, ROSA's additional parole conditions involve no *affirmative disability or restraint*. The relevant inquiry is whether the restrictions resemble imprisonment. *Id.* at 100. A "disability or restraint [that] is minor and indirect, [is] unlikely to be punitive." *Id.* This Court has held occupational debarment to be neither disabling nor restraining. *See Hudson*, 522 U.S. at 104 (restricting a bank shareholder's participation in the banking industry after he used his position to profit unlawfully); *Hawker v. New York*, 170 U.S. 189 (1898) (revoking a doctor's medical license after he used his position to perform illegal abortions). And, this Court has held sex offender registration laws to be neither disabling nor restraining where they allow offenders to freely move, live, and work without supervision. *Smith*, 538 U.S. at 100.

ROSA's additional parole conditions do not resemble imprisonment. Unlike prison, none of Guldoon's restrictions prohibit her ability to move, live, or work – her complaints are either

minor, indirect, or overdrawn. Guldoon is employed, transports herself to work, and has access to the internet aside from social media, internet chatrooms, and pornographic websites. (R. 15-16, 46.) These restrictions are also imposed without constant supervision; rather, Guldoon makes reports to, and is subject to random visits from, her parole officer. (R. 8); *see id.* at 100.

ROSA's additional parole conditions do, however, resemble debarments related to illicit-conduct held by this Court to be non-disabling and non-restraining. *See Hudson*, 522 U.S. at 104; *Hawker*, 170 U.S. at 200. Guldoon's restrictions on accessing school grounds, using social media websites, and using her driver's license result from her conduct, which included performing sexual acts on B.B. on school grounds, driving B.B. to her home to sexually exploit him, and seducing B.B. through text and internet communication. (R. 5, 7.) Guldoon's restrictions are minor disabilities or restraints that in no way resemble imprisonment. *See Smith*, 538 U.S. at 100.

Second, ROSA's additional parole conditions have not *historically been regarded as punishment*. Historical punishments were meant to inflict public disgrace. *Smith*, 538 U.S. at 97. In the past, this was often done publicly through physical punishment, such as whipping or branding, or shaming punishment, such as humiliation or banishment from the community. *Id.* at 98. This Court has refused to find a sex offender monitoring statute that required registration with, and private dissemination of information to, public agencies to be a form of shaming equated with historical punishment. *Id.* at 99. Thus, while sex offender statutes "may humiliate offenders," that shame is "but a collateral consequence of a valid regulation." *Id.*

ROSA's additional parole conditions do not involve physical lashing. Instead, Guldoon must argue ROSA is analogous to a shaming punishment, but that argument, too, is unpersuasive. None of Guldoon's parole conditions are designed to humiliate her; like the *Smith* monitoring statute, her parole conditions are privately imposed and designed to protect the public from her predatory behavior. (R. 20.) Nor are Guldoon's conditions imposed to banish her from

the community: She is able to travel to town, use internet browsers, expand her education, and live a normal life. (R. 14-15.) While the parole conditions may humiliate Guldoon, the shame is but a "collateral consequence" of valid regulation of her predatory behavior. *See id.* at 99.

Third, ROSA's additional parole conditions *do not promote retribution or deterrence*. In balancing this factor, the question is not whether the Act in any way might act as a deterrent because "to hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." *Hudson*, 522 U.S. at 105. Rather, what matters is the underlying purpose the Act at issue serves. *See Smith*, 538 U.S. at 99 (finding an Act that placed restrictions on behavior reasonably related to the danger of recidivism to be nonpunitive, despite the reality it will likely deter offenders).

ROSA's statement of purpose, attached to the additional parole conditions, explains that it is designed to protect the public from recidivistic, predatory acts by sex offenders. (R. 20.) ROSA accomplishes its goal through its additional parole conditions by restricting behavior that directly correlates to the sex offense committed. (R. 20.) Thus, the conditions ultimately seek to protect the public from repeat behavior by sex offenders, not to deter. *See id.* at 99.

Fourth, ROSA's additional parole conditions are *rationally connected to a nonpunitive purpose*. This Court has held that this factor is "most significant." *Id.* at 102. In the same case, this Court held that an interest in "alerting the public to the risk of sex offenders in their community" constitutes a "legitimate nonpunitive purpose." *Id.* at 103.

ROSA's additional parole conditions advance the nonpunitive purpose of protecting the public from sex offenders' predatory behavior, a purpose this Court has held to be nonpunitive. *See id.* ROSA advances this purpose, specifically the protection of school-aged children, through its conditions on offenders' access to school grounds and offenders' ability to drive. (R. 20-21.) The internet's secrecy and the platform it presents for sex offenders to manipulate also rationally

connects ROSA's social media ban to its public protection purpose. (R. 20-21.) Thus, ROSA is also nonpunitive under this "most significant" factor. *See id* at 102.

Fifth, ROSA's additional parole conditions are not *excessive*. This factor concerns the excessiveness of the class the law effects and restrictions the law imposes. Class effected is non-excessive if individuals are grouped into a single class based on a reasonable judgement. *Id.* at 104 (finding a State's decision to group sex offenders as a single class reasonable). Restrictions imposed are non-excessive if they advance the law's nonpunitive objective. *Id.* at 105 (releasing sex offenders' information publicly advanced the state's objective of monitoring sex offenders); *Shaw*, 823 F.3d at 556 (banning sex offenders from school-yards advanced the objective of keeping children "beyond senses that could stir [sex offenders'] perversions").

The class of sex offenders effected by ROSA is analogous to the class this Court found reasonable. *See Smith*, 538 U.S. at 104. Like the *Smith* statute, ROSA seeks to protect against predatory acts by sex offenders, which, as a class, have a high likelihood of recidivism. (R. 20.) Further, ROSA's restrictions were reasonably related to its nonpunitive objective. The school-yard ban and driver's license ban ensure sexual offenders will not approach school-aged children, allowing authorities to better monitor those sex offenders and protect children. (R. 20); *see Shaw*, 823 F.3d at 556. The internet ban advances the objective of protecting children from tens of thousands of sex offenders who manipulatively use social networking websites and are likely to recommit predatory acts upon release from prison. (R. 20.) As a result, each of the five *Mendoza* factors indicate the additional parole conditions are nonpunitive in nature. Thus, this Court must find ROSA's registration requirements and additional conditions of parole to be non-violative of the Ex Post Facto Clause.

CONCLUSION

For all the foregoing reasons, this Court must affirm the United States Court of Appeals for the Thirteenth Circuit's holding that ROSA's registration requirements and additional conditions of parole are non-violative of the First and Fourteenth Amendments and Ex Post Facto Clause.

Respectfully Submitted,

_____/s/_____
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