IN THE

_____

Supreme Court of the United States

MARY GULDOON,

PETITIONER,

V.

LACKAWANNA BOARD OF PAROLE,

RESPONDANT.

_____

ON WRIT OF CERTIORARI TO

THE UNITED STATES SUPREME COURT

_____

BRIEF FOR THE RESPONDENTS

TEAM #14

I. Questions Presented

Issue I: The State can impose conditions on parole if they relate to a legitimate government interest. Mary Guldoon is a sex offender on parole who used technology and a car in pursuit of her victim. As part of her parole conditions, the state prohibited Guldoon from accessing social media and driving a car. Are the conditions rationally related to a legitimate government interest?

Issue II: In Smith v. Doe, the Court applied an intent-effects test to a sex offender registration law; it held Alaska's registration law had the nonpunitive purpose of protecting the public from recidivist sex offenders and did not inflict punishment. ROSA's purpose is to protect the public from the danger of recidivism posed by sex offenders. Guldoon, a parolee subject to ROSA's regulations lives with her husband and child, works outside her home, and may seek waiver to enter her daughter's school. Does Guldoon have clear proof ROSA punishes her?

II. Table of Contents

III. Table of Authorities

Cases

§ 12

Statutes

Other Authorities

Rules

IV. Statement of Facts

Police arrest Mary Guldoon: In 2011, the Old Cheektogwa police arrested Mary Guldoon for molesting a teenager. (R. at 2). That teenager, fifteen-year-old B.B., was a student in Guldoon's computer science class at Old Cheektogwa High School in Lackawanna. *Id* at 6. B.B. sought Guldoon's assistance for his coursework, and eventually used their time together to discuss his turbulent relationship with his parents. *Id.* During a meeting, Guldoon instigated a sexual relationship with her mentee and escalated their physical contact by performing oral sex on him. *Id.* at 7.

For months, Guldoon carried on sexually abusing B.B. *Id.* at 6. Using the school's e-mail system, she sent numerous messages to B.B. probing him for his whereabouts. *Id.* at 5. She had sex with him in both her classroom and her car, and drove him to her home for further abuse. *Id.* Guldoon admits she engaged in sexual conduct with B.B. at least dozens of times before principal Ed Rooney discovered teacher and student having intercourse. *Id.* at 5–6. Her victim reported at least 30 times. *Id.* at 6.

Guldoon pleaded guilty to one count of rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. *Id.* at 2. A judge sentenced her to serve ten to twenty years in Tonawanda Correctional Facility. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp.3d 1 (M.D.Lack. 2019). The State recommended Guldoon be eligible for parole after ten year's incarceration. (R. at 5). During her imprisonment, a psychiatrist diagnosed Guldoon with bipolar disorder. *Id.* at 13. While imprisoned, she also completed a master's degree in computer programming. *Id.* at 13–14.

Lackawanna legislature passes ROSA: During Guldoon's incarceration, the Lackawanna State Legislature passed the Registration of Sex Offenders Act of 2016 ("ROSA").

Registration of Sex Offenders Act of 2016, Pub. L. 2016-1, §1 (hereinafter "Enacting Law"). ROSA shepherded two major changes into Lackawanna law: (1) a sex offender registration system and (2) mandatory conditions for some sex offenders. Aside from registration, Level II and Level III sex offenders must adhere to three special parole conditions: (1) they cannot enter within 1000 feet of the real property line of a school (the "travel restriction"), (2) they may not use the internet to access pornographic materials or social networking websites (the "internet restriction"), and (3) they must surrender their driver's licenses (the "driving restriction"). *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp.3d 1, 2 (M.D.Lack. 2019).

State releases Guldoon on parole: Lackawanna released Guldoon on parole in 2017. *Id.* Upon her release from prison, Lackawanna classified Guldoon as a Level II sex offender. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp.3d 1 (M.D.Lack. 2019). Level II offenders exhibit a moderate risk of reoffending. Lackawanna Correction Law, §168-d(2)(hereinafter "ROSA").

Guldoon returned to her home in Old Cheektogwa to live with her husband and young daughter. (R. at 14). She also began a search for work, which she alleges was frustrated by her inability to access social networking sites and her inability to drive herself to interviews. *Id.* at 15. She cannot teach in schools or online, but secured work on the night shift at a pierogi plant. *Id.* To comply with the driving and travel restrictions, she rides twenty miles by bike to reach the plant. *Id.* at 16. To further ensure compliance with ROSA, the Guldoons do not have internet access in their home or on their cell phones. *Id.* Guldoon alleges the internet restriction is an "unacceptable burden" on her husband and child. *Id.* Their lack of in-home internet access complicates her husband's need to be available by e-mail and telephone at all times for work, and her daughter's desire to use the internet for educational and social purposes. *Id.* at 17.

Guldoon filed a lawsuit against Lackawanna in the United States District Court for the Middle District of Lackawanna. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp.3d 1, 2–3 (M.D.Lack. 2019). Her lawsuit contained two claims for relief: (1) ROSA's restrictions violate her rights to free speech, travel, and substantive due process under the First and fourteenth Amendment, and (2) by enacting ROSA, Lackawanna violated Plaintiff's rights under the Constitution's *Ex Post Facto* Clause. *Id.* She asked for a declaratory judgment that ROSA is unconstitutional as applied to her, and a permanent injunction restraining Lackawanna from enforcing ROSA in any way. *Id.*

The District Court granted a motion for summary judgment in favor of Lackawanna. *Id.* at 3. Guldoon appealed to the United States Court of Appeals for the Thirteenth Circuit, and that court affirmed the District Court's ruling. This Court issued a writ of certiorari to resolve the two issues identified in Section I.

V. Summary of the Argument

The Court should uphold the Thirteenth Circuit's holding on both issues. The conditions imposed by ROSA are valid exercises of Lackawanna's power. The Court weighs parole conditions by balancing deference to state authority with the rights of parolees and in order to overturn the condition, the Court must find the restriction to be arbitrary and capricious. In the present case, the restrictions are narrowly tailored enough for both Level II sex offenders and Mary Guldoon to meet this standard.

ROSA is not an *ex post facto* law. ROSA's text indicates the Lackawanna legislature enacted it with the purpose of protecting the public from harm caused by sex offenders, a purpose historically regarded by this Court as nonpunitive. Furthermore, Guldoon fails to bring clear proof that the law has a punitive effect. ROSA lacks similarity to traditional shaming and

banishment punishments, and does not transform her from a free citizen to a parolee (as she is already a parolee). ROSA's regulatory purpose is not undermined by a deterrent effect, and it does not merely impose retributive punishment. ROSA does not control Guldoon so as to disable or restrain her. But to the extent it controls her, the control is not excessive in relation to ROSA's nonpunitive purpose.

VI. Standard of Review

Courts should grant summary judgment if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The petitioner must still prove they can prevail on their claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This Court reviews constitutional issues *de novo*. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 506 (1984). In other words, the Court applies its own judgment to issues of law while deferring to the lower Court on issues of fact. *Id.*

VII. The Registration of Sex Offenders Act is a valid exercise of state power.

Guldoon comes to this Court painting ROSA's conditions as arbitrary and capricious. To prove conditions are arbitrary and capricious, plaintiffs must prove there was no rational basis for the State action. *McDonald Welding v. Webb*, 829 F.2d 593, 595 (6th Cir. 1987). Guldoon protests four requirements for parole under ROSA: (1) a registration requirement, (2) the internet restriction, (3) the travel restriction, and (4) the driving restriction. In the present case, all four restrictions meet the rational basis test. Even as applied to Guldoon's case, the conditions are not arbitrary and capricious because they relate to her crime.

A. The Court weighs parole conditions by balancing deference to the states and fundamental rights of parolees.

It is safe to say that parole is not an experience to be enjoyed. Since Zebulon Brockway pioneered the practice in the 1860s, parole has served an important role in penological reform. *State v. Ochoa*, 792 N.W.2d 260, 272 (Iowa 2010). The goals of parole are simple—to protect the public from potential reoffenders and encourage parolees to be contributing members of society. *Felce v. Fiedler*, 974 F.2d 1484, 1495 (7th Cir.1992). To further this end, states may infringe on parolees' rights provided they have a basis for doing so. *Malone v. United States*, 502 F.2d 554, 556–57 (9th Cir. 1974). Parolees may find these conditions inconvenient, but they are nonetheless valid exercises of State power. *Morrisey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593 (1972).

In the midst of this tension is the Court, playing King Solomon between two legal principles—deference to state authority over criminal punishment and protecting the rights of prisoners as citizens. On the one hand, states should be able to punish crimes according to their policy values. *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991). They have the power to treat offenders more or less severely than other states. *Id.* They also have the power to decide the means by which they implement those more or less severe penal schemes. *Id.* In fact, "diversity not only in policy, but in the means of implementing policy, is the very *raison d'etre* of our federal system." *Id.*

Because questions at the intersection of substantive rights and states' criminal justice authority implicate federalism, the Court tries to narrowly tailor any relevant rules to preserve that state authority. *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) 411 U.S. 475, 491–92 (1973). In large part, this is because there is no silver bullet for preventing recidivism. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979).

On the other side of this legal seesaw are the rights of parolees. As citizens, persons in state custody still have rights, albeit limited ones. *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1, 1 (13th Cir. 2019)(citing *United States ex rel Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970). Still, there is no right to parole. *Greenholtz*, 442 U.S. at 7. The state may keep offenders up to the limit of their sentences. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

Because the states have no duty to give parole, they have wide latitude in its design. *Id.* States have the power to make parole more or less like prison. *Williams v. Wisconsin*, 336 F.3d 576, 579 (7th Cir. 2003). States can impose conditions on a parolee's release as long as they are reasonably related to a legitimate government interest. *United States v. Ross*, 476 F.3d 719, 721–22 (9th Cir. 2007).

B. Each contested condition of ROSA passes the rational basis test.

In the absence of legal precedent directly addressing the issue, the Court resolves the tension between traditional deference to the states and parolees' rights using the *Turner v. Safely* test. 482 U.S. 78, 81 (1987). To decide if the condition was arbitrary and capricious the Court looks for: (1) a rational connection between the regulation and the government purpose behind it; (2) if the offender has alternative means of expressing the infringed right; (3) the impact on others; and (4) the absence of ready alternatives. *Id.*

1. Registration requirement is legal.

Applying the *Turner* test is unnecessary for the registration requirement because this Court dispensed with any questions on this point in *Conn. Dep't of Pub. Safety v. Doe*. 538 U.S. 1, 4 (2003). In *Conn. Dep't of Pub. Safety*, a sex offender sued alleging Connecticut's registration requirement violated his liberty interests because he had to register without a hearing. *Id.* The Court dismissed the claim on the grounds that any liberty interests the sex offender had regarding

registration were sufficiently protected because he could petition Connecticut to remove him from the list. *Id.* Lackawanna has substantively similar registration requirements as Connecticut. *Id.*; ROSA §168-f. ROSA also has a method for petitioning for removal from the sex offender registration list. ROSA § 168-o(1)("…may be relieved of any further duty to register upon petition…"). Therefore, ROSA's registration requirement is a valid exercise of state authority.

2. The restriction on commercial networking sites is also constitutional.

Before reaching the *Turner* test, Lackawanna asserts the Internet restriction does not implicate a fundamental right. The right to free speech is not a monolithic concept. Rather, the Court distinguishes between political speech—deserving of strict scrutiny—and commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). Commercial speech is speech related to the speaker's economic interests. *Id*. It receives less scrutiny and protection than other speech. *Id*. Guldoon's frustration with the Internet restriction is that it hinders her opportunities to seek employment. (R. at 3). This is commercial speech. Therefore, the State should receive an extra dose of deference.

Next, the state has a valid interest in restricting certain Internet usage. Lackawanna's attorney general found "tens of thousands of known sex offenders" on commercial networking sites accessible by children. Enacting Law § 1. States have the authority to impose conditions on a parolee's release as long as they are reasonably related to a legitimate government interest. *Ross*, 476 F.3d at 721–22. There have been several Circuit decisions involving restrictions on parolee's Internet access. The Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have all upheld some degree of Internet restriction. For example, in *United States v. Ross*, the Fifth Circuit upheld a complete ban on the Internet where the sex offender was a sophisticated Internet user. *United States v. Paul*, 274 F.3d 155, 169–70 (5th Cir. 2001)(sex offender convicted of using

computers to create and sell child pornography). Courts upholding Internet restrictions look to the strong link between the child molestation and the Internet. *United States v. Zinn*, 321 F.3d 1084, 1093 (11th Cir. 2003). They upheld the restrictions based on the overriding concern for child welfare. *Id.* at 1093.

The Court's decision in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) is representative of the line of cases invalidating restrictions on social media use. In *Packingham*, the Court struck down a law which made accessing social media sites a felony. *Id.* They held the statute applied too broadly across the Internet. *Id.* In dicta, the Court compared the Internet to a public square. *Id.* The Court dicta suggests that the restriction was inappropriate because it limited access to places where people share their views. *Id.* But ROSA is distinguishable from *Packingham* in several ways. First, *Packingham*—along with other cases like it—concerns political speech on social media. *Id.* Guldoon's claim only concerns commercial speech. (R. at 3).

Second, the North Carolina statute was much broader than ROSA. *Packingham*, 137 S. Ct. at 1737 (quoting §14-202.5(b)(2)). The inclusion of "information exchange" broadened the list of prohibited websites to include any site with comment features, such as Amazon.com. *Id.* In contrast, ROSA defines a commercial social networking website as "a website that permits persons under eighteen years of age to be registered users *for the purpose of establishing personal relationships with other users*." Enacting Law § 259-c(15)(emphasis added). The purpose of registering on Amazon is to buy and sell products—not to bond with people in the comments. Therefore, Amazon and many other sites remain open to Guldoon. *Packingham*'s majority explicitly noted other States could legally enact narrower Internet restrictions. *Id.*

In Guldoon's particular case, there is a strong nexus between the parole condition and her crime. Guldoon is a technology literate predator. (R. at 5) (quote). Her criminal conduct coincided with her teaching Introductory and Advanced Computer Science. (R. at 11). She increased her computer literacy in prison by earning a Master's Degree in Computer Programming. *Id.* at 13. She used internet applications such as email to communicate and arrange meetings with her victim. *Id.* at 5. She even suggested she wanted to reenter the teaching field by teaching online—a virtual schoolyard. *Id.* at 17.

The Court looks at parole board decisions with great deference. *Bialkin v. Baer*, 719 F.2d 590, 593 (2d Cir. 1983). The Parole Board need not assume Guldoon will molest another child using an identical *modus operandi* to legitimize its fear she will re-offend. The Internet is a sexual predator's toolbox—one with many different avenues to vulnerable adolescents. The Parole Board labeled Guldoon as a Class II sex offender which means it saw her as an elevated threat compared to a low risk sex offender. Enacting Law § 168-a. In the face of that risk, it is not arbitrary and capricious to restrict her access to certain Internet platforms.

Turning to the next prong, offenders have alternative means of expressing their right to free speech. The Court gives a wide latitude for this prong. For example, in *Turner*, the prison restricted prisoners from exchanging mail with inmates at other prisons. 482 U.S. at 81 (1987). The Court ruled the Turner could still exercise his free speech rights because he could still send mail to non-prisoners. *Id.* Parolees under ROSA have alternative avenues to exercise both their commercial and political free speech rights. For example, they can write into print newspapers or send physical mail. Also, in accord with the *Packingham* analysis, Guldoon's belief that ROSA restricts all Internet usage is hyperbolic. Guldoon can access other websites with comment features like the Washington Post or Amazon.

Nor are the rights of Guldoon's family substantially impaired. The text of ROSA states offenders "shall be prohibited from using the internet to access…". Enacting Law § 15. Prohibitions on use do not equal prohibitions on ownership. Nor does the Act contemplate a prohibition on other household members from owning Internet capable devices. *See generally*, Enacting Law § 15. Therefore, it seems like if other household members have password protected devices—thereby making them inaccessible to Guldoon—their rights are not impaired. They also continue to have access to Internet outside the home at work and school.

There are no alternative measures which would accomplish the same result. ROSA's legislative history notes Lackawanna's Attorney General had tried other measures to reduce the risk, but, "existing law limits the ability of law enforcement to prevent a sex offender from using the internet to contact a child in the first place." Enacting Law § 1.

3. The travel restriction is Constitutional.

Guldoon's first obstacle to her travel restriction challenge is that there is no general right to travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). Rather, the Court distinguishes between interstate and intrastate movement. *Id.* While travel between the states is a fundamental right, intrastate travel is awarded less protection. *Wardwell v. Bd. of Ed. of City Sch. Dist. of City of Cincinnati*, 529 F.2d 625, 627 (6th Cir. 1976). As ROSA does not restrict sex offenders' right to move to other states, the restrictions only involve intrastate travel. *See generally* (R. at 8). In other words, like with commercial speech, restrictions on intrastate travel receive an extra dose of deference.

a) The State can limit access to schools.

Over twenty states have child safety zone laws which preclude sex offenders' ability to access or reside near areas where children frequent. *Registered Offender Residency Exclusion*

Zones, COUNCIL OF STATE GOV'TS. (Nov. 2015), http://knowledgecenter.csg.org/kc/content/sex-offender-residency-restriction-zones. Some states only restrict residency, others go farther. *Mann v. State*, 2004, 278 Ga. 442, 603 S.E.2d 283. For example, Georgia restricts sex offenders from living, working, or loitering within 1000 feet of "any child care facility, school, or area where minors congregate." Ga. Code Ann. § 42-1-15 (West); *see also Mann v. State*, 603 S.E.2d 283 (Ga. 2014)(affirming 1000 feet restriction). Likewise, South Dakota prohibits loitering within 500 feet of child safety zones. S.D. Codified Laws § 22-24B-24 (2014).

The general rationale behind safety zone laws is that child molesters go where children are. *United States v. Ristine*, 335 F.3d 692, 696 (8th Cir. 2003). *Id.* Several courts have upheld broad safety zone restrictions. For example, in *United States v. Ristine*, the Eighth Circuit upheld a condition banning a parolee from going to all parks, beaches, and pools under the reasoning that the legitimate government interest in protecting children at places they frequent, outweighed the parolee's right to access those places. *Id.* Both the Georgia and South Dakota Supreme Courts have had opportunities to strike down or limit their loitering laws, but declined to do so. *Mann v. State*, 603 S.E.2d 283 (Ga. 2014); *State v. Stark*, 802 N.W.2d 165, 169 (S.D. 2011), Presumably, both restrictions posed similar problems for parolees, but they still deferred to the lawmakers' judgment.

As applied to Guldoon, the nexus appears even closer. She targeted and groomed her victim on school grounds. (R. at 6). Her classroom was her primary hideout for molesting him. *Id.* So integral was the school to her crime that the abuse only ended when a Principal caught Guldoon in the act. *Id.* Given the facts of her case, restrictions on future access to schools are rationally connected to deter such conduct in the future. Once again, the standard here for the condition is whether it was arbitrary and capricious to apply it to Guldoon and other Class II sex

offenders. There is a rational basis for keeping Guldoon and other sex offenders far away from school property.

The Court should also defer to the Legislature on this point because Guldoon has two alternatives to her current system. First, Guldoon could avoid the situation by simply choosing not to work. Contrary to her complaint, employment is not a parole condition. (R. at 3, 8–10, 19–46). Neither her parole agreement, nor the stipulations of ROSA require parolees to work. *See generally* (R. at 8–10, 19–46). The simplest way for Guldoon to avoid a dangerous commute is to stay home.

The other alternative specific to the travel restriction is that the condition has an exception. ROSA § 14. For close calls on the validity of parole conditions, courts have looked to whether the parolee can receive an exception via prior approval by their parole officer. *United States v. Walser*, 275 F.3d 981, 988 (10th Cir. 2001)(court upheld restriction because it could be waived via prior approval). ROSA allows parolees to go on school grounds with "written authorization of his or her parole officer and the superintendent… of such facility" if they have a family member at the school. ROSA § 14. The plain language of the statute does not limit the waiver's utility. *Id.*

Guldoon's daughter is of elementary school age. (R. at 5). Assuming the Guldoon's send their daughter to the elementary school less than two miles from their house, she could seek a waiver through the school zone. *Id.* at 14 ("One-and-one-half miles east of our home is Old Cheektowaga Elementary School."). This would allow Guldoon to take the direct three-mile route to her job.

b) The State can limit access to driver's license.

Finally, Lackawanna can properly require Class II and III sex offenders to relinquish their driver's licenses while they are on parole. First, this restriction targets a specific cultural narrative—namely the idea of a predator in a white van whisking a child away to them harm. One way we can assess the issue of mobile sex offenders is to look at the existence of AMBER alerts. In 2017, the National Center for Missing & Exploited Children issued 57 AMBER alerts for nonfamily member abductions, many were for abductions by sexual predators. *2017 Amber Alert Report*, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, 12 (2017). In many of these cases, the kidnapper had travelled outside the city—up to 1000 miles—with the child. *Id.* A predator with a car can more easily abduct a child and then transport to another locale where they are less likely to be caught. Thus, states do have legitimate purposes for taking away licenses from sex offenders while they are still deemed to be a threat to society.

The way Guldoon utilized a car in her crime is virtually identical to the type of predatory behavior the driving restriction aims to prevent. She transported her victim to an offsite location to avoid detection on multiple occasions. (R. At 7). She molested her victim within the car itself. *Id.* at 5. Guldoon's crime then, is rationally related enough to the restriction to provide a justification for application.

Turning to the other relevant *Turner* prong, parolees have several alternatives to exercising their rights. As discussed above, Guldoon has no affirmative parole duty to work. The driving requirement also has a statutory exception. ROSA §259-c(16). Offenders may drive if they have, "the written authorization of his or her parole officer and the commissioner of the department of motor vehicles." Finally, offenders also still have access to other forms of transportation such as bikes or public transportation. In Guldoon's case, she even utilizes one of

them—a bike. Stated simply, no one is asking Mary Guldoon to take a dangerous route to go work. She could mitigate the harm in any number of ways. She could ask for a waiver for the school zone restriction or the driving restriction. She could just stay home. Guldoon took this labor on and proceeded to make it as difficult as possible.

In short, ROSA's conditions are not arbitrary and capricious. The restrictions are rationally related to a legitimate government interest and sufficiently tailored to Class II and Class III offenders. While the conditions of parole may seem severe to Guldoon, Lackawanna's interest in protecting children outweighs offenders' conditional liberty interests. One need look no further on this point than the victim impact statement of the present case. The actions of sex offenders permanently harm children—a severe potential harm—and Lackawanna is within its authority to mandate a severe solution.

VIII. ROSA is not an *Ex Post Facto* Law

Ex post facto laws are unconstitutional. U.S. Const. art. I § 9, cl. 10. Generally, a law violates the *ex post facto* clause if it does one of the following: (1) retroactively declares once-innocent behavior criminal, (2) increases punishment for a previously-committed crime, or (3) deprives a defendant of a defense available at the time she committed a crime. *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). Guldoon comes to this Court claiming ROSA increased the punishment for her 2011 convictions. The test governing this issue derives from the Court's opinion in *Smith v. Doe*, 538 U.S. 84 (2003), when it considered an *ex post facto* challenge to Alaska's Sex Offender Registration Act.

Many refer to the *Smith* framework as an "intent-effects" test. *See, e.g.*, *Shaw v. Patton*, 823 F.3d 556 (2016); *Rieck v. Cockrell*, 321 F.3d 487, 488 (2003). First, the Court determines whether the enacting legislature intended to enact a regulatory or a punitive law. *Smith*, 538 U.S.

at 84. Only the former survives an *ex post facto* challenge. *Id.* If the text and structure of the law reveal regulatory intent, the Court proceeds to evaluate whether the law's effect. *Id.* at 92.

To determine the law's effect, the Court applies five factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 87 (1963). Burden lies with the challenging party to provide "the clearest proof" of punitive effect. *Smith*, 538 U.S. at 92. A regulatory law may have a punitive effect if it: (1) is regarded in our history and traditions as punishment; (2) promotes traditional aims of punishment; (3) imposes an affirmative disability or restraint; (4) has a rational connection to a nonpunitive purpose, or (5) is excessive with respect to that purpose. *Id.* at 97 (citing *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). The factors are applicable in many constitutional contexts, and thus the Court notes they are "useful guideposts," but not "exhaustive nor dispositive," in the context of the instant case. *Id.*

Whether registration-only schemes pass the intent-effects test is largely settled law. *See, e.g.*, *Wallace v. New York*, 40 F.Supp.3d 278, 307 (E.D.N.Y. 2014) ("Since *Smith*, countless federal courts, including this one, have rejected similar *ex post facto* challenges to sex offender registration requirements."). Courts often use the statute examined in *Smith* as the anchor point for their decisions. *Id.* at 307.

A. Courts are divided on "registration-plus" laws.

If courts are unified in their opinions that most registration-only schemes are not *Ex Post Facto* laws, "registration-plus" laws fractured them. Many states amended their laws to attach more restrictions on sex offenders' residency, mobility, and access to minors. ROSA is one such "registration-plus" law.

Courts diverge on whether registration-plus laws are punitive in effect, thereby retroactively increasing punishment for a crime. Where they diverge is not what test to apply, but

how they apply the *Mendoza-Martinez* factors. Clashing opinions on similar laws reflect the impact a court's approach may have on the result of an *ex post facto* challenge. *See, e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016) (holding Michigan's SORA, requiring in-person registration and forbidding living, working and loitering within 1,000 feet of a school, imposes punishment); *but see Doe v. Bredesen*, 507 F.3d 998, 1001 (6th Cir. 2007) (holding Tennessee's laws requiring lifetime registration and continuous satellite monitoring of petitioner during his probation did not inflict punishment).

B. The Intent-Effects Test Indicates ROSA is Dissimilar to Registration-Plus Laws that are Punitive in Effect.

Guldoon would have this Court apply the *Mendoza-Martinez* factors in the style of courts that find registration-plus laws are punitive in effect. *See, e.g.*, *Snyder*, 834 F.3d at 701-06. But in many respects, her circumstances are factually distinct from those considered in the line of cases represented by *Snyder*. Also, those courts often apply the *Mendoza-Martinez* factors in a manner inconsistent with this Court's precedent. As the Tenth Circuit noted in *Shaw*, "we are not free to disavow our precedents on the intent-effects test." *Shaw*, 823 F.3d at 563. A finding that ROSA is not an *ex post facto* law is most consistent with this Court's guidance.

Using the intent-effects test from *Smith*, the remaining portions of this brief will show that ROSA is constitutional because it is a law enacted with regulatory intent and does not inflict punishment on sex offenders.

1. Lackawanna's Legislature Enacted ROSA with Regulatory Intent

To determine whether the Lackawanna State Legislature enacted ROSA with regulatory or punitive intent, the Court considers its text and structure. *See, e.g.*, *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) A statute may "…either expressly or impliedly" favor a regulatory or punitive

law. *Hudson v. United States*, 522 U.S. 93, 99 (1997). Then, the Court considers a law's "formal attributes of a legislative enactment." *Smith*, 538 U.S. at 85. These attributes are probative, but not dispositive, of legislative intent. *Id.*

The Alaska legislature's primary aim for the *Smith* statute was "protecting the public from sex offenders," because they pose a "high risk of reoffending." *Smith*, 538 U.S. at 93 (citing 1994 Alaska Sess. Laws ch. 41, § 1). The Court held imposing restrictive measures on dangerous sex offenders was not only "a legitimate nonpunitive governmental objective," but also one that is "historically so regarded." *Id.* (citing *Kansas v. Hendricks*, 521 U.S. 347, 363 (1997)).

The indicia of regulatory intent from *Smith* are all present in ROSA. Lackawanna wanted to "[protect] the public" from "danger of recidivism posed by sex offenders." Enacting Law § 1. Any departure from the Alaska statute appears to be merely the product of sentence structure—the plain meanings of the statutes are indistinguishable.

Lackawanna's legislators went far beyond placing a "public safety" label on ROSA to dodge judicial scrutiny. Like ASORA, the purpose and findings contained in ROSA address how the law remedies deficits in existing laws that regulate in this policy area. For example, the law includes mandatory parole conditions as prophylactic measures to mitigate the ways in which "existing law has failed to keep pace with rapid advances in computer technology, particularly the internet," which affords offenders access to child victims. (R. at 19).

Petitioner suggests ROSA's placement in Lackawanna's criminal code undermines the legislature's stated intent to regulate. But petitioner touts the less significant factor in the Court's intent consideration over its most significant. ROSA – a statute lacking any material differences from ASORA in its statement of purpose – should not motivate the Court to abandon decades-long precedent on how it discerns legislative intent.

C. ROSA Is Not Punitive In Effect.

Because ROSA survives the "intent" prong of the *Smith* test, the Court proceeds to an "effects" analysis of the law with the presumption that it is constitutional. As no factor is dispositive, the Court weighs the factors as a group to determine whether the law is punitive in effect. *See, e.g.*, *Shaw*, 823 F.3d at 561; *Bredesen*, 507 F.3d at 1010-12.

1. ROSA lacks similarity to traditional forms of punishment.

a) ROSA does not shame or banish.

Previous *ex post facto* challenges to sex offender registry laws asserted they resemble the colonial practice of shaming and banishing criminals. *See, e.g.*, Smith, 538 U.S. at 97-98. Shaming required an offender's "physical participation in his own degradation." *Doe v. Patacki*, 120 F.3d 1263, 1284 (2d Cir. 1997). Offenders were publicly ridiculed or branded with markers of their crimes. *Smith*, 538 F.3d at 98. Banishment expelled offenders from their communities. *Miller*, 405 F.3d at 719.

The Sixth Circuit acknowledged Michigan's registration-plus law had "no direct ancestors in our history and traditions," but reasoned the law resembled traditional punishments because it "[met] the general, and widely accepted, definition of punishment." *Snyder*, 834 F.3d at 701. The *Synder* court further argued the law resembled banishment because its restrictions on residency and loitering were "very burdensome." *Id.* This Court's jurisprudence does not support either consideration as relevant to this factor. Instead, the Court focuses on traditional punishments that "either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Smith*, 538 U.S. at 98. A restriction may be "very burdensome," but that does not mean it has the colonial extremity the Court concerns itself with in applying this *Mendoza-Martinez* factor.

Guldoon's frustrations with ROSA raised in her complaint fail to invoke colonial-era punishment. In addition to the registration requirement, she cannot use social media, cannot drive, and alleges she is a "prisoner in her own home." Even considered together, these complications do constitute clear proof ROSA shames Guldoon, or banishes her.

First, Guldoon makes no claim that the registration requirement embarrasses or expels her – perhaps because the Court patently dismissed similar arguments in *Smith*. *See* 538 U.S. at 98 Second, the ROSA requirements that prevent Guldoon from driving and using the internet lack any "ancestors" in traditional penal schemes. Guldoon cannot claim traveling by car and using social networking sites were somehow in the contemplation of the forefathers.

At most, Guldoon's compliance with ROSA has disbarred her from the teaching profession, and this resembles banishment. But this Court consistently holds that removal from one's chosen career is not removal from society – depending on the circumstances, it may be a nonpunitive, prophylactic measure against reoffending. *See, e.g.*, *Hawker v. New York*, 170 U.s. 189 (1898); *De Veau v. Braisted*, 363 U.S. 144 (1960). Barring Guldoon from entering a school limits her access to potential victims. Even if the Court adhered to "very burdensome" standard, Guldoon's disbarment is more of a nonpunitive safety measure against re-offending than an engineered punishment to make her job search difficult.

b. ROSA's attachment to parole is not clear proof of punitive effect.

The Court considers parole and probation traditional forms of punishment. *Smith*, 538 U.S. at 88. But in *Smith*, the lower court's holding that ASORA was "parallel to probation or supervised release," failed to persuade this Court that the law inflicted punishment. *Id.* at 87. Because covered offenders could "move where they wish and…live and work as other citizens, with no supervision," any similarity to traditional punishment did not indicate punitive effect. *Id.*

Lackawanna concedes that the conditions imposed by ROSA are attached to Guldoon's parole. But Guldoon's parolee status makes her distinct from other plaintiffs who raised parole-like conditions as arguable punishment. ROSA does not impose parole on Mary Guldoon. She would be prisoner or parolee until at least 2022 whether or not ROSA became law. She is not analogous to offenders in other states that argued they were made parolees *in effect*.

Within the legal landscape, parolees fall on a spectrum between prisoners and free citizens. They enjoy "only 'conditional liberty properly dependent on observance of special parole restrictions.'" *Guldoon v. Lackawanna Board of Parole*, 999 F.Supp.3d 1, 5 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)). When considering resemblance to parole, the relevant question is not whether under ROSA Guldoon can move, reside, and work as an otherwise free citizen. Rather, it is whether she may do those things more easily than a prisoner.

Even under ROSA's mandatory restrictions for Level II offenders, Guldoon's life starkly contrasts her time as a prisoner. She lives with her husband and child. She need not seek permission to leave her house. She works outside her home. Certainly, she moves about more freely and has more contact with loved ones as a parolee than as a prisoner. ROSA's waiver provisions for entry into her daughter's school also make her distinct from plaintiffs in *Snyder*. *See Snyder*, 834 F.3d at 698 ("These restrictions have…kept those Plaintiffs who have children (or grandchildren) from watching them participate in school plays or on sports teams…"). ROSA's influence over Guldoon's parole does not weigh in favor of finding it punishes her.

2. ROSA does not advance traditional aims of punishment.

In this Court's *ex post facto* jurisprudence, retribution and deterrence are the two most explored aims of punishment. *Smith*, 538 U.S. at 102. A deterrent law discourages would-be offenders by "demonstrating the negative consequences that will flow from committing [an

offense].” *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005). Retributive laws impose sanctions to express society’s disapproval. *Graham v. Florida*, 560 U.S. 48, 71 (2011).

Because deterrence may serve both civil and criminal goals, a deterrent effect alone is not dispositive of a civil regulatory scheme. *See, e.g., United States v. Ursery*, 518 U.S. 267, 292 (1996). Generally, the Court hesitates to over-emphasize this factor, because viewing all deterrence as punitive would undermine effective Government regulation. *Hudson v. United States*, 522 U.S. 93, 105 (1997).

Sex offenders subject to registration-plus laws persist that increasing the severity of restrictions based on “level assignments,” rather than individualized risk assessments, indicates retributive intent. *See Starkey v. Oklahoma Dep’t of Corr.*, 305 P.3d 1004,1027 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009) (holding a regulation “begins to look far more like retribution for past offenses” when applied equally on all offenders without particularized dangerousness assessments). But this position skips over the Court’s precedent. Courts applying the *Mendoza-Martinez* framework, including this Court in *Smith*, upheld restrictions attached to level assignments. *See Smith*, 538 U.S. 84 at 104.

The record does not reference the degree to which ROSA deters sex offenses in Lackawanna. But deterrent effect alone would do little to advance petitioner’s position that ROSA is punitive. ROSA’s restrictions are applicable to sex offenders based on their level assignments. But this is a permissible approach to applying the law consistent with this Court’s precedent. A State need not restrict behavior on a case-by-case basis to ensure a law is non punitive. Also, attaching ROSA’s restrictions to level assignments does not mean they ignore individualized future dangerousness; in fact, each level is defined by a risk of re-offending. Also, the Board makes level assignments

in individual hearings and they are appealable. *Compare Snyder*, 834 F.3d at 702-03 (explaining Michigan's level assignments were un-appealable).

3. ROSA does not impose affirmative disability or restraint.

For this factor, the Court considers how those subject to a law experience its effects. *See, e.g.*, *Smith*, 583 U.S. at 100-01. When the imposed disability or restraint is "minor and indirect, its effects are unlikely to be punitive." *Smith*, 583 U.S. at 101. The Court's primary concern is whether clear proof exists that the law in question allows the state to exert direct, physical control over affected citizens. *Id.*

But restraint alone does not mean a law is punitive—"the Court consider[s] the degree of the restraint involved in light of the legislature's countervailing nonpunitive purpose." *Miller*, 405 F.2d at 721. When weighing restraint against nonpunitive goals, the Court has upheld laws that are "extremely restrictive and disabling to those [affected]." *Id.* In *Hendricks*, the Court found an involuntary civil commitment scheme was nonpunitive because it held a reasonable relationship to Kansas's regulatory goal of protecting the public from the committed (mentally ill sex offenders). *Hendricks*, 521 U.S. at 363.

In *Snyder*, the Sixth Circuit departed from the Supreme Court's focus on physical control. *Snyder*, 834 F.3d at 703 ("[S]urely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound."). But even under a more expansive definition of restraint, Guldoon fails to bring clear proof that Lackawanna exercises improper control over her life. She is perhaps more restricted than those under Alaska's registration law, but she is also less restricted than other petitioners subject to other, harsher laws upheld by this Court.

Like the petitioners in *Smith*, Guldoon alleges the State imposes disability by making most job opportunities "impossible" to obtain. (R. at 3). Even viewing the record most favorably to

Guldoon, it does not reveal specific evidence of lost opportunities solely attributable to the Internet restriction. This Court does not accept "conjecture" as evidence of disability or restraint. *Smith*, 538 U.S. at 100.

Guldoon also alleges ROSA imposes physical restraint through its travel and driving restrictions. For Guldoon, compliance means she must travel by foot or bicycle and had made her "a virtual prisoner in her own home," due to her family home's proximity to two schools. This Court has upheld far more extreme limitations on physical movement – including actual, mandated confinement. Guldoon's complaint is undermined by facts in the record that she, as a mentally ill sex offender, appears far more flexible to move about her community than the mentally ill sex offenders confined in *Hendricks*.

One reasonable interpretation of Guldoon's bicycle travel is that ROSA controls, in some respects, her physical movements. But, even if the Court agrees that this is clear proof of some restraint, that alone cannot render ROSA punitive. "[T]his factor ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose." *Miller*, 405 F.2d at 721.

4. ROSA is rationally related to protecting the public.

This factor is the most significant in the Court's *ex post facto* analysis. *Id.* (citing *Smith*, 538 U.S. at 102). Most generally, the Court examines whether a law's provisions advance its stated purpose. *See, e.g.*, *Smith*, 538 U.S. at 102-03. "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 102. For this factor, Lackawanna would refer the Court to its analysis of each ROSA restriction in section II(B). Section II(B) explains each ROSA provision's utility for curbing the threat of sex offender recidivism and advancing public safety. Lackawanna renews those positions here, reasserting

that each parole condition serves such a purpose. Lackawanna's position that the registration system advances public safety is supported by the countless cases upholding similar laws. *See Wallace*, 40 F.Supp.3d at 307.

5. ROSA's purpose is not a pretext to punish sex offenders.

For the purposes of *ex post facto* analysis, a law is only excessive in regards to its purpose if it is a "sham," or "mere pretext," for punishment. *Id.* at 103. A State need not make "the best choice possible to address the problem it seeks to remedy." *Id.* So long as the regulatory means chosen to address the problem are reasonable, a law is not legally excessive. *Id.* ROSA is not excessive in light of its nonpunitive purpose for several reasons.

First, a bare desire to punish might manifest in legislators' lacking belief in sex offender rehabilitation or dismissal of their needs. *See, e.g., Doe v. Nebraska*, 898 F.Supp. 2d 1086, 1097 (2012) (quoting a floor debate in which a Nebraska representative said he was "revulsed" by sex offenders and "[didn't] have a lot of faith in our ability to rehabilitate [sex offenders]"). But Lackawanna legislators' only words contained in this record—the statute itself—reflect quite the opposite. Legislators selected their regulatory measures only after assessing how those measures would impact convicted sex offenders. For instance, it selected the registration requirement, after "...balancing offenders' rights, and the interests of public security," and found "releasing information about sex offenders to appropriate and responsible parties will further the primary government interest..." (R. 21).

Second, the record in this case reflects that ROSA is distinctively less harsh than other registration-plus statutes found to be punitive. For example, in *Doe v. Miami-Dade County, Florida*, the Eleventh Circuit struck down a registration and residency requirement because it caused homelessness when applied. *See* 846 F.3d 1180 (11th Cir. 2017). ROSA may

inconvenience Guldoon, but it does reflect the offensiveness to human needs seen in Miami-Dade County's law.

Finally, opinions like Sixth Circuit's call into question whether sex offenders re-offend at a higher rate than other classes of criminals, and seek to declare registration-plus laws excessive for that reason. *See Synder* 834 F.3d at 704. But sex offenders' recidivism rate compared to other criminals should not control this inquiry. There is no precedent from this Court regarding a rate of recidivism high enough to justify proactive measures against the harm re-offending sexual abusers could cause. And make no mistake—that harm is severe. Victims experience shame, posttraumatic stress, suicidality and distorted self-perception, among other emotional problems. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ADULT MANIFESTATIONS OF CHILDHOOD SEXUAL ABUSE 1 (2011). They also experience chronic pain and exposure to sexually transmitted infections at higher than normal rates. *Id.* at 2. Even restrictive experimental protocols are appropriate when weighed against ROSA's purpose to prevent that harm. *See, e.g.*, *Miller*, 405 F.3d at 723 (explaining the difficulty in selecting an appropriately-related distance for a residency restriction). For reasons of *stare decisis* and federalism, Lackawanna and this Court need not defer to the Sixth's Circuit crime statistics in legislating or interpreting law.

IX. Conclusion

For the reasons outlined above, the Court should uphold the Thirteenth Circuit's decision.

Respectfully submitted,

Team 14

Counsel for the Respondents