SUPREME COURT OF THE UNITED STATES

No. 19-01

MARY GULDOON,
***Petitioner*,**

v.

STATE OF LACKAWANNA BOARD OF PAROLE,
***Respondent*.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team # 9
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act Violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

II. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act and imposed on Petitioner constitute violations of the Ex Post facto Clause of the United States Constitution.

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STATEMENT OF THE CASE

Petitioner is a Lackawanna resident and in 2008, began teaching at Old Lackawanna High School. (R. 11.) After the birth of her daughter in May 2010, Petitioner began to suffer from severe postpartum depression. (R. 12.) She was treated with Prozac, although it did not alleviate her depression. (R. 12.) Petitioner returned to teaching in September 2010 after her maternity leave expired despite still suffering from depression. (R. 12.)

After returning to school, Petitioner's student, B.B., sought her out for extra help with some of his courses and Petitioner agreed to tutor him. (R. 12.) B.B.'s family environment consisted of an abusive father and an alcoholic mother who abused various painkillers. (R. 12.) In her role as a teacher, Petitioner discussed B.B.'s family troubles during their meetings. (R. 12). In October 2010, still suffering from depression, B.B. and Petitioner engaged in a consensual, though inappropriate, sexual relationship with. (R. 5, 12.)

Later that fall, the school principal discovered Petitioner and B.B. in Petitioner's classroom. (R. 12.) Old Cheektowaga Police Department arrested Petitioner. Petitioner took responsibility for her unfortunate actions and pleaded guilty to Lackawanna Penal Law § 130.25 Rape in the third degree, Lackawanna Penal Law § 130.40, Criminal sexual act in the third degree, and Lackawanna Penal Law § 130.20, Sexual misconduct. (R. 13, 47.) The investigation revealed Petitioner communicated with B.B. solely through email, text messages and notes but no pornographic or sexual communications were discovered (R. 5.) Many innocuous exchanges were found after authorities reviewed the parties' communications and both Petitioner and B.B. reported feeling loved throughout the relationship. (R. 5-6.)

Respondent submitted a Pre-sentence Report (hereinafter "Report") recommending Petitioner's length of incarceration in addition to parole eligibility, consisting of general conditions of parole for Petitioner but making no recommendations for special conditions of

parole. (R. 7.) In addition, the Report noted that Petitioner had no prior criminal history and still suffered from post-partum depression. (R. 6-7.) Ultimately, Petitioner was sentenced to incarceration for ten to twenty years. (R. 2, 13.)

Petitioner began serving her sentence in 2011 at Tonawanda Correctional Facility where she was diagnosed with Bi-Polar Disorder, also known as Manic Depression. (R. 13.) Symptoms of the disorder include recurrent episodes of depression as well as episodes of mania that can be marked by inappropriate behavior including hypersexuality. (R. 13.) Petitioner's psychiatrist concluded the Prozac prescribed for her post-partum depression unmasked her Bi-Polar Disorder and triggered a manic episode. (R. 13.) During that episode, her actions involving B.B. occurred. (R. 13.) Since this diagnosis, Petitioner has treated with lithium, without any additional manic episodes. (R. 13.)

In 2016, five years after Petitioner began serving her prison sentence, Lackawanna enacted the Registration of Sex Offenders Act (hereinafter "ROSA") in an attempt to protect the public from the perceived danger of sex offender recidivism. (R. 14, 19.) Singling out the sex offender citizenry, ROSA imposed previously non-existent registration requirements and mandatory conditions of parole for sex offenders. (R. 14, 23-26.)

Petitioner was on parole in 2017 and classified as a level two sex offender per ROSA. ROSA requires her to register annually for the duration of her life and "personally appear at the law enforcement agency having jurisdiction within 20 days before the third anniversary of the sex offender's initial registration and every three years thereafter during the period of registration for the purpose of providing a current photograph of such offender." (R. 33.) Additionally, ROSA prohibits Petitioner from operating a motor vehicle "for a period of twenty years, or as long as that person is required to remain registered, whichever is shorter." (R. 44.)

Beyond the onerous registration requirements, ROSA also established mandatory conditions of parole for sex offenders, codified as The State's Executive Law, § 259-c. (R. 23.) Such conditions impose three substantial burdens on Petitioner: 1) Petitioner is prohibited from knowingly entering into or upon any school grounds, 2) Petitioner is prohibited from using the internet to access a commercial social networking site, and 3) Petitioner is prohibited from operating a motor vehicle "for a period of twenty years, or as long as that person is required to remain registered, whichever is shorter." (R. 45-46.) These conditions are mandatory to Petitioner based solely on the three sex crimes she plead guilty to. In accordance with ROSA, no factors regarding future dangerousness are weighed before the conditions are enforced. (R. 45-46.)

Due to the retroactive application of ROSA, Petitioner is no longer able to work as a teacher due to being prohibited from coming within 1,000 feet of any school. (R. 15.) Further, ROSA bans Petitioner from teaching online rendering her expertise in teaching and computer science is useless. (R. 17.) The social media restriction has also prevented Petitioner from accessing websites where jobs are posted, such as LinkedIn, Craiglist, Indeed, Facebook, and Twitter, although Petitioner did not use these sites in her interaction with B.B. (R. 15.) Petitioner's family is also restricted from accessing any commercial networking site as the restriction applies to the whole home. (R. 16-17.)

Petitioner now works the night shift at the Plewinski's Pierogi Company plant, located on Maple Road in Old Cheektowaga. (R. 15.) Petitioner's home is located only about three miles from the plant and near Old Cheektowaga Elementary School. Therefore, she cannot take the most direct route to the plant as she would come within 1,000 feet of the school. (R. 14-15.) Instead, Petitioner must ride her bike to work on a dangerous two land road with a speed limit of

65 miles per hour, a round trip totaling 40 miles. (R. 16.) Adding to her burden, Petitioner makes this trip at night and in the winter when the average temperature falls below 30 degrees. (R. 16.)

Due to the burdens ROSA imposes on her, Petitioner, Mary Guldoon, filed a complaint in the United States District Court for the Middle District of Lackawanna against Respondent, Lackawanna Board of Parole on January 1, 2019, (R. 1-4.) Petitioner brought two claims seeking declaratory and injunctive relief under 42 U.S.C. § 1983 stating ROSA's requirements violated her rights under the First and Fourteenth Amendments. Specifically, the requirements that she register as a sex offender, surrender her driver's license, refrain from traveling within 1000 feet of any school or similar facility, and not access any "commercial social networking site." (R. 3-4.) Additionally, Petitioner claimed that ROSA violates the *Ex Post Facto* Clause of the United States Constitution as it was enacted after Petitioner was first sentenced and applies new requirements and conditions of parole not previously found in Petitioner's Pre-sentence Report nor Lackawanna law. (R. 3-4.)

The District Court held that the requirements and special conditions of parole were not imposed by Respondent in an arbitrary and capricious manner nor did Petitioner prove that the special conditions were not reasonably related to Lackawanna's interests. *Guldoon v. Lackawanna Bd. of Parole*, 999 F.Supp.3d 1, 7 (M.D.Lack 2019). With respect to Petitioner's *Ex Post Facto* claim, the District Court ruled that ROSA was not punitive in nature, thus foreclosing Petitioner's claim for relief. *Id.* at 9. Petitioner appealed the District Court's ruling and the United States Court of Appeals for the Thirteenth Circuit affirmed, notwithstanding a vigorous dissent by Judge Skopinski. *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1 (13th Cir. 2019).

This Court granted Petitioner's writ of certiorari to determine whether ROSA's registration requirements and special conditions of parole violate Petitioner's rights under the First and Fourteenth Amendments, and whether ROSA's registrations requirements and special

conditions of parole imposed on Petitioner violate the *Ex Post Facto* Clause. *Guldoon v. Lackawanna Bd. of Parole*, 999 U.S. 1 (2019).

SUMMARY OF ARGUMENT

This Court should vacate the special conditions imposed by ROSA on Petitioner requiring her to surrender her driver's license, restricting her travel, and banning her from accessing commercial social networking sites. Additionally, this Court should adhere to the purpose of the *Ex Post Facto* Clause and deem ROSA is punitive in effect as imposed on Petitioner.

Special conditions of parole must be reasonably related to offense committed and advance the government's interest in deterring future criminal conduct, protecting the public, and rehabilitating the defendant. *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2000). The court of appeals incorrectly found the special conditions appropriate in achieving these interests. The facts do not support Petitioner being a danger to the public nor is there evidence suggesting she is likely to offend again.

The special conditions implicate Petitioner's fundamental rights and are therefore subject to a heightened scrutiny analysis. *United States v. Myers* 26 F.3d 117, 126 (2d Cir. 2005). This analysis requires the conditions to be narrowly tailored to achieve a compelling state interest. *Id.* Accordingly, the conditions may not involve a greater deprivation of liberty than is necessary to achieve those interests. *Id.*

Requiring the surrender of Petitioner's driver's license and restricting her travels implicates her fundamental right to travel. However, the record does not sufficiently support this restriction and its intrusion on her fundamental right. Because the record does not establish the necessity of this special condition, this Court should vacate it appropriately,

Additionally, this Court has already held that banning access to a commercial networking site is too broad of a condition to survive strict scrutiny. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1731 (2017). In weighing the important government interests in protecting the public, this Court found that commercial networking sites are at the center of democracy in the modern age and banning access is offensive to the First Amendment. *Id.* Therefore, the special condition banning access to commercial networking sites imposed on Petitioner should be vacated in accordance with this Court's recent decision.

ROSA retroactively punishes Petitioner in violation of the *Ex Post Facto* Clause. In order to protect vulnerable citizens from vengeful legislation, the *Ex Post Facto* Clause forbids legislatures from enacting laws imposing retroactive punishment on individuals when the law at the time the acts were committed did not impose such punishments. Expounding on the purpose of the Clause, this Court set forth five factors to analyze whether sex offender statutes are punitive in effect. Applying the five factors, courts in the last ten years have held sex offender statutes are growing increasingly more punitive and thus, are violative of the *Ex Post Facto* Clause.

ROSA's broad restrictive means imposed on Petitioner are not rationally connected to public safety. Going further, ROSA excessively punishes Petitioner through requirements and conditions that are unrelated to her isolated acts. ROSA directly restrains fundamental freedoms of Petitioner that is not only controlling of her personal conduct but submits Petitioner to dangerous conditions. All of ROSA's registration requirements and special conditions of parole mirror traditional forms of punishment through shaming and parole conditions. Such a punitive statute cannot be applied per *Ex Post Facto* Clause principles.

ARGUMENT

I. THE SPECIAL CONDITIONS OF PAROLE REQUIRED UNDER LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT UNCONSTITUTIONALLY INFRINGE ON PETITIONER'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The Court of Appeals for the Thirteenth Circuit erred in affirming the District Court's ruling that the special conditions of parole were reasonably related to the crimes committed because the special conditions imposed an unnecessary deprivation of liberty to achieve the purposes of 18 U.S.C. § 3583(d) and the special conditions were not narrowly tailored to achieve a compelling state interest.

A. The special conditions of Petitioner's parole were not reasonably related to the interests of 18 U.S.C. § 3583(d) and required a greater deprivation of liberty than necessary to promote those interests.

It is well established that conditions of supervised release must be reasonably related to the interest enumerated in 18 U.S.C. § 3583(d) (2019) and this statute serves as a limit on the deprivations of liberties that may be placed on citizens in Petitioner's position. *United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005). Total restriction on access to social networking sites and eliminating the right to travel exceeds the deprivation of liberty necessary to achieve those purposes in 18 U.S.C. § 3583(d) (2019).

Parolee's face a variety of restrictions upon release but are not without constitutional rights. *United States ex rel Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970). Any revocation of these rights implicates a parolee's due process rights. *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593 (1972). The revocation of rights during parole is similar to conditions imposed on supervised release. In this related field, special conditions may attach so long as they do not exceed the sentencing court's authority under 18 U.S.C. § 3583 (2019). *United States v. Amer*, 110 F.3d 873, 883 (2d Cir. 1997).

Under 18 U.S.C. § 3583 (2019), a court has broad discretion to impose a special condition of supervised release to the extent the condition is reasonably related to the factors set out in 18 U.S.C. § 3553(a) (2019), involved no greater deprivation of liberty than is reasonably necessary for the purposes set forth in U.S.C. § 3553(a) (2019), and is consistent with any pertinent policy statements pursuant to 28 U.S.C. § 994(a) (2019). The sentencing objectives outlined determine the appropriate deprivation of a certain liberty. *United States v. Reeves*, 591 F.3d 77, 80 (2d Cir. 2010).

In *Reeves*, the Second Circuit vacated a special condition of supervised release that required a man, who had no history of domestic violence nor violence towards romantic partners, to notify any romantic partner of his conviction. 591 F.3d at 77. After holding the special condition exceeded the necessary deprivation of liberty because it is not reasonably necessary for deterrence, the protection of the public, or rehabilitation, the Court continued to clarify that this type of right was fundamental and therefore required a higher, appropriate level of scrutiny in its evaluation. *Id*. at 82.

Here, the special conditions directly implicate Petitioner First Amendment freedom of speech and her fundamental right to travel. *See*, *Shapiro v. Thompson,* 394 U.S. 618, 631, 89 S. Ct. 1322, 1329 (1969) ("In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." (quoting *United States v. Guest,* 383 U.S. 745, 757-758 (1966))). At a minimum, the special conditions must be reasonably related to the offense committed and serve to promote rehabilitation and protect the public. 591 F.3d 77 at 80.

The special conditions are not reasonably related to the offenses committed. Petitioner did not use the internet in the commission of her crimes. While facts show Petitioner used her phone and email to communicate with the minor, she did not seek out the child through those

mediums and those mediums are nothing more than ordinary methods of communication. Courts only find such restrictions appropriate under facts that demonstrate the use of internet in the underlying offense and the record establishes the restriction to be necessary. *See*, *United States v. Munjak*, 669 F.3d 906, 908 (8th Cir. 2012) (upholding ban on internet access after finding over 600 child pornography images on defendant's computer); *United States v. Brigham*, 569 F.3d 220, 234 (5th Cir. 2009) (holding the record supported banning access to a computer for the duration of supervised release after being convicted of possessing and distributing child pornography); *United States v. Johnson*, 446 F.3d 272, 282 (2d Cir. 2006) (upholding an absolute ban on internet use when defendant's computer skills would enable him to circumvent monitoring programs).

The special conditions exceed the deprivation of liberty necessary to achieve the statutory purposes. The conditions place an unreasonable burden on Petitioner to seek work through social networking sites and restrict her ability to appropriately and safely pursue employment by limiting her method of traveling. These additional consequences of the special conditions support Petitioner's claim that she is being deprived of liberties beyond what is permissible under conditions of parole.

Additionally, there are no facts alleged that suggest these special conditions are protecting the public. Petitioner is not deemed to be a danger to the public nor were any special conditions of parole suggested in her pre-sentence report. The record established that during the commission of her offenses, Petitioner had mental challenges that were left untreated. Since her conviction, Petitioner has been under the appropriate care and no specific facts in the record suggest Petitioner is a danger to the public. The government cannot succeed in using protecting the public as support for these conditions based on the record of this case.

These special conditions bear no relation to the nature of Petitioner's offenses. These conditions do not achieve the interests outlined in 18 U.S.C. § 3583 (2019) as they fail to promote Petitioner's rehabilitation and do not appropriately protect the public. Instead, the special conditions exceed the necessary deprivation of liberty to promote the appropriate interests of supervised release. Under this analysis, these special conditions should be deemed impermissible.

B. Petitioner's fundamental rights to free speech and travel are protected from government infringement unless there is a compelling state interest and the condition is narrowly tailored to achieve that interest.

i. The special condition restricting Petitioner's right to travel is not narrowly tailored to achieve the statutory purposes of protecting the public and rehabilitation.

The special conditions imposed on Petitioner implicate her fundamental right to travel by restricting travel and taking her driver's license. The implication of fundamental rights gives rise to a heightened level of scrutiny. *Meyer v. Nebraska*, 262 U.S. 390, 396, 43 S. Ct. 625, 626 (1923). In addition to being reasonably related, these special conditions must be necessary to achieve a compelling state interest and be narrowly tailored to achieve those interests. The special conditions Petitioner challenges are not necessary to achieve a compelling state interest, instead the conditions are broad in scope and fail a heightened scrutiny analysis.

Sentencing courts have broad discretion in imposing special conditions on supervised release. 18 U.S.C. § 3583 (2019). Special conditions of supervised release must be reasonably related to the nature of the offense and the statutory purposes of 18 U.S.C. § 3553 (2019). However, when those special conditions implicate a fundamental liberty interest, the special condition must survive a heightened scrutiny analysis. *United States v. Myers* 26 F.3d 117, 126 (2d Cir. 2005). When a special condition of supervised release implicates a fundamental liberty

interest, the deprivation of liberty must be narrowly tailored to achieve a compelling state interest. *Id.*

In *United States v. Myers*, the Second Circuit examined a special condition requiring a father to obtain permission from his probation officer to spend time with his son. 426 F.3d at 126. The court acknowledged the right to parent one's children as a recognized liberty interest under the 14th Amendment. 426 F.3d at 125 (describing "the fundamental right of parents to make decisions concerning the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court (citing *Troxel v. Granville,* 530 U.S. 57, 65-66, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000) (plurality opinion))).

In determining the appropriate analysis of conditions implicating constitutionally protected interest, the *Myers* court evaluated the special condition under a heightened level of scrutiny. 426 F.3d at 126. The court required that the deprivation of liberty involving a fundamental liberty interest is sufficient only if the deprivation is narrowly tailored to serve a compelling state interest. *Id.* In *Myers*, the court did not find specific facts in the record establishing a purpose for the special condition and remanded the case to be evaluated under the proper level of scrutiny. *Id*. at 130.

Like the record in *Myers*, the record in Petitioner's case does not allege facts supporting the special conditions revoking her driver's license and restricting travel. Because these activities are recognized as fundamental rights, the record must show a reasonable relation to prior conduct and be narrowly tailored to achieve the government's interest in rehabilitation. *See, e.g.*, *United States v. Balderas*, 358 F. App'x 575, 581 (5th Cir. 2009) (upholding a special condition infringing on the fundamental right of association by forbidding a parolee from living with her husband when her husband's influence was deemed 'reasonably related' to the original offense).

The commission of Petitioner's offenses incidentally required a brief use of a motor vehicle. Although this provides some evidence in the record, it is not enough to satisfy the heightened level of scrutiny. *Compare United States v. Warren*, 186 F.3d 358, 367 (3d Cir. 1999) (reviewing the record for specific facts to support the travel restriction and indicating how it furthers the statutory aim of probation), *and United States v. Porotsky*, 105 F.3d 69, 71 (2d Cir. 1997) (holding a flight risk without more was not sufficient to restrict the right to travel), *with United States v. Goddard*, 537 F.3d 1087, 1092 (9th Cir. 2008) (upholding special condition requiring permission from probation officer to establish residence when defendant had history of child pornography and sexual battery charges), *and United States v. Bee*, 162 F.3d 1232, 1235 (9th Cir. 1998) (upholding special condition preventing defendant from loitering within 100 yards of schools or parks when the record shows a long history of sexually deviant behavior).

The special condition restricting Petitioner's right to travel does not meet the heightened level of scrutiny. The restriction is not sufficiently supported by specific facts in the record and therefore, the government does not demonstrate the rehabilitative purposes behind the condition. This Court should properly hold the special condition restricting travel is unconstitutional as applied to Petitioner.

ii. <u>The special condition banning access to commercial social networking sites is not narrowly tailored and this Court has already held these types of conditions as impermissible infringements of the First Amendment.</u>

The special condition banning access to commercial social networking sites is broad in its scope and places an unnecessary burden on Petitioner's exercise of the First Amendment. Petitioner did not use these sites in manners appropriately related to this over inclusive ban nor is this ban narrowly tailored to the government's interests. This Court recently reviewed a similar ban on access to commercial social networking sites and found this type of condition to be impermissible. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1731 (2017).

In *Packingham*, this Court reviewed a North Carolina law that made it a felony for any registered sex offender "to access a commercial networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. § 14-202.5(a) (2018). The North Carolina State Supreme Court upheld the law as carefully tailored because it allows access to sites with similar content, specifically Paula Deen Network or the local NBC affiliate. 137 S. Ct. at 1735. However, this Court recognized that access to such sites described in the statute is covered under the First Amendment because cyber-space, especially social media is a main democratic forum. *Id*. at 1735. This Court rendered the North Carolina statute as unconstitutional for impermissibly restricting the First Amendment. *Id.* at 1738.

The facts that brought rise to the prosecution under the North Carolina statute in *Packingham* are similar to the facts underlying Petitioner's current claims. In *Packingham*, the Petitioner was charged after having sexual relations with a minor and pleaded guilty, subsequently the Petitioner registered as a sex offender. 137 S. Ct. at 1734. Here, Petitioner pleaded guilty under a similar set of facts. Some circuits have found some sexually related charges, limited mostly to child pornography cases, to be a sufficient reason to ban internet access. *See, e.g.*, *United States v. Boston*, 494 F.3d 660, 668 (8th Cir. 2007). *United States v. Paul*, 274 F.3d 155, 170 (5th Cir. 2001); *United States v. Crandon*, 173 F.3d 122, 124 (3d Cir. 1999). Nonetheless, the United States Supreme Court in *Packingham* did not find a singular act of misconduct to warrant banning participation in the largest democratic forum. *Packingham*, 137 S. Ct. at 1737.

In its decision, this Court made clear that "commercial social networking sites" encompass virtually all web sites, placing a significant burden on a sex offenders' access to news, information, and job postings. 137 S. Ct. at 1737. Petitioner raises concerns that echo the

Court's reasoning in *Packingham*. Petitioner, and her family, are essentially cut off from the outside world and she cannot effectively search for meaningful employment due to the broad special condition. Balancing the necessity of access to these sites against the undisputed severity of the offenses committed, this Court did not fail to protect the First Amendment rights of all citizens. *Id*. This Court should continue to protect intrusions on the First Amendment and rule the special conditions banning internet access are unconstitutional.

Should this Court find significant differences between *Packingham* and Petitioner's case, this special condition fails under the *Myers* analysis as well. This special condition is not narrowly tailored to achieve the government's interest in rehabilitating Petitioner nor the government's interest in protecting the public. *United States v. Myers*, 26 F.3d 117, 126 (2d Cir. 2005). The special condition impairs Petitioner's ability to find adequate work, which only prevents rehabilitation in its effect. Because Petitioner has not been established as a threat to the public there is no grounds for the government to claim it is protecting the public. Therefore, the special condition fails to meet a heightened level of scrutiny and should be vacated.

The special condition is not narrowly tailored. The broad language of "commercial networking websites" encompasses almost all websites, even those not popular with minors or not intended to communicate with minors. This broad language contributed to the Court's decision in *Packingham* and clearly establishes that this condition is not narrowly tailored. *Packingham,* 137 S. Ct. at 1736.

There is insufficient record evidence regarding the use of the internet in the commission of Petitioner's offenses to uphold the condition. Additionally, courts have not upheld broad internet bans even when the defendant used the computer to aid in his crime. *See United States v. Wiedower,* 634 F.3d 490, 495 (8th Cir. 2011) (rejecting Internet ban where defendant was convicted of possessing child pornography)*; United States v. Freeman,* 316 F.3d 386, 391-92 (3d

Cir. 2003) (rejecting Internet ban where defendant was convicted of receiving and possessing child pornography)*; United States v. Holm,* 326 F.3d 872, 877 (7th Cir. 2003) (rejecting Internet ban where defendant was convicted of possessing child pornography).

The special conditions imposed on Petitioner are broad in scope and do not sufficiently relate to the offenses committed. Additionally, the special conditions are subject to a heightened scrutiny analysis because they implicate Petitioner's fundamental rights. Neither of these special conditions survive this analysis. This Court has already held that special conditions banning social networking sites similar to the one imposed on Petitioner are inconsistent with the First Amendment and should be vacated. Therefore, this Court should vacate the special conditions banning her access to social networking sites.

II. LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT RETROACTIVELY PUNISHES PETITIONER THROUGH DISPROPORTIONATE AND BURDENSOME MEANS UNDER THE GUISE OF PUBLIC SAFETY, THUS VIOLATING THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court should overturn the Thirteenth Circuit's ruling and find that ROSA is punitive and violates the *Ex Post Facto* Clause with respect to Petitioner, joining the growing number of courts striking down similar punitive laws. The *Ex Post Facto* Clause prohibits the Congress and the States from passing any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (internal citations omitted). The framers included this clause to protect vulnerable citizens from arbitrary governmental overreach. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915); *Calder v. Bull*, 3 U.S. 386, 389 (1798); *See also*, *Dobbert v. Florida,* 432 U.S. 282, 298, (1977) (noting purpose was also to give notice of effect).

Absent legislative intent of a punitive purpose, a plaintiff must demonstrate by the "clearest proof" that the statute is so punitive either in purpose or effect to establish an *Ex Post*

Facto Clause violation. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). This Court has weighed five factors when determining if sex offender registration statutes are so punitive in purpose or effect, those being, 1) whether it has been regarded in our history and traditions as a punishment; 2) whether it imposes an affirmative disability or restraint; 3) whether it promotes the traditional aims of punishment; 4) whether it has a rational connection to a nonpunitive purpose; or 5) whether it is excessive with respect to this purpose. *Smith* 538 U.S. at 97. Per these factors, ROSA's retrospective requirements and conditions, mirroring traditional forms of punishment, excessively punish Petitioner by restricting her fundamental freedoms under the mistaken hope of reducing recidivism. Therefore, this Court should find that the Act violates the *Ex Post Facto* Clause.

A. ROSA is not rationally connected to public safety and the Act excessively punishes Petitioner through requirements and conditions bearing no relation to her isolated acts.

ROSA is not rationally related to protecting the public, and it is excessive with respect to the limited circumstances surrounding Petitioner's actions. Therefore, ROSA must be found punitive per the two relevant *Smith* factors. These two factors dictate that where sex offender statutes do not have a rational connection to a non-punitive purpose and are excessive with respect to the purpose, they will be deemed punitive. *See Smith* 538 U.S. at 97 (holding that these two factors are most important to the analysis).

Rejecting the blind fear of legislatures, an increasing number of courts have found public safety is not rationally connected to the enactment of strict sex offender laws due to evidence that sex offenders do not actually pose a high risk of reoffending. *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (striking down a similar statute on *Ex Post Facto* grounds and going so far to

say that such statutes actually increase the risk of recidivism per scholarly research[1]); *see also*, *Doe v. Miami-Dade Cty., Fla.*, 846 F.3d 1180, 1186 (11th Cir. 2017) (holding plaintiffs stated a plausible *Ex Post Facto* Claim when they argued that a residency restrictive sex offender statute increased the risk of recidivism). To ensure that the means chosen are rationally connected to the legislative purpose, legislatures should draft statutes that provide for individualized risk assessments. *See Smith*, 538 U.S. at 116 (Ginsburg, J., dissenting); *Snyder*, 834 F.3d at 705.

The growing number of courts striking down statutes similar to ROSA correlates with the trend of such statutes becoming far more punitive than the initial round of sex offender statutes. *See Snyder*, 834 F.3d at 700. While this Court did uphold a sex offender statute in *Smith*, the statute required sex offenders only to register and did not have ROSA's parole restrictions on travel or internet usage. *See id.* at 703.Therefore, *Smith* is useful only in providing an *Ex Post Facto* analytical framework but should not be considered as guidance when analyzing the factors as the statutes at issue are fundamentally different.

In addition to the Sixth Circuit, eight states since 2008 have recognized the increasingly excessive nature of sex offender statutes and accordingly have invalidated retroactive application of such laws. *See Com. v. Muniz*, 164 A.3d 1189, 1218 (Pa. 2017); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1028-30 (Okla. 2013); *Doe v. Dep't of Pub. Safety & Corr. Servs*., 62 A.3d 123, 137 (Md. 2013); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); *Com. v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Doe v. State*, 189 P.3d 999, 1017-19 (Alaska 2008).

ROSA set forth broad requirements and conditions on Petitioner doing so without regard to Petitioner's specific actions. The special conditions of parole imposed on Petitioner were

[1] J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161 (2011)

triggered by her past acts alone with no regard to a risk assessment going forward. The excessive conditions burdened Petitioner's way of life and have no relation to her original acts. In addition to the stain of being identified as a sex offender for the rest of her life, Petitioner is no longer able to drive. She is prohibited from using certain social media sites to obtain a job even though she did not commit her actions through the use of any social media sites. These burdens have no relation to public safety, but more importantly, they excessively punish Petitioner by infringing upon well-established fundamental rights. Instead of passively accepting the deficient fear-based logic of the legislature, this Court should follow the lead of other courts by protecting legally vulnerable individuals from arbitrary governmental overreach.

B. ROSA directly restrains Petitioner's fundamental rights causing hardship in her daily life.

ROSA's registration requirements and special conditions of parole directly restrain Petitioner and substantially burden her everyday life, thus violating the *Ex Post Facto* Clause. Where a statute imposes an affirmative disability or restraint on the plaintiff, it will lead to the statute being punitive. *Smith*, 538 U.S. at 97. Courts must analyze this factor subjectively looking at how the effects are felt by those subject to the restraint. *Smith*, 538 U.S. at 99-100.

Regarding registration requirements, the Sixth Circuit held an affirmative restraint existed where sex offenders were required to appear in person for updates, reasoning that it was a restraint on personal conduct. *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016); *see e.g.*, *Piasecki v. Court of Common Pleas, Bucks Cty., PA*, No. 16-4175, 2019 WL 960003, at *6 (3d Cir. Feb. 27, 2019) (finding registration requirements applicable to sex offender met the elements of custody as the sex offender's liberty was restrained). While no such restraint was found in *Smith*, the sex offenders were not required to provide updates in person. 538 U.S. at 101.

Here, not only is Petitioner required to register annually for the duration of her life, but she also must personally appear at the law enforcement agency every three years to provide a

current picture of herself. This is ROSA operating direct control over Petitioner and what she may do, thus it is an affirmative restraint consistent with the rationale in *Snyder*.

Furthermore, a number of federal district courts have found city ordinances restricting where sex offenders may live create affirmative restraints, recognizing the significant burden of prohibiting such conduct. *Evenstad v. City of W. St. Paul*, 306 F. Supp.3d 1086, 1100 (D. Minn. 2018) (holding an ordinance prohibiting sex offenders from living within 1200 feet of schools was an affirmative restraint); *see also*, *Hoffman v. Vill. of Pleasant Prairie*, 249 F. Supp. 3d 951, 958 (E.D. Wis. 2017); *Fla. Action Comm., Inc. v. Seminole Cty.*, 212 F. Supp. 3d 1213, 1227 (M.D. Fla. 2016); *Valenti v. Hartford City, Indiana*, 225 F. Supp. 3d 770, 777 (N.D. Ind. 2016).

It is true this Court did not find affirmative restraints present in *Smith*, however the offenders subject to the statute at issue were "free to move where they wish and to live and work as other citizens, with no supervision." 538 U.S. at 101. This is directly at odds with ROSA's travel restrictions and should have no bearing on this Court's analysis. Instead, this Court should align with the federal courts which have struck down analogous prohibitive city ordinances.

As applied to Petitioner, ROSA's travel restrictions have caused her significant hardship due to living in such close proximity to two schools. Because of this, Petitioner cannot travel the quick three miles to her job and instead must bike on a dangerous highway in sub 30-degree temperatures traveling approximately 40 miles per round trip. Petitioner has sought other employment, but she cannot attend many interviews because she cannot drive. ROSA has uniquely affected Petitioner in such a way that it has affirmatively restrained her right to travel.

With regard to the internet, this Court has recognized that social media is one of the most important places for exchanging ideas, thus worthy of considerable protection under the First Amendment. *Packingham*, 137 S. Ct. at 1735; *See also*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997). When applying the principles expounded in *Packingham*, ROSA's

social media restriction, as applied to Petitioner, cannot stand as it restrains her from utilizing the internet not only for speech purposes but also for job searching purposes. Such a restraint is burdensome to Petitioner and violative of the *Ex Post Facto* Clause.

C. ROSA mirrors traditional forms of punishment as it retroactively targets past actions through conditions of parole and publicly shames.

ROSA seeks retribution for past actions through conditions of parole and shames sex offenders for their past actions, thereby resembling traditional forms of punishment. Here, the two *Smith* factors at-issue weigh whether the action has been regarded in our history and traditions as a punishment and whether it promotes the traditional aims of punishment. *Smith* 538 U.S. at 97. This Court should find that conditions of parole equate to punishment based on the effect such conditions have and their purpose of deterrence. *See Smith*, 538 U.S. at 116 (Ginsburg, J., dissenting); *Snyder*, 834 F.3d at 703.

Courts have also protected sex offenders based on how registration requirements and conditions of parole affect individuals within society. *See Muniz*, 164 A.3d at 1213 (holding publication provisions are similar to shaming due to exposure in digital world); *Snyder*, 834 F.3d at 702; *see also*, Corey Rayburn Yung, *Banishment by A Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U.L. REV. 101, 135 (2007) (opining that sex offender exclusion zones fit the criteria of the ancient punishment of banishment).

ROSA placed a stain on Petitioner that she will have to wear for the rest of her life. Apart from this label, ROSA has also effectively punished Petitioner through shame and banishment. Petitioner is ostracized from the local community as she can no longer step foot in certain areas in such close proximity to her house. Further, she cannot teach, she cannot drive, and she cannot access social media sites. This is punishment. This has not only caused Petitioner shame and embarrassment, but it has marginalized her to such an extent that burdens her everyday life. This retroactive punishment cannot be permitted under the *Ex Post Facto* Clause.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests this Court reverse the Thirteenth Circuit's holding.

Respectfully submitted,

s/_____
Team #9
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