No. 19-01

SUPREME COURT OF THE UNITED STATES

Mary Guldoon, Minor,

Petitioner,

versus

State of Lackawanna Board of Parole,

Respondent.

BRIEF OF RESPONDENT

On Appeal from the United States Court of Appeals
for the Thirteenth Circuit
Hon. Thomas Franczyk

TEAM 5

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. The Thirteenth Circuit did not err in holding that registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act did not violate Petitioner's rights under the First and Fourteenth Amendment rights 4

A. The Petitioner's First Amendment rights are not violated because the special condition is narrowly tailored to serve the state's legitimate governmental interest 5

B. The Petitioner's fundamental right to travel under the Fourteenth Amendment has not been violated because her right to intrastate travel was not compromised by the special condition 10

1. The Petitioner's right to travel under the Fourteenth Amendment has not been violated because the law is rationally related to serve the state's legitimate interest 10

2. The Petitioner's substantive Due Process rights were no violated by revoking her driver's license because the law is rationally related to the state's legitimate purpose 12

II. This court should affirm the Thirteenth Circuits decision because the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act did not constitute violations of the Ex Post Facto Clause 14

A. Lackawanna's ROSA statute was formed to establish civil proceedings, not impose punitive measures and the Petitioner is unable to provide clear proof

to override legislative intent 15

B. The Mendoza-Martinez factors weigh against a finding of punitive effect, thus in favor of Lackawanna's ROSA statute. 18

1. The first factor, history of traditions of punishment weighs in favor of Respondent 19

2. The second factor, imposes affirmative disability or restraint, weighs in favor of Respondent 19

3. The third factor, promotes traditional aims of punishment, weighs in favor of Respondent 20

4. The fourth factor, statute's rational connection to nonpunitive purpose, which hold the most weight, favors the Respondent 21

5. The fifth factor, excessive with respect to this purpose, also weighs in favor of Respondent 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Allen v. Illinois,
478 U.S. 364 (1986) 15

Brewer v. Kimel,
256 F. 3d 222 (4th Cir. 2001) 12

Calder v. Bull,
3 U.S. 386 (1798). 15

De Veau v. Braisted,
363 U.S. 144 (1960) 19

Dobbert v. Florida,
432 U.S. 282 (1977) 14

Doe v. Miller,
405 F. 3d 700 (8th Cir. 2005). 10

Doe v. Pataki,
120 F.3d 1263 (2d Cir. 1997) 17, 19, 22

Doe v. Snyder,
101 F. Supp. 3d 722 (E.D. Mich. 2015). 18

Hudson v. United States,
522 U.S. 93 (1997) 12, 15

Kansas v. Hendricks,
521 U.S. 346 (1997) 15, 16, 17, 20, 21

Lescher v. Florida Department of Highway Safety & Motor Vehicles,
985 So. 2d 1078 (Fla. 2008) 12

Lindsey v. Washington,
301 U.S. 319 (1937) 14

McKune v. *Lile*,

536 U.S. 24 (2002) 16

Morrissey v. Brewer,

408 U.S. 471(1972) 4, 12, 13

Muhammad v. Evans,
No. 11 CV 2113 (CM), 2014 U.S. Dist.

LEXIS 119704 (S.D.N.Y. Aug. 15, 2014) 13

Packingham v. North Carolina,
137 S. Ct. 1730 (2017) 7, 8, 9

Reno v. Flores,
507 U.S. 292 (1993) 12

Saenz v. Roe,
526 U.S. 489 (1999) 10, 12

Smith v. Doe,
538 U.S. 84 (2003). 15, 16, 17, 18, 19, 20, 21

Turner v. Safley,
482 U.S. 78 (1987). 13

U.S. v. Kebodeaux,
570 U.S. 387 (2013) 16, 21

U.S. v. One Assortment of 89 Firearms
465 U.S. 354 (1984) 17

U.S. v. Ursery,
518 U.S. 267 (1996) 15, 21

Ward v. Rock Against Racism,
149 U.S. 781 (1989) 5, 6, 18

Constitutional Provisions

U.S. Const. Amend. I. 1

U.S. Const. Amend. XIV 1

U.S. Const. Art. 1 § 10 1

Statutes

ROSA § 1 6

ROSA § 2 6

STATEMENT OF THE ISSUES

1. Whether the Thirteenth Circuit erred in holding that registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act did not violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the Thirteenth Circuit erred in holding that registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act imposed on Petitioner did not constitute violations of the Ex Post Facto Clause of the United States Constitution.

STATEMENT OF THE CASE

Mary Guldoon (hereinafter "Petitioner") is a convicted Level II sex offender based on the crimes that she pleaded guilty to on January 1, 2017. (R at 10, 14). The Petitioner was a teacher at Old Cheektowaga High School, where she taught Introductory Advanced Computer Science. R. at 11. The Petitioner engaged contact with the victim through her role as a teacher and sexually abused one of her own students, B.B. (R. at 5). B.B. is a troubled fifteen year old victim who's vulnerabilities due to struggles at home led him to turn to the Petitioner for help. (R. at 5). Instead of help, the Petitioner used her position of authority and B.B's vulnerabilities to prey on her victim. (R. at 6). The Petitioner manipulated B.B.'s emotions to make him believe that she loved him and cared for him. (R. at 6).

Beginning October 2010, the Petitioner sexually abused B.B. in her classroom, car, and home. (R. at 5). In order to further the abuse, Petitioner communicated with the victim by school email service and through text messages to arrange meetings at the school and after school. (R. at

6). Additionally, Petitioner used these communication platforms to send messages to B.B. about meeting up or that she "missed him". (R. at 6). B.B. stated that she never sent nude photographs to him, but admitted that he had sent photographs to her. (R. at 6). Petitioner would use her personal vehicle to transport B.B. to her home on at least three occasions. (R. at 6).

Petitioner encouraged and facilitated the sexual relationship through manipulating a vulnerable victim into thinking that this was normal and ok, which now has caused profound effects on the victim. (R. at 6). According to B.B., Petitioner engaged in sexual conduct with him at least 30 times. (R. at 7). B.B. now resides in a residential facility for counseling because of the impact on his mental health that the sexual abuse caused. (R. at 6). B.B. now struggles with "trusting adults" because he truly believed that the Petitioner "loved him" and in turn has not been able to form any relationships with peers of his own age. (R. at 6).

The Petitioner was arrested and plead guilty to one count each of rape in the third degree, a criminal sexual act in the third degree, and sexual misconduct. (R. at 2). At sentencing, it was recommended the Petitioner served a period of incarceration of ten to twenty years, followed by a period of probation of at least ten years. (R. at 2). Further, it was recommended that Petitioner receives eligibility for parole after a period of ten years in prison. (R. at 2). In regards to parole, the pre-sentence report recommended that general conditions would be appropriate. (R. at 7).

Petitioner was sentenced in 2011 and remained incarcerated until 2017 at Tonawanda State Correctional Facility, a total of six years. (R. at 2). In 2016, during Petitioner's incarceration, the Governor signed into law the Registration of Sex Offender Act (hereinafter, "ROSA"). (R. at 2). ROSA imposed requirements and conditions on parolees with certain offenses. (R. at 2). These certain offense were targeted at "sex crimes". (R. at 2). Among the new registration requirements, special conditions include restrictions of internet use which ban the

access to “any commercial social networking site”. (R. at 3). The new travel regulations restrict travel within 1000 feet of a school and revoking of offender’s driver’s license. (R. at 2). Upon release, on January 1, 2017, Petitioner showed no objection and signed the Lackawanna Board of Parole General and Special Conditions of Parole which included a clause that states Petitioner “will obey such special additional written conditions as he/she, a member of the Board of Parole, or an authorized representative of the Division of Sex Offenders may impose”. (R. at 10).

Petitioner alleges the new regulations inhibit her ability to search for employment and that she is a prisoner in her own home because of the travel restrictions. (R. at 2). Petitioner claims that the internet restrictions create a burden on her family’s life and activities. (R. at 17). Further, Petitioner claims that her commute to and from work is dangerous due to her lack of a vehicle and the ban around traveling within 1000 feet of a school. (R. at 14).

SUMMARY OF THE ARGUMENT

Respondent respectfully requests this Court to issue a holding in favor of the Lackawanna Parole Board based on the following reasons. First, the Petitioner’s First Amendment rights to freedom of speech were not violated because the special conditions set forth under ROSA is narrowly tailored to serve the State’s legitimate governmental interest of safety to the public and children. Further, The Petitioner is not banned entirely from internet access or from other ways of accessing information, such as the newspaper and television.

Second, the Petitioner’s rights under the Fourteenth Amendment were not violated based under the fundamental right to travel because the special condition was rationally related to serve the State’s legitimate interest. Further, under the special condition of the revocation of her driver’s license, the Petitioner’s right to substantive due process was not violated because the

condition is rationally related to serve the state's legitimate interest of ensuring the safety of the children of Lackawanna based on her previous offenses.

Lastly, the ROSA statute did not violate the Ex Post Facto Clause of the Constitution because the statute was not intended as punitive measures and Petitioner did not provide clear proof to override the legislative intent.

ARGUMENT

I. The Thirteenth Circuit did not err in holding that registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act did not violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

The First Amendment to the Constitution grants the freedom of speech to all citizens of the United States. U.S. Const. Amend. I. The Fourteenth Amendment grants the power that no state shall deprive any person of life, liberty or property, without due process of law. U.S. Const. Amend. XIV. These rights are granted to every citizen of the United States. However, when a citizen is convicted of a crime, some of these rights can be restricted. Once someone begins serving a sentence, they are imprisoned and those rights which they once had, are not the same. *Morrissey v. Brewer,* 408 U.S. 471, 474 (1972).

In regards to the First Amendment, there was no violation of the Petitioner's freedom of speech rights under the condition of banning access to "any commercial social networking site", pornographic material, communication with individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, or communicate with a person under the age of eighteen. As to the Fourteenth Amendment, there was no violation of her right to travel under the conditions of (a) the restriction on traveling within 1000 ft. of a school and no contact with minors, and (b) the revocation of her driver's license.

A. The Petitioner's First Amendment rights are not violated because the special condition is narrowly tailored to serve the State's legitimate governmental interest of safety to the public and children.

The Petitioner's First Amendment rights were not violated because the special condition of parole is narrowly tailored to serve the State's legitimate governmental interest. The law is narrowly tailored to restrict the place in which Petitioner speaks and not the speech itself. When deciding how to test the regulation, the Supreme Court has held that there are two types of restrictions on speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

The two types of regulation are content neutral speech, where the government is seeking to not control what is being said, and content based speech, where the government is seeking to control what you are saying, especially political in nature. *Id.* Content based restrictions with are analyzed under the highest test at strict scrutiny, while content neutral is tested under intermediate scrutiny. *Id.* A statute survives intermediate scrutiny if it is narrowly tailored to serve the State's legitimate governmental interest. *Id*. Since the Lackawanna Parole Board is attempting to only regulate where the Petitioner speaks, the internet, the analysis falls under a content-neutral analysis and intermediate scrutiny.

In *Ward,* a regulation on noise levels in an amphitheater sparked outrage alleging that the city was attempting to control the expression of what the band was performing. *Id.* at 784. However, the city was attempting to regulate the noise levels in order to protect the residents of the city from unwelcome noise. *Id.* Again, the Court held the test for content neutral is intermediate scrutiny and applied it to the facts. *Id.* The Court ruled that the regulation was valid and constitutional because the city has a legitimate interest in keeping unwelcome noise from their residents and the ordinance was narrowly tailored for that purpose. *Id.* at 803. Further, the

Court acknowledged that the City was not attempting to regulate speech, but the place in which speech was occurring. *Id.*

Similar to *Ward*, the current case creates a regulation that the Petitioner may not access through the internet any pornographic material, communicate with individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, or communicate with a person under the age of eighteen, and "any commercial social networking site". (R. at 9). A "commercial social networking site" is defined as "any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose 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.

As set forth in *Ward,* the regulation of a forum and not the content of speech, is content neutral, as the Parole Board is not trying to regulate what the petitioner says, but where Petitioner is saying it. Under the application of intermediate scrutiny, the special condition in ROSA is narrowly tailored to support the legitimate governmental interest. The special condition is narrowly tailored because it only prohibits access to certain sites and it states unambiguously what those sites are. (R. at 3). It also supports the city's legitimate governmental interest of combating recidivism and protection of minors. (R. at 19). At this time in our society, minors have increased access to the internet and social media websites. This new condition is tailored to protect those minors from sex offenders who are attempting to offend again. Children cannot be monitored or watched at all times and the internet is an open realm of freedom for them. Even

though this special condition does not directly relate to Petitioner's offenses, at the time of the offense, the Petitioner had access to minors in her classroom. Now, if Petitioner were to reoffend she would have to look elsewhere for her next victim, potentially including the internet, especially social media sites.

Further, in *Packingham,* a registered sex offender violated a North Carolina statute that banned all registered sex offenders from the use of "commercial social networking sites". *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017). The statute made it a felony "to access a commercial social networking website, where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages. *Id.* The original purpose of the statute was to protect minors from sexual abuse of these offenders. *Id.* at 1735. In *Packingham,* a registered sex offender logged onto Facebook.com and posted a status about a resolved driving ticket, violating the statute. *Id.* at 1732. After the violation of the statute, the offender then claimed this restriction of commercial social networking sites, was a violation of his First Amendment rights to freedom of speech. *Id*. Since the State was not trying to regulate speech, but a forum, the analysis is under content neutral and therefore the test of intermediate scrutiny. *Id.* However, the court held that the statute was not narrowly tailored to serve the State's interest of protecting minors and its restriction on speech was a greater burden. *Id.* at 1737. This burden weighed heavily on these offender's access to current events, discussion, and employment ads. *Id.*

While *Packingham*, is similar to this case because of the ban of "commercial social networking sites", it is also different for three important reasons. The first reason is that the Lackawanna Parole Board special condition is narrowly tailored to serve the State's legitimate interest of preventing recidivism, protecting the public, and protecting the children of

Lackawanna from these offenders because it only applies to certain offenders at specific levels.(R. at 19). The condition in Lackawanna is not a blanket restriction to all sex offenders, but those that are Level II or III sex offenders. (R. at 26). The Parole Board has narrowly conformed the law to only pertain to the most violent offenders, unlike the *Packingham* statute. As previously stated, the petitioner is a convicted Level II sex offender under Lackawanna law and in line with her offenses (R. at 14). One of the main goals of the Lackawanna Parole board is to decrease recidivism. (R. at 19). Since the internet has taken off, more and more children are accessing it every day and that creates the perfect breeding ground for a sex offender to offend again. The Lackawanna Parole Board is using the necessary power to ensure that the city's children are safe from these offenders.

Second, *Packingham*, did not begin to look at technological advances that the Lackawanna Parole Board has. (R. at 19). As set forth in the Registration of Sex Offenders Act (ROSA), technological advances have increased the risk to minors who now may have access to these social networking websites. (R. at 20). Even within the last two years with the increase of technology, it is imperative Lackawanna must stay vigilant and adjust their statutes to keep with the societal pace of these offenders. (R. at 20). The Parole Board has set forth clear reasoning for the special condition and proven that it conforms to today's society. (R. at 20). If offenders begin using the internet to attack these minors, then special conditions will have to adjust with that and Lackawanna has begun being proactive instead of retroactive. Lackawanna has narrowly tailored this special condition to serve their legitimate interest in recidivism and more importantly keeping their city, especially young children, safe one on of the most easily accessible communication platforms.

Finally, in *Packingham* the Court references that the ban would cut these offenders off to socialization, current events, and employment opportunities. However, that is not the case. The Petitioner is not banned from other websites or access to the internet entirely. (R. at 9). She is banned from certain pornographic material, communication for sexual relations with those under eighteen, and "commercial social networking sites.". This allows the Petitioner to gain access to wifi, the internet, and other websites that allow for only those of eighteen years or older to access them. These sites could be used to retrieve the news or employment opportunities. Additionally, the Petitioner retains access to the newspaper and the television, both places where she could receive current events and find employment opportunities. The Petitioner also claims that her family has lost access to the computer and wifi because of this special condition. (R. at 16). This is untrue because the condition does not ban internet access or the access to wifi. (R. at 9). This special condition only applies to the Petitioner and her access to the internet, not her family. No one in her family must abide by this condition or lose access to the internet. The Petitioner is still afforded access to the internet, she just has restrictions on sites she can visit.

Accordingly, the special conditions of ROSA regarding pornographic material, communicate with individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, or communicate with a person under the age of eighteen, and "any commercial social networking site do not violate the Petitioner's rights under the First Amendment to speech because Petitioner may still access the internet and can use other alternatives to seek employment.

B. The Petitioner's fundamental right to travel under the Fourteenth Amendment has not been violated because her right to intrastate travel was not compromised by the special condition.

The Constitution awards citizens rights and privileges, and while it is not mentioned explicitly, the Constitution awards citizens the right to interstate and intrastate travel. *Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 1523 (1999). However, in this case we focus on intrastate travel, which is the freedom to move within your State. *Id.* The more specific right of intrastate travel has not been fully recognized under the Constitution as a fundamental right. *Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005). Therefore, we must use a rational basis test analysis when dealing with constitutionality. *Id.*

1. The Petitioner's right to travel under the Fourteenth Amendment was not violated because the law was rationally related to serve the state's legitimate interest.

The special condition banning the Petitioner to not travel within 1000 feet of school is no violation of her right to travel, specifically her rights to intrastate travel under the Fourteenth Amendment. Even if this condition were to infringe upon her rights to intrastate travel, this condition is rationally related to the state's legitimate interest of recidivism and the safety of the city's children. (R. at 19).

While the right to travel is recognized under the Constitution as being a fundamental right, the more specific right of intrastate travel has not been. *Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005). It is understood that all citizens possess the fundamental right to peacefully dwell within the limits of their respective states and to move at will from place to place therein. *Id.* In *Doe,* a number of convicted sex offenders filed suit, claiming that a restriction on their residence was a violation of their right to travel under the Fourteenth Amendment. *Id.* at 705. The residency restriction read: " those who have been convicted of certain criminal offenses

against a minor, including numerous sexual offenses involving a minor, shall not reside within 2,000 feet of a school or registered child care facility." *Id.* The offenders claimed this regulation infringed upon their right to travel within the state that they resided because they had to avoid these schools and facilities and could not reside in certain areas. *Id.* at 712.

The court held that this regulation was constitutional because it was a proper execution of the state's police powers that was so related to the protection, health, and safety of the citizens. *Id.* at 711. The court found that this regulation was not subject to strict scrutiny and instead followed other courts' holdings to apply the rational basis test. Numerous courts have held that this regulation is rationally related to serve the State's legitimate interest of keeping the citizens protected, healthy, and safe. *Id.*

Similar to *Doe,* the special condition that requires the Petitioner to refrain from travel within 1,000 feet of schools and restricts contacting any minors serves a legitimate state interest to protect it's public and children. (R. at 19). Based on her previous offenses, there is a direct connection to this restriction on travel and the special condition contains a clear purpose that it is rationally related to serve the State's legitimate interest. The petitioner's offenses occurred for the most part on school grounds. (R. at 5.) If the petitioner were to offend again, she would most likely offend in her comfort zone of the school. The petitioner sexually abused a child at the school where she worked and she should not be allowed to enter upon school grounds for the safety of other children. (R. at 5, 19). This special condition speaks directly to the safety of the children and it speaks to the recidivism of the offender. (R. at 19).

Further, The Petitioner asserts that her right to travel is debilitated because she has to take a route that extends twenty miles, instead of only traveling three miles to her job. (R. at 16). While this may be an inconvenience for the Petitioner, being on parole does not mean you are

free from regulation. *Morrissey v. Brewer,* 92 S. Ct. 2593 (1972). This condition might be not the route Petitioner wishes to take nor the easiest, but it does not restrict her travel and it does not make her a "prisoner in her own home". (R. at 3). The Petitioner is still able to move throughout the State freely and she has freedom to reside wherever she chooses. Based on the special condition and the Petitioner's offenses, the Petitioner's rights are not infringed upon under the right to travel.

Accordingly, the special condition that prohibits travel within 1000 feet of schools does not violate Petitioner's Fourteenth Amendment rights to intrastate travel, because the condition is rationally related to serve a legitimate state purpose of recidivism and the safety of children.

2. The Petitioner's Substantive Due Process rights under the Fourteenth Amendment were not violated when the special condition revoked her driver's license because the law is rationally related to the state's legitimate purpose.

A violation of a person's substantive due process rights must show that the government infringed upon a certain "fundamental" liberty. This infringement is a violation of due process unless it was used to serve a compelling state interest. *Reno v. Flores,* 507 U.S. 292, 302 (1993). In the event of such an infringement, the law must be so narrowly tailored that it furthers a compelling governmental interest. *Saenz* at 1528. However, a number of courts have ruled that possessing a driver's license is not a fundamental right under the United States Constitution. *Lescher v. Fla. Dep't of Highway Safety & Motor Vehicles*, 985 So. 2d 1078,1083 (Fla. 2008) Courts believe that possessing a driver's license is a privilege and privileges may be removed easier than a right. *Id.* (See also *Brewer v. Kimel*, 256 F.3d 222 (4th Cir. 2001); *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488 (1997). When looking at privileges, the scrutiny level will be lowered to a rational basis test, only needing to show that the statute rationally relates to a

legitimate state interest. *Muhammad v. Evans,* No. 11 CV 2113 (CM), 2014 U.S. Dist. LEXIS 119704 (S.D.N.Y. Aug. 15, 2014).

While citizens are afforded these fundamental rights, the government has a specific interest in a parolee and their conditional release. *Id.* More specifically, "the Government retains a substantial interest in insuring that its rehabilitative goal is not frustrated and that the public is protected from further criminal acts by the parolee." *Id.* In *Muhammad,* an individual released on parole had a special condition stating he must inform his parole officer of "intimate relationships" and receive prior consent "before residing with an intimate partner". *Id.* at 6. The defendant had been previously convicted of domestic violence and assault. *Id.* at 23. The individual claimed that this special condition was a violation of his rights to marry under his fundamental rights. *Id.* at 8.

Even though the right to marry is a fundamental right, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 20. (See *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254 (1987). Again, while this individual is no longer in prison, parole is to be viewed as a variation of incarceration and individual's rights may be restricted. *Id.* at 22. (See *Morrissey v. Brewer,* 408 U.S. 471, 92 S. Ct. 2593 (1972)) In the end, the Court found that these restrictions reasonably relate to the overall governmental interest of protecting the public from the future criminal acts of the parolee under the rational basis test. *Id.*

Similar to *Muhammad*, the Petitioner has been convicted and is serving time as a Level II Sex offender. The compelling interest of revoking the Petitioner's license is to keep the public and the children of Lackawanna safe. (R. at 19). By the Substantive due process standard of infringing upon rights this compelling interest relates directly to the Petitioner's offense because

she had sexual relations with a student, a minor in her class.(R. at 5). The minor B.B. engaged in these relations at school and at Mrs. the Petitioner's home. (R. at 7). In order to get B.B. to her home, she would drive him in her vehicle. (R. at 7). By revoking her license under her parole conditions, the Lackawanna Parole Board is implementing proactive regulations directly in line with her previous offenses. While the Parole Board cannot fully ensure that taking away her license will stop her from abusing minors, it allows them to eliminate one aspect of her previous offense. The Petitioner will not be able to transport minors by car to and from places where abuse could take place. While there are other ways of travel such as a bicycle, like she utilizes now or public transportation. (R. at 16). Further, the Petitioner is not restricted from riding in a car, she just cannot operate one. Thus, her range of mobility is not restricted to any degree. The petitioner may still utilize transportation and she may travel by car, so long as she does not operate it.

Accordingly, the regulation in ROSA revoking the driver's license does not violate the Petitioner's Fourteenth Amendment rights because the revocation is rationally related to the state's legitimate purpose.

II. The Thirteenth Circuit did not err in holding that registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act did not constitute violations of the Ex Post Facto Clause of the United States Constitution.

The Ex Post Facto Clause prohibits states from passing any law which applies ex post facto. US Const. Art. 1 SECTION 10. The Framers of the Constitution included this clause to assure that citizens have fair warning of the effect of legislative acts. *Dobbert v. Florida*, 432 U.S. 282, 298 (1977). Essentially, it prevents laws which impose punishment after the crime was committed or imposes additional punishment after. *Lindsey v. Washington*, 301 U.S. 319, 319 (1937). If a law is not punitive in nature it can be applied to people retroactively. *Calder v. Bull*,

3 U.S. 386, 400 (1798). The purpose of the Ex Post Facto clause is to prevent retroactive punishment. *Id.*

The Court uses two different approaches to analyze whether a statute violates the Ex Post Facto Clause. First, the Court must decide whether the legislature intended that statute to establish "civil" proceedings, which includes looking at the statute itself and it's effects. *Smith v. Doe*, 538 U.S. 84, 92 (2003). Second, the Court uses the Mendoza-Martinez factors. These factors are not determinative, but instead used as guideposts. *Id*. The factors include whether, in its necessary operation, the regulatory scheme: (1) has been regarded in history and tradition 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. *Id*.

A. Lackawanna's ROSA statute was formed to establish civil proceedings, not impose punishment and the Petitioner is unable to provide clear proof to override legislative intent.

In order to analyze whether a statute was formed to establish civil proceedings, the Court looks to the legislative intent. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). To determine if the legislative intent is civil or criminal, the Court presents it as a question of statutory construction. *Allen v. Illinois*, 478 U.S. 364, 368 (1986). If the intention is proven to be punitive, then that statute is deemed to violate the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84, 92 (2003). The Court explains since deferring to the legislature's intent, only the clearest proof will override the legislative intent to deem a civil remedy statute into a criminal penalty. *Hudson v. United States*, 522 U.S. 93, 100 (1997) (see also *United States v. Ursery*, 518 U.S. 267, 290 (1996)).

"Sex offenders are a serious threat in this Nation," *McKune* v. *Lile*, 536 U.S. 24, 32 (2002) (opinion of Kennedy, J.), and pose significant "public safety concerns," *United States* v. *Kebodeaux*, 570 U.S. 387, 389 (2013). Congress has enacted multiple laws to encourage and assist States in tracking where sex offenders live, work, and study, and in making that information available to the public. *Smith* v. *Doe*, 538 U.S. 84, 99 (2003).

In *Smith v. Doe*, multiple sex offenders brought a claim alleging the Alaska Sex Offender Registration Act violated the Ex Post Facto Clause. *Smith* at 84. The sex offenders were convicted and sentenced for their crimes prior to the enactment of the statute. *Id* at 85. The Court turned to the statute's text in the objective section which detailed the primary governmental interest was to assist in protecting the public safety. *Smith* at 93. It has historically been held that placing restrictive measures on sex offenders is a legitimate nonpunitive objective and the Court held nothing on the face of the statute suggests any legislative intent other than a civil scheme designed to protect the public. *Hendricks* at 363. Further, the Court cited multiple cases as precedent and concluded that even if the objective of the statute is consistent with the purposes of the criminal justice system, the state's pursuit of it in a regulatory scheme does not make the objective punitive. *Smith* at 94.

Similarly, the legislative intent behind Lackawanna's ROSA statue is a civil scheme, and nonpunitive in nature. ROSA § 1 states "the purpose of this Act is to protect the public from the dangers posed by sexual offenders and those convicted of sexual offenses". (R. at 27). It is clear by the statutory text that the intent of the legislature is to protect the public, which is a legitimate government interest. Thus, only the clearest proof will deem ROSA a violation of the Ex Post Facto Clause.

Further, the Court in *Smith* looked at the location of the statute because the manner of its codification or enforcement can be probative of the legislature's intent. U.S. v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984). The statute was codified in the state's "Health, Safety, and Housing Code" but the registration provisions are codified in the state's criminal procedure code. *Smith* at 94. The location and labels of a statutory provision are not dispositive and the Court held that it was not sufficient to conclude that the legislative intent was punitive. *Id* at 95.

Respondent will argue that Lackawanna's ROSA statute is codified in the "Public Law" and "Corrections Law" is conclusive of punitive intent. (R. at 19, 27). But in *Doe v. Pataki,* the location of New York sex offender statute in "Corrections Law" volume of the state code did not suggest that the legislature sought to impute punishment but instead prevent any future harms that they might cause. *Doe v. Pataki,* 120 F.3d 1263, 1277-78 (2d Cir. 1997). Similarly, the location of ROSA is not conclusive of the legislative intent.

The Court has held that the party alleging the challenge must provide the "clearest proof" to override the legislature's expressed intent. *Hendricks* at 361. Under the "clearest proof" standard the Court expressed it will only exists in "limited circumstances" and it is a "heavy burden" to overcome. *Id*. The heavy deference given to the legislature is in part due to the hazards of attempting to discern a legislature's true motive other than through the express words of the statute. *Id.*

In *Peugh v. United States*, the plaintiff was convicted of bank fraud in 2000. *Peugh v. United States*, 569 U.S. 530, 533 (2013). In 2009, new guidelines from the United States Sentencing Commission released a new calculation for sentencing time for bank fraud convictions. *Id* at 534. Peugh provided the Court with empirical evidence which demonstrated

that sentencing guidelines have the intended effect of influencing the sentences imposed by judges. *Id* at 543. Since the length in time of sentencing was greatly increased by the new sentencing guidelines, the Court held that this was a clear violation of the Ex Post Facto Clause because it directly increased the punishment for the crime. *Id* at 550-51.

In *Doe v. Snyder*, the parties submitted evidence to the court which included a study that showed that registrants who have not re-offended in twenty-five years are less likely to commit a sex offense than person who was arrested for non-sex offenses. *Doe v. Snyder*, 101 F. Supp. 3d 722, 727 (E.D. Mich. 2015). Although the study was attacked by the opposing side, the Court also looked at expert testimony in analyzing the facts.

Here, Petitioner has not provided the Court with any substantial evidence other than her own testimony. Petitioner has not provided any evidence to strengthen her allegations of restraint from ROSA. Accordingly, Petitioner has not overcome the clearest proof burden to show the legislative intent was anything other than civil, thus ROSA does not violate the Ex post Facto Clause.

B. The Mendoza-Martinez factors weigh against finding a punitive effect, thus in favor of Lackawanna's ROSA statue.

The Mendoza-Martinez factors are used as "guideposts" to address whether a law is punishment. *Smith* at 99.These factors are neither "exhaustive nor dispositive" and are meant for guidance only. *Ward* at 249. The Court has used the "intent-effects" test and looks to the Mendoza-Martinez factors under the "effects" prong of the test. *Mendoza* at 168-69.Thus, the legislative intent is one of the factors under the test. The fourth factor, the nonpunitive purpose connected to the act is considered the "most significant factor". *See Femedeer*, 227 F.3d at 1253; *Cutshall*, 193 F.3d at 476; *Russell*, 124 F.3d at 1089; *E.B.*, 119 F.3d at 1097.

1. The first factor, history or traditions of punishment, weights in favor of Respondent.

The first factor, looking at the history or traditions of punishment, is important to examine because it indicates whether the public will recognize it as punishment. In *Smith*, the Court recognizes that sex offender registration and notification statutes are recent in origin. *Smith* at 98. The sex offenders in that case drew a comparison of the registry to colonial punishment of public humiliation. *Id*. The Court rejected that argument and reasoned that the public shaming and humiliation involved much more than dissemination of information, it involved whipping, pillory, and branding. *Id* at 99. Though sex offender registries are fairly recent, the courts have held that registration is typically and historically a regulatory measure. *Doe v. Pataki* at 1285. Thus, even though sex offender registries and regulations are fairly recent in origin, there is precedent that concludes it is a regulatory measure, not punitive.

Similar to *Smith*, Lackawanna's ROSA statute, which encompasses sex offender registration and restrictions, is fairly recent in origin. ROSA involves the restriction of social media sites, which are new, and thus does not involve a traditional means of punishment. Additionally, the internet in general is fairly recent and the restriction of it is not comparable to any historic punitive means, thus the integral part of the objective of ROSA, to protect the public, is not punitive.

2. The Second Factor, imposes affirmative disability or restraint, weighs in favor of Respondent.

The second factor, imposes affirmative disability or restraint examines how the statute effects the sex offenders. The Court has held if the disability or restrain is minor and indirect, its effects are unlikely to be punitive. *Smith* at 99. Additionally, the Court has held that sanction of occupational debarment are not punitive. *Id*. See also *De Veau v. Braisted*, 363 U.S. 144 (1960).

Further, in *Hendricks*, the Court even reasoned that civil commitment, which involves confinement, did involve affirmative restraint but held that the restraint was outweighed by the legislature's nonpunitive purpose. *Hendricks* at 363.

Here, Petitioner is restricted from communicating with minors and cannot enter within 1000 feet of a school. Since Petitioner was a teacher, she alleges that this is an unconstitutional restraint. But, this is similar to an occupational debarment, which the court has held as nonpunitive. Further, the Petitioner is free to move or obtain a job in another field. Petitioner was in a position of authority, one who is supposed to protect children as a teacher, not abuse them, which further substantiates that the restrictions is made for protection, not punishment.

The physical restriction to not travel within 1000 feet of any school does not prohibit her movement entirely. Petitioner complains that these restrictions make her a prisoner in her own home, but there is no evidence that she is unable to relocate to a different house that would be more convenient. Petitioner is free to go to the mall, grocery shop, seek employment elsewhere. Further, these are restrictions all serve the overarching purpose of ROSA, to protect the public. Thus, similar to *Hendricks*, the restraint is outweighed by the legislature's nonpunitive purpose.

3. The Third factor, promotes traditional aims of punishment, weighs in favor of Respondents.

Third factor, promotes traditional aims of punishment, looks to the retribution and deterrence of the statute. *Mendoza* at 168-69. But, as reasoned in *Smith*, the Court concluded that even if a statute may deter future crime as an unintentional side effect, it does not make the legislative intent punitive. *Smith* at 102.

The goal of ROSA is to protect the public and prevent recidivism. These goals are described as civil and regulatory, even though they may deter future crime as an unintentional side effect. Any number of governmental programs might deter crime without imposing

punishment. The Court held that the "mere presence of a deterrent purpose renders such sanctions criminal would severely undermine the Government's ability to engage in effective regulation". *Smith* at 102.

4. The Fourth Factor, statute's rational connection to nonpunitive purpose, weighs in favor of Respondents.

The fourth factor, the statute's rational connection to nonpunitive purpose, is the most important factor in determining whether the statute's effects are punitive. *United States v. Ursery*, 518 U.S. 267, 290 (1996). Though the factors are not exhaustive or dispositive, this factor carries the most weight.

In *Hendricks*, the civil commitment of sexually violent predators was held to not violate the ex post facto clause. *Hendricks* at 361. Even though civil commitment involved physical confinement exceeding original sentencing times, the Court held that the civil commitments rational connection to the nonpunitive purpose was evident. *Id*. The Court reasoned that nothing on the face of the statute suggested that the legislature designed anything other than a scheme to protect the public. *Id* at 362.

Lackawanna's ROSA statute details the purpose is to protect the public. (R. at 21). This is a legitimate governmental purpose that is rationally related to the statute. Further, all 50 states have used their police powers to enact sex offender registration laws. *U.S. v. Kebodeaux*, 570 U.S. 387, 420 (2013). Additionally, Lackawanna states that the danger of recidivism is a paramount concern and interest to the legislature to protect vulnerable populations and the public from harm. (R. at 20). Lackawanna relies on results from an investigation the Attorney General worked on which targeted strengthening security on social networking sites to protect children from sexual predators. (R. at 20).

Further, Lackawanna recognizes the importance of internet in today's society for employment purposes, thus any measure that restricts the use of the internet must be tailored specifically to target the type of offenses committed on the internet. (R. at 21). This furthers the argument that Lackawanna's ROSA statute is rationally connected to a nonpunitive purpose because the intent it to protect the public and it is narrowly tailored to specific offenses rather than a blanket restriction.

5. The Fifth factor, excessive with respect to this purpose, weighs in favor of Respondent.

The fifth factor, excessive with respect to this purpose, weighs in favor for the Parole Board. In *Pataki*, the court stated that the legislature is not required to act with "perfect precision" and if legislation "decides to cast a net wider than what might be absolutely necessary" it does not transform an otherwise regulatory measure into a punitive sanction. *Pataki* at 1282-83.

While ROSA implements certain restrictions, they are not excessive in terms of the purpose. The purpose is to protect the public, which is within the state's police powers and a legitimate purpose. Since the statute is rationally related to the purpose, it is not excessive in nature since it passes the rational basis test.

Since the Mendoza-Martinez factors are only meant to be guideposts, the conclusive analysis is the legislative intent. However, both the legislative intent and all the Mendoza-Martinez factors display that ROSA is a civil nonpunitive scheme. The Petitioners allegations fail under both tests, thus ROSA does not violate the Ex Post Facto Clause.

CONCLUSION

For these reasons, the Court should affirm the Thirteenth Circuit's decision that Petitioner's First and Fourteenth Amendment rights were not violated and ROSA does not constitute a violation of the Ex Post Facto Clause.

Respectfully Submitted,

Team 5

Attorney for Respondent