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 Thirteenth Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Under the First and Fourteenth Amendments of the United States Constitution, does the State of Lackawanna's Registration of Sex Offenders Act violate Ms. Guldoon's fundamental constitutional rights when the special conditions inherent in the Registration of Sex Offenders Act are overbroad and are not related to the offense from which Ms. Guldoon is now a parolee?

2. Under the ex post facto clause of the United States Constitution, did the State of Lackawanna Board of Parole violate Ms. Guldoon's constitutional protection when the parole sentencing board imposed the new Registration of Sex Offenders Act legislation that required new registration requirements and special conditions that have a punitive effect after already being convicted?

STATEMENT OF THE FACTS

Nine years ago, Ms. Guldoon made a series of terrible decisions that caused great pain to her victim B.B., her school, and her family. (Aff. 11). In 2008, she became a teacher at Old Lackawanna High School, where she taught Introductory and Advanced Computer Science. (Aff. 11). Following the birth of her daughter in May 2010, she suffered from severe post-partum depression for which she was prescribed Prozac. (Aff. 12). B.B. was a student in her Computer science class, and Ms. Guldoon developed a close relationship with him that eventually became physical. (Aff. 12). Ms. Guldoon began her sentence at Tonawanda Correctional Facility, where she was first diagnosed with Bi-Polar Disorder, which has side effects of hypersexuality. (Aff. 13). The psychiatrist at Tonawanda Correctional Facility determined that Ms. Guldoon had been misdiagnosed, and the crimes she committed were a result of a manic episode triggered by the misdiagnosis. (Aff. 13). Since that diagnosis, Ms. Guldoon has been treated with lithium with no further problems. (Aff. 13). While incarcerated, Ms. Guldoon completed a master's degree in computer programming through the University of Phoenix online program. (Aff. 14).

While Ms. Guldoon was incarcerated, the State of Lackawanna enacted the Registration of Sexual Offenders Act (ROSA), which added new conditions to Ms. Guldoon's parole, such as her surrendering her driver's license, not appearing within 1,000 feet of any school, and barring her from accessing any social networking programs. (Aff. 14). These new conditions were not mandatory conditions of parole for sex crimes prior to the enactment of ROSA. (Aff. 14). Upon release, Ms. Guldoon returned to Old Cheektowaga to live with her family on Nine Mile Road. (Aff. 14). For several months after her release, Ms. Guldoon struggled to find work as she is barred from her chosen career of teaching due to ROSA. (Aff. 15). She is also barred from using any social networking website, including LinkedIn, Craigslist, and other platforms where employment opportunities are posted. (Aff. 15). Ms. Guldoon's inability to drive has also

frustrated her search for employment as public transportation is infrequent in the rural part of Old Cheektowaga where she resides. (Aff. 15). Ms. Guldoon was only able to find one job, at Plewinski's Pierogi Plant. (Aff. 15). Due to ROSA's requirements, Ms. Guldoon must bike to work and take a "maddingly circuitous route" with a distance of 20 miles each way. (Aff. 16). The route she is forced to take follows State Highway 10, which has speeds of 65 miles per hour. (Aff. 16). Additionally, ROSA is negatively affecting her family as well as neither Mr. Guldoon nor their daughter can access social media outlets. (Aff. 16). ROSA also limits Ms. Guldoon's ability to work in her chosen profession even remotely, as ROSA forbids her from teaching any online courses. (Aff. 17).

SUMMARY OF THE ARGUMENT

This Court should reverse the United States Court of Appeals for the Thirteenth Circuit because Lackawanna's Registration of Sex Offenders Act violates Ms. Guldoon's rights under the First and Fourteenth Amendments. Petitioners recognize that parolees can be subjected to special parole conditions that diminish liberty interests. However, Lackawanna's Registration of Sex Offenders Act still violates Ms. Guldoon's free speech rights under the First Amendment, because ROSA's special condition banning internet access is not reasonably related to the nature of her offense, past history or characteristics, and Lackawanna's need to deter criminal conduct. Additionally, this Court should recognize that Ms. Guldoon possesses a fundamental right to drive as an extension of the fundamental right to intrastate travel inherent in the Privileges and Immunities Clause of the Fourteenth Amendment. Lastly, this Court should strike down Lackawanna's special condition prohibiting Ms. Guldoon's operation of a motor vehicle as it is not reasonably related to the nature of her offense, past history or characteristics, and Lackawanna's need to deter criminal conduct.

Lackawanna's ROSA legislation establishes punitive, retrospective legislation that disadvantages sex offenders for an act that had already been committed. Although ROSA may have been written with a regulatory, procedural scheme, the punitive effect shows that the alteration in the law truly is substantive. The last time the Ex post facto Clause was reviewed in regard to ROSA legislation was in *Smith v. Doe* in 2003. Much change has occurred in the past sixteen years and should be reevaluated in the Court. Ex Post Facto violations effect not only sex offenders, but all citizens of the United States because all citizens deserve to know the rules and consequences of breaking those rules.

STANDARD OF REVIEW

Because petitioner's challenge of ROSA's constitutionality implicates the First and Fourteenth Amendments of the United States Constitution, which are purely questions of law, the appropriate standard of review is *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Additionally, in regard to petitioner's ex post facto challenge, this Court has always applied a *de novo* standard of review when faced with the question of whether the law then before it imposed a punishment. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 220 (1963).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURT BECAUSE LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT VIOLATES MS. GULDOON'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Although Parolees Can Be Subjected To Special Parole Conditions That Diminish Liberty Interests, Lackawanna's Registration Of Sex Offenders Act Still Violates Ms. Guldoon's Free Speech Rights Under The First Amendment To The United States Constitution.

Like other citizens in our society, parolees possess fundamental constitutional rights. Although the liberty rights of parolees have not been well-defined, it is clear that "[p]arolees are,

of course, not without constitutional rights. *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970). However, parolees are subject to "restrictions not applicable to other citizens, "and a prisoner on parole enjoys only 'conditional liberty properly dependent on observance of special parole restrictions.'" *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972). Additionally, this Court stated that, "although the full panoply of rights due a defendant in a criminal prosecution does not apply to parole revocations," due process interests are nonetheless implicated by such terminations". *Id*. at 480. In scenarios where a parolee's special conditions of release diminish her fundamental liberty interests, the second circuit has held that those liberty interests are not infringed in the absence of a showing that the [parole] board or its agents acted in an arbitrary and capricious manner. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972). In 2014, the United States District Court for the Eastern District of New York stated that, "[t]he imposition of conditions—whether imposed prior to, or subsequent to release, by the parole board or a field parole officer—must be upheld as long as they are reasonably related to a parolee's past conduct, are not arbitrary and capricious, and are designed to deter recidivism and prevent further offenses. *Singleton v. Doe,* 2014 WL 3110033 at *3 (E.D.N.Y 2014).

Therefore, based on the case law examined above, Ms. Guldoon possesses limited due process rights as a parolee. In addition, any special conditions imposed upon her must be reasonably related to her past conduct, must be designed to deter recidivism, and must prevent further offenses. As part of Ms. Guldoon's parole, the special conditions imposed upon her by Lackawanna restricted her ability to operate a motor vehicle and her ability to access a commercial social networking website. (Aff. 14). As mentioned in the statement of facts, Ms. Guldoon's charges stem from her sexual involvement with her former student B.B., whom she taught computer sciences to at Old Lackawanna High School. (Aff. 12). Ms. Guldoon admitted that she had engaged in sexual contact with B.B. in her classroom, in her car, and in her home.

(PSR 5). Based on these facts, the special conditions of parole imposed are not reasonably related to the circumstances surrounding Ms. Guldoon's convictions, her past history or characteristics, recidivism, and the need to protect the public from further crimes by her. The use of a motor vehicle was one of the many avenues utilized by Ms. Guldoon during her sexual encounters with B.B. and was not a necessary requirement in Ms. Guldoon's furtherance of the crimes she committed. There is no evidence or mention in the pre-sentence report that Ms. Guldoon had used her vehicle as a means to lure minors into committing sexual acts with her, or that she has a history of using her vehicle in nefarious ways. Due to the fact that Ms. Guldoon's convictions only involve the use of motor vehicle tangentially, this special condition is not reasonably related to the nature of her offense, her past history or characteristics, and Lackawanna's need to deter criminal conduct.

Similarly, Ms. Guldoon's convictions did not involve access to the internet in the form of a "commercial social networking website". Ms. Guldoon made contact with B.B. via email and text messages. Respondent's may argue that Ms. Guldoon's communications with B.B. were those which Lackawanna's Registration of Sex Offenders Act (hereinafter "ROSA") now aims to forbid, and this special condition via ROSA is reasonably related to Ms. Guldoon's past conduct and should be upheld. Based on the reading of ROSA, email and text messages do not fall within the meaning of the "commercial social networking" aspect of the legislation, as they are not websites. Additionally, the special condition banning Ms. Guldoon from accessing a "commercial social networking website" is not reasonably related to the circumstances of her offense. In 2015, the seventh circuit held that conditions that were unrelated to the crime of the conviction were unwarranted. *United States v. Taylor*, 796 F.3d 788, 793 (7th Cir. 2015). There has been no evidence provided in the pre-sentence report that allows this Court to make the inference that Ms. Guldoon's usage of commercial social networking websites, such as LinkedIn

or Monster.com among others, would induce her to engage in nefarious activities, or commit more crimes going forward. In Ms. Guldoon's sworn affidavit, she attested to the fact that her crimes were partially caused due to her untreated bipolar disorder. (Aff. 13). Since her diagnosis, she has continuously used her prescribed medication and is presently undergoing treatment. (Aff. 13). There is also no mention in the record that the special condition banning Ms. Guldoon's access to commercial social networking websites would protect Lackawanna's residents from further crimes by her. Rather, this special condition has negatively affected other Lackawanna residents. In Ms. Guldoon's affidavit, she attested that this internet ban has not only frustrated her ability to obtain employment, but has also negatively affected her family as there cannot be internet access in their home. (Aff. 16). No one in the Guldoon household is able to access websites and apps like, Facebook, Twitter, Instagram, LinkedIn, Netflix, and Hulu, as most of these websites have some type of chat feature which implicates the "commercial social networking" aspect of ROSA. (Aff. 16). This burden has proved unacceptable to both Mr. Guldoon and Mr. and Mrs. Guldoon's young daughter.

Courts have routinely overturned special conditions relating to internet bans when the court heard no evidence and made no findings demonstrating a connection between the ban and the defendant's conduct. In 2009, the first circuit vacated a special condition which banned the defendant, who was convicted of sexual contact with a minor, from possessing any pornographic material because there was no suggestion in the pre-sentence report, or at sentencing that the defendant's use of pornographic material contributed to his offense or would be likely to do so in the future. *United States v. Perazza-Mercado*, 553 F.3d 65, 78 (1st Cir. 2009). As previously mentioned, there has been no evidence provided in the pre-sentence report that allows this Court to draw the conclusion that Ms. Guldoon's usage of commercial social networking websites, such as LinkedIn or Monster.com among others, contributed to her offense, would likely induce

her to engage in nefarious activities, or commit more crimes going forward. This Court should vacate the special condition banning Ms. Guldoon from accessing commercial social networking websites for the same reasons as the first circuit in 2009.

Additionally, as the United States Court of Appeals for the Thirteenth Circuit stated in its dissenting opinion, these special conditions involve a greater deprivation of liberty than is reasonably necessary to fulfill the purposes of sentencing. 999 F.3d 1, 5 (13th Cir. 2019). To protect the First Amendment, courts are prohibited from enforcing regulations that prevent a substantial amount of protected First Amendment activity, even if the particular conduct which violated the regulation was not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747, 769 (1982). This Court has stated that "a fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers "relatively unlimited, low-cost capacity for communication of all kinds." *Id*. at 868-870. In 2017, in *Packingham v. North Carolina*, this Court unanimously held that a North Carolina statute making it a criminal offense for convicted sex offenders to access social media websites was unconstitutionally overbroad and violated the First Amendment to the United States Constitution. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). This Court analyzed the importance of the internet in today's age, by referring to it as the "modern public square" and referred to specific examples of how important the internet is for First Amendment communications. *Id*. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. Id. at 1735. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship, and on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Id.

Governors in all 50 states and almost every member of Congress has set up accounts for this purpose, which underscores the importance of the internet in today's day and age. Id. Additionally, in *Packingham*, this Court acknowledged the state interest in preventing the sexual abuse of minors. Id. Because the state statute was content-neutral, it was subjected to intermediate scrutiny upon review by this Court. Id. at 1736. To survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest. Id. This Court held that North Carolina's law failed intermediate scrutiny because "with one broad stroke, North Carolina bar[red] access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thoughts and knowledge. Id. at 1737. In essence, this Court held that the North Carolina statute was overbroad.

The special condition banning "commercial social networking websites" imposed upon Ms. Guldoon by Lackawanna fails to satisfy intermediate scrutiny for many of the same reasons as the statute in *Packingham*. ROSA and its inherent special conditions are not narrowly tailored to serve a significant governmental interest. Lackawanna's governmental interest is to protect minors from unlawful sexual advances from adults as recent investigations conducted by the attorney general have found that many sex offenders use social networking websites popular with children. (ROSA 20). However, the special condition banning Ms. Guldoon's internet access is even broader then the North Carolina statute in *Packingham*. Practically, all websites now allow users to 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. In *Packingham*, this Court underscored the importance of a website like LinkedIn, which allows users to look for work, advertise for employees, or review tips on entrepreneurship. *Packingham*, 137 S. Ct. at 1735. By upholding ROSA, this Court would prevent Ms. Guldoon from using websites like

LinkedIn, which would assist her already arduous journey towards finding suitable employment. Additionally, ROSA has effectively forbade the entire Guldoon family's access to websites and apps like, Facebook, Twitter, Instagram, LinkedIn, Amazon, Netflix, and Hulu. (Aff. 16). The lack of access to these websites has negatively affected Mr. Guldoon and their child. (Aff. 17). One can easily surmise that ROSA is not narrowly tailored. It is also overbroad as it effectively bans almost all use of the internet. 999 F.3d at 5. Therefore, like the statute that was invalidated by this Court in *Packingham*, ROSA is far too overbroad and fails to satisfy intermediate scrutiny. Ultimately, ROSA should be struck down as it violates Ms. Guldoon's guaranteed rights under the First Amendment to the United States Constitution. For the foregoing reasons, even though parolees can be subjected to special parole conditions that diminish liberty interests, ROSA nonetheless violates Ms. Guldoon's free speech rights under the First Amendment to the United States Constitution.

B. <u>This Court Should Recognize A Fundamental Right To Drive As An Extension Of The Fundamental Right To Intrastate Travel Inherent In The Privileges And Immunities Clause Of The Fourteenth Amendment To The United States Constitution</u>.

The right to travel without undue restriction was the very first right recognized as a fundamental liberty under the Fourteenth Amendment to the United States Constitution. *Crandall v. State of Nevada*, 73 U.S. 35, 35 (1867). Since that early recognition by this Court, many courts have routinely recognized a fundamental right to travel within the United States, which courts have referred to as the "right to free movement". *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008). In *Saenz*, this Court stated that "[t]he 'right to travel' ... embraces *at least* three different components," including "the right of a citizen of one state to enter and leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and for travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500

(1999). This Court has suggested that although pinpointing the exact textual source of the right to travel is elusive, the fundamental right to travel has been invoked, and protected by the Privileges and Immunities Clause inherent in the Fourteenth Amendment to the United States Constitution. *Id*. at 502-03. Based on the case law cited above, it is apparent that Ms. Guldoon has a fundamental right to travel.

Although courts have routinely agreed that a right to travel exists, they have failed to reach a consensus for what exactly the right means. Matthew Gillespie, *Shifting Automotive Landscapes: Privacy And The Right To Travel In The Era Of Autonomous Motor Vehicles*, 50 WASH. U. J.L. & POL'Y 147, 150 (2016). Courts have generally recognized five rights inherent in the right to travel, which include: (1) the right to freedom of movement, (2) the right to travel on public fora, (3) the right to intrastate travel, (4) the right to interstate travel, and (5) the right to international travel. Id. Of these five, the two most pertinent to everyday motorists are the rights to interstate and intrastate travel. Id. Interstate travel is defined as "travel from one state to another, and necessarily to use the highways, and other instrumentalities of interstate commerce in doing so." Kathryn E. Wilhelm, *Freedom of Movement At A Standstill? Toward The Establishment Of A Fundamental Right To Intrastate Travel*, 90 B.U. L. REV. 2461, 2464 (2010). Contrarily, intrastate travel contemplates movement within the borders of a single state. *Id*. Intrastate travel "is an everyday right, a right we depend on to carry out our daily life activities, and at its core, a right of function." *Id*. This Court has never definitively addressed the existence of a right to intrastate travel, explicitly reserving the issue in *Memorial Hospital v. Maricopa County*, and has not considered it since that decision *Id*. at 2476. Because this Court has recognized the right to interstate travel as a fundamental right, this Court has applied a strict scrutiny standard of review when determining whether a government restriction of the right to interstate travel is unconstitutional. *Id*. at 2465.

However, there should also be a substantive due process right regarding the right to intrastate travel. Appellate courts have arrived at the conclusion that this Court has not yet directly addressed. Gillespie, *Shifting Automotive Landscapes: Privacy And The Right To Travel In The Era Of Autonomous Motor Vehicles*, 50 WASH. U. J.L. & POL'Y at 151. In *King*, the second circuit held that it would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel "within" a state. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971). In 2009, the second circuit reaffirmed this concept when it stated in *Selevan* that they have previously recognized the Constitution's protection of a right to intrastate travel, as well as interstate travel, referring to its decision in *King*. *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 100 (2d Cir. 2009). Similarly, the third circuit stated that the right to move freely around one's neighborhood or town, even by automobile is indeed implicit in the concept of ordered liberty and deeply rooted in our country's history. *Lutz v. City of York, Pa.*, 899 F.2d 255, 268 (3d Cir. 1990). For the reasons mentioned by both the second and third circuits, this Court should recognize the right to intrastate travel as a fundamental right inherent in the right to travel, as this Court has repeatedly done so for the right to interstate travel. Therefore, any violation of the right to intrastate travel should be subjected to strict scrutiny. Strict scrutiny states that any law that violates a fundamental right is constitutional only if it is narrowly tailored to further a compelling government interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

Secondly, although courts have been extremely deferential to the right to travel, not all courts have yet to establish the right to drive as a fundamental right, which extends from the right to travel. Gillespie, *Shifting Automotive Landscapes: Privacy And The Right To Travel In The Era Of Autonomous Motor Vehicles*, 50 WASH. U. J.L. & POL'Y at 152. Therefore, the majority of government laws and regulations that impede one's right to drive have not been subjected to

strict scrutiny judicial review analysis. *Id*. Early American jurisprudence went so far as recognizing the right to drive, rather than just the right to travel, as fundamental. In 1907, Justice Ladd of the Supreme Court of Iowa stated that the right to make use of an automobile as a vehicle of travel is no longer an open question, and the owners thereof have the same rights in the roads and streets as the drivers of horses or those riding a bicycle or traveling by some other vehicle. *House v. Cramer*, 112 N.W. 3, 3 (Iowa 1907). Additionally, in 1890, the Supreme Court of Kansas stated that "each citizen has the absolute right to choose for himself the mode of conveyance he desires, whether it be by wagon or carriage, by horse, motor or electric car, or by bicycle". *Swift v. City of Topeka*, 23 P. 1075, 1076 (Kan. 1890). The Supreme Court of Kansas also stated that the right to drive was "so well established and so universally recognized in this country that it has become a part of the alphabet of fundamental rights of the U.S. citizen." *Id*. Even this Court suggested, if only in dicta, that driving a motor vehicle without undue government interference was a constitutional right. In *Buck*, Justice Louis Brandeis wrote that the right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States, and a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle. *Buck v. Kuykendall*, 267 U.S. 307, 314 (1925). For the reasons argued above, this Court should recognize the right to drive as inherent within the constitutionally protected right to travel. Therefore, any government action that violates a citizen's constitutional right to drive must satisfy strict scrutiny. As previously stated, in order to satisfy strict scrutiny, a government law or regulation must have a compelling government interest and must be narrowly tailored to achieve that law. *Grutter*, 539 U.S. at 326. Lackawanna's governmental interests for imposing the special condition of no driving upon Ms. Guldoon include protecting vulnerable populations, and in some instances, the public from the potential harm of sexually violent offenders who commit

predatory acts characterized by repetitive and compulsive behavior. (ROSA 19). As previously stated, the use of a motor vehicle was one of the many avenues utilized by Ms. Guldoon during her sexual encounters with B.B. and was not a necessary requirement in her furtherance of the crimes she committed. There is no evidence or mention in the pre-sentence report that Ms. Guldoon used her vehicle as a means to lure minors into committing sexual acts with her, or that she has a history of using her vehicle in nefarious ways. Quite plainly, there is no evidence in the record that Ms. Guldoon's operation of a motor vehicle would protect vulnerable populations from her. ROSA's no driving prohibition is not narrowly tailored to achieve the state's interest in protecting vulnerable communities and should thus be struck down.

Additionally, in today's day and age, the right to travel, and namely the right to drive is more critical to a functioning society than ever. In 2019, having the ability of driving one's own vehicle is often critical to employment, health care, and even maintaining family ties. Gillespie, *Shifting Automotive Landscapes: Privacy And The Right To Travel In The Era Of Autonomous Motor Vehicles*, 50 WASH. U. J.L. & POL'Y at 154. It is important to note that narrow interpretations of the right to travel, that do not include the right to drive, may have a disproportionately adverse impact on the nation's poorest and most vulnerable populations. *Id*. Due to her status as a parolee, Ms. Guldoon is one of those people who would be extremely vulnerable and most negatively affected if a narrow interpretation of the right to travel, which does not include a right to driving, was accepted by this Court. Public transportation is infrequent in the rural area of Old Cheektowaga, Lackawanna, where Ms. Guldoon resides. (Aff. 15). It is not practicable for Ms. Guldoon to exercise her right to travel appropriately in the rural community in which she resides without the right or ability to drive a motor vehicle. Ms. Guldoon was able to find one job at a pierogi plant, which is about three miles from her home. (Aff. 15). However, as ROSA states, she must stay 1,000 feet of any school. (ROSA 24). Due to

ROSA's requirement, Ms. Guldoon must take a "maddingly circuitous route" with a distance of approximately 20 miles each way. (Aff. 16). A narrow interpretation of the right to travel that does not include the right to drive, would have a disproportionately adverse impact on Ms. Guldoon's ability to exercise her constitutionally protected right to travel.

For the foregoing reasons mentioned above, this Court should recognize a fundamental right to drive as an extension of the fundamental right to intrastate travel inherent in the Privileges and Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

C. This Court Should Strike Down Lackawanna's Special Condition Prohibiting Ms. Guldoon's Operation Of A Motor Vehicle As It Is Not Reasonably Related To The Nature Of Her Offense, Past History, Characteristics, And Lackawanna's Need To Deter Criminal Conduct.

Petitioners have established that Ms. Guldoon has a fundamental right to intrastate travel and a right to drive a motor vehicle. Additionally, petitioners have shown that Lackawanna did not satisfy strict scrutiny when infringing upon Ms. Guldoon's constitutional protections. However, as previously discussed, petitioners understand that due to Ms. Guldoon's status as a parolee, she is subject to "restrictions not applicable to other citizens and that as a prisoner on parole, she enjoys only 'conditional liberty properly dependent on observance of special parole restrictions.'" *Morrissey,* 408 U.S. at 482. Petitioners have previously mentioned that special conditions—whether imposed prior to or subsequent to release, by the parole board, or a field parole officer—must be upheld as long as they are reasonably related to a parolee's past conduct, are not arbitrary and capricious, and are designed to deter recidivism and prevent further offenses. *Singleton,* 2014 WL 3110033 at *3. The special conditions of parole imposed upon Ms. Guldoon are not reasonably related to the circumstances surrounding her convictions, past history, characteristics, recidivism, and the need to protect the public from any further crimes by her. As analyzed during the strict scrutiny analysis, the use of a motor vehicle was one of the

many avenues utilized by Ms. Guldoon during her sexual encounters with B.B and was not a necessary requirement in the furtherance of the crimes she committed. There is no evidence or mention in the pre-sentence report that Ms. Guldoon used her vehicle as a means to lure minors into committing sexual acts with her, or that she has a history of using her vehicle in nefarious ways. Because Ms. Guldoon's convictions only involve the use of motor vehicle tangentially, this special condition is not reasonably related to the nature of her offense, past history, characteristics, and Lackawanna's need to deter criminal conduct, and should therefore, be struck down by this Court.

For the foregoing reasons mentioned above, this Court should strike down Lackawanna's special condition prohibiting Ms. Guldoon's operation of a motor vehicle as it is not reasonably related to the nature of her offense, past history, characteristics, and Lackawanna's need to deter criminal conduct.

II. STATE OF LACKAWANNA BOARD OF PAROLE VIOLATED MS. GULDOON'S CONSTITUTIONAL PROTECTION UNDER THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE OF RETROACTIVE, PUNITIVE LEGISLATION THAT ESTABLISHED NEW REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS AFTER ACT HAD BEEN COMMITTED.

A. Lackawanna's Registration Of Sex Offenders Act Violates The Ex Post Facto Clause.

A law is ex post facto if it is retrospectively applies to events occurring before its indictment and disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Article 1, Section 10, Clause 1, of the United States Constitution established that the states are prohibited from passing any laws which apply ex post facto. (U.S. Const. art. I, §10).

Ex post facto legislation is "any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome punishment for a crime after its commission, or which deprives one charged with crime of any defense available

according to law at time when act was committed, is prohibited as ex post facto." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925); *Dobbert v. Florida*, 432 U.S. 282, 292 (1977). With the prohibition of ex post facto legislation, the Framers of the United States Constitution sought to assure that future legislation would give fair warning of their effect to permit wrongdoers to rely on their meaning until explicitly applied. *Weaver*, 450 U.S. at 28. Even now, this prohibition bans governmental power by restraining arbitrary, vindictive, and oppressive language. *Id*. at 29; *Dobbert*, 432 U.S. at 293.

It is the effect, not the form, of the law which determines whether it is ex post facto. *Weaver*, 450 U.S. at 24. The clause looks to the standard of punishment prescribed by statute rather than to the sentence actually imposed, and the Constitution forbids application of any new punitive measures to crime already consummated, to detriment or material disadvantage of the wrongdoer. *Dobbert*, 432 U.S. at 299. For ex post facto purposes, whether a retrospective criminal statute worsens conditions imposed by its predecessor is a federal question *Weaver*, 450 U.S. at 33.

Lackawanna's ROSA legislation was ex post facto because its reach extends to already convicted sex offenders and disadvantages them for a crime that they had already committed. Ms. Guldoon was given no fair warning of the effect ROSA would have on her, and she was already incarcerated in Tonawanda Correctional Facility when the retrospective grasp of ROSA encompassed her. (ROSA 26). The case at hand is similar to *Weaver* regarding the effect of the legislative intent. *Weaver*, 450 U.S. at 31. As in *Weaver*, Lackawanna's ROSA may have been written to be "non-punitive," but the effect of the act is far from what the form states. *Id*. at 31. Lackawanna's ROSA changes the legal consequences of Ms. Guldoon's acts completed before its effective date. (Aff. 13). Both the registration requirements and the special conditions of parole are punitive in nature and are conditions that were not stated when Ms. Guldoon pled

guilty. (Aff. 14). She must report information to the Division of Sex Offenders, including her: name, date of birth, sex, race, weight, eye color, driver's license number, home address, internet accounts, recent photograph, fingerprints, a description of the offense, address of any higher education enrolled in, employment address, and any other pertinent information by the division. (LCL §168 29). All of this information is then made public and given to agencies that can use the information to discriminate against sex offenders. (LCL §168 29-30). Also, each time Ms. Guldoon changes any part of the report to register, she must pay $10 and renew annually. (LCL §168 30). ROSA even prohibits her from going within 1,000 ft. of any school ground (ROSA 24); not to use the internet to access pornographic material and commercial social networking websites; and to surrender her license to operate a motor vehicle. (LCL §168 43-44). The internet and vehicle usage were incidental to her crime and were not used in furtherance of the crime.

The respondent may argue that ROSA is not punitive in nature and strictly reformatory. However, the language of ROSA states that it is "an Act to amend the correction law, the *penal law*, and the executive law." (*emphasis added*). (ROSA 19). Although the governmental interest is to protect vulnerable populations and the public from potential harm, this does not mean that the government should be able to take away constitutional rights as stated before. ROSA states that the internet restrictions are to prevent recidivism; however, it gives no justification for the overdetailed registry, the 1,000 ft. restriction, or surrendering a license. The fact that ROSA requires a sex offender to report a driver's license, while at the same time surrendering it shows just how lacking of detail and unscrupulous the legislature was to enact this law.

Most importantly, the danger of recidivism has been well documented and used as a scaring tactic to pass this type of legislation. With rhetoric of sex offenders having a high recidivism rate, sex offenders are being characterized as having low impulse control and being mentally ill with the inability to control themselves resulting in being a danger to the community.

Roger Przybylski, *Recidivism of Adult Sexual Offenders*, NATIONAL CRIMINAL JUSTICE ASSOCIATION, Jul. 2015, at 1-3. Data is highly skewed because sex offenders are not just pedophiles, but also exhibitionists, sexual assaulters, and rapists as well. *Id*. at 2. ROSA legislation is not fair because there are huge differences in these crimes. For example, rape is considered violent; whereas, sex offenses against minors generally are not. When sex offenders do recidivate, only 4% are for continued sex crimes, which is one of the lowest occurrences of recidivism for criminals. *Id*. at 3. In fact, recidivism in sex offenders is due to poverty crimes and due to the burdens placed upon them if they fail to check in. *Id*. at 3. Homelessness, unemployment, and lack of technology effects sex offenders far more than the form was to create.

B. The Effects Of Lackawanna's Registration Of Sex Offenders Act Are Substantive.

The Court has found that no ex post facto violation occurs when the changes effected are procedural in nature. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977). This is not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. *Beazell v. Ohio*, 269 U.S. 167, 171 (1925). A procedural change is not ex post facto. *Dobbert*, 432 U.S. at 293. Alteration of a substantial right is not merely procedural even if the statute takes a seemingly procedural form. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). An ex post facto law need not impair a vested right because the presence or absence of an affirmative, enforceable right is not relevant to the ex post facto prohibition, which bans punishment more severe than the punishment assigned when the act occurred. *Weaver*, 450 U.S. at 29. Relief under the clause is not the wrongdoer's right to less punishment. *Id*. at 30. However, the lack of fair notice and governmental restraint when the legislature increases punishment beyond what is prescribed when the act occurred is the aim of the clause. *Id*. The question looks to the challenged provision and not to any special circumstances which might mitigate its effect on the particular individual.

Id at 33. This Court looks for a clearly stated preference on the part of the legislature. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If no clear preference exists, the Court examines the act on its face to determine whether it is regulatory in both structure and design. *Id*. One of the most important characteristics of a regulatory law is adequate procedural protections. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984). The legislature does not immunize law from scrutiny under the Ex Post Facto Clause simply by labelling it "procedural;" subtle ex post facto violations are no more permissible than overt ones. *Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

An ex post facto violation has occurred because Lackawanna's ROSA legislation effects sex offenders substantially over procedurally. ROSA is affecting Ms. Guldoon's fundamental rights. Even if this Court deems that her rights are not fundamental, if these changes are substantive along with being retroactive and punitive, it will violate the Ex Post Facto Clause. *Weaver*, 450 U.S. at 29. This case is dissimilar from *Dobbert* because the Court found no violation in that case because the effect was found to be procedural. *Dobbert*, 432 U.S. at 282. The law was found to be procedural because, although the law was retroactive, it had no punitive effect. *Id*. The law affected the jury's decision in a murder trial. *Id*. There was no punitive effect because the effect was in regard to the hearing process, and the effect of the death penalty would have the same result regardless of whether the law was passed or not. *Id*. It is apparent that Lackawanna's ROSA legislation is not procedural because there is a lack of any fair notice or hearing to deprive of life, liberty, and property; whereas, the substantive effect is quite apparent because Lackawanna is using its power to regulate paroled sex offender's daily activities. ROSA is silent to the rationale behind all of its decisions to violate rights. The power of the Ex Post Facto Clause is that it is not conceptualized on Ms. Guldoon's constitutional violations, but the effect of the law for all sex offenders in Ms. Guldoon's position. It is quite clear that all sex

offenders in Lackawanna are affected by the passage of ROSA, especially those who were convicted prior to its enactment. Although Lackawanna believes ROSA to be procedural in nature, its retroactive, punitive effect on sex offenders is regulatory and substantive.

Respondent may argue that ROSA is procedural because of the hearing aspect and steps to take to register. (ROSA 28-30). However, even if the written law has aspects of procedure, it is the effect that the Court uses to determine if the law is actually substantive. *Kansas*, 521 U.S. at 361. There was no clearly stated preference to Lackawanna's actions, which means the Court is likely to find ROSA's effect substantive. *Id*.

1. The Ex Post Facto Clause In Regard To ROSA Type Legislation Should Be Reevaluated By This Court.

When a SORA law is nonpunitive, its retroactive application does not violate the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84, 85 (2003). The determinative question of whether the issue is nonpunitive is whether the legislature meant to establish "civil proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the intention was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, the Court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to deem it civil. *Smith*, 538 U.S. at 92. Because the Court ordinarily defers to the legislature's stated intent, only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty. *Id*. The "clearest proof" standard is not an insurmountable burden requiring a showing of ill motive or bad faith because statutes are not struck down based on ill motive, and this Court does not inquire into the motive of legislators when examining a statute to determine whether it is constitutional. *United States v. O'Brien*, 391 U.S. 367, 383 (1968). The Court refers to the factors noted in *Kennedy v. Mendoza-Martinez* as a useful framework to determine the intent to

establish a civil regulatory scheme: (1) does the law inflict what has been regarded in our history and traditions as punishment; (2) does it impose an affirmative disability or restraint; (3) does it promote the traditional aims of punishment; (4) does it have a rational connection to a non-punitive purpose; and (5) is it excessive with respect to this purpose. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Respondents need only show that any one of these factors, or any combination of two or more demonstrates that the ASORA is excessive in either its purpose or effect. *One Assortment of 89 Firearms*, 465 U.S. at 365.

Lackawanna's intention may have been to create a regulatory scheme; however, there is clear proof to show that the effect does not create a regulatory scheme. The *Kennedy* factors are not exhaustive or dispositive, and the weight to be given each factor depends upon the context and type of the sanction to be used. *Id*. at 168. First, public notification, shaming, and ostracism have historical roots and have been nothing but punitive. Sex offenders are continuously reminded of their crime more than any other type of offender because it is put on display. Paying fines and losing licenses are also forms of punishment. Second, there is an affirmative disability and restraint because ROSA places sex offenders at a serious disadvantage, and it limits the exercise of fundamental rights. Registrants under ROSA are also subject to community scorn and outrage because there is so much personal information being received. These deprivations are to prevent future misconduct, but it in turn makes it nearly impossible to reintegrate successfully back into society. Third, ROSA promotes retribution and deterrence, which are traditional aims of punishment; however, the excessive notification and deterring by taking away incidental tools is not deterrence of the crime. Fourth, there is not a rational connection to a non-punitive purpose because public protection through deterrence of future criminal behavior is a constitutionally insufficient purpose to justify such a broad offense-based registration and special conditions. Lastly, ROSA is excessive for its purpose because where fundamental rights are abridged, the

state must do more than show a reasonable relationship between the purpose and the means to achieve the purpose. The goals of ROSA are far outweighed by the punitive effects associated with the registration and special conditions.

These factors are relevant to Lackawanna's ROSA, and the fact that most of the factors are affected negatively shows that there is a need for sex offender laws to be reevaluated in this Court. Respondent may argue that it was shown in *Smith v. Doe* that these factors did not persuade the Court; however, in *Smith* the legislation was to report basic information solely to law enforcement. *Smith v. Doe*, 538 U.S. 84, 84 (2003). Lackawanna's ROSA is way above and beyond the legislation from *Smith*. *Id*. The Court seemed to settle the ex post facto issue in *Smith*, holding that registration and notification in that case was not punitive, and therefore, could be retroactively imposed as regulatory action. *Id*. Since the *Smith* decision, the Court has seen a series of cases that have tried to interpret 18 U.S.C. §2250, but it has declined to interpret any ex post facto implications raised by these cases. *United States v. Kebodeaux*, 570 U.S. 387, 419 (2013); *Carr v. United States*, 560 U.S. 438, 442 (2010). The problem with this is that the *Doe* case is now 16 years old. With continued increases of legislation targeting sex offenders, this is an issue that needs to be reevaluated. This Court has not been seeing ex post facto challenges to ROSA legislation because lower courts continue to rely on *Smith v. Doe*, failing to recognize that the new statutory schemes are becoming more and more punitive and oppressive than the original registration and notification schemes due to the addition of special conditions.

2. The Circuit Courts Have Followed This Court's Ruling On The Ex Post Facto Clause Regarding ROSA Type Legislation Up Until Recently.

Punitive actions that are ex post facto include restrictions where people can live, work, and loiter; categorizing people into tiers without individualized assessment; and require cumbersome in-person reporting. *Does #1-5 v. Snyder*, 834 F.3d 696, 699 (6th Cir. 2016). Recent

ROSA legislation meets the general definition of punishment and puts significant restrictions on how registrants can live their lives. *Id*. Punitive effects far exceeded even generous assessments of constructive effects as shown by factor case. *Id*.

ROSA type legislation across the nation, which began as a non-public registry maintained solely for law enforcement use, has now grown into a scheming code governing in minute detail the lives of those convicted of sex offenses. Federal courts, therefore, had held since 2003 that sex offender registration and notification schemes had not violated the Ex Post Facto Clause as well; however, in 2017, the sixth circuit held in *Does #1-5 v. Snyder* that Michigan's ROSA law was punitive and could not be applied retroactively. *Does #1-5 v. Snyder*, 834 F.3d at 706. This is new, binding law in Kentucky, Michigan, Ohio, and Tennessee. The Michigan statute was punishing registrants and could not be applied to persons convicted of the underlying sex offense prior to its enactment. *Id*. In reaching its decision, the *Kennedy* factors were also used and were persuasive in showing that retroactive, punitive, substantive effects were occurring, which is an ex post facto violation. *Id*. With federal encouragement, such as Megan's Law, most states began taking, as the *Snyder* court put it, an "increasingly aggressive tack" in their ROSAs, piling on additional "affirmative disabilities or restraints" over and above the registration and special requirements. *Id*. at 698. These bills are easily passed by legislators because they do not want to be labeled as a friend to sex offenders by their constituents.

Respondent may argue that this Court has already made the concrete rule in *Smith*. However, that decision was 16 years ago. This circuit court case shows that states are becoming aware of the unconstitutional monstrosities that the sex offender laws are becoming. As laws progress, so to must our analysis of them. This Court is starting to realize that this issue needs to be reevaluated as well. On March 17, 2017, the acting solicitor general was invited to file a brief

in the case expressing the view of the United States. *Snyder v. Does #1-5*, 137 S. Ct. 1395 (2017). The Ex Post Facto Clause is an imperative right that even sex offenders deserve.

C. Arbitrary, Vindictive, And Oppressive Legislation Effects All Citizens Of The United States.

As citizens of the United States, everyone lives by a set standard of rules. These rules set out the difference between right and wrong. These rules establish a moral, sensible society, and these rules let those who do wrong know the consequences. When the rules are set in place, cases such as this do not arise. These rules can be abused by the government to create harsher punishments for wrong-doers. Rules established ex post facto are considered a hallmark of tyranny because it deprives citizens of the United States a sense of what behavior will and will not be punished and allows for random punishment at the whim of those in power. The Ex Post Facto Clause has been recognized as a right by the Framer's, and it has been interrupted by this Court to continue this right. However, time and again, legislatures continue to create laws that retrospectively increase punishment to wrong-doers. Legislatures may believe that their policies are for the betterment of society. However, taking away an established constitutional right is not for the betterment of society. No group of wrong-doers are privier to this as are sex offenders. Empathy towards the crimes committed by sex offenders is unsought; rather, the constitutional rights of sex offenders should not be infringed upon because they did not follow the rules. When the courts allow legislators to enact statutes that violate the ex post facto clause, they put all citizens at risk of losing constitutional rights. If the Court allows such retroactive laws to be acceptable, such as Lackawanna's ROSA, then the state is being allowed to target specific people. Societal norms change as society advances. What is normal today could be penalized tomorrow, which is why laws need to be concrete. When a citizen of the United States pleads guilty to a crime, she should know exactly what that entails, or they too may end up having retroactive laws used against them like sex offenders.

When Lackawanna enacted ROSA, it was doing so to target sex offenders. Sex offenses are not the only heinous crimes committed. No other group of felons are required to register or have special conditions similar to that of sex offenders. If the Court allows a law such as ROSA to stand, then the constitutional rights of all Americans one day may be in jeopardy. It is not solely Ms. Guldoon who is affected ex post facto. All similarly situated people in her position would be affected. ROSA is far too overbroad and punishing and it should coincide with the sex crime itself. First, the registration is overtly substantive because it creates the effect of endangering sex offenders' personal safety and reintegration into becoming a functioning member of society. Second, driving has nothing to do with the sex crime. If for example, kidnapping is present where one would have used the car, it is a completely separate characterization of crime. Third, the internet bar effects not only the daily functions of the offender, but anyone trying to live with the offender. Not every offender is a pedophile, and most have families. ROSA is affecting the lives of families; offenders do not deserve seclusion and separation from the one support system they may have left. Lastly, the government interest is honorable and makes sense; however, the route it is taking is the issue. ROSA needs to be rewritten to take all constitutional rights into account.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to reverse the rulings made by the United States Court of Appeals for the Thirteenth Circuit.