No. 19-01

IN THE

Supreme Court of the United States

MARY GULDOON

Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Thirteen Circuit

BRIEF FOR PETITIONER

TEAM 8

QUESTIONS PRESENTED

I. Whether the requirements of the Registration of Sex Offender's Act, which substantially burden Mary Guldoon's fundamental rights to travel and free speech and deter her rehabilitation, violate the First and Fourteenth Amendments to the U.S. Constitution.

II. Whether the registration requirements and special conditions of parole outlined in the Registration of Sex Offender's Act and imposed on Mary Guldoon violate the ex post facto clause when that statute was enacted after she had pled guilty to her crime, when the statute increases the punishment for her crime, and when the legislative intent illustrates that the statute was meant to increase the punishment for the crime.

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STATEMENT OF FACTS

On January 1, 2017, Mary Guldoon woke up knowing that she would be able to hug her daughter. For most of her daughter's life, the pair had only been able to speak through plexiglass. However, on that day, everything was about to change: she was going home. (J. App. at 10)

For the past six years, Mary had been making amends for her previous mistakes. In 2010, following the birth of her daughter, she suffered from severe postpartum depression for which she has prescribed Prozac. Unfortunately, this prescription triggered her underlying manic depression causing her to experience expansive emotion, marked by inappropriate behavior. It was during this mania when she made a series of terrible decisions, including engaging in an inappropriate relationship with her student. (J. App. at 13)

After this period of mania had ended and the depression had begun anew, Mary realized the gravity of her actions and took full responsibility for her crimes to spare her family and the student the pain of trial. On January 1, 2011, Mary pled guilty to her offenses and provided information to investigators which allowed for speedy sentencing. (J. App. at 5, 13)

On January 31, 2011, the Board of Parole ("the Board") submitted a report indicating that Mary had been cooperative. This coupled with her lack of criminal history and social indicators led the Board to recommend she receive only the general conditions of parole upon her release. (J. App. at 5-7) In 2011, the general conditions of parole required her to make regular reports to her parole officer, comply with law enforcement, avoid people with criminal records, and not possess a firearm. (J. App. at 8-10) In light of these recommendations, Mary was sentenced to an indeterminate sentence of 10-20 years. (J. App. at 5.)

While serving her sentence, Mary received the medical attention that she needed and was formally diagnosed with Manic Depression. Moreover, her treating psychiatrist determined that the Prozac she had been prescribed had triggered her manic episode and that the crimes for which

Mary pled guilty were all the result of that episode. Since her new diagnosis and treatment, Mary has not suffered any further episodes. (J. App. at 13-14)

Once her mental health was under control, Mary was able to begin her rehabilitation. First, while incarcerated, Mary was able to take several graduate courses and earn a Master's Degree in Computer Programming through an online program. Additionally, she was able to build a relationship with her young daughter. (J. App. at 13-14) After six years of rebuilding her life, Mary was considered for parole. At her parole hearing, the Board acknowledged Mary's rehabilitation over the last six years and gave her five years of parole. (J. App. at 10, 14)

As to the conditions of her parole, the Board applied both the general conditions, as well as the newly enacted special conditions from the Registration of Sex Offenders Act ("ROSA"). (J. App. at 8-7, 19-20) These conditions, which became effective as of January 21, 2015, included: (1) Level II sex offender registration; (2) prohibition on entering within 1,000 feet of any school grounds; (3) prohibition on access to commercial social networking websites; and (4) revocation of her driver's license. (J. App. at 8-9)

At first, being home was everything Mary dreamed it would be. However, the special conditions of parole placed a heavy burden on both her and her family. First, her employment opportunities were limited as the ban on access to commercial social networking sites prevented her from accessing job postings. Second, because Mary was no longer allowed to drive, even when she got an interview for a potential job, she would be unable to get to that interview. This meant that the only job available to her was the night shift at a local pierogi plant. (J. App. at 14-17) However, ROSA's travel restrictions made getting to this job difficult. Because of the rural area where she lives only has a few roads, Mary is forced to bike 20 miles in a circuitous and dangerous route to get to work each day. (J. App. at 15-18) Moreover, because Mary lives at home, her whole

family is forced to live under these restrictions. The restrictions mean that her family cannot have internet access in their home or own internet-capable telephones. This burdens her husband and daughter greatly, impacting their ability to work and study. (J. App. at 16-17)

Struggling under this burden, Mary turned to the courts. On January 1, 2019, she filed a complaint with the U.S. District Court, Middle District of Lackawanna against the Board. Mary alleged that the conditions of ROSA violated her First and Fourteenth Amendment rights, as well as the Ex Post Facto Clause. (J. App. at 1-4) The Board moved to dismiss the complaint for failure to state a cause of action which was granted. 999 F. Supp.3d 1 (M.D. Lack. 2019). Mary appealed to the U.S. Court of Appeals for the Thirteenth Circuit, where the District Court's decision was affirmed in a 2-1 decision. 999 F. Supp.3d 1 (13th Cir. 2019). Judge Skopinski dissented and found the conditions of ROSA violated the First and Fourteenth Amendments, as well as the Ex Post Facto Clause. *Id.* This Court granted certiorari on the following two issues: (1) Whether ROSA's requirements violated the First and Fourteenth Amendments; and (2) Whether ROSA's requirements violated the Ex Post Facto Clause. 999 U.S. 1 (2019).

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Thirteenth Circuit and find ROSA's requirements violate Mary Guldoon's First and Fourteenth Amendment rights under the U.S. Constitution. Additionally, ROSA's requirements violate the Ex Post Facto Clause.

ROSA's requirements substantially infringe Mary's fundamental rights to travel and free speech. The infringement of these rights triggers substantive due process protection, which requires a restriction on a fundamental right to be narrowly tailored to serve a compelling governmental interest. Here, ROSA's restrictions fail to withstand such exacting scrutiny, as neither the special conditions relating to travel, nor speech are narrowly tailored. Indeed, even when analyzed as "non-fundamental" rights under a rational basis standard, these conditions are far too attenuated from ROSA's purpose to be rationally related to the Board's interest in public protection and recidivism. Moreover, because ROSA's requirements burden Mary's liberty interests, they must be reasonably and necessarily related to the goals of parole. ROSA's requirements fail to be reasonably related to ROSA's purpose, instead undermining such purpose. These restrictions have thus been arbitrarily and capriciously imposed by the Board and must be invalidated.

Moreover, Mary should be exempt from the special conditions of parole outlined in ROSA because those conditions violate the Ex Post Facto Clause. First, in order to be within the scope of the Ex Post Facto Clause, there needs to be a statute applied under color of state law, that statute needs to be applied retroactively, and the effects of that statute must fall within one of the four categories enumerated by this Court. Here, ROSA falls within the scope of the Ex Post Facto Clause because it satisfies all three requirements. First, ROSA is a statute that was enacted into law by the legislature, and then applied against Mary by the Board. Second, this application

against her was retroactive because Mary's crime and sentencing had occurred prior to the enactment of this legislation. Finally, third, the effects of this statute fall into the third category because this statute increases the punishment for her crime after the crime was committed.

Next, in order to determine if the conditions of parole can be understood as an increase in punishment, this Court has looked to the effects of the legislation, and the legislative intent behind the legislation. Here, when ROSA is compared to the sentencing guidelines in effect at the time Mary committed her crime, it is evidence that ROSA has exacerbated the punishment for this crime. None of the conditions included in ROSA were ever included under the general guidelines in effect when Mary committed this crime. When comparing these statutes under the significant risk standard that this Court has adopted, this increase in punishment is a clear violation of the ex post facto clause. Finally, because the purpose of the Ex Post Facto Clause is to protect against rogue legislators, to determine if a criminal statute has increased the punishment for a crime, this Court also looks at the legislative intent. Here, the legislative intent was to target a narrow and unpopular group and give them harsher penalties. This sort of intent backs up the claim that ROSA violates the Ex Post Facto Clause.

ARGUMENT

I. ROSA'S REQUIREMENTS INFRINGE ON MARY GULDOON'S SUBSTANTIVE DUE PROCESS RIGHT; MOROEVER, THE REQUIREMENTS WERE ARIBRTRILY & CAPRICIOUSLY IMPOSED BY THE BOARD.

"Parolees are not without constitutional rights." *United States ex rel Sperling Patrick*, 426 F.2d 1161, 1164 (2d Cir. 1970). In fact, parolees occupy the highest end of a "continuum" of liberty interests to which state prisoners are entitled to. *Victory v. Pataki*, 814 F.3d 47, 60 (2d Cir. 2016). Thus, special conditions of parole which infringe on parolees' protected liberty interests *must* comply with the relevant constitutional inquiries. The special conditions of parole imposed by ROSA impede on two primary liberty interests possessed by Mary: the fundamental right to travel and the right to free speech found in the First and Fourteenth Amendments of the U.S. Constitution. *See* U.S. CONST. amend I; U.S. CONST. amend. XIV, § 1.

A. ROSA's Requirements Infringe Upon Mary's Fundamental Rights to Travel and Free Speech in Violation of Substantive Due Process Under the Fourteenth Amendment.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Such fundamental rights include the freedoms protected by the Bill of Rights as well as a handful of rights implicit in the Due Process Clause, centering around personal privacy and liberty. Those rights which are not "fundamental" must nevertheless be examined under a rational basis analysis when infringed upon. *Id.* at 720-21. While this Court should analyze Mary's fundamental right to travel and free speech under the heightened protection standard. ROSA's requirements fail to withstand even a rational basis analysis.

1. The ROSA's requirements implicate Mary's fundamental right to travel and fail to withstand strict scrutiny analysis.

In a substantive due process analysis, the Court makes two inquiries: (1) whether the right at issue are "objectively deeply rooted in this Nation's history and tradition"; and (2) that there has been a "careful description" of the asserted fundamental liberty interest. *Glucksberg*, 521 U.S. at 720-21. Furthermore, when a fundamental right is at issue, this Court conducts a strict scrutiny analysis which requires that the restriction on the right be narrowly tailored to serve a compelling governmental purpose. *Id.* at 772, n. 12.

This Court has already recognized the right to interstate travel as a fundamental right. *See United States v. Guest*, 383 U.S. 745, 759 (1966). Although this Court has yet to explicitly recognize the right to *intrastate* travel, at least four circuit courts have recognized this right. *See Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) (acknowledging the first, second and third circuits as recognizing the right to intrastate travel). These courts have concluded intrastate travel to be fundamental right based on the importance of this right in our nation's history. *See Johnson*, 310 F.3d at 496-97. Thus, because, intrastate travel is deeply rooted in the history of this nation, and because Mary has asserted this careful description of her fundamental right to intrastate travel, ROSA's conditions must be analyzed under strict scrutiny.

In *Johnson v. City of Cincinnati*, a city ordinance excluded individuals for up to ninety days from "public streets, sidewalks, and other public ways" in all drug-exclusion zones if the individual was previously arrested within the zone. *Johnson*, 319 F.3d at 487-88. Analyzing the ordinance under strict scrutiny, the court found that its exclusion of "individuals from each and every public space and roadway in [the affected zone]" infringed on an individual's right to intrastate travel. *Id.* In contrast, in *Doe v. Miller*, the Eighth Circuit speculated that a right to travel

would be infringed upon if a restriction resulted in an actual barrier, to movement within the state. *Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005).

ROSA's restrictions impact access as well as impose actual barriers on Mary's right to travel. Like the ordinance in *Johnson*, which prevented individuals from accessing public spaces and roadways, here the condition of parole preventing Mary from coming with 1,000 feet of any "school grounds," has prevented her from accessing several roads and public spaces. Unlike *Johnson,* however, this restriction threatens Mary's safety, as she is forced to bike lengthy distances over dangerous highway to comply with her parole conditions. Moreover, this case differs from *Miller*, in that Mary has been forced to surrender her driver's license, which does indeed serve as an actual barrier to movement. Her movement has been restricted to those locations she can reach on foot or by bike, which in the rural town where she resides, is extremely limited.

While protecting the public from recidivist sexual offenders may be a compelling state interest, ROSA's restrictions on travel fail to be narrowly tailored to serve this interest. In *Johnson,* the Sixth Circuit considered whether there were other methods available that would achieve the state's interest. There, the court found that the failure of previous measures to advance state interests was not sufficient affirmative evidence to establish narrow tailoring. Similarly, here, there is no affirmative evidence that this is the least restrictive means of achieving the Board's interests, and the mere fact that a previous law failed to address these interests does not establish this. Moreover, a review of state sex offender registration statutes reveals the existence of many less restrictive means of controlling travel of such offenders including ankle monitoring, driving logs, and restricted licenses. Therefore, because ROSA's infringement on the fundamental right to travel is not narrowly tailored to serve the interests of the Board, these special conditions must be invalidated.

2. Even under a rational basis standard, the special conditions of parole are too attenuated to serve the Board's interest in protecting the public and reducing recidivism.

If this Court determines that ROSA's restrictions do not implicate "fundamental rights" which call for a strict scrutiny analysis, a rational basis review of the restrictions must be conducted. Under a rational basis standard, the statute must "rationally advance some legitimate governmental interest." *Miller*, 405 F.3d at 715. A special condition of parole will be invalidated where such condition and legitimate government interest are so attenuated as to lead to an irrational or arbitrary result. *See Yunus v. Robinson*, 17-CV-5839 (AJN) (BCM), 2018 WL 3455408 *1, 21 (S.D.N.Y. Jan. 11, 2019). Even under this deferential standard, the special conditions of parole remain too far removed to rationally serve a legitimate state interest, and undermine the Board's interest in reducing recidivism and protecting the public.

A court may consider the costs imposed by law in a rational basis analysis. *Yunus*, 2018 WL 3455408 at * 23. In *People v. Diaz*, a parolee had been required to register as a sex offender due to an out-of-state statute, even though his offense had no sexual component. There, the First Department emphasized the burden that such registration would place on the parolee, including harming his reputation, employment, schooling, and housing prospects, among "many other areas." *People v. Diaz*, 150 A.D.3d 60, 65-66 (1st Dept. 2017), *aff'd on other grounds*, 32 N.Y.3d 538 (N.Y. 2018). The Court concluded that these burdens imposed on the parolee supported a finding that the restriction lacked a rational basis to the purpose of the registration statute. *Id.*

Similar to *Diaz*, Mary faces substantial burdens which ultimately undermine the central purpose of ROSA: to protect the public from recidivist sex offenders. The significant curtailments of travel have resulted in near impossible barriers to her successfully reentering

society. Mary must risk her life every day to comply with her restrictions on travel. Such barriers deter Mary from rehabilitation, not recidivism. As seen in *Diaz*, where such contradiction between the governmental interest and the restriction existed led to the determination of no rational relationship, here too, the restrictions of travel are not rationally related to the purpose of ROSA.

3. ROSA's internet restriction is an infringement of Mary's fundamental right to free speech and fails to withstand a strict scrutiny analysis.

Among those rights which qualify as "fundamental" and therefore are subjected to heightened protection, are those enumerated in the Bill of Rights, including the right to free speech. *Glucksberg*, 521 U.S. at 720. This Court has recently extended the right to free speech to include internet access to social media websites. *Packingham v. N.C.*, 137 S.Ct. 1730, 1733-34 (2017). In *Packingham*, a state statute prohibited sex offenders from accessing "commercial social networking websites." *Id.* at 1733-34. There, this Court reaffirmed that "a fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." In doing so the Court recognized "cyberspace" and "social media in particular" as some of the most important spaces for fostering this principle. *Id*. at 1735. While acknowledging the state interest in enacting laws which "ward off the serious harm that sexual crimes inflict," this Court concluded that to prevent "access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights" and struck down the statute as an unconstitutional infringement of free speech on *all* sex offenders. *Id*. at 1737.

This Court in *Packingham* recognized the chilling effect that a ban on commercial social networking sites would have, including barring "access to what for many are the principal

sources of knowing current events, checking ads for employment, speaking and listening in the modern public square." *Id*. at 1737. ROSA's restriction has proven to have the same chilling effects, as it prevents Mary from accessing employment opportunities, restricts her husband's job performance, and prevents Mary's young daughter from accessing necessary textbooks and assignments for her schooling. Moreover, this Court in *Packingham* acknowledged that a narrowly tailored ban on internet access would include prohibiting sex offenders "from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information from a minor." Based on this, the statute at issue in *Packingham* was found not to be narrowly tailored. Therefore, ROSA's even broader ban on access to "commercial social networking sites" cannot found to be narrowly tailored to serve the government's interest, and must too be invalidated.

B. ROSA'S Internet Restriction Was Arbitrarily and Capriciously Imposed.

"First Amendment rights may be curtailed *only by the least drastic means.*" *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (emphasis added). ROSA's restriction which bans Mary from accessing "commercial social networking website," which essentially curtails any and all use of the internet, is a *drastic* abridgement of her First Amendment right. This special condition imposed by the Board was arbitrary and capricious, as it failed to be "reasonably and necessarily related to the interests that the Government retains after [a parolee's] conditional release." *Muhammad v. Evans,* No. 11 CV2113 (CM), 2014 WL 4232496 * 1, 9 (S.D.N.Y. 2014). The special conditions must be "reasonably related to the defendant's offense, history and characteristics." *U.S. v. Goodwin,* 717 F.3d 511, 521-22 (7th Cir. 2013). Moreover, "a special condition of parole must not cause a greater deprivation of liberty than is reasonably necessary to achieve the goals of deterrence, protection of the public and rehabilitation." *U.S. v. Taylor,* 796 F.3d 788, 792 (7th Cir.

2015). Here, ROSA's internet restriction fails to be reasonably related to either of these requirements for special conditions of parole.

1. Commercial social networking sites were neither related to the nature and circumstances of Mary's offense, nor to Mary herself.

The imposition of a special condition of parole requires that the condition be "reasonably related to the defendant's offense, history and characteristics." *U.S. v. Shannon*, 743 F.3d 496, 500 (7th Cir. 2014). Thus, "a condition with no basis in the record, or with only the most tenuous basis will [be invalid]." *U.S. v. Voelker*, 489 F.3d 139, 144 (3d Cir. 2007) (internal citation omitted). Here, Mary's offense, history or characteristics did not implicate the internet, and therefore were arbitrary and capricious conditions.

In *Perazza-Mercado,* the parolee had worked as an educational technician at a school and engaged in sexual contact with a nine-year-old student in his care. *U.S. v. Perazza-Mercado,* 553 F.3d 65, 66 (1st Cir. 2009). He subsequently pled guilty to a sex offense. As a special condition of his supervised release, the sentencing court imposed a "total ban" on use of the internet in his home. The First Circuit found that the parolee "ha[d] no history of impermissible internet use and the internet was not an instrumentality of the offense of conviction," and therefore the ban was not reasonably related to the defendant's personal characteristics or the offense. *Id.* at 69.

Similar to *Perazza-Mercado,* the ROSA's internet restriction is not reasonably related to Mary or her previous offense. Though there was some limited email contact between Mary and her student, this was not conducted through a "commercial social networking site," but instead through her school email. Moreover, even her limited use of email during the relationship fails to rise to the levels of legality required for such a broad sweeping ban to be justified. In fact,

there were no pornographic or sexual communications recovered at all in any of the email exchanges between Mary and her student. Moreover, Mary has no previous criminal history. Significantly, Mary faced greater freedom to access the internet while she was still incarcerated. In *Perazza-Mercado*, there was a similar discrepancy, where the internet ban only extended to residential use, and there the court found this undermined the purpose of the condition. *Perazza-Mercado*, 553 F.3d at 72. The complete lack of relation of the internet to either Mary or her offense support a finding that the ban on commercial social networking sites was arbitrarily and capriciously imposed.

2. The ROSA's internet restriction causes a greater deprivation of liberty than is necessary to carry out its purpose.

Parole is central to two main purposes of law enforcement: (1) "to help individuals reintegrate into society as constructive individuals as soon as they are able"; and (2) "[to] alleviate[] the costs of society of keeping and individual in prison." *Maldonado v. Fischer*, No. 11-CV-1091Sr, 2012 WL 4461647 (W.D.N.Y 2012). Under ROSA, a primary goal is protecting the public from recidivist sex offenders. The restriction barring Mary from almost all internet use is a significantly greater deprivation of liberty than is necessary to achieve these goals, and instead strains the Board's interest in preventing recidivism and protecting the public.

Even where the internet was seen as an essential tool in the facilitation of the crime, courts have struck down overly broad restrictions over internet access. In *U.S. v. Voelker*, the parolee had been convicted of downloading child pornography and admitted to showing his minor daughter's naked buttocks on a webcam. *Voelker*, 489 F.3d at 142-43. Upon his release, he faced the special condition of parole which banned all computer and internet access. *Id.*

However, despite the computer use and offense being inextricably connected , the Third Circuit found that such a broad sweeping ban on internet use, with no exception for employment or education involved a greater deprivation than reasonably necessary. *Id.* at 144. Moreover, in in *Perazza-Mercado*, the First Circuit found the special parole condition "requiring [the parolee] to leave his home in order to take advantage of many of the vocational and educational opportunities offered by the internet" was a greater deprivation of liberty than necessary for his rehabilitation. *Perazza-Mercado*, 553 F.3d at 73-74.

As in *Perazza-Mercado*, where the parolee was burdened from seeking vocational and educational opportunities, here, ROSA's even *broader* restriction over internet access is a greater deprivation of liberty than necessary to serve the Board's goals. Mary does not have the ability to leave her home to access the internet. This has proven a detriment to her own ability to secure employment and has impacted her husband and daughter's lives significantly. Moreover, unlike the parolee in *Voelker*, who had used the internet to facilitate his offenses, Mary *did not* use the internet to facilitate or further her offense. Thus, this condition was arbitrary and capricious and therefore invalid.

C. The Suspension of Mary's Driver's License Is Arbitrary and Capricious.

The special conditions of parole which require Mary to surrender her driver's license implicates her liberty interest to freely travel. Therefore, in order to be valid, this special condition must: (1) be reasonably related to the nature, circumstances and characteristics of Mary and the offense; and (2) involve a deprivation no greater than is reasonably necessary to protect the public, prevent recidivism and aid in rehabilitation. *Taylor*, 796 F.3d at 792. Here, the revocation of the driver's license cannot meet either of these conditions.

1. Neither the offense nor Mary's history are reasonably related to driving an automobile.

In setting special conditions of parole, there must be a "reasonable nexus between the special condition of release and the crime for which the individual was convicted." *LoFranco v. U.S. Parole Com'n*, 986 F.Supp 796, 804 (S.D.N.Y. 1997). In *Gerena v. Rodriguez*, a parolee brought an Article 78 proceeding to review his special conditions of release. *Gerena v. Rodriguez*, 192 A.D.2d 606, 606-07 (2d Dep't. 1993). Specifically, he alleged the special condition of parole which prevented him from obtaining a driver's license or operating a motor vehicle without the consent of his parole office was arbitrarily and capriciously imposed by the parole board. There, the court found that the nature and circumstances of the offense supported the restriction, as he had been convicted in the attacks of three young children, all of which occurred after the children had been lured into his car, and driven to a secluded location. *Id.*

Mary's offense is substantially different from those in *Gerena*. Mary did not use the vehicle as the primary means to facilitate her crime. In fact, most of the inappropriate conduct took place in her classroom. The car was only used on the occasions in which Mary met B.B. in her home. Furthermore, Mary's own characteristics are substantially different from the parolee in *Gerena*. There, the parolee was a violent predator who had carried out three separate attacks on children. *Gerena*, 192 A.D.2d at 606-07. Mary on the other hand, is neither a violent nor repeat offender. Her offense stemmed from an undiagnosed mental health condition, which is now being properly treated. She has no prior criminal history. This condition must be found arbitrary and capricious.

2. ROSA's restriction on driving entails a greater deprivation of liberty than is necessary to achieve its purpose.

A special condition of parole must not encompass a greater deprivation of liberty than is necessary to protect the public. *Taylor*, 796 F.3d at 792. Here, requiring Mary to surrender her driver's license deprives her significantly of her right to travel. Thus like in *Perazza-Mercado*,

where an internet ban undermined the state interest in rehabilitation, the requirement that Mary surrender her driver's license creates barriers to Mary's successful reintegration into society and in turn, cuts against ROSA's purpose of preventing recidivism and protecting the public. *Perazza-Mercado*, 553 F.3d at 73-74. The immense obstacles Mary faces in attempting to return back to society include extremely limited employment opportunities, a strain on her family, and even a risk on her life as she is forced to bike over dangerous road conditions. Additionally, unlike *Gerena*, where the parolee—who's offense *was* facilitated by his car— had the option to obtain permission from his parole officer before driving or getting into a car, here, Mary does not even have the option to seek permission. *Gerena*, 192 A.D.2d at 606-07. Moreover, *Voelker* demonstrates, that even where the condition is related to the commission of the offense, if deprivation of liberty is unreasonable, then the condition can still be invalidated. *Voelker*, 489 F.3d at 144. Because this is substantially greater deprivation of liberty than reasonably necessary to serve any interest of the Board, this special condition should be invalidated.

II. APPLYING ROSA VIOLATES THE EX POST FACTO CLAUSE BECAUSE IT RETROACTIVELY INCREASES THE PUNISHMENT FOR MARY'S CRIMES.

Ex Post Facto laws are so repugnant to the very nature of our democracy that they are outlawed "twice in the Constitution, first as a restraint upon the power of the general government, and afterwards as a limitation upon the legislative power of the States." *Kring v. Mo.*, 107 U.S. 221, 227 (1883). *See also* U.S. CONST. Art. I § 9, cl. 3; U.S. CONST. Art. I § 10, cl. 1. These "constitutional bulwarks" were specifically included in the Constitution "in favor of personal security and private rights," and to protect against the "sudden changes and legislative interferences" enacted by "the hands of enterprising and influential speculators. . . ." THE FEDERALIST NO. 44 (James Madison). Our Founding Fathers own experiences with Great Britain

"ha[d] taught [them], nevertheless, that additional fences against these dangers" were necessary. *Id*. *See also Calder v. Bull*, 3 U.S. 386, 389 (1798). Thus, the Founding Fathers' enacted and reinforced the prohibition against Ex Post Facto laws. *Id.*

A. The Retroactive Application Of ROSA is Included Within the Scope of the Ex Post Facto Clause Because the Statute Was Enforced Under Color of State Law, Was Applied Retroactively, and Falls With the Categories Outlined in *Calder*.

"[E]x post facto laws . . . [are] prohibited. . . in order to restrain the State legislatures from oppressing individuals by arbitrary sentences, clothed with the forms of legislation, and from making retrospective laws applicable to criminal matters." *Ogden v, Saunders*, 25 U.S. 213, 254 (1827). Thus, "[a]lthough the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,'" this Court has exclusively and consistently held that the prohibition against Ex Post Facto laws applies only to statutes concerning criminal conduct. Paul D. Reingart & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CAL. L. REV NO. 3 593, 595 (2018). Therefore, in order to violate the Ex Post Facto Clause, the following three items need to be found: (1) an action needs to be committed by a person acting under the color of state law; (2) a statute needs to be applied retrospectively; and (3) the imposition needs to have a potentially detrimental effect on the accused. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Here, ROSA, as applied against Mary, fulfills all three criteria.

First, the Respondent has already conceded that "the Parole Board's conditions of parole are imposed under color of state law." 999 F. Supp.3d 1, 4 (M.D. Lack. 2019).

Second, ROSA was applied against Mary retroactively. To determine if a law is being applied retroactively, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast

as asking whether [the statute] applies to prisoners convicted for acts committed before the provision's effective date." *Weaver*, 450 U.S. at 31. In *Peugh v. United States*, the defendant was found guilty in 2009 of committing five counts of bank fraud between January 1999 and August 2000. *Peugh v. United States*, 569 U.S. 530, 532-533 (2013). At his sentencing in 2009, the judge used the current sentencing guidelines, instead of the guidelines from 1999 and 2000. *Id.* This Court then found that the judge's decision to apply modern sentencing guidelines to crimes committed a decade ago was a retroactive application. *Id.* Similarly here, the Respondent is trying to use a current law for an old crime. ROSA first became enforceable January 21, 2016. However, Mary pled guilty and was sentenced in January of 2010, 1,632 days earlier. Therefore, to apply the statute against her when she was "convicted for acts committed before the provision's effective date, . . ." is a retroactive application of the statute. *Weaver*, 450 U.S. at 31.

Third, in 1789, when first addressing the scope of the Ex Post Facto Clause, this Court demarked four categories that encompass all possible violations of the Ex Post Facto Clause. *Calder*, 3 U.S. at 390; *see also Collins v. Youngblood*, 497 U.S. 37, 44 (1990). Therefore, in order to be considered a violation of the Ex Post Facto Clause, the violation must fall within one of the four denoted categories:

(1) "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action;

(2) Every law that aggravates a crime, or makes it greater than it was, when committed;

(3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; [and]

(4) Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder*, 3 U.S. at 390.

Here, as will be addressed, the third category has been triggered, because the special conditions contained in ROSA exacerbate the punishment inflicted upon Mary.

B. ROSA Poses a Significant Risk Of Increasing Mary's Punishment.

"The Constitution forbids the application of any new punitive measure to a crime already consummated." *Calif. Dept. of Corrections v. Morales*, 514 U.S. 499, 505 (1995). "The Ex Post Facto *C*lause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Lindsey v. Wash*., 301 U.S. 397, 401 (1937). Thus, to evaluate the constitutionality of ROSA, this Court "must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509.

First, a retroactively-imposed, statutorily-mandated increase in the baseline conditions for parole can be considered an increase in punishment because a parolee is still serving their sentence when they are released on parole. U.S. DEPT. OF JUST. | U.S. PAROLE COMMISSION, *Frequently Asked Questions*, https://www.justice.gov/uspc/frequently-asked-questions (last visited March 13, 2019). Judges, knowing that parole will likely become part of the sentence, unless explicitly excluded, factor in the possibility of parole and the conditions under which parole would be served when delivering indeterminate sentences. Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, THE MARSHALL PROJECT (Jul. 10, 2015) https://www.themarshallproject.org/2015/07/10/

nine-things-you-probably-didn-t-know-about-parole. Therefore, to retroactively apply a statutory increase in the minimum conditions of parole will exacerbate the punishment for a crime, after the punishment had already been imposed and partially served.

Although some circuit courts have now tried to shift the burden of proof toward inmates by forcing them to make a factual record that their risk of punishment could have been significantly increased, that is not this Court's jurisprudence. *Morales*, 514 U.S. at 509. Instead this Court has continuously investigated Ex Post Facto Clause violations as questions of law and conducted its own comparative analysis between the two provisions at issue. *See Weaver*, 450 U.S. at 24. For example, in *Weaver v. Graham*, an inmate challenged a statute which reduced his ability to collect "gain time" for good behavior. *Id.* at 33. The defendant's inability to collect this time could therefore, theoretically extend his time incarcerated. In completing its analysis, this Court found that "[t]he inquiry looks to the challenged provision," and then this Court compared the two statutes side by side. *Id*. at 33 (internal citations omitted).

In the instant action, a direct comparison between the two statutes reveals that ROSA imposed new deprivations that were far greater than what was considered and applied when she was sentenced. In January of 2011, the Board stated that, if Mary was placed under their supervision, they would recommend only the general conditions of parole. The general conditions of parole for her crime required Mary to make regular reports to her parole officer, to comply with law enforcement, to avoid people with criminal records, and to not possess a firearm. However, post-ROSA, Mary was, for the first time, required to register as a sex offender, surrender her driver's license, and stop using the internet. In analyzing the effects of imposing these types of conditions on parolees, researchers have determined that these requirements are additional punishments and cause an increase in stress and numerous hardship

for parolees. Richard Tewksbury and Kristen M. Zgoba, *Perceptions and Coping With Punishment: How Registered Sex Offenders Respond to Stress, Internet Restrictions, and the Collateral Consequences of Registration*, 54 INT. JOURN. OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY NO 4. 537 (2010). Additionally, a federal judge in Colorado found that requiring three registered sex offenders to remain on the sex offender registry violated the 8th Amendment's prohibition against cruel and unusual punishment after the individuals testified to the hardships the registration imposed on them including forced changes of residence, one man's exclusion from his own children's school, and difficulties in obtaining or maintaining employment. *Millard v. Rankin,* 265 F. Supp. 3d 1211 (D. Colo. 2017). Therefore, it can be concluded that the special condition outlined in ROSA do constitute punishment, based on their relative effect on a parolee's life. Therefore, since none of these conditions were required or mentioned as a general condition of parole when Mary was sentenced, imposing these requirements upon her after her sentence has begun represents an increase in punishment.

Moreover, even if this Court declines to follow its precedent and instead follows in the direction of the circuit courts, the special conditions of parole are still considered punishment as they have had a marked effect on Mary's life. In general, the circuits have agreed upon a two part test to determine whether conditions of parole can be considered punishment, and they have all generally identified two factors which demonstrate that the condition imposed constitutes punishment: (1) if "the condition of parole could affect the length of sentence or is so onerous that it was effectively impossible to meet;" or (2) if there is "a monetary payment that flows from the commission of the underlying crime [which] could be construed as part of punishment of that crime because payment is a condition of the parolee's continuing release from prison." *Sheppard v. Louisiana Bd. of Parole*, 873 F.2d 761, 764 (5th Cir. 1989). While here, there is no monetary

payment at issue, the burden placed on Mary and her family by the special requirements of parole are "so onerous that [they are] effectively impossible to meet."

In the instant action, the burden placed on Mary by the special conditions of ROSA are oppressively burdensome. As explained above, Mary is subject to numerous travel restrictions: she was forced to surrender her license, and she is not allowed to travel within 1,000 feet of a school. Due to the rural area where she lives, this means she has to bike everywhere as there is no public transportation option, and she must bike along the highway, so that she avoids the school zone. These restrictions on her travel endanger her safety daily, as she has to now bike twenty miles to and from work, in all weather and risk death, or violate the conditions of her parole. Therefore, these conditions are unlike the Fifth Circuit's holding in *Vineyard v. Keesee,* which found that ankle monitors and urinalysis tests were not increases in punishment because those were mere hindrances on day-to-day activities, where the conditions found here either force Mary to risk her physical safety on a daily basis or violate the terms of her parole. *Vineyard v. Keesee*, No. 95-10132, 1995 U.S. App. LEXIS 41422, at *4 (5th Cir. Oct. 18, 1995).

C. ROSA Has a Detrimental Effect Because It Is A Substantive Change In Law.

The prohibition against Ex Post Facto laws extends to "any statute which . . . makes more burdensome the punishment for a crime." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925). This "constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . [while balancing] the legislative control of remedies and modes of procedure that do not affect matters of substance." *Id.* at 171.

Unfortunately, the distinction between procedural and substantive changes in law cannot be simplified to any uniformly applied test; instead, "the distinction is one of degree." *Id.* To combat the issue of procedural-in-name-only statutes, several circuits have looked to the

legislative intent and the effect of the statute. *See Johnson v. Owens*, 612 F App'x 707, 715 (5th Cir. 2015). Under the "intents-effects test," parole conditions might also constitute additional punishment when "(1) the legislature intended the sanction to be punitive, and (2) the sanction is so punitive in effect as to prevent courts from legitimately viewing it as regulatory or civil in nature." *Id*. (internal citations omitted). Here, the legislature intended the special conditions denoted in ROSA to be punitive, and the effect of those special conditions is "so punitive" that it should "prevent courts from legitimately viewing it as a regulatory or civil in nature." *Id*.

In enacting ROSA, the legislature's intent was the segment off a portion of the population who they believe to be likely to re-offend and impose retroactively harsher penalties on those offenders. In *Morales*, the legislature enacted a statute which allowed a parole board to defer a hearing for up to three years when a prisoner was incarcerated for multiple offenses involving taking a life. *Morales*, 514 U.S. at 501-502. This statute was passed in 1981, and then retroactively applied to a prisoner whose crime was committed in 1980. In evaluating this law, Justice Stevens found that the legislative intent behind this statute was to "usurp the judicial power . . . so as to administer justice unfairly against particular individuals." *Morales*, 514 U.S. at 520 (Stevens, J. dissenting) Moreover, "[t]he policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *Id.* (internal citations omitted).

Similarly here, the legislature here is targeting a "specific persons or classes of persons" who they wish to punish. *Id.* First, this statute targets sex offenders, "especially those sexually violent offenders who commit predatory acts by repetitive and compulsive behavior." (J. App. at

19). This targeting assumes that the people covered within the scope of the act are likely to re-offend, and therefore desires to punish them to the point that they cannot re-offend. However, as is evidence by the instant action, this statute is targeting all sex offenders, regardless of their likelihood of re-offending. In the instant action, Mary is unlikely to re-offend, as her offense was caused by manic episode and the parole board recognized that at her sentencing.

Overall, "the danger of legislative overreaching against which the Ex Post Facto Clause protects is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as" sexual offenders. However, the Ex Post Facto Clause was designed to protect against these legislative overreaches. Therefore, because the statute has been applied retroactively, because it increases the punishment associated with Mary's crime mid-sentence, and because there is evidence that the legislature intended these effects, ROSA, as applied to Mary, violates the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the Thirteenth Circuit and find the conditions imposed by ROSA violate Mary Guldoon's rights under the First and Fourteenth Amendments, as well as the violate the Ex Post Facto Clause.

Respectfully Submitted,

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