UNITED STATES

SUPREME COURT

No. 19-01

MARY GULDOON,

Appellant,

v.

LACKAWANNA BOARD OF PAROLE

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS,
THIRTEENTH CIRCUIT,
BRIEF FOR THE APPELLANT.

Team 33

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II. Whether the registration requirements and extensive special conditions of parole required by Lackawanna's Registration of Sex Offenders Act and imposed on Petitioner constitute violations, which were so punitive as to violate the *ex post facto* clause of the United States Constitution.

STATEMENT OF THE CASE

Mary Guldoon ("Mrs. Guldoon") was born and raised in the town of Old Cheektowaga, in the State of Lackawanna. Joint Appendix ("J.A.") 11 at ¶ 3. In 2008, she fulfilled her lifelong goal of becoming a teacher at Old Cheektowaga High School. J.A. 11 at ¶ 4. Two years after the start of her career, she suffered severe post-partum depression and was treated with the medication, Prozac. J.A. 12 at ¶¶ 5-7.

After she began treatment, she met the student. J.A. 12 at ¶ 9. Shortly thereafter, Mrs. Guldoon was arrested when it was discovered that she and the student had initiated a relationship. J.A.12 ¶ 15. During the course of the investigation, the Old Cheektowaga Police Department ("OCPD") retrieved "[n]o pornographic materials or sexual communications" from either Mrs. Guldoon's phone or email. J.A. 5-6. To spare her family and the student from the pain of a trial, she pleaded guilty to the alleged crimes. C. 13 at ¶ 16.

While serving her sentence at the Tonawanda Correctional Facility, Mrs. Guldoon was diagnosed with Bipolar Disorder, which is "marked by recurrent episodes of depression [and with] episode[s] of mania that interfere[s] with functioning." J.A. 13 at ¶ 19. It was determined that her actions occurred as a result of manic episodes triggered by the Prozac. J.A. 13 at ¶ 22. Since the diagnosis, she has been treated with the drug, Lithium, which has ceased all of the manic episodes. J.A. 13 at ¶ 23.

After Mrs. Guldoon was sentenced and had begun serving her time, the Registration of Sexual Offenders Act ("ROSA") was enacted. J.A. 14 at ¶ 25. The act required, for the first time, that Mrs. Guldoon must register as a level II sex offender. J.A. 14 at ¶ 26. This classification stipulates that, in addition to previous terms of parole imposed, the individual: (1) must surrender their driver's license upon release; (2) must not come "within 1,000 feet of any school or similar facility"; (3) must not access any "commercial social networking website"; and (4) must register as a Sex Offender with the Division of Criminal Justice Services. J.A. 25-26 at ¶16. The statute defines a "commercial social networking website[s]" as:

> any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purposes of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age. ROSA § 2.

At the time Mrs. Guldoon was originally sentenced, these conditions were not mandatory conditions of parole; rather such conditions were optional "special conditions." J.A. 2 at ¶ 15. Now, these conditions are mandatory pursuant to ROSA's amendments of Executive and Corrections Law. ROSA § 1.

After being released on parole, Mrs. Guldoon struggled to find employment as she is prohibited from accessing websites that require one to create a webpage or profile and she is barred from maintaining an email account. J.A. 3 at ¶ ¶ 17-21. Such restrictions restrict her from accessing sites, such as LinkedIn, that could be used to procure employment. J.A. 16 at ¶ 47. Additionally, because of the overbroad language of the statute, Mrs. Guldoon is also not permitted to access sites "that call[] for networking or connecting to a networking site." J.A. 16

at ¶ 47. Thus, in order to comply with the overly restrictive nature of the statute, Mrs. Guldoon and her family have foregone having access to the Internet in their home. J.A. 17 at ¶ 48.

Further, the statute's provision requiring that individuals relinquish their driver's licenses has unjustifiably encumbered Mrs. Guldoon's ability to find employment as she lives in a small rural town and may now only "travel by foot or on a bicycle, which eliminates most[,] if not all[,] employment opportunities." J.A. 3 at ¶ 22. While Mrs. Guldoon was able to acquire a job at a pierogi factory, ROSA's conditions requiring her to surrender her driver's license, and barring her from coming within 1,000 feet of a school or similar or facility, have significantly hindered her ability to get to and from interviews. J.A. 15 at ¶ 35. Thus, she had to accept the job at the pierogi factory, despite having other skills more suitable for a job in the field of computer science, simply because it was the only place her husband was able to bring her for an interview, and it was one of the only places of employment accessible from her home on a bicycle. J.A. 15 at ¶¶ 33-38. Despite being only three miles away from the factory via the most direct route, Mrs. Guldoon has been forced to take an indirect route to avoid coming within 1,000 feet of a school or similar facility. J.A. 15 at ¶¶ 38-39. This route forces her to travel twenty miles each way, in all weather conditions, on State Highway 10, "which is a two-lane road, with a speed limit of 65 miles per hour." J.A. 15-16 at ¶¶ 33-42. Enduring this route, Mrs. Guldoon has "frequently [been] forced off the road by speeding or inattentive drivers." J.A. 16 ¶ 43.

As previously noted, these conditions were not mandatory prior to ROSA; nor did the parole board decide to impose such special conditions on Mrs. Guldoon in its Pre-sentence Report. *See* J.A. 7. In the statute, the State concedes, "[s]tudies indicate that access to employment and education greatly reduces the risk of recidivism by ex-offenders." J.A. 21.

Thus, ROSA's mandatory conditions create substantial hardships on Mrs. Guldoon, despite having no relevance to curbing recidivism or promoting healthy re-entry into the community.

SUMMARY OF THE ARGUMENT

The First Amendment of the Constitution affords citizens the right to engage in free speech, particularly in areas that have been traditionally recognized as public forums. Where state parole boards prohibit access to the Internet, a forum where individuals have traditionally engaged in a free exchange of thoughts and ideas, the Supreme Court has held that the state must demonstrate a significant interest that is narrowly tailored to further that interest. The overbroad restrictions of ROSA support the conclusion that the law was not narrowly tailored to further state interests and in fact was overbroad and deprived the defendant of more liberty than was reasonably necessary.

The Fourteenth Amendment of the Constitution expressly provides that no State shall deprive any person of life, liberty, or property without due process of law. By revoking Mrs. Guldoon's driver's license, the state encroached on Mrs. Guldoon's right to travel under the Fourteenth Amendment. This revocation is unrelated to the sentencing objectives, the crime committed or promoting rehabilitation. Further, this condition does not promote public safety interests as it is applied to all applicable offenders, regardless of how their crimes were executed.

The *ex post facto* clause of the Constitution protects citizens against abuses of the legislature, by prohibiting the retroactive applications of law or increases in punishment after a crime has already been committed. Non-punitive alterations to the civil regulatory scheme do not violate the *ex post facto* clause, however, such statutes may still be found to have violated the clause where the law is sufficiently punitive in effect, as it is here.

The extremely onerous nature of the restrictions placed upon Mrs. Guldoon, and others affected by the change, all support the conclusion that this law is punitive in nature. The series of

mandatory parole conditions imposed by the law constitute affirmative restraints and disabilities. Parole and supervised release more generally have been historically regarded as a punishment. Additionally, the fact that many of the conditions relate little to the actions of those who the statute is imposed upon, gives rise to a serious inference that their operation will promote the traditional aims of punishment and retribution. The legislature indicates that the statute is aimed at protection of the public, and while at least some of the restrictions can at least be rationally assigned to this valid purpose, even those restrictions are excessive in relation to the stated aim. For the foregoing reasons, ROSA violates the *ex post facto* clause of the Constitution, as retroactively applied.

ARGUMENT

I. THE APPELLATE DIVISION ERRED IN HOLDING THAT PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENT WERE NOT VIOLATED BECAUSE PETITIONER HAS A RIGHT TO EXERCISE FREE SPEECH BY ACCESSING THE INTERNET UNDER THE FIRST AMENDMENT AND PETITIONER HAS A FUNDAMENTAL RIGHT TO TRAVEL UNDER THE FOURTEENTH AMENDMENT.

To prevail on a claim under 42 U.S.C. § 1983, a petitioner must demonstrate (1) "that some person has deprived him [or her] of a federal right" and (2) "that the person who has deprived him [or her] of that right acted under color of state … law." Gomez v. Toledo, 446 U.S. 635, 640 (1980) (citing Monroe v. Pape, 265 U.S. 167, 171 (1961)). Here, it is asserted that Mrs. Guldoon was deprived of rights under (1) the First Amendment when the State of Lackawanna enacted a statute restricting her freedom of speech; and (2) the Fourteenth Amendment when the State restricted her fundamental right to travel. J.A. 4. The First Amendment states, in relevant part, "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court, in *Packingham v. North Carolina*, held "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment

rights." 137 S. Ct. 1730, 1737 (2017). Thus, a statute's restriction of access to the Internet must be narrowly tailored to serve a compelling state interest and the interest "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Packingham, 137 S. Ct. at 1739 (quoting Ward v. Rock Against Racism, 491 U. S., 781, 798-99 (1989)).

Moreover, the Fourteenth Amendment, in relevant part, states, "[n]o State shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. A parolee's fundamental constitutional rights may only be abridged where such infringements serve reasonable and penological interests. Birzon v. King, 479 F.2d 1241, 1243 (2d Cir. 1972). A probation condition is unreasonable if it is "unnecessarily harsh or excessive in achieving goals [of rehabilitating the defendant and protecting the public]." Trisvan v. Annucci, 284 F. Supp.3d 288, 300 (E.D.N.Y. 2018) (quoting U.S v. Tolla, 781 F.2d 29, 34 (2d Cir. 1986)).

A. Mrs. Guldoon's First Amendment Rights Were Violated.

To prevail on a claim under 42 U.S.C. § 1983, a petitioner must demonstrate (1) "that some person has deprived him [or her] of a federal right" and (2) "that the person who has deprived him [or her] of that right acted under color of state … law." Gomez, 446 U.S. 635, 640 (1980) (citing Monroe, 265 U.S. 167, 171 (1961)). Here, there is no dispute that the parole conditions imparted on to Mrs. Guldoon were implemented through state action. The critical substantive inquiry, thus, is whether Mrs. Guldoon has alleged facts demonstrating that she was deprived of her constitutional rights. Mrs. Guldoon asserts, in part, that her First Amendment rights were violated when the State of Lackawanna enacted a statute prohibiting parolees from accessing the Internet. J.A. 4.

Parole is recognized as “the conditional release of a prisoner who has already served part of his or her state prison sentence.” Prison Law Office v. Koenig, 186 Ca. App. 3d 560, 566 (1986). The United States Supreme Court has recognized that, although parolees are afforded fewer constitutional rights than ordinary persons, Morrissey v. Brewer, 408 U.S. 471, 482 (1972), “[p]arolee’s are of course, not without constitutional rights.” U.S. ex rel Sperling v. Fitzpatrick, 426 F.2d 1161, 1164 (2d Cir. 1970). While parole releases the incarcerated individual from “immediate physical imprisonment,” it also enforces conditions, which restrict an individual’s freedom. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

"A sentencing court may impose special conditions of supervised release that are 'reasonably related' to certain statutory factors governing sentencing, involv[ing] no greater deprivation of liberty than is reasonably necessary[ ] to implement the statutory purposes of sentencing, and are consistent with pertinent Sentencing Commission policy statements." U.S. v. Myers, 426 F.3d 117, 123-24 (2d Cir. 2005) (quoting 18 U.S.C. § 3583(d)). To determine whether the conditions are reasonably related, relevant statutory factors assessed include, "the nature and circumstances of the offense and the history and characteristics of the defendant," the need "to afford adequate deterrence to criminal conduct," and the need "to protect the public from further crimes of the defendant." 18 U.S.C. §§ 3553(a)(1), (a)(2)(B), (a)(2)(C).

The First Amendment of the United States Constitution states, in relevant part, “Congress shall make no law… abridging the freedom of speech.” U.S. Const. amend. I. Such protections are made applicable to the states by means of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). To ensure that parolees are not subjected to a greater deprivation of a liberty interest than is reasonably necessary, a parolee’s “First Amendment rights may [only] be

restricted in ways [that are] 'reasonably related to legitimate penological interests.'" Johnson v. Owens, 612 Fed. Appx. 707, 711 (5th Cir. 2015) (quoting Stauffer v. Gearhart, 741 F.3d 574, 584 (5th Cir. 2014)).

When assessing restrictions on web access, lower courts have only upheld special conditions prohibiting all forms of Internet access where evidence was presented to the trial court that the defendant's behavior necessitated the imposition of a broad ban on Internet access. *See* U.S. v. Love, 593 F.3d 1, 11-13 (D.C. Cir. 2010) (upholding a tailored Internet usage restriction as appropriate to curb defendant's potential to recidivate and to protect children). As a result of the proliferation of Internet usage, such restrictions on speech have been challenged before the Supreme Court.

In *Packingham*, the Court assessed whether a statute barring registered sex offenders from accessing commercial social networking sites, where one would reasonably know that the site permitted minors to become members, was an unconstitutional violation of an individual's First Amendment rights. 137 S. Ct. at 1733. The Court acknowledged "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." Id. at 1735. Further, the Court asserted that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace… websites can provide, perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Id. at 1735-37.

Prior to the Court's ruling in *Packingham*, significant deference, with regard to web access restrictions, was given to the states in assessing whether parole restrictions were narrowly tailored. *See* Birzon, 469 F.2d 1241 (1972). In *Packingham*, however, the Court asserted that

while "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," the law at issue was not designed to serve a compelling state interest. 137 S. Ct. 1739 (quoting New York v. Ferber, 458 U.S 747, 757 (1982)). To serve a compelling state interest, the law "must not 'burden substantially more speech than is necessary to further the government's legitimate interests." *Packingham*, 137 S. Ct. at 1739 (quoting Ward, 491 U. S., at 798-99). In his concurrence, Justice Alito notes that the "fatal problem" for the North Carolina state law was "that its 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." *Packingham*, 137 S. Ct. at 1741 (Alito, S. Concurring).

Since the *Packingham* decision, special conditions of parole limiting or prohibiting Internet usage have been consistently found unconstitutional. *See* Mutter v. Ross, 240 W. Va. 336, 338 (2018) (finding a statute that barred a registered sex offender, whose underlying offense did not involve internet usage, did not further a legitimate government interest); Doe v. Ky. ex rel. Tilley, 283 F. Supp 3d 608 (E.D. Ky. 2017) (finding the statute at issue "burden[ed] substantially more speech than necessary to further the Commonwealth's legitimate interests in protecting children from sexual abuse solicited via the internet"); U.S. v. Holena, 906 F.3d 288, 293-95 (3d Cir. 2018) (holding conditions relating to the use of the internet and electronic devices were overbroad and deprived the defendant of more liberty than was reasonably necessary to serve the government's interests); Manning v. Powers, 281 F. Supp 3d 953, 960-61 (C.D. Cal. 2017) (holding general goals of deterrence and public safety did not constitute legitimate government interests). Thus, courts no longer give deference to states when determining whether such restrictions are narrowly tailored.

In the present case, the State of Lackawanna's restriction on social media usage was

enacted to "prevent[] sexual victimization and to resolve[] incidents involving sexual abuse and exploitation." J.A. 19. While this government interest, similar to that of the interest of the North Carolina statute at issue in *Packingham*, "constitutes a government objective of surpassing importance," ROSA, the statute at issue here, is not narrowly tailored to serve a compelling state interest as it burdens substantially more speech than is necessary to further the government's legitimate interests. *See* Packingham, 137 S. Ct. at 1739. A straightforward reading of the text of ROSA prohibits all level II and level III sex offenders, and no other parolees, regardless of the circumstances of their crime, from accessing an immense number of websites. J.A. 25-26 at ¶ 16.

ROSA defines a "commercial social networking site" as "any business, organization, or other entity operating a website that permits persons under eighteen years of age to be registered users." J.A. 3 at ¶ 18. This broad definition is applicable where minors may (i) "create web pages or profiles that provide information about themselves to the public or to other such users"; (ii) engage in direct or real time communication with other users, such as chat room or instant messenger; and (iii) communicate with persons over eighteen years of age. J.A. 3 at ¶ 18. This prohibition includes restricting access to typical social media sites such as Facebook, LinkedIn, and Instagram. Id. Most notably, though, ROSA also restricts access to "any other website, as most websites now call for some kind of networking [or require the user to] connect to a networking site." J.A. 16 at ¶ 47.

The statute at issue in *Packingham* possessed a similar provision barring access where the website "allowed users to create Web pages or personal profiles that contain[ed] information such as the name or nickname of the user, photographs placed on the personal Web page by the user…." 137 S. Ct at 1741. Based on the statute, the Court found that while parolees would be restricted from accessing traditional social media sites, the broad nature of the statute would also

restrict access to sites such as Amazon.com, WebMD.com, and Washingtonpost.com. Id. at 1736. In finding the statute violated parolee's First Amendment rights, the Supreme Court asserted, "[b]y prohibiting sex offenders from using those websites, North Carolina … bar[red] access to what for many are the principal sources for hearing about 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. at 1732.

Here, ROSA is applicable to a broader category of websites than the North Carolina statute as it also bars access to sites that permit individuals to engage in real time communication. J.A. 25-26 at ¶16. Based on its restrictions, in addition to prohibiting access to sites such as Amazon.com, WebMD.com, and Washingtonpost.com, parolees subject to the special conditions of parole under ROSA will also be prohibited from accessing email services; a condition that parolee's in North Carolina were expressly afforded. Id. Additionally, such restrictions have inhibited Mrs. Guldoon's ability to search for worthwhile employment opportunities, stay up to date on current events, and engage with her elected representatives via Twitter and similar social media sites. Id. at ¶ 34. As such, ROSA cannot be found to be narrowly tailored as the statute compels overly broad restrictions inevitably forbidding Mrs. Guldoon from accessing most sites on the Internet. Id. 25-26 at ¶16. Therefore, this restriction forbids immeasurable amounts of First Amendment activity on the exact platforms that the Supreme Court has recognized as one of the "most important places (in the spatial sense) for the exchange of views." Packingham, 137 S. Ct at 1735.

Moreover, while restricting an offender's access to sites where one could communicate with minors likely serves a substantial government interest, restricting email services to all level II or level III offenders, regardless of whether they used the Internet in furtherance of their

crimes, is not narrowly tailored to fulfill this goal. *See* Yunus v. Robinson, 2018 U.S. Dist. Lexis 110392 at *117 (S.D.N.Y. 2018) (in assessing whether it was appropriate for a parolee to be barred from accessing social media and email services, the court held the parolee did "not fall into the very narrow class of offenders for whom the public interest demands that the First Amendment take a back seat to public safety….") "To survive a constitutional challenge, restrictions on the First Amendment must be narrowly tailored to the history or known proclivities of the individual parolee, supervised releasee, or registered sex offender." Yanus, 2018 U.S. Dist. Ct. Lexis 110392 (citing Doe, 283 F. Supp 3d at 613). Here, investigators found no evidence that Mrs. Guldoon had possessed or requested child pornography. J.A. 5-6. In fact, when the student asked her to send photographs of herself, Mrs. Guldoon refused. Id. To subject individuals to further punishment when, in fact, the history of an individual's previous crimes did not involve the use of the Internet, such restrictions are not narrowly tailored to the history or known proclivities of individual parolees and burdens substantially more speech than is necessary to further the government's legitimate interests. *See* Mutter, 240 W. Va. at 338 (finding statute that barred a registered sex offender whose underlying offense did not involve internet usage did not further a legitimate government interest). In *Doe v. Kentucky*, the court held that a statute prohibiting registered sex offenders, "regardless of the conduct underlying [the parolee's] mandated registration," from accessing all social media websites that could be accessed by minors, was not "tailored" to pass constitutional muster. 283 F. Supp 3d at 610. Thus, ROSA is not narrowly tailored as it compels parole boards to enforce this provision against all level II and level III offenders, regardless of whether the individual committed a sex crime through the use of the Internet. J.A. 25-26 at ¶ 16.

Further, the Court in *Packingham* found the *Board of Airport Commissioners of City of*

Los Angeles v. Jews for Jesus, Inc. decision to be analogous to the issue of whether the statute created an impermissible burden under the First Amendment. The Court noted,

> [i]f an ordinance prohibiting any 'First Amendment activities' at a single Los Angeles airport could be struck down because it covered all manners of protected, nondisruptive behavior, including "talking and reading, or the wearing of campaign buttons or symbolic clothing," it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of modern society and culture.

Packingham, 137 S. Ct. at 1733 (citing Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569 (1987). Here, ROSA quells a myriad of "First Amendment activities" without taking any measures to target activities implicating the State of Lackawanna's interest. While Mrs. Guldoon understandably may not befriend or follow a previous student on Facebook, she is also excluded from following the newsfeeds of politicians, local political party chapters, and news sites.

Finally, despite the State's own acknowledgement that "more than 200,000,000 American adults use the Internet for employment purposes, to access educational opportunities, communicate with family and friends, manage finances and pay bill, stay informed of news and current events and shop[,]" it still places broad restrictions on individuals without consideration of whether the crimes committed by those subjected to this law involved the impermissible use of the Internet. *See* J.A. 25-26 at ¶ 16. The state takes no effort to narrowly tailor such restrictions to its interest. *See* Id. at 19-21. In its broad application, ROSA fails to take into account the rehabilitative effects that educational and learning opportunities provide, and serves as an arbitrary restriction on a parolee's First Amendment rights. Id. at 21. Thus, the fatal problem for ROSA "is that its 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." Packingham, 137 U.S. at 1741. As such, the decision of the Appellate Division should be overruled.

B. Guldoon's Fourteenth Amendment Rights Were Violated.

The next critical substantive inquiry is whether Mrs. Guldoon has alleged facts demonstrating that she was deprived of her constitutional rights under the Fourteenth Amendment. Mrs. Guldoon asserts her rights were violated when the State of Lackawanna enacted a statute revoking her driver's license in violation of her fundamental right to travel. Guldoon v. Lackawanna Bd. of Parole, 999 F. Supp.3d 1, 2-3 (M.D.Lack. 2019). The Due Process Clause of the Fourteenth Amendment of the United States Constitution states, in relevant part, "nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. IV.

A parolee's fundamental constitutional rights may only be abridged where such infringements serve reasonable and penological interests. Birzon, 479 F.2d 1241, 1243 (2d Cir. 1972). To assess whether applicable restrictions are reasonable and penological, "the release conditions [must] permissively serve 'legitimate interests of the parole regime' such as 'rehabilitat[ion]' and "protection of the public,' tailored 'in light of the conduct for which [the plaintiff] was convicted.'" Trisvan, 284 F. Supp.3d at 300 (quoting Best v. Nurse, No. CV 99-3727, 1999 U.S. Dist. LEXIS 19708, 1999 WL 1243055, at *3 (E.D.N.Y. Dec. 16, 1999)). A probation condition is unreasonable if it is "unnecessarily harsh or excessive in achieving goals [of rehabilitating the defendant and protecting the public]." Trisvan, 284 F. Supp.3d at 300 (quoting Tolla, 781 F.2d at 34).

ROSA imposes restrictions on all level II and level III sex offenders, requiring each individual to relinquish their driver's license, thus denying each of the fundamental right to travel without consideration of whether the crime committed involved the use of a motor vehicle. J.A. 14 at ¶ 26-28. Mrs. Guldoon was prohibited from possessing a driver's license and has since

been unable to operate a vehicle. J.A. 14 at ¶ 26-28. The State of Lackawanna is a rural state with infrequent access to public transportation, and as a result, residents are dependent on motor vehicles to access work, education, doctors, and even grocery stores. *See* Id. 14 at ¶ 35. Because Mrs. Guldoon's driver's license was revoked as a mandatory term of parole, she has had to use a bicycle to access employment opportunities, riding twenty miles to and from work on an incredibly dangerous highway, often being forced off of the road by speeding cars. Id. 16 at ¶ 43. This condition is unreasonably harsh as it endangers the life of parolees, regardless of whether revoking their driver's licenses protects the community or aids in the offender's rehabilitation.

§ 1 of the legislative purpose or findings of ROSA expressly describes the State's rationale for enacting the Internet restrictions and the system of registering offenders. *See* id. at 19. The State of Lackawanna, however, asserted no rationale for the imposition of the condition requiring all level II and level III offender's licenses to be revoked, thus it is unknown whether the restriction is reasonably related to the State's sentencing objectives. J.A. 25-26 at ¶ 16. Any such rationale that the State may now assert could not be determined to have been designed in light of the crime committed by parolees, as here, the revocation requirement applies to all level II and level III offender's, regardless of whether their crime involved the use of a motor vehicle. Id. Moreover, prior to the enactment of ROSA, the parole board was given sole discretion as to whether it should apply this special condition on parolees, and it chose not to impose such conditions on Mrs. Guldoon. Now, such discretion has been completely removed and the parole board must apply once optional conditions to every level II or level III offender. *See* J.A. 7. Thus, the condition is not tailored in light of the conduct for which Mrs. Guldoon was convicted.

Additionally, any argument by the State would also fail to demonstrate that such a restriction promotes the defendant's rehabilitation as the State has conceded, "[s]tudies indicate

that access to employment and education greatly reduces the risk of recidivism by ex-offenders." J.A. 21. Because the State of Lackawanna is a rural state with little to no access to public transportation, Mrs. Guldoon's access to employment opportunities has been greatly diminished as she not only cannot drive or operate a motor vehicle, but she must also abide by the provision of ROSA requiring her not to travel within 1,000 feet of any school or similar facility. As she must remain 1,000 feet away from any school or similar facility, she has been forced to take alternative routes, to the only job she was able to obtain without a license or access to the internet, thus requiring her to ride a bicycle 40 miles each day, a total of 200 miles per week, in all weather conditions, on a dangerous highway. J.A. 41 at ¶ 41. As the dissent in the lower court decision noted,

> [p]arole conditions are meant to protect the public and to aid in the rehabilitation of the parolee. The travel restrictions imposed by ROSA fail to do wither in this case: her lack of a car has made her a prisoner in her own home, and the 1,000-foot rule has put her in danger of death or serious injury. Furthermore, there is no relation between her crimes and these conditions. Guldoon, 999 F.3d at 5.

The Court should find that the burden on Guldoon's ability to travel is unrelated to the State's sentencing objective, the crime committed, or to promoting rehabilitation. Further, the imposition of such conditions is unnecessary to promote public safety. Thus, the restriction is not reasonably related to the sentencing objectives and the restrictions imposed by ROSA are not designed, in light of the crime committed, to promote the defendant's rehabilitation or to ensure the protection of the public. U.S. v. Reeves, 591 F.3d 77, 82-83 (2d Cir. 2010). As such, the decision of the Appellate Division should be overruled.

II. THE APPELLATE DIVISION ERRED IN HOLDING THAT THE *EX POST FACTO* CLAUSE WAS NOT VIOLATED; BECAUSE THE REQUIREMENT THAT MRS. GULDOON REGISTER AS A LEVEL II SEX OFFENDER AND THE SPECIAL CONDITIONS OF PAROLE IMPOSED BASED ON THAT STATUS, ARE PUNITIVE AND RETROACTIVELY APPLIED.

Article I, § 10 of the Constitution provides: "No State shall . . . pass any . . . ex post facto Law . . . ." In *Weaver v. Graham*, the Supreme Court explained that "[t]he *ex post facto* prohibition forbids Congress and the States from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." 450 U.S. 24, 28 (1981). (quoting Cummings v. Mo., 71 U.S. 277 (1867).) In order to determine whether the sanction or restriction imposed by a statute is an additional punishment which violates the *ex post facto* clause, the first inquiry is "whether [the legislature] intended proceedings under [the statute] to be criminal or civil." U.S. v. Usery, 518 U.S. 267, 288 (1996). However, "by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause." Collins v. Youngsblood, 497 U.S. 37, 46 (1990). Furthermore, even when it is determined that the intent of the legislature was truly nonpunitive, the statute may still be found to be punitive where the regulation is "so punitive in fact . . . [that it] may not legitimately be viewed as civil in nature, despite [the legislature's] intent." Usery, 518 U.S. at 288. The Supreme Court has acknowledged the difficulty in delineating a precise standard to determine whether a law is "penal or regulatory in nature." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). To better articulate the standard, the Court, in *Kennedy v. Mendoza-Martinez*, laid out several factors to determine whether a law is punitive, which include:

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned" *Id at* 168-9.

It has been explained that "[t]hrough this prohibition [of *ex post facto* laws], the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on

their meaning until explicitly changed." Weaver, 450 U.S. at 28. The Supreme Court noted that the reason these "retroactive statutes raise particular concerns," is because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration," and "[i]ts responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Landgraf v. Usi Film Prods., 511 U.S. 244, 266 (1994).

A. There Is Reason To Believe That The Legislature Enacted The Law With A Punitive Intent.

The Supreme Court has noted that "by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the E*x Post Facto* Clause." Collins, 497 U.S. at 46. However, the expressly stated intent of the legislature is still important, and the Supreme Court has noted "we will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" Kan. v. Hendricks, 521 U.S. 346, 361 (1997). This explicit manifest intent is important and in *Kanas v. Hendricks*, the Supreme Court examined a statute, which "established procedures for the civil commitment of persons who, due to a 'mental abnormality' or a 'personality disorder,' are likely to engage in 'predatory acts of sexual violence,'" and determined that the legislature's intent to create a civil proceeding was evidenced by "its description of the Act as creating a '*civil commitment procedure*.'" Id. at 350, 361.

However in *Hudson v. United States*, significantly, "the provision authorizing debarment contains no language explicitly denominating the sanction as civil;" however the Court got around this and found civil intent because "the authority to issue debarment orders is conferred upon the 'appropriate Federal banking agencies,'" which were administrative agencies. Hudson

v. U.S., 522 U.S. 93, 103 (1997). Similarly, the Court in *Hendricks*, found it to be significant that when civilly committed, "Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections." Hendricks, 521 U.S. at 368. Further indicating their intent, the Court paid significant weight to the fact that that the Kansas legislature had placed "the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code," in Article 29(a) beside sections entitled Estates of Absentees in Article 27 and Special Personal Representatives in Article 28. Hendricks, 521 U.S. at 361; *see* K.S.A. §§ 59-29a01, 59-27, 59-28. Additionally, the Court concluded that the legislature had not acted with a punitive intent; because, beyond simply disavowing any punitive intent, the legislature had, "limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; . . . afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired . . . ." Hendricks, 521 U.S. at 398-99.

The Court in *Hendricks* could not have done more to distance their civil commitment statute from criminal law; however, unlike that law, ROSA makes no distinction between particular violators who are violent, or have a high risk of recidivism, and those who do not, in favor of a broad categorization. *See* ROSA § 2. While overcoming expressly stated legislative intent is a high hurdle, ROSA lacks any explicitly stated intent to define the mandates as civil. Furthermore, the Court in *Hendricks* made much of the fact that the statute was placed in the probate code, rather than the criminal code; however, ROSA specifically declares itself to be an act to amending the executive law, correction law, and the penal law. *See* ROSA § 1.

Additionally, unlike *Hudson*, there is no administrative agency that determines whether to apply sanctions; rather, the legislature of Lackawanna has stripped the Board of Parole of any discretion by imposing legislatively mandated conditions. J.A. at 25-26 at ¶ 16. Additionally, unlike the statute in *Hendricks*, ROSA fails to provide any mechanism by which an individual can be liberated of the restrictions if found to no longer be dangerous. Mrs. Guldoon now has the proper medication being prescribed to her, which will prevent the manic episodes which in part contributed to her crime, yet there is no consideration given for the fact that she is less of a risk than she was previously, nor is there consideration that she was and is less of a risk than many other level II and III offenders whom she is subject to the same restraints as J.A. 13 at ¶ 23-24. Such distinctions from existing case indicate that the legislature acted with punitive intent.

B. The Sanctions Involve Affirmative Disabilities/Restraints.

Even if determined that there is no punitive intent, the statute may still be found to be punitive where the regulation is "so punitive in fact . . . [that it] may not legitimately be viewed as civil in nature, despite [the legislature's] intent." Usery, 518 U.S. at 288. The first factor delineated in the second prong of the test from *Kennedy v. Mendoza-Martinez*, requires an examination of "[w]hether the sanction involves an affirmative disability or restraint." 372 U.S. at 168. The Supreme Court explained "[h]ere, we inquire how the effects of the Act are felt by those subject to it," and explained that "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." Smith v. Doe, 538 U.S. 84, 100 (2003). In that case, the statute only required the registration of sex offenders, and the Court rejected the argument that "the registration system is parallel to probation or supervised release in terms of the restraint imposed . . . [because] [p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of

infraction." Id. at 101. Further, the Court noted that under this statute, "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." Id. In contrast, in *Commonwealth v. Baker*, Kentucky's Supreme Court addressed a statute, which imposed restrictions on where a sex offender could reside. Commonwealth v. Baker, 295 S.W.3d 437, 439 (2009). In that case, the Court held that "[w]e find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint;" and the Court further explained that as noted by the lower court, "the restrictions could, . . . 'impact where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care.'" Id. at 445.

The restrictions retroactively imposed upon Mrs. Guldoon under ROSA can hardly be said to be minor and indirect as it entails the very kind of mandatory conditions that were lacking in *Smith v. Doe*. It is true that some of the conditions, such as revocation of one's driver's license have been found not to constitute an affirmative restraint or disability, at least when viewed outside the context of parole or probation. *See* Rivera v. Pugh, 194 F.3d 1064 (9th Cir. 1999). However, here, we must view the special conditions of parole as part of a series of mandatory conditions imposed. The ban on being within 1,000 feet of schools or similar facilities imposes severe restraints on where Mrs. Guldoon can walk, live, work, and even the route she can take to get to work. J.A. at 15 ¶ 36-40. Therefore, just as in *Commonwealth v. Baker*, this constitutes an affirmative disability or restraint. Similarly, restricting access to the Internet also inhibits access to employment opportunities, as the commercial networking sites are integral to contemporary job searches and many other aspects of modern life and communication. For these reasons, the special conditions of parole constitute affirmative disabilities and restraints.

C. Parole Conditions Have Historically Been Regarded As Punishments.

The next factor is whether the sanction or restraint has "historically been regarded as a punishment." Kennedy, 372 U.S. at 168. The New Jersey Supreme Court has held that "parole and probation have historically been viewed as punishment." Riley v. New Jersey State Parole Board 219 N.J. 270, 288 (2014). In this decision, the New Jersey's Supreme Court referenced the United States Supreme Court case, *Griffin v. Wisconsin*, which noted that "[p]robation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'" *Id*.; Griffin v. Wis., 483 U.S. 868, 874 (1987); *see also* Commonwealth v. Muniz, 640 Pa. 699, 736 (2017) (comparing registration requirements to "historical forms of punishment such as probation and parole"). The Court in *Griffin* indicated that it views probationers and parolees in somewhat similar lights given the fact that

> [t]o a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions." 483 U.S. at 874.

Whether a punishment has been historically regarded as a crime is of tremendous importance. In some cases in which it was determined that a restriction was not found to have been historically regarded as a punishment, courts have noted a failure to analogize restrictions to parole and probation, indicating that many situations, parole, and probations have been treated as something of a benchmark for what is a historically recognized punishment. *See* Muniz, 640 Pa. 699, at 736. Probation is undoubtedly a punishment, and parole is seen in a similar light as probation; furthermore, some state courts have explicitly defined both as historically recognized forms of punishment. Riley, 219 N.J. 270 at 288. Therefore, the fact that the restrictions and requirements of ROSA are imposed as part of parole conditions means they fall into historically

recognized categories of punishment, and this should be weighed heavily towards the ultimate determination of the statute's punitive nature.

D. The Statute's Operation Will Promote Retribution And Deterrence, Which Are Traditional Aims Of Punishment.

In analyzing the punitive nature of a law, it must be considered "whether its operation will promote the traditional aims of punishment − retribution and deterrence." Kennedy, 372 U.S. at 168. In *Smith v. Doe*, the statute at issue dealt with a sex offender registration statute and notification system. 538 U.S. at 89. In, a concurring opinion, Justice Souter wrote, "[t[he fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on." Id. at 109 (Souter J. concurring opinion). Justice Souter further explained, "when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." Id. (Souter J. concurring opinion). Additionally, he noted, the "argument can claim support, too, from the severity of the burdens imposed." Id. (Souter J. concurring opinion).

To find evidence that ROSA applies burdens upon those who are no real threat to the community, and is therefore retributive, the Court needs to look no further than the fact that the parole board did not see fit to impose the same onerous restrictions that the statute has mandated, even though it was within their discretion to do so. J.A. at 7. Additionally, the burdens imposed by ROSA far surpass that of the Alaska statute at issue in *Smith v. Doe*. Here, beyond the mere shame of the notification systems, there are actual limitations on movement, both legally and practically, as she cannot operate a motor vehicle; she has been stripped of the right to use the Internet; there are crippling restraints on where Mrs. Guldoon can work; and restrictions are

placed on the route she can take to access her place of employment. It bears repeating that the parole board did not feel it was necessary to impose this level of restrictions during its initial evaluation; rather, it was the legislature, through the statute's reclassification of Mrs. Guldoon as a level II sex offender with the corresponding special parole requirements it mandated. J.A. 7. The factors which made *Smith v. Doe* a close case for Justice Souter are exacerbated tenfold in the present case and therefore the statute should be acknowledged as promoting traditional aims of punishment, thus supporting the ultimate conclusion of its punitive nature.

E. Although An Alternative Non-Punitive Purpose, Which The Statute May Rationally Be Connected, Is Assignable For The Restrictions, The Restrictions Are Excessive In Relation To The Alternative Purpose Assigned.

Another factor to consider when analyzing the punitive nature of the law is "whether an alternative purpose to which it may rationally be connected is assignable for it." Kennedy, 372 U.S. at 168-9. Laws such as this have been held to have "a legitimate nonpunitive purpose of public safety." Smith, 538 U.S. at 102-3. However, even when such an alternative non-punitive purpose exists, the restrictions imposed will still be found to be punitive where the restrictions are "excessive in relation to the alternative purpose assigned." Kennedy, 372 U.S. at 169. One factor, which can be important in determining whether the restrictions would be excessive, is the presence of, or lack of, individualized assessment. *See* Smith, 538 U.S. at 104. In *Smith v. Doe*, the Court explained that in *Hendricks* "[t]he magnitude of the restraint made individual assessment appropriate," however "[t]he Act [in *Smith v. Doe*], by contrast, impose[d] the more minor condition of registration." Id. Kentucky's Supreme Court found "the "magnitude of the restraint" involved in residency restrictions is sufficient for a lack of individual assessment to render the statute punitive." Baker, 295 S.W.3d at 446.

Here, the magnitude of the restraint far exceeds that of the registration requirements in *Smith*. The intrusions upon Mrs. Guldoon's liberty can hardly be said to be minor. Rather, the limits on where she can live, walk, and work, include and surpass the restraints involved in *Commonwealth v. Baker* and should therefore similarly be found to be excessive in the absence of individualized assessment. Had there been individualized assessment, there is no reason to believe that restrictions this harsh would have been imposed and this assertion is clearly evidenced by the fact that the pre-sentence report advised that only the General Conditions of parole should be imposed, even though it was within their authority to impose the Special Conditions that ROSA now mandates. J.A. at 14 at ¶26. This removal of discretion also supports the conclusion that the restrictions are excessive. The statute understandably seeks to hinder the ability of sex offenders to repeat their crime, but it does so in a way that has no regard for the specifics of the offense. The use of a motor vehicle was hardly instrumental in Mrs. Guldoon's offense, yet the statute removes her driver's license. Similarly, the Internet played little role in the crime, rather her offense was initiated, and continued because she had in-person access to a minor. *See,* J.A. at 6-7. While internet restrictions, and bans on maintaining a driver's license, would be legitimate for a predator who used such tools to commit their crime, Mrs. Guldoon's conduct bears little relation to either of these scenarios. The statute itself claims, in the legislative purposes section, that one of its aims in restricting internet access is to "prohibit[] certain high-risk sex offenders from using the internet to victimize children," yet the statute makes no differentiation between which sex offenders are high risk and which are not, in favor of casting a wide net over even those whose crimes did not entail any internet use at all. ROSA § 1(B). It is not disputed that legislatures are free to legislate with respect to entire class of offenders as a whole, however when making broad applications, the more onerous the restrictions are, the

greater the risk is that such restrictions will be excessive; and in this situation the restrictions are excessive in relation to their non-punitive purpose.

F. The Behavior To Which The Statute Applies Is Already A Crime, However, A Finding Of Scienter Was Not Required.

The last factors to consider are "whether [the sanction] comes into play only on a finding of *scienter*," and "whether the behavior to which it applies is already a crime." Kennedy, 372 U.S. at 168. In *Smith v. Doe*, the Court gave almost no consideration to the two aforementioned factors, noting that they "are of little weight in this case." 538 U.S. at 105. The Court explained that the reason these factors were given little attention was that "[t]he obligations the statute imposes are . . . not predicated upon some present or repeated violation;" rather, the obligations are imposed on the basis of past crimes alone. Id.

ROSA appliesto behaviors that are already a crime. While admittedly, there is no finding of scienter required for the offenses Mrs. Guldoon was convicted of, just as in *Smith v. Doe*, this court should give little weight to these factors. These factors weigh in conflicting directions on the question of whether the statute was punitive, but given the lack of significance the Supreme Court has applied in these types of circumstances, this Court should largely disregard these two factors in its consideration, and look at the weight of facts present in the other factors, all of which support the conclusion that the effects are so punitive as to render the statute and affront to the *ex post facto* clause of the Constitution. As such, the decision of the Appellate Division should be overruled.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the Appellate Division be reversed.