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 SUPREME COURT OF THE STATE OF LACKAWANNA

BRIEF OF PETITIONER

TEAM #13
Counsel for Petitioner

QUESTIONS PRESENTED

1. 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; and
2. 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 Mary Guldoon ("Guldoon") brought this 42 U.S.C. § 1983 action against Respondents Lackawanna Board of Parole ("the Board") after the State of Lackawanna's Registration of Sex Offender Act ("ROSA") went into effect, and the Board imposed special conditions on her parole, as required, that were not law at the time of her conviction. *Guldoon v. Lack. Bd. of Parole*, 999 F. Supp.3d 2 (M.D.Lack. 2019).

Statement of facts

Guldoon is a wife and a mother (Guldoon Aff. ¶ 3.). Guldoon was a high school teacher and taught computer science *Id*. at ¶ 4. Guldoon was B.B.'s teacher; upon B.B.'s requests, she spent extra time tutoring him. *Id*. at ¶ 9-10. Guldoon and B.B. admitted to having a consensual physical relationship. *Id*. at 14; *Guldoon*, 999 F. Supp.3d at 1. B.B. was fifteen years old at that time. *Guldoon*, 999 F. Supp.3d at 1. During their physical relationship, Guldoon took Prozac for her depression. She was later diagnosed with bipolar disorder, which was not known at the time of their encounters. *Id*. at ¶ 7, 21-22. Neither the internet nor pornography had anything to do with the crimes Guldoon pleaded guilty to. *Id*. at ¶ 53.

In 2011, Guldoon pleaded guilty to three offenses pursuant to Lackawanna Penal law §§§ 130.25, 130.40, 130.20. (Guldoon Aff. ¶ 15-16.). The Board recommended Guldoon to be sentenced no less than twenty years. (Compl. ¶ 7.). The Board saw no need for *any* special conditions of parole. *Id*. at ¶ 8.

In 2011, Guldoon began serving her sentence at Tonawanda State Correctional Facility. *Id*. at ¶ 10. Guldoon was an exemplary prisoner. During her incarceration, her psychiatrist diagnosed with her with bipolar disorder, also known as Manic Depression. The Psychiatrist explained that the crimes Guldoon committed were a result of her manic episode. *Id*. at ¶ 18-22.

Guldoon has now been successfully treated for her bipolar disorder. *Id.* at ¶ 23. Further, Guldoon completed a Master's Degree in Computer Programming, through a university's online program. *Id*. at ¶ 24.

The Registration of Sex Offenders Act ("ROSA")

In 2016, while Guldoon was incarcerated, the State of Lackawanna approved ROSA. (Compl. ¶ 11.). ROSA imposed new mandatory registration requirements and special conditions of parole on certain offenses, like Guldoon's. *Id*. at ¶ 12. Among these conditions, Guldoon is required to register as a Level II Sex Offender for life and surrender her driver's license for twenty years. (Guldoon Aff. ¶ 26-27.). Her failure to register or comply with the driving conditions will result in a felony and misdemeanor (felony on the second violation) charges, respectively. Corr. L. §168-t. Further, Guldoon is forbidden to have any contact with minors, to come within 1,000 feet of any school or any similar facility where minors are present, and to access any social networking websites. (Compl. ¶ 17.). These conditions were not law under Lackawanna or part of Guldoon's parole conditions in her presentence report before ROSA. *Id*. at ¶ 19.

In 2017, Guldoon was released to serve five years' parole. *Guldoon*, 999 F. Supp.3d at 2. Guldoon was released fourteen years earlier than the Board's recommended twenty-year minimum because of her exemplary behavior in prison. The Board imposed the general conditions on her parole. *Id*. at 6. The new special conditions were also imposed as required by ROSA, without a hearing or risk assessment on whether those conditions were appropriate or reasonable. *Id*.

Upon release, Guldoon returned to live with her family in the same home before her conviction. (Guldoon Aff. ¶ 29-30.). Guldoon's restrictions on travel within 1,000 feet of a

school are strenuous when Guldoon's home is one and a half miles away from an elementary school and a high school. *Id*. at ¶ 31-33. Guldoon had struggled to find employment due to her special conditions. *Id*. Guldoon is not able to utilize her teaching degree or her master's degree since her ban from any school, including teaching in an online-setting, as ROSA bans such interactions. *Id*. at ¶ 33, 51. Guldoon is barred from networking sites where employment opportunities are posted, which restricted her opportunities to seek or apply employment online. *Id*. at ¶ 31-34. Guldoon has refrained from using or having the internet totally *Id*. at ¶ 48.

Further, Guldoon's inability to drive had frustrated her ability for employment, especially living in a rural area where public transportation is infrequent. *Id*. at ¶ 35. Despite these obstacles, Guldoon's persistence allowed her to secure only a nighttime position with the Company Plant. *Id*. at ¶ 36. Guldoon's job is three miles from her house, but since Guldoon can no longer utilize her driver's license, she travels by foot or bicycle, making the commute to work longer and more dangerous. *Id*. at ¶ 38. Moreover, Guldoon is forced to take the longest route to work because the shorter routes come within 1,000 feet of a school. Her six-mile commute to work is turned into a forty-mile commute. *Id*.

Procedural History

In an attempt to live a reasonable life, Guldoon filed a complaint against the Board in the United States District Court for the Middle District of Lackawanna asserting a violation of her First and Fourteenth Amendment Rights and an Ex Post Facto Violation of the United States Constitution, because of ROSA. *Guldoon*, 999 F. Supp.3d at 2. Specifically, Guldoon claimed that that the ban from accessing the internet violated her right to free speech, the revocation of her driver's license in combination with the 1,000 ft. condition violated her fundamental right to travel, and that the requirement to be a registered sex offender along with the other conditions

imposed by ROSA, violated the Constitution's Ex Post Facto Clause. *Id*. at 3. The Board filed a Motion for Summary Judgment under the Federal Rules of Civil Procedure 56. *Id*. The District Court granted the Board's motion. *Id*.

Guldoon appealed to the United States Court of Appeals for the Thirteenth Circuit, seeking a reversal of the District Court's grant of summary judgment. *Guldoon v. Lack. Bd. of Parole*, 999 F.3d 1 (13th Cir. 2019). The Thirteen Circuit affirmed the District Court's judgment. *Id*. Guldoon filed a petition for writ of certiorari, which this Court granted on January 1, 2019. *Guldoon v. Lack. Bd. of Parole*, 999 U.S. 1.

SUMMARY OF THE ARGUMENT

Even as a parolee, Guldoon has constitutional protections, including her fundamental rights to free speech, travel, and due process. Since ROSA restricts Guldoon's fundamental rights, it must pass under strict scrutiny on each condition to be upheld.

However, ROSA's speech-permitting requirements are overbroad because they fail any standard of review. ROSA is unconstitutional because it impermissibly restricts lawful speech in violation of the First Amendment's free speech clause, as the internet is protected under that Clause. ROSA's internet conditions fail strict scrutiny because it does not use the least restrictive means of achieving Lackawanna's interest. ROSA's internet-use conditions stretch far beyond the government interest and create a chilling effect on free speech.

ROSA's internet conditions also fail under intermediate scrutiny. ROSA must be narrowly tailored to meet the State's interest. But, ROSA burdens substantially more speech than necessary because it requires an affirmative act as a condition of First Amendment activity, applies broadly, threatens serious criminal penalties, and applies to Guldoon without regard to current risk. Therefore, it is not narrowly tailored and fails under intermediate scrutiny.

Also, ROSA violates Guldoon's Fourteenth Amendment Right to free travel. Strict scrutiny applies because ROSA deters and unreasonably burdens travel through its revocation of Guldoon's driver license coupled with the 1,000-foot ban from any school or similar facility. ROSA's travel conditions are so restrictive making Guldoon a prisoner of her own home.

By retroactively imposing lifetime registration, Lackawanna has violated Guldoon's Fourteenth Amendment Due Process both by failing to provide a fair warning at the time of the Guldoon's conviction and by upsetting settled expectations arising out of that proceeding. It is undisputed that Guldoon did not know of these conditions at the time of her sentence.

Lastly, the Ex Post Facto Clause bars retroactive punishment of any law. Regardless if this Court finds ROSA's intent as civil, ROSA is punitive in its effect. ROSA consigns Guldoon to a lifetime on the sex offender registry, and twenty years of oppressive conditions that restrain her everyday life, absent individualized risk assessment. These conditions were not law at the time of her sentence.

Accordingly, this Court should reverse the lower court's decisions', and affirm that ROSA is an unconstitutional violation of Guldoon's First and Fourteenth Amendment Rights and that ROSA violates the Ex Post Facto Clause of the United States Constitution.

ARGUMENT

I. ROSA VIOLATES GULDOON'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The United States Constitution ensures citizens certain fundamental rights. One of the constitutional rights "parolees are entitled to [is] some form of due process in the imposition of special conditions of parole." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

Courts apply the strict scrutiny standard in two contexts: when a fundamental constitutional right is infringed, and those fundamental rights protected by the Due Process

Clause of the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (Blackmun, J.). Accordingly, ROSA'S conditions restricting Guldoon's fundamental rights to free speech under the First Amendment and right to free travel under the Fourteenth Amendment are reviewed under strict scrutiny.

Due Process Clauses "safeguard common interests – in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws." *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001).

A. ROSA infringes on Guldoon's First Amendment Right for Free Speech

The First Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and liste[n]. *Packingham v. North Carolina*, 137 S. Ct. 1730 (U.S. 2017). This Court has extended the First Amendment's free speech protections to the internet. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

ROSA's mandatory condition prohibiting Guldoon from accessing commercial social networking website infringes on that protected right. "Commercial social networking website" is defined as:

> any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such webpages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein. *Id*.

This restricts Guldoon's free speech and curtails her ability to express herself. While parolee's liberty rights may be limited, "[p]arolees are, of course, not without constitutional

rights." *United States ex rel Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir.1970); *United States v. Hallman*, 365 F.2d 289, 291 (3d Cir. 1966).

1. ROSA's internet conditions burden free speech.

The ability to use the internet has become essential to daily life. ROSA's conditions burden Guldoon's "ability and willingness to speak on the internet." *Doe v. Harris*, 772 F.3d 572 (9th Cir. 2014).

ROSA requires Guldoon to register all "internet accounts with internet access providers belonging to such offender [and] internet identifiers that such offender uses" no later than ten calendar days after any changes. Corr. L. § 168-f (4). ROSA creates an "affirmative obligation" to report activity, thus requiring her to weigh the benefits of speech against the burden of reporting it. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). It is no defense that the burden falls mainly on online speech. *Reno*, 521 U.S. at 844, 870. Nor is it a defense that ROSA burdens rather than bans speech; "the distinction between laws burdening and laws banning speech is a matter of degree." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565–66 (2011) (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000)) (cleaned up).

Social media today functions as a device to share ideas, religious views, network, seek employment and access to U.S. elected officials. *Packingham*, 137 S. Ct. at 1737. ROSA bars Guldoon from engaging in protected speech on social media completely. *Id*. This Court stated that the internet conditions would be comparable to denying that same individual the right to speak in public streets or parks. *Id*. at 1735.

ROSA is far reaching. It prevents offenders from accessing websites that would not fall into the common definition of social media websites. ROSA is not limited to unlawful internet activity. While ROSA burdens illegally accessing child pornography and soliciting sex with

minors, it also burdens engaging in discourse about political topics, seeking employment, and networking. A state may burden speech if it has a strong enough interest, however, it cannot overburden speech. ROSA "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Id*. at 1730, 1734-35. Accordingly, ROSA burdens constitutionally protected speech

2. ROSA's internet conditions are content-based thus strict scrutiny applies.

If a law burdens speech, the next step is to determine what level of scrutiny applies. The level of scrutiny used depends on whether the law is content neutral. "Content-based laws that target speech based on its communicative content are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2226 (2015). On the other hand, if a law regulates speech without reference to content, it receives "intermediate" scrutiny. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

ROSA is a content-based law. ROSA prohibits Guldoon from accessing the internet to "communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen." ROSA §259-c(15). The only way to tell if a conversation is prohibited requires looking to the content of Guldoon's speech to determine its purpose. Because ROSA's internet conditions are not content-neutral and they target speech based on its communicative content, strict scrutiny must apply and ROSA is presumptively unconstitutional unless it uses the least restrictive means to further a compelling interest. *Playboy*, 529 U.S. at 813. Also, when fundamental rights are infringed, strict scrutiny applies.

3. ROSA's internet condition fail under strict scrutiny.

To pass strict scrutiny, the law must be justified by a compelling governmental interest,

must be narrowly tailored to achieve that goal or interest, and must be the least restrictive means for achieving that interest. *Reed*, 135 S. Ct. at 2218, 2226.

Lackawanna's compelling interest is protecting the public from dangers posed by sexual offenders. *See* ROSA §168. But Lackawanna has not adopted the least restrictive means of achieving that interest. Less restrictive means include but are not limited to: allowing social networking websites to access internet information contained in state's sex offender registry thereby allowing them to preclude sex offenders from accessing vulnerable users. These methods are not part of Lackawanna law. Since ROSA does not use the least restrictive means of furthering its interest it fails under strict scrutiny. Moreover, ROSA burdens substantially more speech than is necessary so it fails under intermediate scrutiny, too.

4. **Even if intermediate scrutiny applies, ROSA's internet condition still fail.**

Even if this Court finds that the statute is content neutral, ROSA still fails under intermediate scrutiny. To survive intermediate scrutiny a law must be "narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

A law is narrowly tailored if it does not "burden substantially more speech than is necessary to further the government's legitimate interests. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2534-40 (1989). Special conditions of parole banning access to the internet have been routinely overturned where the trial court heard no evidence and made no findings demonstrating a connection between the ban and the defendant's conduct. *See Doe v. Marion County Prosecutor*, 705 F.3d 694, 702 (7th Cir. 2013) (internet restriction overbroad where "legislature imprecisely used the sex offender registry as a universal proxy for those likely to solicit

minors").

ROSA's internet conditions are not related to Guldoon's prior conduct nor are they necessary for furthering the state's compelling interests. Guldoon offenses did not - except tangentially - involve the use of an email. Further, the use and content in the email were legal. Further, there is no indication that accessing a social networking website would make Guldoon more likely to harm children. In fact, Guldoon submitted evidence that her crimes were caused, in part, from her bipolar disorder. Guldoon has been successfully treated for her bipolar disorder, with no further manic episodes. Guldoon still undertakes this treatment.

In *Packingham v. North Carolina*, this Court held that a law prohibiting registered sex offenders from accessing various websites, where minors are known to be active and have accounts, regardless of whether or not the sex offender directly interacted with a minor violated the First Amendment. 137 S. Ct. at 1736. The Court reasoned that the statute's broad wording not only restricts access to social media websites but encompasses many and varying websites. *Id*. Further the Court found that this far reaching restriction on speech is unprecedented; essentially resulting in a total ban on the exercise of First Amendment speech on social networking sites that are imperative to participating in modern society. *Id*. The state could accomplish the same goal by enacting a more narrowly written statute. *Id*.

Similarly, ROSA's internet prohibition is overreaching and includes a large number of websites unlikely to facilitate the commission of a sex crime against a child, like *Packingham*. *Id*. ROSA defines "commercial social networking website" to include websites such as Amazon, News Articles, WebMD, and other websites unsuitable for use in abusing minors. *Id*. at 1730. "Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not

appreciably advance the State's goal of protecting children from recidivist sex offenders." *Id*.

Perhaps the state could enact a "specific, narrowly tailored" law addressing "conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Packingham*, 137 S. Ct. at 1730, 1737. ROSA failed to do that, instead it makes little effort to single out types of speech that raise safety concerns and instead broadly prohibits access to commercial social networking websites.

Moreover, ROSA's internet restrictions unduly chill protected speech, making the condition overbroad, thus unconstitutional. A state "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition,* 535 U.S. 255 (2002). Guldoon's internet conditions are unclear when it comes to length and violation penalties. Like Guldoon's other conditions, this one may either last for life, or twenty years, but if not, at least through the end of parole without regard to current risk. Guldoon has refrained from having or using the internet at all from the fear of another criminal conviction. "The concern that an overbroad statute deters protected speech is especially strong where, as here, the statute imposes criminal sanctions". *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

Since ROSA's internet condition fails under strict and immediate scrutiny, ROSA should be declared unconstitutional.

B. ROSA infringes on Guldoon's right to free travel under the Fourteenth Amendment.

The Fourteenth Amendment's free travel protection is applicable to the states through the due process clause of the Fourteenth Amendment. The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. The substantive due process "protects fundamental rights that are so implicit in the concept of ordered liberty that neither liberty nor justice would

exist if they were sacrificed." *Doe v. Moore*, 410 F.3d 1337, 1342 (11th Cir. 2005). Freedom to travel is "a virtually unconditional personal right, guaranteed by the Constitution." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (citation omitted).

ROSA §§ 259-c(14) and 259-c(16) mandatory prohibits sex offenders, like Guldoon from coming within 1,000 feet of a school grounds where people under the age of eighteen are present. *Id*. "School ground" is defined as any elementary, parochial, intermediate, junior high, vocational, or high school, and any public property within 1,000 feet of the school's property line. *Id*. In combination with one another, these conditions curtail Guldoon's ability to freely travel. Parolees still have limited due process rights and a protection of their free travel. *See Selevan v. New York Thruway Auth.*, 584 F.3d 82, 99 (2d Cir. 2009).

1. Strict scrutiny applies when the right to free travel is infringed.

This Court had identified that the right to travel, is a fundamental right worthy of protection by strict scrutiny and has consistently recognized the fundamental nature of this right. *See Shapiro v. Thompson, 394 U.S. 618, 89 (1969); United States v. Guest*, 383 U.S. 745, 757-759 (1966).

Strict scrutiny applies to restrictions on travel when the restrictions "actually deter" and "unreasonably burden" travel. *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986); *Shapiro v. Thompson*, 394 U.S. at 618, 629, 638 (strict scrutiny for interstate travel); *Johnson v. Cincinnati*, 310 F.3d 484 (6th Cir. 2002) (strict scrutiny for localized travel).

ROSA substantially burdens and deters travel. Guldoon's rights to free travel are implicated because she is not allowed to leave the state of Lackawanna, not allowed within 1,000 feet of a school or similar facility, and not allowed to use her driver's license. Individually, these conditions may be reasonable, but when taken together they unreasonably burden and deter

travel. Because of this, strict scrutiny applies.

2. Taken together, ROSA's conditions on travel fail under strict scrutiny

Where a burden on free travel is found, the state is required to come forward with a compelling justification. *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974). Here, Lackawanna has a compelling interest in protecting the public and in deterring recidivism. However, revocation of Guldoon's driver's licenses does not further Lackawanna's compelling interest and when taken together with her other conditions they are overbroad, and use very restrictive means.

Guldoon lives in a rural town where public transportation is infrequent. Even if public transportation is accessible, their routes are not created off of a1,000 foot restrictions from school grounds, thereby excluding them as an option for Guldoon. Further, cab services in rural areas are unavailable. Guldoon's internet conditions prohibit her from having alternative driving services such as Uber and Lyft. Accordingly, Guldoon's only options for traveling are by foot, bicycle, or asking for rides.

Less restrictive means would include, but are not limited to: a condition barring Guldoon from being within 1,000 feet of a school during certain hours that children are present, or, allowing her to drive with the condition that no minors are allowed in her vehicle, or at least allowing her to drive while enforcing the other travel conditions.

These conditions are not narrowly tailed to meet the government's interests. There is also no indication that ROSA's traveling conditions have any deterrent value or protect the public from further crimes by Guldoon. As mentioned above, Guldoon's psychiatrist said that Guldoon's crimes were due to her bipolar disorder. These travel restrictions actually hinder the furtherance of the compelling interests by making it difficult for Guldoon to continue her

treatment, which has been successful so far.

ROSA's traveling restrictions are not related to Guldoon's prior conduct. Guldoon offenses did not - except tangentially - involve the use of a motor vehicle. Revoking her ability to drive coupled with the other travel restrictions renders her a prisoner in her own home. Further, it places Guldoon in severe danger; she is forced to walk or bike along dangerous routes for work, in the middle of the night, during any weather condition. Justice or liberty does not exist when sacrificing these fundamental rights. *Moore*, 410 F.3d at 1337, 1342.

Guldoon is unable to reasonably determine the boundaries of the exclusion zones, resulting in over-policing oneself and deterring travel. The 1,000-foot zones are measured from the property line of schools, but ROSA does not provide Guldoon with a map of exclusion zones or a list of all school properties. Even with the help of an application like Google Maps it would not eliminate the vagueness of the exclusion zones. Sources such as Google maps do not provide parcel data nor do they clearly mark property lines, it would merely provide estimates as to distances between two properties. Although Guldoon has a fundamental "right to travel locally through public spaces and roadways," her inability to discern the zones makes local travel impossible. *Johnson*, 310 F.3d at 49. Accordingly, Guldoon is forced to choose between limiting her travel to a greater extent than is required or risk violating ROSA.

Therefore, ROSA's relevant conditions are not narrowly tailored, nor use the least restrictive means to further a compelling government interest. Thus, ROSA involves a greater deprivation of liberty than is reasonable necessary to fulfill the purposes of Lackawanna.

C. ROSA violates Guldoon's Due Process under the Fourteenth Amendment.

The Fourteenth Amendment's procedural due process "guarantees that a state will not deprive a person of life, liberty, or property without some form of notice and opportunity to be

heard." *Moore*, 410 F.3d at 1337, 1342; U.S. Const. amend. XIV, § 1.

Retroactively subjecting Guldoon to ROSA'S lifetime registration is fundamentally unfair because, when convicted, Guldoon, and other offenders, did not know, and could not have expected they would later become subject to lifetime registration. Further, Guldoon's conditions were imposed on her without any formal hearing. Guldoon is entitled to a determination hearing and the lack thereof violated the fairness guaranteed under due process. Corr. L. §168-d.

Due process also bars Lackawanna from subjecting Guldoon to lifelong registration, when her plea agreement promised privacy. Once plea agreements are made, "it would surely be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations" to impose more severe conviction based consequences than those considered by the defendant at the time of the plea. *I.N.S. v. St. Cyr*, 533 U.S. 289, 323 (2001); *See also Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Barnes*, 278 F.3d 644, 648 (6th Cir. 2002). This is exactly what happened to Guldoon.

II. ROSA VIOLATES THE EX POST FACTO CLAUSE.

The Ex Post Facto Clause, U.S. Const. art. I, § 10, cl. 1, in pertinent part, prohibits state governments from retroactively inflicting a greater punishment than that permitted at the time of the crime. *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990); citing *Beazell v. Ohio* 269 U.S. 169 (1925); *Weaver v. Graham*, 450 U.S. 29 (1981). Even if this Court does not find that ROSA facially violates the Ex Post Facto Clause, ROSA violates the Ex Post Facto Clause as applied to Guldoon. *United States v. Pruitt,* 502 F.3d 1154, 1171 (10th Cir. 2007).

Whether a retrospective law violates the Ex Post Facto Clause hinges on whether or not the sex offender regulations were enacted for a non-punitive or civil purpose, or were intended to be punitive. *See generally*, *Kansas v. Hendricks*, 521 U.S. 346 (1997*);Smith v. Doe*, 538 U.S. 84

(2003).

Courts are increasingly recognizing that today's sex offender registries are punitive and no longer have minor and indirect consequences. In 2016, the Sixth Circuit Court held that Michigan's sex offender registration act retroactively imposed punishment and therefore violated Ex Post Facto Clause of United States Constitution. *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

Even if this Court finds ROSA is punitive in effect, civil laws may still run afoul the Ex Post Facto Clause. The framers displayed a clear aversion to any retroactive lawmaking, making no distinction between civil and criminal statutes. The Constitution provides that "[n]o State shall . . . pass *any* . . . Ex Post Facto law." U.S. Const. art. I, § 10, cl. (emphasis added).

Lastly, parole board rules are subject to the federal prohibition against Ex Post Facto laws. *Garner v. Jones*, 529 U.S. 244, 250 (2000).

A. ROSA's conditions are punitive in nature and effect.

To be a violation under the Ex Post Facto Clause, the regulation must be punitive. *Smith*, 538 U.S. at 84-85. To determine whether the application of ROSA is punitive or non-punitive, this Court requires the two-part intent-effects test. *Id*. First, courts should determine whether the legislature intended to impose punishment. *United States v. Ward*, 448 U.S. 242, 248 (1980). If it is deemed that the legislature intended the law to be punishment, the analysis ends. *Id*. Second, if the legislature intended to enact a civil regulatory scheme that is non-punitive, then the court examines whether the statute is punitive enough in purpose or effect to negate the civil intention. *Id*. at 249. The burden is on the challenger to show that the retroactive law is punitive by "clearest proof" that the statute has a punitive effect. *Id*. at 248-49. *Kennedy v. Mendoza-Martinez* identified seven factors to guide whether a statute has a punitive effect. 372 U.S. 144,

168-69 (1963). These factors are neither exhaustive nor dispositive. *Ward*, 448 U.S. at 249. ROSA's conditions are punitive.

In *Smith* this Court held that a retroactive application of Alaska's Sex Offender Registration Act ("ASORA") was non-punitive because it imposed only "minor and indirect" consequences. 538 U.S. at 380, 395. ASORA required the offenders to register with the state, to provide personal information, and to notify the state of any changes in the registration information. *Id*. at 84, 89. This Court employed the two-part intent-effects test to determine whether ASORA's conditions constituted punishment. This Court found ASORA did not restrain activities registrants may pursue; the registrants were free to move, live and work as other citizens, without supervision, and free to change jobs or residences without occupational or housing disadvantages. *Id*. at 100. The difficulties registrants faced "flow[ed] not from the Act's conditions, but from the conviction." *Id*. at 100-01. Further, ASORA did not impose restraints sufficient to make it punitive in the absence of individualized review. *Id*. at 104.

The presence of factors here that were absent in *Smith* compels a finding that ROSA is punishment, absent of individualized review. Many of ROSA's conditions were never considered in *Smith* because they were not part of ASORA. Here, Guldoon's conditions restrict virtually every aspect of her life, unlike in *Smith*, where this Court found no restraints on the individual's daily activities. *Id*. at 100. All the harm Guldoon suffers from are attributable to ROSA. Therefore, the indignity under ROSA flows from the statute itself, and not from Guldoon's past offense and present lifestyle, unlike *Smith*. *Id*. at 100-1. ROSA restrains a wide variety of Guldoon's life with severely restricting conditions; therefore, it cannot be applied based merely on a prior conviction, with no risk assessment, as was done here. *Id*. at 104.

Smith has effectively allowed states to direct burdensome civil penalties towards a

particular class of individuals. *See Hendricks*, 521 U.S. at 346, 368-71 (holding that civil commitment of certain sex offenders did not violate the Ex Post Facto Clause because commitment was based on individualized determinations of current dangerousness); *Doe v. Pataki,* 120 F.3d 1263 (2d Cir. 1997) (holding that a statute requiring sex offenders to register in person every ninety days for a minimum of ten years, did not inflict "punishment" within meaning of Ex Post Facto clause). Guldoon's case presents substantially different facts and issues that significantly affect our analysis from that in *Hendricks*, and ROSA imposes burdens that are "different both in nature and degree" from those in *Smith* and *Pataki*. *United States v. Juvenile Male*, 590 F.3d 924, 926 (9th Cir. 2010).

Accordingly, this Court must decide whether the intent of Lackawanna's Legislature in enacting ROSA was to punish sex offenders. *Smith* identified the following relevant factors for this case: whether ROSA (1) involves an affirmative disability or restraint; (2) has historically been regarded as a punishment; (3) promotes the traditional aims of punishment-retribution and deterrence; (4) has a rational connection to a non-punitive purpose; and (5) appears excessive in relation to the non-punitive purpose. *Smith v. Doe*, 538 U.S. at 97.

The legislature intended ROSA as a punishment. ROSA's provisions are enforced by the threat of criminal prosecution and criminal offenses only trigger ROSA. Corr. L. § 168-t. Further, Registration is handled by criminal justice agencies, including corrections, probation, parole, and police. *Id*. at § 168. It is not argued here that the Legislature may not impose these restrictions, only that they are punitive and therefore may not be applied retroactively or as additional punishment. Even if this Court were to find that the legislature's intent was civil, ROSA is punitive in effect. *Ward*, 448 U.S. at 249.

1. ROSA involves affirmative obligations, disabilities, and restraints.

ROSA's conditions have "led to substantial occupational and living disadvantages" and limit Guldoon's ability to engage in basic human activity. *Smith*, 538 U.S. at 101. Guldoon's conditions resemble her restrictions in prison. According to *Hendricks*, ROSA's restraints require individual proof of current dangerousness. 521 U.S. at 346, 364. Perhaps the most punitive aspect of ROSA is that it destroys Guldoon's right to live like other free persons in society. This factor weighs in Guldoon's favor.

2. ROSA imposes sanctions historically regarded as punishment.

ROSA's geographical restrictions resemble the punishment of banishment. Guldoon is forced to tailor much of her life around the school zone restrictions, and living one and a half miles away from two schools, in a rural area, makes it difficult to get around.

Publicly labeling Guldoon as a "sex offender" for the purpose of warning the community is moral condemnation, which is the essence of punishment and precisely what distinguishes punishment from regulation. *See Doe v. Pataki*, 120 F.3d at 1272. (Punishment is the deprivation of legal rights in response to a prior offense for deterrence and social condemnation.)

Like incarceration, parole conditions are considered punishment. *See United States v. Knights*, 534 U.S. 112, 119 (2001) (supervision requirements are akin to parole, which like incarceration, are a form of criminal sanction). Most of Guldoon's conditions are part of her parole, but they extend fifteen years to life after her parole ends. Since her conditions last beyond her parole, they are considered punishment. This factor weighs in Guldoon's favor.

3. ROSA serves the traditional aims of punishment: retribution, and deterrence.

ROSA advances all the traditional aims of punishment: retribution and deterrence. It is retributive because it looks back at Guldoon's offense and nothing else in imposing its

restrictions. Its very purpose is to deter recidivism as it seeks to keep Guldoon away from opportunities to re-offend. Corr. L. § 168(1). This factor weighs in Guldoon's favor.

4. ROSA is not rationally related to non-punitive interests.

ROSA is supposed to protect against the recidivism rates against convicted sex offenders, like Guldoon. Corr. L. § 168(1). However, by imposing barriers to community reintegration, ROSA undermines public safety and increases reoffending so it cannot be rationally related to public safety.

In *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006), the court emphasized that a sex-offender-treatment condition could not be imposed in 2005 based on a 1988 sex offense. Because of the passage of time, the condition was not reasonably related to public protection. *Id*. at 531-32. Similarly, Guldoon's sentence was in 2011, and ROSA's conditions were enacted in 2016 and imposed in 2017.

Moreover, lifetime registration is irrational. Corr. L. § 168-h. Guldoon may petition to be removed from the registry after thirty years by clear and convincing evidence that Guldoon is not a threat to public safety or recidivism. *Id*. at § 168-o. This type of petition may only be considered once every two years. *Id*. This factor weighs in Guldoon's favor.

5. ROSA is excessive in relation to non-punitive interests.

"[T]he regulatory means chosen [must be] reasonable in light of the non-punitive objective." *Smith*, 538 U.S. at 105. ROSA is excessive to its public safety goals because its onerous conditions were not tailored to Guldoon as an individual; they merely reflect a retroactive change in the law. Whereas in *Hendricks* the challenged statute was not punitive because it "unambiguously requires a finding of current dangerousness," not just a past conviction. *Id*. at 346-47. *See also City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432 (1985)

(holding negative attitudes, unsubstantiated fears, or the desire to impede a politically unpopular group cannot provide a rational basis for a restriction, absent actual evidence of danger).

Here, the Board has offered no evidence to show that Guldoon poses such a risk. One study suggests that sex offenders are less likely to recidivate than other sorts of criminals. *See* Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003).

ROSA puts significant restrictions with no discussion that any positive effects counterbalance the difficulties it imposes. Further, the requirement that Guldoon give up her driving license appears to have no relationship to public safety at all. The twenty-year minimum for Guldoon's conditions is arbitrary and out of proportion to Guldoon's offenses and the legislature's purpose to "protect the public." *See Hawker v. New York*, 170 U.S. 189 (1898) (Harlan. 3., dissenting) ("the legislature's failure to take into account present behavior and singling out of former felons, served as indicators of the punitive intent of the statute, thereby making it violative of the Ex Post Facto Clause"). This factor weights in Guldoon's favor.

ROSA's conditions impose a severe restraint on Guldoon's liberty without a determination of individualized risk assessment; thus, ROSA is excessive to a non-punitive purpose. Fortunately, courts are realizing that the new sex offender registries are incredibly harsh and restrictive.

In *Does v. Snyder*, the court held that the Sex Offender Registration Statute ("SORA") was punitive and its retroactive application was unconstitutional. 834 F.3d at 704. SORA prohibited, among many other restrictions, registrants from living, working, or loitering within 1,000 feet of school property. It required stringent internet reporting requirements, had extensive restrictions on ordinary conduct, and required certain sex offenders to register for life. *Id*. at 696, 698. The court analyzed SORA through the intent-effects test using the *Mendoza-Martinez*

factors. *Id*. at 701. The court reasoned that SORA is substantially different from and far more punitive than any registration statute upheld. *Id*. 696, 705. SORA's consequences are not "minor and indirect," but encompass every facet of plaintiffs' lives. *Id*.

The SORA in *Snyder* is almost identical to ROSA. ROSA also imposes severe restraints on Guldoon's everyday life, such as where she can live, work, and travel. *Id*. at 696, 705. ROSA regulates where Guldoon may go and restricts her ability to do so by revoking her driver license. ROSA too brands registrants as moral lepers solely from a prior conviction. *Id*. Guldoon asks this Court to recognize that the nature of Lackawanna's original sex offender law has fundamentally changed, like the court in *Snyder* did. *Id*.

Because ROSA's statutory scheme after the 2016 amendments is so punitive in effect as to negate the implied legislative intent to deem it civil, this Court should hold that the Ex Post Facto Clause precludes the retroactive application of ROSA to Guldoon who committed the qualifying offense before January 21, 2016.

B. The Ex Post Facto Clause Draws No Distinction Between "Civil" and "Criminal Retroactive Penalties

If this Court finds that ROSA is civil in nature and effect, there may still be an Ex Post Facto violation. The Clause forbids the enactment of *any* law that "imposes additional punishment to that was then prescribed." *Cummings v. Missouri*, 71 U.S. 277, 325–26 (1866) (emphasis added). Despite the Framers' strong repugnance towards retroactive lawmaking and the Constitution's explicit text prohibiting *any* retroactive law, this Court in *Calder v. Bull* held that the constitutional prohibition on ex post facto laws was not intended to apply to civil laws. 3 U.S. 386, 391(1798).

However, *Calder*'s conclusion that the Ex Post Facto Clause only applies to retroactive criminal laws is undermined by a case this Court dealt with twelve years later. In *Fletcher v.*

Peck, the Court found that a civil statute offended the ex post facto provisions of the Constitution. 10 U.S. (6 Cranch) 87, 139 (1810). *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (Retroactive application of a law outside the criminal law is highly disfavored).

Regardless of the label given to the law, any deprivation of rights was considered a punishment subject to scrutiny under the clause. In *Cummings* this Court held that the deprivation of any rights, civil or political, previously enjoyed, may be punishment. 71 U.S. at 277, 320. The Court struck down a civil law in violation of the Ex Post Facto Clause. *Id*. The Court rejected the argument that the sole indicator of punishment was the taking of life, liberty or property. *Id*.

Justices of this Court, have signaled a willingness to ground constitutional interpretations in its historical understandings. Justice Johnson in *Satterlee v. Matthewson* objected to this Court's holding in *Calder* that the Ex Post Facto Clause applied only to criminal laws. 27 U.S. 380 (1829) (Johnson, J., concurring). Johnson stated that the issue in the *Satterlee* case was based in the "unhappy idea that the phrase 'ex post facto,' in the constitution of the United States, was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative acts without prohibitions of the constitution." *Id.* at 416. *See also E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) ("I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes is nonetheless unconstitutional under the Ex Post Facto Clause"). Accordingly, the authorities above undermine *Calder's* holding and suggest that early courts interpreted the clause to prohibit both criminal *and* civil retroactive penalties.

The Constitution makes no distinction between laws on the basis of whether they are civil

or criminal in form. Moreover, courts that dealt with ex post facto challenges near the time of *Calder* came to differing conclusions regarding the scope of the Clause. This Court should take the case at bar and reaffirm that the Ex Post Facto Clause encompasses both civil and criminal laws.

C. Parole board rules are subject to Ex Post Facto analysis.

As a general rule, the board applies the rules in effect at the time the person committed her crimes. *See e.g. Ross v. State of Oregon*, 227 U.S. 150, 162-63 (1913) (holding that rules made pursuant to delegated legislative authority are subject to ex post facto analysis.) *Ross* applies to Board rules because the Board derives its rulemaking authority from statutes.

To be a violation, the challenged statutes have to be regarded or treated as a law for purposes of the Ex Post Facto Clause. *See Smith v. United States Parole Comm'n,* 875 F.2d 1367-89 (9th Cir.1988) (holding that revised parole regulation did not violate ex post facto because it was not a "law" for purposes of the Ex Post Facto Clause). The operative factor in assessing whether a directive constitutes a "law" for ex post facto purposes is the discretion that the Parole Commission retains to modify that directive or to ignore it altogether." *Id.* at 1367. If the Board was at all times free to refuse any reduction in prison sentences, the parole regulations here are not "laws" for ex post facto purposes. *Id*.

Here, ROSA is labeled and treated as a law as applied to Guldoon. First, ROSA has the "force and effect of law." *Miller v. Fla.*, 482 U.S. 423, 435 (1987). Second, ROSA does not provide flexible guideposts for use in the exercise of discretion. *Id*. at 423, 424. Instead, ROSA explicitly says that the Board "*shall*" impose these conditions on specific offenders, like Guldoon. Corr. L. § 168(2). The only discretion the Board may have is some leniency on these conditions, but regardless they "*shall*" be applied. *Id*. Further, Guldoon's registry requirement is

a must, and is not under the discretion of the Board at all. *Id*. at § 168-h.

Finally, ROSA requirements directly and adversely affected the punishment Guldoon received. *Miller*, 482 U.S. at 423, 435. Guldoon's parole conditions before ROSA were minor and reasonable. Under the general conditions, she would have been merely required to receive permission before leaving the state, notify her parole officer of any changes in residence and employment, not own a firearm, and not violate any law. Guldoon would have at least been able to utilize her two degrees by teaching online and drive.

Under ROSA however, Guldoon is required to be a registered sex offender for life, revoke her driver's license, restrict her internet use, and is banned from being near a school or similar facility within 1,000 feet. *See Lindsey v.* Washington, 301 U.S. 401 (1937) (holding that a statute violated the *Ex Post Facto* Clause when the measure of punishment prescribed by the later statute is more severe than that of the earlier).

Therefore, ROSA is a law for purposes of the Ex Post Facto Clause and its retroactive application carried a significant risk of increased punishment. *Morales*, 514 U.S. at 499, 509; *See also Fletcher v. Reilly*, 433 F.3d 867, 879 (D.C. Cir. 2006).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the lower court's decisions' and hold that ROSA is unconstitutional.

TEAM #13

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