SPRING TERM, 2019

Docket No. 19-01

In the

Supreme Court of the United States of America

MARY GULDOON,

Petitioner,

-against-

STATE OF LACKAWANNA BOARD OF PAROLE,

Respondent.

On Writ of Certiorari to the

Supreme Court

of the United States

BRIEF FOR THE PETITIONER

Team 4
Counsel for Petitioner

QUESTIONS PRESENTED

1. Under the substantive guarantee of due process, does Lackawanna's Registration of Sex Offenders Act ("ROSA") impose arbitrary special conditions of parole that violate Petitioner's fundamental rights of speech and travel when conditions are neither related to her crime nor tailored toward achieving a legitimate parole aim?

2. Under the Ex Post Facto Clause of the Constitution, does the retroactive attachment of ROSA's registration requirements and special conditions on Petitioner's sentence amount to a criminal punishment when the effects of the Act outweigh any legislative intent to create a civil regulatory scheme?

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STATEMENT OF THE FACTS

Mary Guldoon, Petitioner, is a mother of a young child and wife to a supporting husband. J.A. at 11. Following the birth of her daughter, she was diagnosed with postpartum depression and prescribed Prozac. *Id.* Not only did the Prozac fail to alleviate the symptoms of her depression, it unknowingly triggered her undiagnosed bipolar disorder. J.A. at 13. Bipolar encompasses episodes of extreme depression, as well as manic episodes of hypersexuality. *Id.* Despite continuing symptoms, Ms. Guldoon returned to work as a computer science teacher at Old Cheektowaga High School in September 2010. J.A. at 11, 12.

B.B. was a high school student in Petitioner's class. J.A. at 12. He and Petitioner developed a close student-teacher relationship after discussing his physically-abusive father and addict mother. *Id*. In October, due to her improper treatment, Petitioner allowed their relationship to escalate. *Id*. The physical relations primarily occurred in her classroom, though she occasionally drove B.B. to her home. J.A. at 6. For the most part, they communicated via text message and email, with no evidence that the parties exchanged sexual or otherwise explicit messages. J.A. at 5-6. The relationship lasted two months before Petitioner's arrest. J.A. at 13.

To spare B.B. and her family the pain of trial, Petitioner pleaded guilty to one misdemeanor and two felony charges, which carried a total sentence of ten to twenty years. *Id.* Her pre-sentencing report recommended only general conditions of parole. J.A. at 7. While serving her sentence, Petitioner completed her master's in computer programming. J.A. at 14. Petitioner has sought proper medical treatment for her bipolar disorder and has not since experienced a manic episode. J.A. at 13. Prior to Petitioner's release, the Lackawanna State Legislature passed the Registration of Sex Offenders Act ("ROSA"). J.A. at 14. As a result,

Petitioner's convicted offense required mandatory conditions on her parole unmentioned in her pre-sentencing report. J.A. at 7, 14. These rash conditions required registration as a Level II Sex Offender, revocation of her driver's license, a sweeping restriction on internet use, and a prohibition on entering within 1,000 feet of school grounds. J.A. at 9-10.

Adherence to the special conditions has been difficult for Petitioner and her family. J.A. at 15. Although she must obtain employment, she has struggled to find work given the prohibition on internet use and her inability to drive. J.A. at 15. ROSA's special conditions prevent Petitioner from pursuing a career in education and computer science. Instead, she works a night shift at a pierogi plant, three miles from her home. *Id.* However, due to her travel restrictions, Petitioner must take a "maddingly circuitous" twenty-mile bike ride, along a sixty-five-mph, two-lane highway in less than thirty-degree temperatures. J.A. at 16. She has often been forced off the road and continually fears for her safety. *Id.* Lastly, because her residence is located near two schools, she has been made a "virtual prisoner in her own home." J.A. at 3.

SUMMARY OF THE ARGUMENT

Society's perception of a "sex offender" is clouded by misconceptions, bias, and prejudice. Unlike any other class of felons, the conditional liberty of paroled sex offenders is restrained by punitive, invasive, and highly burdensome laws disguised as regulatory schemes. The State of Lackawanna, through the passage of ROSA, has trampled on Petitioner's fundamental rights through the retroactive imposition of punitive conditions that undermine her rehabilitation and reintegration.

First, ROSA's special conditions violate Petitioner's First and Fourteenth Amendment rights by depriving her of due process. Even within the context of parole, the State must act

within the confines of the Fourteenth Amendment. Paroled-liberty still provides freedom of speech and a right to intrastate travel. Penumbral to the First Amendment is the fundamental right to access public forums of speech. The prohibition on use of social networking sites severely infringes on free speech by limiting access to platforms of speech, avenues of communication, and access to current events. Additionally, the Court must recognize the right of local travel as fundamental to our national traditions and penumbral to the First Amendment. The travel restrictions estop Petitioner from exercising this right.

While this Court has yet to establish a standard, contravention of these fundamental rights is deserving of heightened scrutiny. Outside of parole, infringements on these rights are subjected to intermediate scrutiny. Petitioner was deprived of due process where conditions lacked tailoring to her individual characteristics and recognized aims of parole. Finally, these conditions can be struck as facially overbroad. While overbreadth is confined to First Amendment violations, the fundamental liberties at stake for Petitioner are penumbral to First Amendment rights. As such, Petitioner can bring this claim where a substantial amount of protected conduct is swept into the Act's prohibitory reach.

Second, the retroactive application of ROSA's special conditions and registration requirements extends unforeseen punishment in violation of the Ex Post Facto Clause. This Court's endorsement of early registration laws has opened the door to next-generation schemes carrying harsher, broader, and overly excessive restrictions.

Due to the outdated analysis of an early registration scheme, this Court must narrowly read *Smith v. Doe*, 538 U.S. 84 (2003). Courts have misinterpreted this holding to protect excessive next-generation schemes, which share little resemblance to their predecessors. This

Court must apply the intent-effects test to ROSA to find the effect transforms any stated civil remedy into a punishment without law. ROSA's special conditions and registration requirements reflect the hallmarks of punishment, echoing the banishment and public shame of colonial days. Limits on free movement and the inflicted social ostracism act as an affirmative restraint on Petitioner's liberty. ROSA serves all traditional aims of punishment, such as retribution and deterrence. Lastly, where Petitioner lacks any likelihood of re-offense, and her crime involved no predatory or violent acts, the burden of these conditions is unduly excessive.

ARGUMENT

This case comes before this Court after Petitioner brought a § 1983 Claim against the State of Lackawanna Board of Parole for violations of her First and Fourteenth Amendment rights, as well as a violation of the Ex Post Facto Clause of the Constitution. The District Court granted summary judgement in favor of the State and the Thirteenth Circuit affirmed. This Court is to review the imposition of parole conditions for abuse of discretion and any related legal rulings de novo. *United States v. Eaglin*, 913 F.3d 88, 94 (2d Cir. 2019). This Court should reverse the Thirteenth Circuit's decision affirming summary judgment.

I. MANDATORY IMPOSITION OF ARBITRARY SPECIAL PAROLE CONDITIONS DEPRIVES PETITIONER OF SUBSTANTIVE DUE PROCESS.

At the heart of the due process guarantee is assurance that the government cannot arbitrarily abridge the life or liberty of any member of society. U.S. Const. amend. XIV. Upon conditional release, parolees regain many of the liberties held prior to conviction. *See Morrisey v. Brewer*, 408 U.S. 471, 482 (1972). While the State may properly impose restrictive conditions on a parolee, it must do so in accordance with due process. *Id.*

Parole is given to those that show a "reasonable promise" of being able to reintegrate into

society and live a lawful and productive life. *Id*. At that point the State, as well as the public, form an interest in opportunities for the parolee to obtain gainful employment and establish "other enduring attachments of normal life." *Id.* at 484. Overbroad and unnecessarily harsh deprivations of liberty lack tailoring toward a valid parole purpose and are thus unconstitutional. *United States v. Reeves*, 591 F.3d 77, 82 (2d Cir. 2010).

The imposition of ROSA's special conditions deprives Petitioner of substantive due process. First, the sweeping conditions of parole substantially burden fundamental liberties under the First and Fourteenth Amendment, specifically the rights of free speech and travel. Second, there is insufficient justification for the imposed conditions as to satisfy heightened scrutiny. Lastly, the conditions must be struck as unconstitutionally overbroad.

A. ROSA's Special Conditions Infringe on Fundamental Rights Under the First and Fourteenth Amendments.

Conditions restricting Petitioner's access to the internet and use of a motor vehicle substantially burden fundamental rights. To assert a Due Process claim, Petitioner must show that a liberty interest was substantially burdened. *See Singleton v. Doe*, 210 F. Supp. 3d 359, 366 (2d Cir. 2016). The "liberty" protected by the Due Process Clause is defined as those rights deeply rooted in our nation's traditions and fundamental to justice. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). Most rights are enumerated in the Bill of Rights. *Id.* at 145. However, those enumerated in the Constitution "shall not be construed to deny . . . other[s] retained by the people." U.S. Const. amend. IX. Thus, through the Due Process Clause, the Court has protected unenumerated rights as fundamental. *See Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965).

1. The internet ban burdens Petitioner's First Amendment freedom of speech.

The ban on internet usage infringes on Petitioner's First Amendment right of free speech

by depriving her of a fundamental right to access public forums. The First Amendment, applied to the States through the Fourteenth Amendment, ensures that free speech shall not be curtailed. U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). This unfettered exchange is axiomatic to our political institutions, advancing science, knowledge, and the arts. *See Gitlow*, 268 U.S. at 670, 671.

However, the First Amendment is not limited to speech. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Penumbral to the Amendment is the right to access the essential venues for the exercise of speech. *See id.*; *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (finding a First Amendment right to access public ways). Restrictions on this "access," while content-neutral, potentially chill too much protected expression. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Therefore, time, place, and manner restrictions are subjected to intermediate scrutiny, upheld only if "narrowly tailored to serve a significant governmental interest" and "leave[] open ample alternative channels" of speech. *Id.*

The internet is the modern-day town center. Recently, the Court struck down a North Carolina statute that prevented registered sex offenders from accessing social networking sites. *Packingham*, 137 S. Ct. at 1738. The Court found that public safety did not justify restrictions on the most important public forum of lawful and protected communication. *Id*. at 1735.

Petitioner has a First Amendment right to access this forum. ROSA's special conditions banning access to social networking sites directly and substantially burden this right. Similar to the statute at issue in *Packingham*, Petitioner cannot access any website which allows mere incidental communication with minors, including LinkedIn, Facebook, Craigslist, Twitter, or even New York Times online. *See Packingham*, 137 S. Ct. at 1735; J.A. 15, 25. Without

Facebook or Twitter, Petitioner is denied a meaningful soapbox to express political speech, the cornerstone of the First Amendment. Further, she is denied the ability to connect with state representatives, congressmen, and even hear the words of the President. Moreover, blanket denial of social networking sites limits her advancement of education, science, and the arts. Petitioner cannot access news sources, any online education, or basic modes of entertainment. As such, banning Petitioner from the internet substantially burdens her freedom of speech.

2. Petitioner has a fundamental right to intrastate travel, burdened by the mandatory suspension of her driver's license.

Deeply embedded in our nation's traditions and fundamental to notions of liberty is the right to local travel. *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990). The Bill of Rights and Fourteenth Amendment were not intended to represent an exhaustive list of all freedoms. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2014). As a result, the Court has continuously had to define the scope of "liberty" protected by the Fourteenth Amendment. *Id.* With history guiding the analysis, this Court looks to whether the purported liberty is (1) central to a moral consensus, (2) fundamental to self-governance, or (3) penumbral to an enumerated right. *See* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 284 (1973).

The right to local travel is rooted in our nation's traditions, necessary for our democratic process, and penumbral to the First Amendment. Today, this Court is presented with an opportunity to recognize this right as fundamental. In determining the appropriate scrutiny, the Third Circuit concluded that this right should be analyzed under the intermediate scrutiny framework of time, place, and manner restrictions. *See Lutz*, 899 F.2d at 270.

The right to local travel does not reflect a newfound or novel understanding of liberty.

Fundamental rights that derive from a moral consensus are those sowed in the conscience of the people. *See Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). While the Court has not expressly declared it a liberty interest under Due Process, there are whispers of the right to local travel as far back as the Articles of Confederation. Articles of Confederation of 1781, art. IV, § 2, cl. 1 ("the people . . . shall have free ingress and egress amongst the states"); *see also Kent v. Dulles*, 357 U.S. 116, 126 (1958) (the freedom of movement across and within frontiers is part of our Nation's heritage)*; Williams v. Fears*, 179 U.S. 270, 274 (1900) (the Fourteenth Amendment protects the right of free transit in and throughout a State).

The Court has already recognized a fundamental right to interstate travel. *See Kent*, 357 U.S. at 126. Yet, this right was premised on the notion that citizens must be able to travel between the States "*as freely as [within their] own*." *Smith v. Turner*, 48 U.S. 283, 492 (1849) (Taney, C.J., dissenting) (emphasis added). "It would be meaningless to describe the right to travel between states as fundamental and not to acknowledge a correlative right to travel within a state." *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971).

Local travel is a right of function, necessary in our everyday life. *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). It is also necessary for democracy and self-governance. Without the right to local travel, one cannot attend town hall meetings, access the courts, campaign throughout neighborhoods, or travel to polls to vote. For these reasons, the First, Second, Third and Sixth Circuits have each expressly acknowledged this right. *See id.; Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971); *Cole v. Housing Auth. of Newport*, 435 F.2d 807 (1st Cir. 1970).

The First Amendment also encompasses a right to local travel. *See* Jeanne M. Woods,

Travel that Talks: Toward First Amendment Protection for Freedom of Movement, 65 Geo. Wash. L. Rev. 106 (1996). Penumbral rights exist on the periphery of enumerated rights, pouring in meaning and substance. A clear example is the fundamental right of privacy that attaches to the First, Third, Fourth, and Ninth Amendments. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Central to the First Amendment is the enumerated right to assemble, as well as the implied right of association. U.S. Const. amend. I; *see NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (the freedom of association is fundamental to safeguard the freedom of assembly). The freedoms of assembly and association require the right to local travel in order to assemble with those of one's choosing. *See* Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U.L. Rev. 2461, 2471-72 (2010). The freedom of religion requires the right to travel on roads to reach one's place of worship. *Id.* Further, one must travel to public forums to engage in protected speech. *Id.* These First Amendment rights would lose their bite were the State able to substantially burden travel with little justification.

The aggregation of the mandatory license suspension and the presence requirement as conditions of Petitioner's parole substantially burdens the fundamental right to intrastate travel. Petitioner lives in a rural part of Lackawanna with limited roads and public transportation. J.A. at 3, 15. Due to the presence restriction on entering within 1,000 feet of school grounds, Petitioner is unable to travel along her neighborhood's two major roads. J.A. at 5. While Petitioner works three miles from home, she is forced to ride her bicycle twenty miles along a sixty-five-mph highway because she can neither drive a car nor access nearby roads. J.A. at 5-6, 16. Additionally, the cumulative effect of the travel restrictions confines her to her home.

Reinstating her driver's license would cure most of these substantial burdens where she could safely access alternative, indirect routes. Without her driver's license, the State has unreasonably infringed upon Petitioner's fundamental right to travel within her neighborhood.

B. Lackawanna Board of Parole Cannot Justify the Infringement on Petitioner's Fundamental Rights to Satisfy Due Process.

Despite Petitioner's parole status, the State is not free to regulate on its every whim. Petitioner lacks a liberty interest in parole or in being free of special conditions but retains a right to be free from arbitrary and capricious State action. *See Guldoon v. State of Lackawanna Board of Parole*, 999 F.3d 1, 3 (13th Cir. 2019) (Skopinski, J., dissenting). The lower courts incorrectly applied a toothless rational basis review when granting summary judgment. However, even Petitioner's quasi-liberty as a parolee requires the State to show that special conditions are necessarily tailored toward parole interests. *See United States v. Eaglin*, 913 F.3d 88, 94 (2d Cir. 2019) (citing 18 U.S.C. § 3583(d) (2012 & Supp. V 2017)).

When the State grants an individual a privilege, despite no constitutional entitlement, it must do so in accordance with the Fourteenth Amendment. *Plyler v. Doe*, 457 U.S. 202, 214-15, 221 (1982). In *Plyler*, the Court found that Texas could not prohibit undocumented children's access to public education. *Id.* at 209. Although no right to public education exists, the Court held that when a state provides such a benefit, Due Process and Equal Protection must be satisfied. *Id.* at 214-15, 221. Judge Skopinski of the Thirteenth Circuit correctly noted that Petitioner retains a right to be free of conditions unrelated to her prior conduct or untailored toward the goals of parole. *Guldoon*, 999 F.3d at 3 (Skopinski, J., dissenting).

Under this Court's ruling in *Packingham* and the Third Circuit's ruling in *Lutz*, substantially burdensome restrictions on internet and travel must be subjected to intermediate

scrutiny. *See Packingham*, 137 S. Ct. at 1736; *Lutz*, 899 F.2d at 270. The Southern District of New York, in a similar case, indicated that the *Packingham* mandate of such scrutiny was not intended to stop short of parole. *See Yunus v. Robinson*, 17-cv-110392 (AJN), 2019 WL 168544, at *1, *16 (S.D.N.Y. January 11, 2019) (citing *Packingham*, 137 S. Ct. at 1733-34). Even as a condition of parole, burdens on fundamental liberties must satisfy the appropriate scrutiny. *Id.*

The Fifth Circuit recognized that no set standard has been advanced for assessing whether parole conditions violate fundamental rights. *Johnson v. Owens*, No. 14-50627, 2015 WL 236712, at *707, *712 (5th Cir. May 19, 2015). The court in *Johnson* looked to its sister circuits and determined that the test is whether the imposed restrictions are (1) necessarily tailored toward achieving the goals of parole and (2) reasonably related to the individual's past conduct. *Id.* While the standard applies rational basis language, the courts "carefully scrutinize unusual and severe conditions" in a manner that resembles intermediate scrutiny. *See Eaglin*, 913 F.3d at 94 (quoting *United States v. Doe*, 79 F.3d 1309, 1319-20 (2d Cir. 1996)).

1. Conditions are arbitrary when untailored toward valid aims of parole.

Lackawanna's interest in public safety cannot serve as a catch-all to justify such serious infringements on fundamental liberties. Special conditions that restrict fundamental rights must directly relate to a narrowly tailored aim of parole, involving no greater deprivation of liberty than necessary. *See Eaglin*, 913 F.3d at 94, 97. Following the statutory post-release guidelines, the established goals of parole are deterrence of further criminal conduct, rehabilitation of the parolee, and prevention of recidivism. *See id.* (citing 18 U.S.C. § 3553(a)(2) (West 2018)).

Unlike a rational basis test, the State cannot just purport that any conceivable public interest is served. Rather, the State must provide something more than a "scant explanation" that the imposition on the individual parolee serves a specific goal of parole. *United States v. Zobel*,

696 F.3d 558, 567 (6th Cir. 2012); *see Eaglin*, 913 F.3d at 97. The mere possibility of abuse is insufficient to justify denial of a liberty interest. *Eaglin*, 913 F.3d at 97.

Although the State retains an interest in protecting the public, the superseding aim of parole must be the parolee's rehabilitation and reintegration into society. Leading jurisdictions, such as New York, have codified parole is not to be granted as a "reward" for good conduct, but only when there is a "reasonable probability that . . . [the parolee] will live and remain at liberty without violating the law, and that [her] release is not incompatible with the welfare of society." N.Y. Executive Law § 259-i(2)(c)(A) (McKinney 2018). Special conditions cannot be justified by public safety alone at the total expense of the parolee's successful rehabilitation.

Here, the special conditions undermine the State's interest in Petitioner's rehabilitation. While serving her sentence, Petitioner earned a master's degree in computer programming and sought proper treatment. J.A. at 13-14. Putting her back into society where she is completely restricted from enduring any normal attachments of life threatens her progress. Due to the internet ban, not only is she unable able to pursue a career in her specialized field, all employment opportunity is curbed by blanket restrictions on accessing websites like Indeed and LinkedIn. J.A. at 17. The conditions further limit her viability as a candidate, where most jobs require active use of email, as well use of a motor vehicle. J.A. at 15-17. Furthermore, the cumulative burden of the travel restrictions has rendered her a prisoner in her own home. J.A. at 15. These provisions are arbitrary and lack necessary tailoring toward Petitioner's reintegration.

2. Conditions are arbitrary when not reasonably related to the individual.

Special conditions of parole must serve more than a general public interest or penological aim. *See United States v. Holena*, 906 F.3d 288, 291 (3d Cir. 2018). There must be some nexus between the defendant's individualized past conduct, the potential for her re-offense, and the

restriction on liberty. *United States v. Perazza-Mercado*, 553 F.3d 65, 70 (1st Cir. 2009). The First Circuit refers to this as an "offense-specific nexus." *Id.*

The Circuits echo agreement that this "offense-specific nexus" is necessary to uphold any restriction on a fundamental right. *See United States v. Holena*, 906 F.3d 288, 291 (3d Cir. 2018) (despite use of social media to entice teenagers, the internet ban was not tailored to parolee's conduct); *United States v. Tome*, 611 F.3d 1371, 1376 (11th Cir. 2010) (a one-year internet ban was justified where defendant used the internet to solicit minors); *United States v. Perazza-Mercado*, 553 F.3d 65, 73 (1st Cir. 2009) (parole condition banning internet was struck where defendant's relationship with a twelve-year-old did not involve the internet); *United States v. Brigham*, 569 F.3d 220, 234 (5th Cir. 2009) (internet restriction was appropriate when it was directly involved in the offense and access would interfere with treatment).

A condition is inherently arbitrary when imposed solely by conviction. Punitive special conditions limitedly linked to the offender designation undermine rehabilitation and efforts to deter recidivism. *See* Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. L. & Econ. 207, 209 (2011). The State cannot rest its argument on Justice Kennedy's baseless assertion, plucked from the pages of a pop magazine, that recidivism rates for sex offenders are "frightening and high." *Smith v. Doe*, 538 U.S. 84, 103 (2003); *see* Ira Mark Ellman & Tara Ellman, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Commentary 495 (2015). A Department of Justice study proves that the rate of recidivism is low, lingering around four percent. *See* Patrick A. Langan et. al, *Recidivism of Sex Offenders Released from Prison in 1994* 24 (Carolyn Williams & Tom Hester eds., 2003).

The internet ban and license revocation are devoid of an offense-specific nexus. Even if

ROSA's primary aim is to ensure public safety and prevent recidivism, the restrictions do little to achieve those objectives. Misdiagnosis and improper medication incited Petitioner's crime. J.A. at 13. Since undergoing proper treatment, Petitioner poses little risk to the public. *Id.* Additionally, neither social networking nor a motor vehicle was directly used in the commission of her offense. Most of Petitioner's communications with B.B. were either in person or over text, the relationship transpired from their professional relationship, and the motor vehicle was merely incidental to the offense. *See Guldoon*, 999 F.3d at 3 (Skopinski, J., dissenting).

While unsettled, the State cannot satisfy the standard advanced by the Circuits, where the conditions lack an offense-specific nexus and tailoring toward the recognized aims of parole.

C. Overbroad Conditions of Parole Violate Petitioner's First and Fourteenth Amendment Rights.

Overbroad laws are repugnant to the First Amendment, as well as our notions of due process and fairness. *Farrell v. Burke*, 449 F.3d 470, 482 (2d Cir. 2006). The substantial overbreadth a statute is judged in relation to the statute's legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Under an overbroad law, sensible citizens will avoid behavior that has any chance of falling within the prohibitory scope. *Farrell*, 449 F.3d at 499. In *Farrell*, the Second Circuit noted that the special condition banning pornography was particularly "elusive" when pornography was not involved in the crime. *Id.* at 96. When unrooted in the fruits of a convicted offense, a parolee lacks any reference to the conduct targeted by a restriction. *Id.* Furthermore, this Court in *Packingham* acknowledged the broad nature of the term "social networking sites." *Packingham*, 137 S. Ct. at 1736-37.

Judge Skopinski would have struck the conditions as facially overbroad. *See Guldoon*, 999 F.3d at 1 (Skopinski, J., dissenting). The restriction on social networking acts as a de facto

internet ban, sweeping far too much protected conduct into its prohibitory scope. To ensure compliance with the condition, Petitioner and her family have forgone use of computers and smart devices altogether, resulting in serious interference with their free speech. J.A. at 17. Alternatively, because the right to local travel is penumbral to the First Amendment, this Court may consider the overbreadth of the travel restrictions. The aggregation of the travel restrictions infringes on Petitioner's freedom of movement. J.A. at 14. Lacking any tailoring toward conduct that poses a risk to public safety, the overbreadth of ROSA's internet and travel restrictions has resulted in a chilling effect on protected First Amendment rights.

II. ROSA'S SPECIAL CONDITIONS ARE A RETROACTIVE CRIMINAL PUNISHMENT IN VIOLATION OF THE EX POST FACTO CLAUSE.

Retroactive impositions of criminal penalties are abhorrent to our notions of ordered liberty and principles of the social compact. The Federalist No. 44 (Madison). From the beginning, the Framers established that neither Congress nor a state shall pass an ex post facto law. U.S. Const. art I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1. The States and the newfound Federal Government agreed, no legislature may "make[] more burdensome the punishment for a crime, after its commission." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925); *see Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). While not a bar on establishing civil regulations, it prevents substantive legal changes to punish those already convicted. *See Beazell*, 269 U.S. at 171.

Generally, the "intent-effects" test embodies the framework for determining ex post facto violations. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). Proving a non-punitive scheme requires a clear showing of civil intent, looking to the statute's text to indicate the legislative aim. *Id.* However, even if the goal was to impose a non-punitive regulatory scheme, this Court must analyze seven non-exhaustive factors to determine whether the punitive effect negates the intent.

See United States v. Ward, 448 U.S. 242, 249 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

In analyzing a 1994 regulatory scheme, *Smith* opened the door for excessive "super-registration" systems that share little resemblance to their predecessors. Catherine L. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 Sw. L. Rev. 1, 21 (2017). Legislatures have endorsed greater punishment, while technology has escalated the social ostracism from dissemination of personal information. *Id.* Yet, empirical evidence shows that registries neither lower crime rates nor reduce recidivism. *See* Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. L. & Econ. 207, 209 (2011). The conviction-based registration requirement under ROSA subjects parolees to an aggravated punishment without cognizance of the committed offense. First, this Court must narrow the application of *Smith* to the limited facts present in that case. Next, in applying the intent-effects test, the effect of ROSA's mutated conditions exceeds any non-punitive intent.

A. The Controlling Precedent of *Smith v. Doe* Must Be Narrowly Read to Recognize the Punitive Impact of Modern Regulatory Schemes.

Courts have rendered excessive regulations constitutional under the guise of the outdated reasoning in *Smith v. Doe*, 538 U.S. 84 (2003). Unlike modern schemes, the *Smith* Court considered a first-generation registry comprised only of a registration and notification requirement. Catherine L. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 Sw. L. Rev. 1, 22-23 (2017). Nevertheless, the *Smith* holding shaped the judicial go-ahead for arbitrary provisions governing the livelihood of those reentering society. *Id.*

This Court's review of five of the *Mendoza-Martinez* guideposts should not be emulated in cases involving far more restrictive schemes. *Kennedy*, 372 U.S. at 168-69. Instead, the Sixth

Circuit's application of the intent-effects test should pave the modern understanding of the punitive consequences resulting from super-regulatory schemes. *See Doe v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016). The Sixth Circuit cautioned that *Smith* cannot justify "writing a blank check to states." *Id.* at 705. Unlike the first-generation laws, those we see today restrict where individuals live, work, and linger within their community. *Id.*

The internet is integral to the operation of registration laws. In 1994, Congress passed the Wetterling Act, which held federal law enforcement funding hostage unless states folded and implemented online registries. *See* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U.L. Rev. 295, 326 (2006). However, by virtue of its insidious geographic sweep, anyone with curiosity can peruse an online registry. *See Wallace v. State*, 905 N.E.2d 371, 376 (Ind. 2009). A nondescript search on the national registry provides thousands of results, including pictures, vehicle information, addresses, and more. *See* Dru Sjodin National Sex Offender Public Website, http://www.nsopr.gov (last visited March 10, 2019). The *Smith* Court thought it was innocent to place this information online but did not anticipate the resulting punishment. *Smith*, 538 U.S. at 99.

In the age of social media, registrants are subjected to a de facto scarlet letter through the unfiltered access to private information. *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1227, 1231 (D. Colo. 2017). The Colorado District Court in *Millard* discussed the effect of this dissemination on a woman not even registered on the statewide database. *Id.* at 1227. She allowed a registrant to reside in her home, leading to ridicule from her community, harassment in-person and online, and social pressure so intense she had no choice but to sell her house and move. *Id.* Even after the registrant stopped residing in her home, the public shame failed to cease. *Id.*

The excessive escalation of these statutory schemes against the technological backdrop of today's society results in an unacceptable punishment. Lackawanna's ROSA imposes a registry civil by name, but radically different than its predecessors. J.A. at 29. The online registry resembles that of *Millard* and *Snyder*, yet ROSA goes further in establishing a hotline that the public can use to obtain registrant information. J.A. at 29, 42. Culture has shifted, registries evolved, and the implications which flow exceed any non-punitive intent. *Smith* may have been the Court's last word but can no longer be used to justify mutated regulatory schemes.

B. Under the "Intent-Effects" Test, ROSA is a Criminal Penalty.

Despite any legislative intent, an analysis of the *Mendoza-Martinez* guideposts proves the effect to be so punitive as to override Lackawanna's intended civil remedy. No matter what ROSA is called, its effect is shockingly criminal. To determine punitive effect, this Court may consider any of the seven non-exhaustive *Mendoza-Martinez* guideposts. *Kennedy*, 372 U.S. at 168-69. This Court should focus on whether the Act (1) incorporates elements historically regarded as punishment, (2) imposes an affirmative disability or restraint, (3) promotes the traditional aims of punishment, and (4) is excessive in relation to a civil purpose. *Id.*

1. ROSA reflects the historic hallmarks of punishment.

Published conviction-based classifications and strict presence-restrictions echo the essence of historic punishment. *Snyder*, 834 F.3d at 703. Laws which have historically shared a punitive designation are those which involve hostile consequence, flowing from a legal offense. *See* H.L.A. Hart, *Punishment and Responsibility* 4-5 (1968). Limits on access to housing and one's free movement create the constructive equivalent of colonial banishment. Catherine L. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 Sw. L. Rev. 1, 29-30 (2017). Registrants must modify where they live and work in accordance with school

zones and other prohibited areas. *Snyder*, 834 F.3d at 702.

The *Smith* Court laid unfortunate precedent that a registration requirement for sex offenders cannot reflect the historic hallmarks punishment. 538 U.S. at 98. This was premised on a naïve notion that one cannot face public shame and ostracism because "real effort" is required to search the database. *See id.* In reality, posting an image of a registrant with intimate background information rises to the level of "face-to-face" shaming that Justice Kennedy dismissed. *See Millard v. Rankin*, 265 F. Supp. 3d 1211, 1226-27 (D. Colo. 2017).

The combination of all ROSA provisions constructively shuns Petitioner from society. While seeking a normal life, Lackawanna's collective eye is fixed on her every move. ROSA allows the public to access boundless sums of her information by means of the online registry and special telephone service. J.A. at 42, 43. Petitioner's name, address, details of her offense, and "*any other information deemed pertinent*" is available to anyone. J.A. at 29 (emphasis added). Furthermore, Petitioner is subjected to strict conditions which limit her means of travel, access to information, as well as restrict where she can live and work. J.A. at 9.

Society has only one definition of a "sex offender," yet this term encompasses a wide array of offenses. Petitioner is not innocent, but her designation as a Level II Sex Offender equates her with sexually violent offenders and sexual predators. While none of these, the social ostracism and constructive banishment is hers to bear.

2. ROSA acts as an affirmative restraint on a registrant's livelihood.

Significant limits on one's freedom, even when serving parole, act as affirmative disabilities and restraints. *Snyder*, 834 F.3d at 703. The Sixth Circuit held that conditions on where registrants can "live, work, and loiter" are affirmative restraints. *Id*. Furthermore, *Snyder* recognized that requiring registrants to appear in-person has the same effect. *Id*. While these

limits on freedom are not on their face physical, "[cold irons] are always in the background," where the threat of parole revocation and imprisonment accompany failure to comply. *Id*.

Significant obligations and severe stigma additionally act as an affirmative disability on registrants. *Wallace*, 905 N.E.2d at 379. The Indiana Supreme Court in *Wallace* found long term registration, annual re-registration, and disclosure of information to be too burdensome to bear a "civil" label. *Id.* at 379, 380. Registrants are subjected to threats, limited employment, housing disadvantages, and other means of harassment. *Id.* at 380. The Act analyzed in *Smith* lacked restrictions on employment, housing, and one's presence in a statutorily defined area. *Smith*, 538 U.S. at 100. Today, presence requirements affirmatively restrain registrants in socially sanctioned ghettos and fundamentally disable their right to travel and post-release livelihood.

ROSA's special conditions impose multiple restrictions, shackling Petitioner to the confines of her residence and limiting access to employment. Facing the threat of imprisonment, Petitioner must put her safety as risk by traveling along a high-speed highway to satisfy the myriad of restrictions–the presence requirement, no use of a motor vehicle, and maintaining employment. J.A. at 15-16, 23. Despite living in a rural area, the presence requirement has restricted travel within her community. J.A. at 15. The disabling effect would only be heightened were she to move to an urban area. Furthermore, Petitioner must adhere to a state mandated schedule requiring personal appearance every three years. J.A. at 33. Updating information requires a fee, further disabling Petitioner from living despite strict regulation. J.A. at 34. These outrageous restrictions restrain a registrant from successful rehabilitation and reintegration.

3. ROSA furthers the traditional aims of punishment.

Even under the guise of a civil remedy, incapacitation for the purpose of deterrence and retribution amounts to punishment. *Snyder*, 834 F.3d at 704. A clear retributive aim is dispositive

of punishment. *Id.* Without further elucidation of the circumstances, a law is facially retributive when it is solely conviction-based, brands registrants, and stunts reintegration. *Id.*

Outside the scope of any reasonable non-punitive purpose, strict conviction-based registration and mass dissemination of information provide a retributive effect, which promotes societal condemnation. *See Wallace*, 905 N.E.2d at 381; *Doe v. State*, 189 P.3d 999, 1013 (Alaska 2008). The court in *Doe v. State* held a pure conviction-based registration scheme unconstitutional, as registration encompassed a "spectrum of crimes regardless of their inherent or comparative seriousness." 189 P.3d at 1013.

Likewise, ROSA implements a broad conviction-based registry, trumping any discretion given to the board to make an individualized assessment. J.A. at 37. Before ROSA was enacted, Petitioner, with advice of counsel, chose to forego trial without understanding the breadth of punishment to come. J.A. at 13. Petitioner's pre-sentencing report only recommended general conditions of parole. J.A. at 7. Because Parole is an extension of Petitioner's sentence, the conditions imposed aggravate this punishment for purposes of retribution and deterrence.

4. ROSA is excessive in relation to any non-punitive purpose.

Many courts have recognized that registration requirements, regular appearances, and restrictions on liberty are excessive. *See Snyder*, 834 F.3d at 705 (in-person appearance bears no relation to public safety); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (requirements last long beyond sentencing and completion of treatment); *State v. Letalien*, 985 A.2d 4, 23 (Me. 2009) (duration of requirements was excessive); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013) (public dissemination of information is excessive). Most notably, two sitting Justices agreed with these lower courts. *Smith v. Doe*, 538 U.S. 84, 116 (2003) (Ginsburg, J., dissenting). Justices Ginsburg and Breyer in the *Smith* dissent recognized how conviction-based

registration is excessive when it pays no relation to the goal of protecting the public. *Id.*

Most concerning, ROSA's restrictions carry well beyond Petitioner's actual sentence. The registration requirement is for life. J.A. at 35. The mandatory revocation of her driver's license will last ten years beyond her completed sentence. J.A. at 44. Additionally, special conditions restricting internet and travel will last for the remainder of her parole. J.A. at 45. The excessive impact of these conditions affects not only her but causes collateral damage to her family. J.A. 17. Specifically, her daughter cannot access to the internet for her school work and her husband has forgone internet-capable devices. *Id.*

ROSA is a criminal penalty in violation of the Ex Post Facto Clause. Conviction-based registries drape a lifelong cloak of judgment over the registrant, excessive in relation to any civil aim. The Court must recognize the detrimental effect of registries on successful reintegration.

CONCLUSION

The application of ROSA's special conditions infringes on fundamental constitutional liberties implicit in the First and Fourteenth Amendments, depriving Petitioner of due process. Furthermore, the retroactive application of ROSA is an ex post facto violation, imposing an additional criminal penalty that hinders Petitioner's rehabilitation and reintegration. The Court must reverse the lower courts' granting of summary judgment.

Respectfully Submitted,

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ATTORNEYS FOR PETITIONER