2019 Wechsler Moot Court Competition
Mary Guldoon v. Lackawanna Board of Parole
Team 30 Brief, for the Petitioner

UNITED STATES SUPREME COURT

MARY GULDOON, PETITIONER,	)	
VS.	)	No. 19-01
LACKAWANNA BOARD OF PAROLE, RESPONDENT,	)	On Writ of Certiorari from the Thirteenth Circuit Court of Appeals

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

QUESTIONS PRESENTED

I. Do the registration requirements and conditions of parole required by ROSA violate Petitioner's rights under the First and Fourteenth Amendments?

II. Do the registration requirements and special conditions of parole required by ROSA and imposed on Petitioner constitute violations of the Ex Post Facto Clause?

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STATEMENT OF THE FACTS

Petitioner Mary Guldoon gave birth to her first child in April of 2010 and subsequently developed severe Post-Partum Depression. J.A. at 12. She returned to her job as a teacher of

Introductory and Advanced Computer Science at Old Lackawanna High School in September of 2010. J.A. at 11–12. Mrs. Guldoon still suffered from depression and, unbeknownst to her, undiagnosed Bi-Polar Disorder and manic episodes. J.A. at 12–13.

As a result of her mental illnesses, Mrs. Guldoon developed a close relationship with a student in her introductory Computer Science class. J.A. at 12, 13. The student confided in Mrs. Guldoon and disclosed his dysfunctional home life. J.A. at 12. Their relationship became physical and lasted until they were discovered by the Principal of the high school. J.A. at 12. Mrs. Guldoon pled guilty to one count of Rape in the Third degree, Criminal Sexual Act in the Third Degree, and Sexual Misconduct and was sentenced to ten to twenty years. J.A. at 13. While seeing a psychiatrist at Tonawanda Correctional Facility, Mrs. Guldoon was diagnosed with Bi-Polar Disorder and discovered that her actions were part of a manic episode, triggered by the antidepressant Prozac that she was prescribed for her Post-Partum Depression. J.A. at 13.

After her incarceration began, the State of Lackawanna passed the Registration of Sexual Offenders Act ("ROSA"). ROSA § 168 (2018); J.A. at 14. This Act required that Mrs. Guldoon register as a sex offender, surrender her drivers license upon release, not pass within 1000 feet of any school, and barred her access from any "commercial social networking website." J.A. at 9, 14. Prior to ROSA's passing, the parole recommendation for Mrs. Guldoon was "general conditions of parole," and did not include ROSA's mandatory categorical restrictions. J.A at 7. Mrs. Guldoon was released under parole after 7 years and returned to live with her husband and daughter in Old Cheektowaga, Lackawanna. J.A. at 10, 14.

Upon release, the mandatory restrictions of ROSA have caused great difficulties in Mrs. Guldoon's life and impeded her reintegration into society. As she is barred from travelling within

1000 feet of a school, she cannot return to her previous career of teaching. J.A. at 15. Mrs. Guldoon is also not allowed to access a wide range of websites, including LinkedIn, Craigslist, Indeed, Facebook, and Twitter, where employment opportunities are often posted. J.A. at 15. Mrs. Guldoon also lives in a rural area with infrequent public transportation; since she also had to surrender her drivers license her husband would have to drive her to interviews, but he works during the day. J.A. at 15. Mrs Guldoon was only able to find one job opportunity, working the night shift at a pierogi factory. J.A. at 15. Unfortunately, there are two schools within one and half miles of the Guldoon house, so she cannot use the main roads to get to work as she would pass within 1000 feet of the schools. As a result, to avoid passing near the schools, Mrs. Guldoon has to bike a circuitous 20 mile route each way through the elements to get to her place of employment. J.A. at 14–16. This route takes her on a two-lane highway with a speed limit of 65 miles per hour. J.A. at 16. Mrs. Guldoon never used social media in the commission of her crimes nor did she use a motor vehicle to initiate the relationship. J.A. at 6–7.

SUMMARY OF THE ARGUMENT

Petitioner Guldoon argues that the Thirteenth Circuit erred in finding ROSA constitutional as it applied to her and erred in affirming the District Court's judgment in favor of the Lackawanna Board of Parole.

The restrictions in ROSA that prohibit the Petitioner from accessing commercial social networking websites are unconstitutionally overbroad and restrict the Petitioner's First Amendment right to free speech; a holding mandated by this Court's ruling in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

Further, the travel restrictions in ROSA, that the Petitioner must surrender her driver's license and cannot travel within 1000 feet of a school, are unconstitutional. The petitioner is entitled to a fundamental right to intrastate travel; unnecessarily burdening this right is violative of substantive due process guarantees of the Fourteenth Amendment.

Additionally, Petitioner Guldoon argues that the registration requirements and special conditions of parole required by ROSA violate the United States Constitution's Ex Post Facto Clause. Though taking civil form, ROSA constituted punishment to Guldoon with detrimental effect. Furthermore, ROSA was retroactively applied to Guldoon after commission of the crimes to which she pled guilty in violation of the Ex Post Facto Clause.

For the above reasons, Guldoon requests that this Court issue a declaratory judgment that Lackawanna's ROSA is unconstitutional as applied to Petitioner under the First and Fourteenth Amendments to the United States Constitution and in violation of 42 U.S.C. § 1983, and issue a permanent injunction restraining Respondent, its employees, agents, and successors from enforcing in any way the ROSA as applied to her.

LEGAL STANDARD

Since facts outside of the pleadings have been presented to and accepted by the court, according to Federal Rule of Civil Procedure 12(d), the Defendant's motion to dismiss must be construed as a motion for summary judgment under rule 56. Summary judgement should only be granted when there is no "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The motion must be denied if, taking the evidence in the light most favorable to the non-moving party, a rational juror could find in favor of the non-moving party.favor of that party. *Pinto v. Allstate Ins. Co.*, 221 F.3d 394 (2d Cir. 2000).

ARGUMENT

I. PAROLEES ARE ENTITLED TO DUE PROCESS AND CONSTITUTIONAL PROTECTIONS

Parolees are entitled to constitutional protections, including those of substantive due process. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *see also U. S. ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970) ("Parolees are, of course, not without constitutional rights . . ."). A paroled prisoner is not entirely free, as the alternative to parole would be continued incarceration. *Hyser v. Reed*, 318 F.2d 225, 235 (D.C. Cir. 1963) ("From our review of the nature and purposes of parole it can be seen that appellants are neither totally free men who are being proceeded against by the government for commission of a crime, nor are they prisoners being disciplined within the walls of a federal penitentiary. They stand somewhere between these two."). Nevertheless, "this is not to say that parolees lose their constitutional rights, nor do prisoners in custody". *Berrigan v. Sigler*, 499 F.2d 514, 522 (D.C. Cir. 1974). In *Morissey v. Brewer*, holding that parolees are entitled to due process protections when facing a possible revocation of parole, this court stated that the liberty interest of a parolee "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Morissey*, 408 U.S. at 482. The liberty interests of a parolee therefore "must be seen as within the protection of the Fourteenth Amendment." *Id*. While *Morissey* concerned revocation of parole, the liberty interests at stake here, Mary Guldoon's right to free speech and right to freedom of travel are fundamental liberty interests that demand the protections of the Fourteenth Amendment. After *Morissey*, lower courts have extended the reach of the holding, holding that the protection of due process extends beyond revocation proceedings. *Berrigan v. Sigler*, 499 F.2d; *see also Farrell v. Burke*, 449 F.3d 470, 484 (2d Cir. 2006); *Pollard v. United*

States Parole Comm'n, No. 15-CV-9131 (KBF), 2016 WL 3167229, at *4 (S.D.N.Y. June 6, 2016). Accordingly, parole conditions must be reasonably and necessarily related to government interests. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972).

II. ROSA'S INTERNET RESTRICTIONS VIOLATE PETITIONER'S FIRST AMENDMENT RIGHTS

Content neutral speech restrictions must not burden substantially more speech than is necessary to to further government interests. *Packingham*, 137 S. Ct. 1730 (2017). Section 2 of ROSA, far from being narrowly tailored, categorically bans all Level II offenders from accessing any "commercial social networking site," which the Act broadly defines. J.A. at 15, 25. Even with a narrow reading of ROSA's prohibition, the Petitioner cannot access traditional social media websites, such as Facebook or Twitter, or common websites used for job searches. *Id.*

A. *Packingham* makes it clear that the internet restrictions of ROSA cannot stand

In *Packingham*, the Court reviewed a North Carolina law that made it a felony for a registered sex offender to access a "commercial social networking website" that allows minors to create profiles. *Packingham*, 137 S. Ct. at 1731. As in the case at hand, the law at issue broadly defined a commercial social networking website. *Id.* at 1733–34. The court noted that the broad wording of the statute could bar access to websites such as Amazon and WebMD, but declined to arrive at a precise determination of the scope of the statute, operating under the assumption that the statute applied to social networking sites "as commonly understood," such as Facebook, Twitter, and LinkedIn. *Id.* at 1736–37. In articulating the nature of the right at issue, the court noted that the internet has become a quintessential forum for the exercise of First Amendment Rights. *Id.* at 1735. These social networking sites provide forums for users to "debate religion

and politics with their friend and neighbors," "look for work," network, and even "petition their elected representatives," noting that governors and elected representatives create a social media presence for that very purpose. *Id.* at 1735–37 ("These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."). The statute was struck down for being unconstitutionally overbroad, as the North Carolina legislature had "with one broad stroke" prevented sex offenders from accessing "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* The court did note, however, that the decision does not prevent legislatures from passing more specific, narrowly-tailored regulations. *Id.* Indeed, a law making it illegal for Mary Guldoon from using one of these websites to contact a minor would certainly pass constitutional muster, but a law broadly prohibiting any access to a website with a social networking component must be considered an impermissible restriction of First Amendment rights.

B. The definition of a commercial social networking website in ROSA is functionally the same as in the statute reviewed in *Packingham*

The definition of a commercial social networking website in ROSA is fundamentally the same as the definition contained in the statute in *Packingham*. Accordingly, it is clear that the restrictions of ROSA must be unconstitutional as applied to sex offenders in general. The statute in *Packingham* defined a commercial social networking website with four broad criteria: a website that derives revenue from membership fees or advertising, facilitates the social introduction between two or more persons for the purposes of information exchange, allows users to create web pages or personal profiles, and provides users mechanisms to communicate with other users. *Id.* at 1733–34. As Justice Kennedy warned, this definition could potentially

apply to websites well beyond social media. *Id.* at 1736–37. ROSA defines a commercial social networking site as any business that allows persons under the age of eighteen to create web pages or profiles, engage in direct or real time communication with other users, and communicate with persons over eighteen years of age. *J.A.* at 25. While the ROSA definition is slightly narrower than that in *Packingham*, given that it only limits access to websites that allow minors to create profiles and communicate with users, the statute would still prevent access to most social media websites and websites with job postings as applied. *See Doe v. Kentucky ex rel. Tilley*, 283 F. Supp. 3d 608, 610 (E.D. Ky. 2017) (applying the holding in *Packingham* to a statute that prohibited sex offenders from using "social networking websites that may be accessed or used by minors"). And, as discussed above, the Court in Packingham narrowly construed the statute at issue, holding that a ban on even just traditional social media websites was unconstitutional. *Packingham*, 137 S. Ct. at 1737. If the Court in *Packingham* considered a statute that categorically restricted all sex offenders from websites "commonly understood" to be social media websites, then the internet restrictions in ROSA, which have the very same effect, must also be struck down.

C. The holding of *Packingham* should be extended to parolees, thus requiring narrowly tailored restrictions

Although the statute in *Packingham* covered all registered sex offenders, whether on parole or not, courts have since extended *Packingham* to cover laws like ROSA that apply to sex offenders that are still on parole or supervised release—a holding that this Court should now make explicit. *See United States v. Eaglin*, 913 F.3d 88, 99 (2d Cir. 2019) (overturning an internet ban as a condition of supervised release based on *Packingham*); *United States v. Holena*, 906 F.3d 288, 295 (3d Cir. 2018); *Manning v. Powers*, 281 F. Supp. 3d 953 (C.D. Cal. 2017)

(relying on *Packingham* to invalidate a special condition of parole prohibiting use of social networking sites where none of the parolees convictions involved internet use); *Mutter v. Ross*, 240 W. Va. 336 (2018) (noting that *Packingham* made no special exception for parolees and declining to accept the states argument that *Packingham* does not apply to special conditions of parole). The court in *Holena* made clear that any internet restrictions post-*Packingham* must be narrowly tailored:

> The District Court can limit Holena's First Amendment rights with appropriately tailored conditions of supervised release . . . Under Packingham, blanket internet restrictions will rarely be tailored enough to pass constitutional muster. Here, even under Packingham's narrower concurrence, the bans fail. They suffer from the same "fatal problem" as North Carolina's restriction on using social media. Their "wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child."

Citations omitted. *United States v. Holena*, 906 F.3d 288, 295 (3d Cir. 2018). Applying the same blanket restriction to any commercial social networking website to all level II sex offenders is far from narrowly tailored and unconstitutional under *Packingham*. Mary Guldoon did not use any social media in the commission of her crimes. No government interest is served by banning her from all such websites and potentially much more under a broad reading of the definition. Furthermore, Mary Guldoon's professional background and education is in computer science, including the completion of a Masters in Computer Programming while incarcerated. J.A. at 11–14, 17. These restrictions render her education and experience useless, frustrating the reintegrative purpose of parole.

D. Courts were hesitant to uphold categorical bans before *Packingham*

Courts have been hesitant to uphold categorical bans on internet usage or certain types of websites even before *Packingham*. *Yunus v. Robinson*, No. 17CV5839AJNBCM, 2018 WL

3455408, at *30 (S.D.N.Y. June 29, 2018), *report and recommendation adopted*, No. 17-CV-5839 (AJN), 2019 WL 168544 (S.D.N.Y. Jan. 11, 2019) ("Even before *Packingham*, courts in this Circuit looked with disfavor on broad cellphone, computer, and internet restrictions for sex offenders on parole or supervised release, generally requiring an individualized showing that a particular restriction 'relates to [the offender's] prior conduct.'"); *see also Doe v. Prosecutor, Marion Cty., Indiana*, 705 F.3d 694, 696 (7th Cir. 2013) (overturning a statute making it illegal for sex offenders to access social networking websites on the grounds that the law was not narrowly tailored); *United States v. Barsumyan*, 517 F.3d 1154, 1161 (9th Cir. 2008) (overturning a condition of supervised release prohibiting computer access). Internet usage has become a modern necessity and a quintessential forum for free expression; the restrictions contained in ROSA are not narrowly tailored and are therefore unconstitutional.

III. THE TRAVEL RESTRICTIONS IN ROSA VIOLATE PETITIONER'S FUNDAMENTAL RIGHT TO TRAVEL, GUARANTEED BY DUE PROCESS

As a Level II sex offender, Mary Guldoon had to surrender her drivers license and is not allowed to travel within 1000 feet of a school. These restrictions impermissibly burden the Petitioner's right to freedom of travel.

A. The right to travel has long been recognized as an essential right — this Court should now explicitly recognize a fundamental right to intrastate travel

While a right to travel is not explicitly located anywhere in the constitution, the Supreme Court has long recognized a right to travel freely and use public roadways. As early as 1849 Justice Roger Taney stated in dissent that "[w]e are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Smith v. Turner*, 48 U.S. (7 How.) 283

(1849) (Taney, C.J., dissenting). In 1900 the Court commented that "the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of liberty . . . secured by the 14th amendment." *Williams v. Fears*, 179 U.S. 270, 274 (1900).

This Court has explicitly recognized a fundamental right to enter and exit the United States and to travel between states; but, these decisions also acknowledge the importance of a broad right to freedom of travel. *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."); *Saenz v. Roe*, 526 U.S. 489 (1999). The Court in *Kent* explained that a right to travel is deeply ingrained in the values of our country. *Kent*, 357 U.S. at 126 ("Freedom of movement is basic in our scheme of values."). However, this Court has only explicitly recognized a right to interstate travel. This Court should now hold that the Constitution also provides for a fundamental right to intrastate travel: a right to use public walkways and roads and travel freely without government interference.

B. Three Circuits and several states have recognized a right to intrastate travel

The Second, Third, and Sixth Circuits and a number of states have held that a fundamental right to intrastate travel exists, in that such a right is implicit in the concept of ordered liberty and deeply rooted in the nation's history. The Second Circuit has held that there is a fundamental right to travel within a state, explaining that "it would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971); *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008). *Williams v. Town of Greenburgh* suggests that this right guarantees movement

between places and has no bearing on access to a particular place. *Id*. This is precisely the right that has been burdened in the case at hand. Mary Guldoon does not seek access to schools, but asks only for the right to use her vehicle and public roads to get to her place of employment.

The right to travel is more precisely articulated in the Third and Sixth Circuits. The Third Circuit has held that the Due Process clause of the constitution creates "a right of localized intrastate movement," describing the right generally as a right to travel locally through public spaces and roadways. *Lutz v. City of York, Pa.*, 899 F.2d 255, 268 (3d Cir. 1990) ("We conclude that the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"). The Sixth Circuit reached a similar articulation of the right, holding that the "Constitution protects a right to travel locally through public spaces and roadways." *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). This right is "an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function." *Id.*

Multiple states have also recognized a right to intrastate travel as a fundamental right: California, *In re White*, 97 Cal. App. 3d 141 (Ct. App. 1979) ("We conclude that the right to intrastate travel . . . is a basic human right protected by the United States and California Constitutions as a whole."); Connecticut, *Bruno v. Civil Serv. Comm'n of City of Bridgeport*, 192 Conn. 335 (1984) ("Implicit in this *Nicholls* decision was the recognition by the court of a fundamental right to intrastate travel, a right we now explicitly recognize."); North Carolina, *Standley v. Town of Woodfin*, 362 N.C. 328 (2008); Illinois, *City of Chicago v. Morales*, 177 Ill. 2d 440 (1997), *aff'd*, 527 U.S. 41 (1999) (The Illinois Supreme Court held that a gang loitering ordinance restricted a fundamental right to travel. This Court affirmed the judgement on grounds

of vagueness); and Oklahoma, *Hayes v. Mun. Court of Oklahoma City*, 1971 OK CR 274. This Court should join these states and the Second, Third, and Sixth Circuit and hold that the right to intrastate travel is a fundamental right protected by the due process clause.

C. If a fundamental right to travel is recognized, ROSA's travel restrictions fail heightened scrutiny

Under a substantive due process analysis, once a fundamental liberty interest is recognized, the government cannot infringe that right "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Protecting minors from sex offenders is certainly a compelling interest, but the broad requirements of ROSA are not narrowly tailored. A complete surrender of a driver's license cannot be narrowly tailored when the compelling interest can be served by other means, such as prohibiting access to areas where minors congregate. Mary Guldoon lives in a rural area with limited public transportation and is forced to bike to work in frequently rough conditions. J.A. at 15–16. Driving has become an essential facet of modern life. *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood.").

Even more burdensome is the requirement that the Petitioner not come within 1000 feet of a school. According to ROSA, Mary cannot enter into or upon any school grounds, but subdivision fourteen of section 220.00 of the law defines school grounds as including any area accessible to the public within one thousand feet of a school's property line. J.A. at 24–25. Since there are two schools close to her home, Mary Guldoon cannot use the main roads and must bike a circuitous twenty mile route to get to her job. J.A. at 15–16. This overbroad definition of

school grounds is far from narrowly tailored and the government interest can be served by prohibiting the petitioner from entering just the school property itself or reducing the distance.

D. Cases upholding residency restrictions are not instructive for a travel restriction

Ordinances prohibiting residency within a certain distance of a school are frequently upheld (although often overturned for being vague or overbroad), but these holdings cannot stand for the proposition that a total prohibition on travel within 1000 feet of a school is constitutional. 25 A.L.R. 6th 227 (Originally published in 2007). The Eighth Circuit, in upholding an Iowa statute that prohibited sex offenders from residing within 2000 feet of a school, noted that the statute "does not erect any actual barrier to intrastate movement" and explicitly noted that the statute does not prevent sex offenders from travelling within 2000 feet of a school. *Doe v. Miller*, 405 F.3d 700, 713 (8th Cir. 2005). This is not the case here, as there is substantial barrier to intrastate movement preventing Mary Guldoon from accessing public roadways merely because they pass through the 1000 foot radius surrounding a school. The Eighth circuit has also narrowly construed reside to mean ones permanent dwelling. *Weems v. Little Rock Police Dep't,* 453 F.3d 1010 (8th Cir. 2006). Accordingly, cases where residency requirements have been upheld cannot not stand for the proposition that restricting travel within a certain distance from a school is constitutional.

E. Absent a recognition of a fundamental right, ROSA's travel restrictions fail a rational basis test as applied to Petitioner

Absent a holding that a fundamental right to intrastate travel exists, the 1000 foot requirement is still unconstitutional, as it fails a rational basis test as applied to Mary Guldoon. *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a law that does not burden a fundamental right or target a suspect class will be upheld "so long as it bears a rational relation to some

legitimate end."). The unworkable result of these restrictions, that Mary Guldoon must bike 20 miles to work to avoid passing within 1000 feet of a school, is irrational and bears little relationship to the goal of protecting minors.

IV. ROSA AS APPLIED TO PETITIONER VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION

The Ex Post Facto Clause, prominently set forth in Article I of the United States Constitution, unequivocally prohibits state and federal governments from enacting ex post facto laws: penal laws that are retroactive in their effect. As formulated in *Calder v. Bull*, an ex post facto law is one that punishes, as criminal, acts performed before the enactment of a law. *Calder v. Bull*, 3 U.S. 386, 390–91 (1798). A law violates the Ex Post Facto Clause if it "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime any defense available according to the law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925).

The Framers of the U.S. Constitution firmly believed that the power to create ex post facto laws was one of the hallmarks of tyranny: such laws place citizens at the mercy of government, unable to know the consequences of their acts, and concomitantly subject citizens to the possibility of legislative vindictiveness. *See* THE FEDERALIST No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961) (describing ex post facto laws to be "contrary to the first principles of the social compact, and to every principle of sound legislation"). Mindful of the excesses of Parliament, the Framers adopted the Ex Post Facto Clause to protect future Americans against oppressive, retroactively imposed, legislative enactments. *See Malloy v. South Carolina*, 37 U.S. 180, 183 (1915) ("The constitutional inhibition of *ex post facto* laws was

intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment."). The prohibition against ex post facto rules thus serves two main purposes: to assure that citizens have fair warning of what conduct is punishable, and to restrain arbitrary and vindictive lawmaking.

In accord with these purposes, this Court prescribes that two essential elements must be present for a criminal or penal law to be held ex post facto: "it must be retrospective, that is, it must apply to event occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). *See also Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

Unlike Petitioner's above arguments addressing her rights under the First and Fourteenth Amendments, to violate the ex post facto prohibition, the law need not impair a "vested right." *Weaver*, 450 U.S. at 29. The Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred," and violates the prohibition if "it is both retrospective and more onerous than the law in effect on the date of the offense." *Id.* at 30–31. The Clause does not seek to protect an individual's right to less punishment, but rather "the lack of fair notice and governmental restraint when the legislature increased punishment beyond what was prescribed when the crime was consummated." *Id.* at 30. Therefore, presence or absence of an affirmative right is not relevant to the ex post facto prohibition.

A. ROSA was applied retroactively to Petitioner.

i. The Presence of Discretion Does Not Displace the Ex Post Facto Clause.

The Thirteenth Circuit held that "merely by formalizing some conditions under which the Parole Board could grant parole, ROSA did not increase retroactively the measure of Plaintiff's punishment." *Guldoon v. Lackawanna Board of Parole* 999 F. Supp. 3d. (M.D. Lack 2019). Thus, the court reasoned that Petitioner's special parole conditions did not constitute increased retroactive punishment, because parole conditions are ultimately discretionary. Through this line of reasoning, the court mischaracterized the standards and analysis of retroactivity: when looking at retroactive application, the Clause looks at the standard of punishment actually prescribed by the statute, not the sentence actually imposed. *Lindsey v. Washington*, 301 U.S. 397, 394 (1937). The mere fact that the conditions imposed on Mrs. Guldoon were already within the discretion of parole does not exempt it from the Clause.

In *Weaver v. Graham*, the State of Florida reduced the number of gain-time credits that a prisoner was eligible to receive after the effective date of the new enactment. 450 U.S. 24, 25 (1981). In *Lindsey v. Washington*, the legislative change eliminated the low-end range of incarceration terms that could be imposed for the crime of larceny. 301 U.S. 397, 399 (1937). In both cases, it was possible that the duration of the sentence would have been the same under the statute that existed at the time of the crime's commission or the new statute as amended. Nonetheless, in both cases the Court held the statutory change was in violation of the Ex Post Facto Clause, because discretion does not displace the Ex Post Facto Clause's protections. *Weaver*, 450 U.S. at 30–31.

Here, just as in both *Weaver* and *Lindsey*, there is no question that ROSA actually and substantially increased Guldoon's punishment, regardless of the pre-existing discretions of the parole board. ROSA assured that Mrs. Guldoon would receive what was only the discretionary

parole conditions under the old law—this new statutory scheme made what was discretionary, mandatory. It became mandatory that she relinquish her driver's license, mandatory that she stay 1,000 feet away from school zones, mandatory that she register as a sex offender, and mandatory that she stay off of the internet, virtually in its entirety.

Furthermore, the very fact that the punishment imposed on Petitioner was done by way of stricter parole conditions rather than incarceration is immaterial. The danger that legislatures might disfavor certain persons after the fact is present even in the parole context, and this Court has stated that the Ex Post Facto Clause guards against such abuse. Accordingly, this Court has held that the determinants of early release are properly considered part of the punishment of a crime. *See Weaver*, 450 U.S. at 32; *see also Warden v. Marrero*, 417 U.S. 653, 662–63 (1974) ("a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause . . . of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the . . . offense.'").

In *California Dep't of Corr. v. Morales*, the Court held that a California statute that amended parole procedures to allow Board of Prison terms to decrease frequency of parole suitability hearings under certain circumstances did not violate the Ex Post Facto Clause as applied to the petitioner, who was convicted prior to the amendment. 514 U.S. 499 (1995). In addressing the degrees of necessary changes in parole violations to make a showing of ex post facto violations, *Morales* stands for the notion that the government may not retroactively abolish parole, or parole eligibility, or mechanisms for providing early release. *See Morales*, 514 U.S. 499 at 500 (1995) ("[T]he question of what legislative adjustments are of sufficient moment to transgress the constitutional prohibition must be a matter of degree. . . ."). In *Garner v. Jones*, the

Court similarly noted that Parole Board's discretions do not displace the Ex Post Facto Clause's protections: the idea of discretion is that it has the capacity to change procedurally, without altering the substance of a parolee's conditions. 529 U.S. 244, 250 (2000). Thus, the Court has declined to hold that punishment via parole is exempt from the ex post facto prohibition.

ii. Petitioner should have been afforded notice.

The essential element to ex post facto prohibitions—and the concept of liberty itself—is notice. *See Marks v. United States*, 430 U.S. 188, 191 (1977) ("[F]air warning of [] conduct that will give rise to criminal penalties is fundamental to our concept of constitutional liberty."). Not only was Mrs. Guldoon not on notice of the mandatory requirements that would be paroled on her when her crime was commissioned, but she also was not on notice at the time she chose to take a guilty plea.

Prior to the enactment of ROSA, the Parole Board retained discretion to potentially adapt her special parole conditions to her specific circumstances. Parole decisions rest on prisoner's individual circumstances, and the Parole Board's consideration of numerous factors specific to that prisoner's offense, rehabilitative efforts, and ability to live a responsible, and productive life. *See Garner v. Jones*, 529 U.S. at 254 (describing the reasons why Parole Boards retain discretion in their decision making). Mrs. Guldoon's criminal behavior was an isolated incident for which she pled guilty. While incarcerated, Mrs. Guldoon was diagnosed with Bi-Polar Disorder, also known as Manic Depression. Bi-Polar Disorder may be marked by episodes of mania, which include expansive periods of inappropriate behavior, such as hypersexuality. She began treatment for her condition while incarcerated, and also went on to earn her Post-Graduate Degree in Computer Programming during her incarceration. However, these were all considerations that the

Parole Board was unable to take into consideration when applying to her the special conditions of her parole. These mandatory conditions frustrated her ability to find a job, and substantially narrowed potential careers available to her.

The Parole Board could have promoted Petitioner's ability to reintegrate into society through modified conditions, such as allowing her to get to her place of work on a more direct route, or allowing her to work remotely through use of internet communication. But what was discretionary became mandatory, and was applied to Mrs. Guldoon without due notice. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. United States*, 511 U.S. 244, 265 (1994). ROSA frustrated Mrs. Guldoon's reasonable expectations and reliance on the law in effect at the time of her conduct and her guilty plea, by changing the law retroactively and without fair warning.

The amendment to ROSA did not "create[] only the most speculative and attenuated possibility of increasing the measure of punishment for covered crimes," *Morales*, 514 U.S. at 500, but rather made it mandatory that Petitioner's punishment be increased to her detriment: this retroactive increase in punishment is prohibited by the Ex Post Facto Clause. Lackawanna has the power and authority to prescribe the penalties for sexual misconduct, so long as those prescriptions operate prospectively. In contrast, what the government may not do is what it in fact did to Mrs. Guldoon—enact a law that increases retroactively the parole conditions for an offense she was already punished for.

B. The Reach of the Ex Post Facto Clause Cannot be Evaded by Giving Civil Form to What is Essentially Criminal.

The Thirteenth Circuit reasoned that ROSA was not an ex post facto law as applied to Mrs. Guldoon because it is intended to "promote community safety and consistency with policies of other states governing the same subject," and therefore did not impose punishment. *Guldoon v. Lackawanna Board of Parole*, 999 F. Supp. 3d. 1, 9 (M.D. Lack. 2019). However, these laws effectively imposed an additional punishment on Guldoon after the commission of her crime, and the reach of the Ex Post Facto Clause cannot be evaded by giving civil form to what is essentially criminal. *Burgess v. Salmon*, 97 U.S. (7 Otto) 381, 385 (1878).

The determinative question when considering whether a claim is penal, and therefore subject to the prohibition of ex post facto laws, is whether a legislature meant to establish "civil proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the intent was to impose punishment, the inquiry is over, and the law is subject. *See Smith v. Doe*, 538 U.S. 84, 85 (2003). If the intention was "to enact a regulatory scheme that is civil and nonpunitive, the court must further examine whether the statutory scheme is so punitive either in purpose or effect to negate [the State's] intention to deem it civil." *Id.* The Court ordinarily defers to legislative intent, so only the "clearest proof" will suffice to overcome a legislature's stated intent. *Id. See also Beazell v. Ohio*, 269 U.S. 167, 171 (1925) ("[The] provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.").

Born out of this strong presumption of legitimacy, legislatures have a strong incentive to cloak or obfuscate a punitive purpose with a civil statute. These statues are frequently comingled with procedural changes such as the promotion of community safety standards, making it all the more difficult to say with certainty whether a given statute constitutes "punishment." As stated

by this Court in *Austin v. United States*, "sanctions frequently serve more than one purpose." 509 U.S. 602, 610 (1993). The understanding that statutes do not take form in a vacuum is inherent to the Ex Post Facto Clause itself: ex post facto analysis demands keen sensitivity to the political, social, and economic context to which legislative initiatives take root and gain approval. *See DeVeau v. Braisted*, 363 U.S. 144, 147 (1960) (discussing how when seeking to determine whether the statutory aim was to punish, the provision must be placed in the context and history of the legislation of which it is a part).

It is undisputed that in many cases, such laws may be deemed necessary in order to effect expansive regulatory schemes. *See Doe*, 538 U.S. at 84 ("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."). But models that use public health and safety rhetoric to justify procedures that are, in essence, punishment and detention, still may be found to constitute punishment. As stated by this Court in *Weaver*, "it is the effect, not the form, of the law that determines whether it is ex post facto." *Weaver*, 450 U.S. at 24. *See also Dep't. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 (1994) ("The legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character."); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362–363 (1984) (noting that even avowedly nonpunitive sanctions can be "so punitive in either purpose or effect" to impose punishment).

ROSA essentially cloaks what is a punitive and retroactive law, as applied to Mrs. Guldoon, with language promoting community safety standards. Making what was previously at the discretion of the Parole Board for violent sex offenders a mandatory exercise of punishment applicable to all Level II sex offenders, regardless of the specific circumstances of their crime,

rendered this law punitive in effect. While the state and legislative interest in increasing punishments for sex offenders may be strong, citizens are protected from retroactive punishment, regardless the nature of the crime.

The proposition of unregistered sex offenders is an unsettling conception for the citizens of Lackawanna and their elected officials, and it reasonably follows under such circumstances that the legislature would want to make change. But for the government to succumb to retroactive application and fail to meet the high standard of restraint and respect for the rights of unpopular groups—as required by the Ex Post Facto Clause—is constitutionally prohibited. For good reason, this Court has never held that a state's interests allow it greater latitude to retroactively increase the punishment attached to a crime.

This Court recognized the legislature's incentives to cloak punitive purposes in civil statutes in *Cummings v. Missouri*. "The constitution deals with substance, not shadows . . . It is intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867). Invalidating a provision of the Missouri Constitution (newly amended after the conclusion of the Civil War) that required those with religious and legal occupations to take an oath of loyalty, the Court looked to the broader historical record to gauge the originating conditions giving birth to the statutes and made clear that the Ex Post Facto Clause—by definition—requires demanding scrutiny of legislative purpose.

In the late 1860s, Congress was determined to punish legislatively those who had supported the Confederacy: that risk of legislative vindictiveness is no less pertinent today. Legislatures will boundlessly find reason to deal harshly with groups that pose an apparent threat

to public safety, but prohibition against ex post facto laws reflects an enduring value that transcends pressing concerns of any day in age.

C. The Quantum of Punishment was Retroactively Increased.

Even if ROSA on its face was not punitive, ROSA "substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] the 'quantum of punishment.'" *Weaver v. Graham*, 450 U.S. 24, 32 (1981) (quoting *Dobbert v. Florida*, 432 U.S. 282, 293–94 (1977)). Therefore, under *Weaver*, this law can only be retroactively applied to Mrs. Guldoon if it is not to her detriment. *Id.*

The Court has yet to articulate a single formula for defining what constitutes "punishment" within the constitutional prohibition. The Court has long held that the question of what legislative adjustments "will be held to be of sufficient moment to transgress the constitutional prohibition" must be a matter of "degree." *Beazell v. Ohio*, 269 U.S. 167, 171 (1925). *See also Morales*, 514 U.S. at 500 ("[T]his Court has long held that the question of what legislative adjustments are of sufficient moment to transgress the constitutional prohibition must be a matter of degree, and has declined to articulate a single 'formula' for making this determination."). To help determine what may constitute as punishment, the Court looks to a number of factors set forth in *Kennedy v. Mendoza-Martinez*.[1]

The statute did not "simply alter the method to be followed" in prescribing special parole conditions. *Morales*, 499. Nor did it merely "alter the methods employed." *Dobbert v. Florida*,

[1] They include whether 1) the sanction involves an affirmative disability or restraint; 2) it has historically been regarded as a punishment; 3) it requires a finding of scienter; 4) its operation will promote the traditional aims of punishment-retribution and deterrence; 5) the behavior to which it applies is already a crime; 6) an alternative purpose to which it may rationally be connected is assignable to it; and 7) it appears excessive in relation to the alternative purpose assigned. 372 U.S. 144 (1963).

432 U.S. 282, 293–94 (1977). Rather, the cumulative effect prescribed by the later statute was far more severe than that of the earlier, to Mrs. Guldoon's detriment.

Living in a rural area, Petitioner was forced to travel over 20 miles daily in sub-freezing temperatures on a bicycle, had effectively no use of the internet, and forbidden from operating a motor vehicle. These conditions made more burdensome the punishment for the crime to which she pled guilty, and clearly involve an affirmative restraint. As held by this court in *Weaver* and *Lindsey*, legislative bodies cannot stiffen the standard of punishment applicable to crimes already committed. *Morales*, 514 U.S. 499 at 505. The "quantum of punishment" and the degree of detriment imposed on Guldoon retroactively was substantially increased.

CONCLUSION

For the foregoing reasons, Mrs. Guldoon requests that this Court issue a declaratory judgment that ROSA is unconstitutional as applied to Petitioner under the First and Fourteenth Amendments to the United States Constitution and in violation of 42 U.S.C. § 1983, and issue a permanent injunction restraining Respondent, its employees, agents, and successors from enforcing in any way the Registration of Sex Offenders Act as applied to her.