SUPREME COURT OF THE UNITED STATES

No. 19-01

MARY GULDOON,

Petitioner,

v.

LACKAWANNA BOARD OF PAROLE,

Respondent.

Appeal from the United States Court of Appeal
for the Thirteenth Circuit

BRIEF FOR THE RESPONDENT

Team 36

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QUESTIONS PRESENTED

I. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act violate Petitioner's rights under the First and Fourteenth Amendment to the United States Constitution when a convicted sex offender must: (1) register as a sex offender; (2) surrender her driver's license; (3) maintain a distance from any school, facility, or other institution used for the care or treatment of persons under the age of eighteen; and (4) refrain from accessing any commercial social networking website.

II. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act imposed on Petitioner constitute violation of the *Ex Post Facto* Clause to the United States Constitution when a sex offender guilty of sexual assault of a minor and released on parole is required to: 1) register with the state, 2) surrender her driver's license for a maximum of 20 years, 3) maintain a distance of one thousand feet from school grounds in order to prevent recidivism, and 4) refrain from accessing social networking sites accessible to minors because of the high volume of sex predators recently discovered on these sites.

STATEMENT OF FACTS

In 2008, Mary Guldoon (hereinafter "Petitioner") began her career at Old Lackawanna High School teaching Advanced Computer Science. (R. at 11.) In the fall semester of 2010, Petitioner and B.B. (hereinafter "Victim") met and developed a close relationship. (*Id*.) Eventually, Petitioner began a physical relationship with Victim that lasted until they were discovered in Petitioner's classroom by the principal of the school. (*Id*.) Petitioner was subsequently arrested. (R. at 13.)

In a voluntary statement to the police, Petitioner admitted that she had a voluntary relationship with Victim that lasted several months prior to her arrest. (R. at 5.) Petitioner further detailed that both herself and Victim engaged in sexual conduct dozens of times in her classroom, in her car, and in her home. (*Id*.) Following an investigation, it was determined that Petitioner's abuse of Victim began in October of 2010 and was maintained through the school's email system and text messages. (*Id*.)

On January 1, 2011, Petitioner pled guilty to one count each of: rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. (*Id*.) Petitioner was sentenced to a period of incarceration of no less than twenty years, followed by probation for a period of no less than ten years. (R. at 2.) On or after January 31, 2011, Petitioner began serving her sentence at Towanda Correctional Facility in Towanda, Lackawanna. (R. at 5, 13.)

On July 25, 2015, the Lackawanna State Legislature approved the Registration of Sex Offenders Act ("ROSA") that would go into effect on January 21, 2016. (R. at 19.) The Lackawanna Legislature found that the danger of recidivism posed by sex offenders, especially those who commit predatory acts, was of paramount concern to the important government interest of public safety. (*Id*.) ROSA imposed new registration requirements and new conditions of parole. (R. at 2.) Those convicted of sex crimes were required to register in-person with the state as sex

offenders with levels corresponding to their respective crimes. (*Id*.). Parole conditions of sex offenders of a level two or above that have committed a sexual offense against a minor include: (1) mandatory suspension of driving privileges for a maximum of twenty years, (2) bans of travel near schools and similar facilities of at least one thousand feet, (3) and bans on accessing commercial social networking websites accessible by minors. (R. at 8-10.)

Recent investigations by the attorney general revealed that tens of thousands of sex offenders were using websites popular with children. (R. at 20). The Lackawanna Legislature entered into an agreement with social networking sites to place and enforce safeguards aimed at protecting children and adolescents from sexual predators. (*Id*.) However, the Lackawanna Legislature acknowledged that such restrictions must be tailored to the seriousness of the crime while promoting the successful reintegration of sex offenders into society. (R. at 21.)

On January 1, 2017, Petitioner was released on parole. (R. at 10.) Petitioner was designated a "level two sex offender" and was required to register with the state accordingly. (R. at 14.) On January 1, 2019, Petitioner filed her Complaint in United States District Court Middle District of Lackawanna. (R. at 1.) The Middle District Court of Lackawanna found in favor of the state. *Guldoon v. Lakawanna Bd. of Parole*, 999 F. Supp.3d 1, 10 (M.D.Lack. 2019). Petitioner appealed and The Thirteen Circuit affirmed the District Court decision. *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1 (13th Cir. 2019).

STANDARD OF REVIEW

The Supreme Court reviews motions for summary judgment de novo and needs not rely on the lower courts' understanding of the facts or law. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 465 n.10 (1992). Summary judgment is proper if there is no issue of material fact and the movant is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). In

a motion for summary judgment a Court may rely on materials outside of the four-corners of the complaint, including affidavits. *See id.*

SUMMARY OF ARGUMENT

Parolees have limited liberty interest upon release from prison. Not yet free from the supervision of the government, parolees live under the conditions imposed upon them by the Board of Parole. The government maintains substantial interest in rehabilitating parolees and in protecting the public at large from recidivism and criminal acts. The government certainly maintains these interests with sex offenders. Therefore, the Lackawanna Board of Parole has the right to impose the special conditions of ROSA upon sex offenders, such as Petitioner. The ban on the use of commercial social media websites inhibits Petitioner's ability to access victims behind the secrecy of her computer, something she has done before. The travel restrictions and no-contact restrictions inhibit Petitioner's ability to access victims in venues similar to the one she exploited in the past. The suspension of Petitioner's driver's license inhibits her ability to transport victims to the secrecy of her home, something she has also done in the past. The registration requirement provides law enforcement with the tools it needs to effectively identify, impede, and control sex crimes in the state. These special conditions do not violate the limited liberty interests provided to Petitioner as a parolee under the First and Fourteenth Amendments to the United States Constitution.

"[I]t would be absurd to argue that a defendant would have an *ex post facto* claim if the compassionate judge who presided over the district where he committed his crime were replaced, prior to the defendant's trial, by a so-called 'hanging judge.'" *Garner v. Jones*, 529 U.S. 244, 258 (2000) (Scalia, J., concurring in part in the judgment). The Supreme Court has recognized the right of state legislatures to enact statutes that retroactively affect sex offenders, when the statute's intent is procedural in nature and non-punitive in effect. Although ROSA retroactively subjects sex

offenders to certain parole requirements, the Lackawanna State Legislature's intent is to promote public safety and not aggregate punishment. Laws similar to ROSA have all survived *ex post facto* challenges when it is demonstrated that the law's effect would not traditionally be considered punitive, does not impose substantial restraint, is rationally connected to a non-punitive purpose, and not excessive in its purpose. The conditions imposed by ROSA are the result of recent data showing a high rate recidivism among sex offenders posing a clear and present danger to the community. Therefore, ROSA's conditions do not violate the *Ex Post Facto* Clause.

ARGUMENT

I. ROSA registration requirements and special conditions of parole do not violate Petitioner's First and Fourteenth Amendment rights under the United States Constitution.

Petitioner does not have a protected liberty interest to be free from the special conditions of her parole. The evidence presented by the Petitioner does not support her claim that the special conditions imposed by the State of Lackawanna Board of Parole (the "Board") violate and deprive her of her limited constitutional rights as a parolee. This court should, therefore, affirm the 13th Circuit Court of Appeals upholding the District Court's decision.

To state a claim pursuant to 42 U.S.C. § 1983, the "conduct at issue 'must have been committed by a person acting under color of state law' and 'must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.'" *Conejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010) (quoting *Pitchell v. Callan*, 13 F.3d 545, 547 (2d Cir. 1994)). Petitioner alleges here that the special conditions deprived her of her rights, privileges, or immunities secured by the Constitution.

The argument here is not that the special conditions do not infringe upon her rights, privileges, or immunities. Rather, it is, the well understood notion, that parolees by their very nature have only conditional liberty. Parolees are subject to "restrictions not applicable to other

citizens," and a prisoner on parole enjoys only "conditional liberty properly dependent on observance of special parole restrictions." *Morrisey v. Brewer*, 408 U.S. 471, 482 (1972). Parole may free a parole from physical imprisonment, but "it imposes conditions which significantly confine and restrain his freedom." *United States v. Polito*, 583 F.2d 48, 54 (3d Cir. 1978) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

Parolees are not wholly without liberty interest, however, and are "entitled to some form of due process in the imposition of special conditions of parole." *Pollard v. United States Parole Comm'n*, No. 15-CV-9131, 2016 WL 3167229, at *3-4 (S.D.N.Y. June 6, 2016). However, the limited liberty interests the parolee maintains, cannot frustrate the government's substantial interest in rehabilitating the parolee and protecting the public from additional criminal acts by the parolee. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972). To realize these goals, the government "may impose restrictions on the rights of the parolee that are reasonable and necessarily related to the interests that the government retains after his conditional release." *Id*. Additionally, to the extent special conditions confine a parolee's limited liberty interest, those liberty interests are not infringed "in the absence of a showing that the board or its agents acted in an arbitrary and capricious manner." *Boddie v. Chung*, No. 09 CV 04789, 2011 WL 1697965, at *2 (E.D.N.Y. May 4, 2011). "Under the arbitrary and capricious standard, a reviewing court must consider whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Fassler v. Pendleton*, 110 Fed. App'x. 749, 751-52 (9th Cir. 2004).

Applying the above framework, courts have overturned various special conditions for vagueness. In *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2007), the court overturned a condition requiring the defendant to notify the probation department when entering into a significant romantic relationship. The court determined that the special condition did not have any legitimate connection to defendant's crime—possession of child pornography. In *United States v. Bello*, 310

F.3d 56 (2d Cir. 2002), the court overturned a condition barring defendant from watching television to encourage "self-reflection." The court stated reducing the likelihood of recidivism did not have any connection to watching television. The case here does not present disconnection and vagueness like the cases above.

A. First Amendment Claims

i. Social Media Ban

When applying the framework in this context, courts have upheld special conditions of parole that ban all forms of internet access when the evidence demonstrates that the defendant's conduct warranted imposing a broad ban. In *United States v. Lombardo*, 546 F. App'x 49 (2d Cir. 2013), the court upheld a prohibition of access to "sexually explicit conduct" because "ample evidence" supported the conclusion that the defendant's pornography addiction influenced his criminal acts. In *United States v. Simmons*, 343 F.3d 72, 82 (2d Cir. 2013), the court upheld a ban on pornographic material because the evidence demonstrated a connection between defendant's pornography viewing and his criminal behavior. In *United States v. Boston*, 494 F.3d 660 (8th Cir. 2007), the court upheld a can pornography ban because it deterred the defendant from committing further crimes.

Conversely, courts have overturned special conditions where the evidence does not demonstrate a connection between the ban and defendant's conduct. In *United States v. Perazza Mercado*, 553 F.3d 65 (1st Cir. 2009), the court overturned a condition banning defendant's possession of pornographic material, because no evidence demonstrated he had abused or even possessed pornography in the past. In *United States v. Loy*, 191 F.3d 360 (3d Cir. 1999), the court remanded the case because the trial court failed to explain its reasons for imposing a pornography ban on defendant convicted of receipt of child pornography. In *United States v. Armel*, 585 F.3d 182 (4th Cir. 2009), the court vacated a special condition prohibiting a defendant convicted of

threatening federal officials from possessing any pornography because the district court offered no explanation for the condition.

Here, the special condition banning Petitioner's social media use is reasonably related to her criminal conduct and supported by the evidence. Additionally, the special condition is reasonably related to the Board's interest of deterring recidivism, assisting law enforcement in identifying sex offenders, and protecting the public from Petitioner's crimes.

The evidence demonstrates that Petitioner communicated with the Victim over text, telephone, and email. In so doing, Petitioner demonstrated her capability of utilizing the internet to communicate with and lure in her victim. This is not unusual behavior for sex offenders. According to ROSA, the attorney general found that tens of thousands of known sex offenders use social networking websites. Using these social media platforms, sex offenders can then hide behind the computer screen, deceive victims about their identity and purpose, and ultimately commit sex crimes. To combat this epidemic, the government has an interest in inhibiting Petitioner's and all sex offenders use of these platforms. It would prove inconsequential if the government could only partially ban social media platform use, because sex offenders would still have access to and leniency in their use of social platforms. To realize its stated interests, the government must have at its disposal the ability to impose these blanket bans.

The ban on Petitioner's use of social media is not akin to special condition overturned by courts in the past. It doesn't serve an irrelevant or incongruous purpose like the pornography ban in *Armel* or the TV ban in *Bello*. Rather, and contrary to *Perazza Mercado* or *Loy*, the special condition here finds lengthy support in the evidence. The evidence at large demonstrates that the government must limit sex offenders' access to potential victims through the internet. To realize this goal the government must impose a blanket prohibition on access to all social media. To do otherwise, would leave loop holes open and encourage recidivism. The evidence of this particular

case demonstrates that Petitioner fits firmly in the category of sex offenders the government seeks to deter—sex offenders who have demonstrated an ability to abuse the internet to solicit victims. Ultimately, the evidence demonstrates that the internet assisted and encouraged Petitioner's criminal behavior and the Board correctly seeks to curb her ability to reoffend through her preferred methods.

ii. Travel Ban

The evidence also supports the imposition of the special conditions prohibiting Petitioner from coming within 1000 feet of any school grounds, facility, or institution primarily used for the care or treatment of persons under the age of eighteen and suspending her driver's license. These special conditions are reasonably related to the Board's stated interest of deterring recidivism, assisting law enforcement in identifying sex offenders, and protecting the public from Petitioner's crimes.

To quote Judge Skopinski's dissent: "The special conditions of parole which required [Petitioner] to surrender her driver's license, and which prevented her from coming within 1000 feet of any school, do not, on their face, abrogate that right. Citizens have travelled for centuries in this country without the use of motor vehicles. [Petitioner] herself admits she can find alternative ways to work that do not take her by the schools in her neighborhood." *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1, 5 (13th Cir. 2019). Despite this admission, Judge Skopinski ultimately arrives at the conclusion that the special conditions violate Petitioners' right to travel. The case law supports an opposite conclusion.

In *Bagley v. Harvey*, 718 F.2d 921, 924 (9th Cir. 1983), the court held "an individual's constitutional right to travel, having been legally extinguished by a valid conviction followed by imprisonment, is not revived by the change in status from prisoner to parolee." In *Bostic v. Jackson*, No. 9:04-CV-676, 2008 WL 1882696, at *2 (N.D.N.Y. April 24, 2008), the court held

"constitutional rights such as freedom of travel and association may be limited without violating the parolee's constitutional rights." In *Pena v. Travis*, No. 01 Civ.8534, 2002 WL 31886175, at *15 fn. 5 (S.D.N.Y. Dec. 27, 2002), the court held plaintiff's First Amendment rights to freedom of travel and association can be abridged by parole restrictions without implicating a constitutional violation. Therefore, the court determined the special condition of plaintiff's parole which imposed a curfew between 10:00 pm and 7:00 am everyday did not violate her First Amendment right to travel. *Id*. at *5. In *Pelland v. Rhode Island*, 317 F.Supp.2d 86, 96 (D.R.I. 2004), the court upheld an interstate travel ban against a sex offender, stating: "There is little doubt that greater supervisory authority (which does not eliminate wholesale a sex offender probationer's right to travel) over these probationers in particular, and greater restrictions over their geographic mobility out-of-state, are goals reasonably related to the government's legitimate interest in protecting the public."

Likewise, the travel restrictions here do not "eliminate wholesale" Petitioner's right to travel. The Board's interest in limiting Petitioner's travel derives clearly from the facts in this case. Petitioner met the Victim while teaching in the high school. She utilized her position to influence and cajole the Victim into having a sexual relationship with her on school premises, during school hours, and after school hours. Additionally, she used her car to drive her victim to her home to have further sexual conduct with him, before ultimately driving him home afterword. These acts demonstrate that once provided an opportunity to associate with minors, Petitioner would exercise her control and position to victimize students. Further, she did not shy away from using her vehicle to perpetuate her crimes. This sort of conduct is not merely incidental, rather it demonstrates behavior the Board rightfully now seeks to discourage and eliminate.

Moreover, the special conditions limiting Petitioner's travel do not render her "essentially house-bound." Petitioner has proven this by finding gainful employment and commuting around town on her bicycle. If provided with a vehicle, Petitioner would once again have unfettered access

to transport and target minors like the Victim. Her previous behavior demonstrates her willingness to use her vehicle as a tool to carry out her crimes. The Board has a duty to remove this tool from her possession.

Petitioner also argues she cannot pursue her desired career as a teacher any longer due to the travel restrictions. At the core of the mission of public education in the United States is the safety and protection of students. Prohibiting convicted sex offenders from having access to our nation's youth is not only responsible, but necessary. Providing Petitioner and other sex offenders like her, with unvetted access to minors, would insult the intelligence of the public education system's goal in protecting students and the government's role in protecting the public.

iii. Contact with Minors

The evidence also supports the imposition of the special conditions prohibiting Petitioner from having any contact with minors. This special condition is reasonably related to the Board's stated interest of deterring recidivism, assisting law enforcement in identifying sex offenders, and protecting the public from Petitioner's crimes.

Courts have found that parole restrictions barring sex offenders from conduct with minors is reasonably related to public safety concerns. In *Fassler*, the court stated the commission had a legitimate concern the sex offender might commit inappropriate acts again with minor children. *Fassler*, 110 Fed. App'x. at 752. It continued to say the special conduction prohibiting conduct with a minor is not "remote in time to the alleged improper conduct and [is] reasonably related to the nature of [sex offender's] improper conduct and to the commission's public safety and supervision goals." *Id*. In *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015), the court stated: "We think the sentencing judge's explanation is sufficient to justify imposing upon Kappes an appropriately tailored no-contact condition." The sentencing judge explained the condition was

necessary because Kappes collected minor girls' panties for over 20 years and photographed minors playing in the park.

Likewise, the Board here has a legitimate interest in preventing Petitioner from having immediate physical access to minor children. She abused her position as a teacher working with minors to commit sex crimes in the past. She committed sex crimes against the Victim dozens of times over the course of a few months. Her behavior indicates a pattern of abusive behavior and a lust for minor children. To combat this the Board reasonably instituted the special condition barring her contact with minor children. Moreover, the condition is reasonably related to the government's ultimate goal in preventing Petitioner from victimizing more minors by removing her ability to have any contact what-so-ever with them.

B. 14th Amendment Claim

i. Registration

Petitioner's argument that the registration requirements required by ROSA violate her substantive due process rights under the 14th Amendment. This argument fails because requiring sex offender registration is reasonably related to the Board's desire to aide law enforcement in protecting the public from sex crimes.

The United States Constitution guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This provision has been interpreted to have both a procedural and substantive component when reviewing state action. The substantive due process component protects fundamental rights that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994).

The circuit courts that have considered this substantive due process argument regarding sex offender registries have upheld such registration and publication requirements finding no

constitutional infirmities. In *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004), the court stated "Persons who have been convicted of serious sex offenses do not have a fundamental right to be free from . . . registration and notification requirements . . . ." In *Paul P. v. Verniero*, 170 F.3d 404, 405 (3d Cir. 1999), the court held that sex offender registration did not infringe fundamental right of family relationships, and although the registration of offenders home address invaded the fundamental right to privacy, the state had a compelling interest to prevent future sex offenses. In *Doe v. Moore*, 410 F.3d 1337, 1345-46 (11th Cir. 2005), the court upheld the Sex Offender Act requirement that sex offenders register with local law enforcement because it had a rational relationship to a legitimate government interest. The court reasoned, "it has long been in the interest of government to protect its citizens from criminal activity and we find no exceptional circumstances in this case to invalidate the law." *Id*. at 1345.

Overwhelmingly courts agree with the presumption that sex offender registration serves a legitimate government purpose in protecting the public from sex crimes. These registries do not violate Petitioner's substantive due process rights. The Board rightly assumes that registration of sex offenders is paramount to the realization of public safety. Law enforcement agencies' efforts to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of information about sex offenders who live within their jurisdiction. This lack of information can lead to the failure of the criminal justice system to identify, investigate, apprehend, and prosecute sex offenders. Therefore, the system of registering sex offenders is a proper exercise in the state's police powers to regulate conduct. Registration will provide necessary information to law enforcement critical to preventing sexual victimization and to resolving ongoing incidents of abuse. Additionally, it will allow law enforcement to notify the public when necessary for community why protection. Ultimately, the registration is reasonably related to the government's interest in protecting the public from sex crimes.

II. ROSA registration requirements and special conditions of parole do not violate the *Ex Post Facto* Clause.

A. A statute that applies retroactively to certain parole conditions does not violate the Ex Post Facto Clause.

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

Collins v. Youngblood, 497 U.S. 37, 42 (1990) (citing *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925); *see also Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *see also United States v. Amirault*, 224 F.3d 9, 14 (1st Cir. 2000) ("[a] law . . . violates the Ex Post Facto Clause if it 'changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'") (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)); *see also United States v. Hardeman*, 704 F.3d 1266, 1268 (9th Cir. 2013) (holding that a law violates *ex post facto* principles only when the law is retrospective and increases the penalty of a punishable crime) (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Cal. Dep't of Corr. v Morales*, 514 U.S. 499, 507 (1995)).

The constitutional protection against *ex post facto* laws carries the purpose "to secure substantial personal rights against arbitrary and oppressive legislation action, and not obstruct the mere alteration in conditions deemed necessary for the orderly infliction of humane punishment." *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Such protection was not intended to restrict the legislative control over remedies and procedures not affecting matters of substance. *Beazell*, 269 U.S. at 171; *see also Dobbert*, 432 U.S. at 293. Instead, the focus of the *ex post facto* inquiry relies on whether any legislative change increases the penalty by which a crime is punishable rather

than producing some ambiguous disadvantage. *Morales*, 514 U.S. at 503; *see also Garner*, 529 U.S. at 244 (2000); *see also Doe v. Pataki* ("*Doe I*"), 120 F.3d 1263 (2d. Cir. 1997).

Not every retroactive statute creating a risk of affecting an inmate's terms or conditions of confinement results in an *ex post facto* violation: "the question is a matter of degree." *Garner*, 529 U.S. at 250 (quoting *Beazell*, 269 U.S. at 169). In *Smith v. Doe*, the Supreme Court provides a two-step test to determine whether a statute with retroactive elements violates the *Ex Post Facto* Clause. *See* 538 U.S. 84, 92 (2003). The two-step test requires a court to determine (1) whether the legislature intended the statutory scheme to be punitive, and (2) if not, whether the statutory scheme is so punitive in either its purpose or effect so as to negate the legislature's intent. *See id*.; *see also United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (citing *United States v. Ward*, 448 U.S. 242, 248 (1980)); *see also Com. v. Britton*, 134 A.3d 83, 87 (Pa. 2016). The court will generally reject the legislature's intent only when "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.'" *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *see also Ward*, 448 U.S. at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

i. A statute containing retroactive elements that the legislature intends to be facially procedural and non-punitive does not violate the Ex Post Facto Clause.

When analyzing an *ex post facto* claim, the court must first "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Hendricks*, 521 U.S. at 361. Categorizing a statute as either civil or criminal is a question of statutory construction. *Id*. (quoting *Allen v. Illinois*, 478 U.S. 364, 368 (1986)).

In *Smith*, the Supreme Court held that the Alaska Sex Offender Registration Act did not violate the *Ex Post Facto* Clause despite its retroactive nature because the Act was non-punitive. *See* 538 U.S. at 105-06. The Court explained that legislative findings indicated that "sex offenders

pose a high risk of reoffending" and identified "protecting the public from sex offenders" as the "primary governmental interest" of the Act. *Id*. at 93. The Court concluded that the statute on its face did not suggest that the legislature has any intent other than creating a civil scheme designed to protect the public from harm. *See id*.

In *Doe I*, the Court held that retroactive application of registration and community notification provisions of New York's Sex Offender Registration Act is constitutional. *See* 120 F.3d 1285. The Court explained that the introductory text of the Act established the dual purposes served by the statute—protecting communities by alerting them of the presence of individuals who may present a danger and strengthening law enforcement authorities' ability to battle sex crimes. *Id.* at 1276. The Court established that the Act was facially non-punitive because the text and structure of the Act convincedly supported the legislature's stated regulatory intent. *Id.* at 1278.

ii. A statute containing retroactive elements found to be facially non-punitive and neutral in its purpose and effect does not violate the Ex Post Facto Clause.

When a law does not facially pose a significant risk, a defendant must demonstrate, using evidence of the rule's implementation by the agency charged and responsible with exercising discretion, that its retroactive application will result in a stiffer punishment than under an earlier rule or in the absence of the new rule. *Garner*, 529 U.S. at 255. The Supreme Court in *Smith* applies the seven factors test presented in *Kennedy v. Mendoza-Martinez* when analyzing the punitive effects of a facially neutral statute. *See generally Smith*, 538 U.S. at 97; *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). As of yet, the Court has only applied five of the seven factors in its analysis of "whether, in its necessary operation, the regulatory scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to this purpose." *Smith*, 538 U.S. at 97.

First, the relatively recent origin of the sex offender registration and notification statutes suggests that these statutes are not meant as a punitive measure because they do not involve a traditional means of punishment. *Id*. In *E.B. v. Verniero,* the Third Circuit concluded that New Jersey's sex offender notification scheme was not publicly displayed for ridicule and shaming but rather from the dissemination of accurate public record information about their past criminal activities and a risk assessment by responsible public agencies based on that information in the furtherance of public safety. 119 F.3d 1077, 1099–1101 (3d Cir.1997); *see also Femedeer v. Haun,* 227 F.3d 1244, 1251 n. 2 (10th Cir. 2000).

Second, the effects of a sex offender statute are unlikely to be punitive if the disability or restraint of that statute is minor or indirect. *Smith*, 538 U.S. at 100-01. In *United States v. Parks,* the First Circuit found that in-person requirements are "doubtless more inconvenient," but ultimately this inconvenience is minor compared to the disadvantages already present in the statute upheld in *Smith*. *See Parks*, 698 F.3d 1, 6 (1st Cir. 2012); *see also Kammerer v. State*, 322 P.3d 827, 837 (Wyo. 2014); *but see State v. Letalien*, 985 A.2d 4, 18 (Me. 2009) (finding that a *quarterly, in-person* reporting requirement imposes a disability or restraint to the offender) (emphasis added); *but see Starkey v. Oklahoma Dept. Of Corrections*, 305 P.3d 1004, 1023, 1025 (Ok. 2013) (holding that a sex offender statutes requiring to yearly renewed the driver's license and having the words "sex offender" placed on the license is punitive in effect) (concluding that restriction for an offender to reside within two-thousand feet of a property working with children is punitive if the restriction is made regardless of whether the original victim was a child or an adult).

Third, the registration and dissemination provisions of sex offender statutes do not promote the traditional aims of punishment; they are only retributive and any deterrence effect is only incidental to the provisions' regulatory functions. *Doe v. State* ("*Doe II*"), 189 P.3d 999, 1015

(Alaska 2008). In *Smith*, the Supreme Court noted that "[t]o 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." 538 U.S. at 102. Additionally, the classification of offenders and reporting requirements based on their crimes is not indicative of retributive intent rather they are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective. *See id*.

Fourth, the state's non-punitive interest in public safety "unquestionably provides support for the view that a statute is not punitive for *Ex Post Facto* Clause purposes." *Doe II*, 189 P.3d at 1016. A rational connection to a non-punitive purpose was a "[m]ost significant" factor in its determining whether a sex offender statute is non-punitive in effect. *Id*. In *Smith*, the Supreme Court held that public safety is a legitimate non-punitive interest and sex offender statutes rationally advance such interest by alerting the public to the risk of sex offenders in their community. *See* 538 U.S. at 102.

Fifth, a statute is not considered punitive simply because it lacks a close or perfect fit with the nonpunitive goal it seeks to achieve; registration and dissemination provisions must just be reasonable in advancing the state's interest in public safety. *Doe II*, 189 P.3d at 1018. In *Smith*, the Court explained that individual risk assessment was unnecessary for sex offender registration requirements, and that "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause." 538 U.S. at 104. The Court determined that Alaska's statute was not excessive in relation to the state's interest in public safety. *See id*.

B. ROSA does not violate the Ex Post Facto Clause

ROSA's registration requirements, despite its retroactivity, do not violate the Ex Post Facto Clause. Courts have held that a sex offender registration act that criminalizes certain conduct—failing to register when a duty to register exists even if that duty arose retroactively—does not violate the *Ex Post Facto* Clause. *Hardeman*, 704 F.3d at 1269; *see also Smith*, 538 U.S. 84 (2003) (holding that retrospective application of an Alaska sex-offender registration statute does not violate the *Ex Post Facto* Clause); *see also United States v. Simon-Marcus*, 363 F. App'x 726 (11th Cir. 2010) (holding that registration requirements of the Sex Offender Registration Notification Act, even if retroactive, do not violate the *Ex Post Facto* Clause); *see also People v. Castellanos*, 21 Cal. App. 4th 785 (Cal. Ct. App. 1999) (holding that a similar California retroactive registration requirement does not violate the *Ex Post Facto* Clause); *see also People v. Fioretti*, 54 Cal. App. 4th 1209 (Cal. Ct. App. 1997) (holding that retroactive application of the state sex offender registration laws does not violate the *Ex Post Facto* Clause). Individually, these laws have not been found to violate *ex post facto* principles because registration itself is not considered punitive. *Hardeman*, 704 F.3d at. 1268.

i. Lackawanna State Legislature did not intend for ROSA to be punitive

States must be able to exercise flexibility in formulating parole procedures and addressing problems associated with confinement and release. *Garner*, 529 U.S. at 252. The Lackawanna State Legislature passed ROSA to promote public safety in the face of high recidivism rates among sex offender, specifically offenders who commit predatory acts. Similar to the retroactive non-punitive registration requirements enacted by the Alaska State Legislature in *Smith*, here the Lackawanna State Legislature enacted ROSA with the purpose and intent to promote public safety in the face of rising recidivism amongst sex offenders. *See* 53 U.S. at 96.

Lackawanna's Legislature exercised its discretion in tailoring ROSA—its registration requirement, internet restriction, driving restriction, and school grounds restriction—because the structure and intent of the Act is to protect the community and allow the police to efficiently prevent sex crimes. Similar to the notification and registration requirements in *Doe I*, where the legislature found that releasing information about sex offenders to law enforcement agencies and releasing limited information to the public, furthers the primary government interest of public safety and potential harm, here the conditions imposed by ROSA illustrate the Lackawanna Legislature's intent to keep the community safe. *See* 120 F.3d 1276.

ii. ROSA is neutral in its effects and purpose

When a law does not facially show a significant risk, a defendant must demonstrate, using evidence of the rule's implementation by the state charged and responsible with exercising discretion, that its retroactive application will result in a stiffer punishment than under an earlier rule or in the absence of the new rule. *Garner*, 529 U.S. at 255.

First, ROSA does not involve a traditional means of punishment. Similar to non-punitive registration requirements in *E.B.*, here, the new mandatory conditions under ROSA requiring sex offenders to register with the state do not have the purpose to shame those sex offenders. *See* 119 F.3d at 1099–1101. The effects of associating a certain level of risk based on the crimes committed with a specific registration requirement is consistent with the advancement of the state's interest in public safety. Imposing restrictive measures on sex offenders adjudicated to be dangerous is "a legitimate non-punitive governmental objective and has been historically so regarded." *Hendricks*, 521 U.S. at 363.

Second, the effects of ROSA are not punitive because the disability or restraint of the statute is minor or indirect. Based on the seriousness of her crime, Petitioner has been given a risk level two designation, which only requires an in-person reporting requirement every three years.

Similar to the in-person requirements in *Parks*, the Petitioner's mandatory in-person registration is definitely minor considering the frequency of the reporting. *See* 698 F.3d at 6. Contrary to both the driver's license requirements and the living restrictions in *Starkey*, here, Petitioner's limitations on having a driver's license and travelling within 1000 feet of a school are not punitive in effect. *See* 305 P.3d at 1023. While the statute in *Starkey* subjected the offender to humiliation when the offender was forced to display his license with the words "Sex Offender" on it and required the offender to pay a renewal fee every year, the driver's license suspension period in ROSA prevents Petitioner from fleeing the state. *See id*. at 1023, 1025. Also, whereas the statute in *Starkey* indiscriminately prevented sex offenders from living in proximity of a school, ROSA's restrictions on travel proximity to schools and access to social networking websites accessible to minors are limited to sex offenders whose victim was a minor. *See id*. at 1023. Therefore, such restrictions are non-punitive because it is reasonably related to the purpose of protecting children.

Third, ROSA does not promote the traditional aims of punishment. Similar to the reporting requirements in *Smith*, ROSA's classification of sex offenders and reporting requirements based on their crimes are reasonably related to the danger of recidivism and consistent with the regulatory objective. *See* 538 U.S. at 102. ROSA seeks only to lessen the contact, and hence the opportunity for tragedy, between known sex offenders and some of the community's most vulnerable members.

Fourth, ROSA is rationally related to Lackawanna's non-punitive interest in public safety. Similar to the state's interest of public safety in *Smith*, the registrations requirements and the travel and social networking website restrictions required by ROSA rationally advance public safety by reducing the contacts between potential recidivists and their potential child victims. *See* 538 U.S. at 103-04. These mandatory conditions of parole have been widely recognized by courts to advance a state's interest in public safety. *See Starkey*, 305 P.3d at 1028 (holding that the retroactive extensions of Oklahoma's sex offenders statute rationally advance the protection of its citizens,

which is a basic obligation of state government); *see also Kammerer*, 322 P.3d at 838 (holding that Wyoming's sex offenders statute bears a rational connection to the goal of public safety).

Fifth, ROSA is not excessive in respect to its purpose. States must be able to exercise flexibility and discretion in formulating parole procedures and addressing problems associated with confinement and release. *See Garner*, 529 U.S. at 252. New findings about sex offenders and the risk of recidivism consequent on an offender's release, along with a multitude of other factors, assist and allow for the state to make informed decisions when formulating parole procedures. *See id*. at 253. The Court in *Smith* held that Alaska's sex offender statute did not violate the *Ex Post Facto* Clause even if it did not require an individual determination of the sex offender's dangerousness, here ROSA has tailored its restrictions based on the seriousness of the crime because the Lackawanna Legislature has recognized the importance of successfully reintegrating sex offenders back into society. *See* 538 U.S. at 104. For example, as a result of the attorney general's findings that tens of thousands of known sex offenders use social networking websites popular with children, ROSA's access restriction to social networking websites accessible to minors to sex offenders who have abused minors is rationally related to the prevention of recidivism and not excessive considering the importance of protecting children and adolescents from sexual predators and harassment.

CONCLUSION

Therefore, for the foregoing reasons, the Respondent respectfully requests that Court AFFIRM the Thirteenth Circuit and hold that ROSA does not violate Petitioners rights under the First and Fourteenth Amendment and does not violate the *Ex Post Facto* Clause.