No. 19-01

In the Supreme Court of the United States

OCTOBER TERM, 2018

MARY GULDOON,
PETITIONER

v.

STATE OF LACKAWANNA BOARD OF PAROLE,
RESPONDENT.

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

BRIEF FOR THE PETITIONER

TEAM 17

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QUESTIONS PRESENTED

1. Whether the registration requirements and special conditions of parole that banned Mary Guldoon from accessing large portions of the internet and required her to endanger her life unnecessarily to maintain employment, as permitted by Lackawanna's Registration of Sex Offenders Act, violated the First Amendment freedom of speech and the Fourteenth Amendment freedom to travel.
2. Whether the registration requirements and special conditions of parole ROSA retrospectively imposed upon Mary Guldon violated the ex post facto clause by punishing Ms. Guldon after she had already been sentenced.

STATEMENT OF FACTS

Mary Guldoon began teaching at Old Lackawanna High School in 2008. J.A. at 11. She took maternity leave in April 2010 after giving birth to her first child, but soon began suffering from postpartum depression. J.A. at 12. A doctor prescribed Prozac to Ms. Guldoon in an effort to treat her condition, providing only marginal improvement when she returned to teach in September 2010. J.A. at 12. While still attempting to work through her depression, Ms. Guldoon met and developed a close relationship with one of her students. J.A. at 12. The student sought out additional tutoring from Ms. Guldoon and began to confide in her about personal difficulties. J.A. at 12. This relationship later resulted in sexual interactions. J.A. at 12. Ms. Guldoon and the student communicated through text messages and e-mail during their relationship. J.A. at 6. They also used Ms. Guldoon's vehicle to drive the student home. J.A. at 7.

Authorities became aware of this relationship in May 2011, and Ms. Guldoon promptly pleaded guilty to Sexual Misconduct, Third-Degree Criminal Sexual Act, and Third-Degree Rape. J.A. at 7, 13. She started serving her indeterminate sentence of ten to twenty years followed by probation in 2011. J.A. at 2. While incarcerated, Ms. Guldoon's psychiatrist diagnosed her with

bipolar disorder, determining that the Prozac she took unmasked the condition and strongly contributed to her behavior with the student. J.A. at 13. During the remainder of her incarceration, she received successful treatment for her disorder and enrolled in graduate courses, completing a master's degree in Computer Programming. J.A. at 13-14.

Ms. Guldoon received parole in January 2017. *See* J.A. at 10. Prior to her release, but while incarcerated, Lackawanna passed the Registration of Sex Offenders Act ("ROSA"). J.A. at 19. ROSA created new registration requirements for offenders and permitted the parole board to create special conditions prohibiting entry onto school grounds or access to many social networking websites. J.A. at 20. As a result, the Lackawanna Parole Board imposed the following conditions on Ms. Guldoon: she could "not enter into or upon any school grounds," defined as coming within 1000 feet of the real property; she could "not use the internet to … access a commercial social networking website;" and she had to "surrender [her] license to operate a motor vehicle." J.A. at 9, 45. Despite ROSA going into effect after Ms. Guldoon's sentencing, the Lackawanna Parole Board decided to apply ROSA's standards to her release. Ms. Guldoon brings this suit to vacate these standards due to their unconstitutional burdens.

SUMMARY OF THE ARGUMENT

The special conditions on Mary Guldoon's parole violate her First Amendment rights. The Supreme Court has closely guarded the individual's right to free speech. Preventing Ms. Guldoon from accessing commercial social networking websites flies directly in the face of those protections. As determined in *Packingham v. United States*, this restriction is unconstitutional regardless of whether this Court treats it as content-based or content-neutral. The ban extends far too broadly to avoid overburdening protected speech while serving any of Lackawanna's purported interests. Although parolees may receive fewer liberties than individuals free from supervised release, the conditions here do not reasonably or necessarily relate to the underlying convictions.

The simple fact that she used e-mail to correspond with a student fails to draw remotely near the type of behavior that would justify preventing access to a huge portion of websites in common usage. Lackawanna's ban goes too far and should be vacated.

The special conditions also violate Ms. Guldoon's Fourteenth Amendment right to travel. Although not expressly stated in the Constitution, the Supreme Court has long recognized a fundamental right to travel. Lackawanna's conditions effectively deprive her of that right. Without her license, she is unable to seek employment farther than a bike ride away on roads that are not even designed for bicycles. The 1000-foot buffer around schools also prevents her from travelling to work or across town in a reasonable manner. What could be a three-mile ride is instead a twenty-mile ride. These restrictions do nothing more than create unnecessary and irrational barriers to Ms. Guldoon's reentry into society. This Court should therefore vacate them.

ROSA violates the U.S. Constitution's ex post facto clause because it retrospectively punishes Ms. Guldoon and other individuals who must meet ROSA's draconian registration requirements. First, ROSA applies retrospectively, as it increases the punishment for Ms. Guldoon's crime after she was already convicted. When Ms. Guldoon was convicted, her sentencing report stated that, if she were released on parole, she would only have to abide by the general conditions of parole. While Ms. Guldoon was serving her sentence, the Lackawanna legislature passed ROSA. Now, ROSA added special conditions to Ms. Guldoon's parole which were not present when she was convicted. These special conditions force Ms. Guldoon to register with the Division of Sex Offenders as a Level II Sex Offender. These conditions also forbid Ms. Guldoon from entering within 1,000 feet of school grounds, place severe restrictions on her ability to use the internet, and revoke Ms. Guldoon's driver's license. These special conditions clearly impose greater restrictions on Ms. Guldoon than the general conditions of parole she agreed to in her presentence report.

In *Doe v. Smith*, this Court established a two-prong test to determine when registration statutes such as ROSA violate the ex post facto clause. ROSA violates the first prong because its text and statutory construction reveal that the Lackawanna Legislature intended to retrospectively punish Ms. Guldoon and other individuals forced to register under the act. ROSA also violates the second prong of this test, as even if ROSA's punitive intent is not obvious from its text and statutory scheme alone, the factors identified by this Court in *Smith* reveal that ROSA is punitive in effect and therefore violates the ex post facto clause.

ARGUMENT

On July 25, 2015 the Lackawanna legislature passed ROSA. Lackawanna Public Law 2016-1. At the time, Ms. Guldoon had already pled guilty and was serving her sentence. J.A. at 2, 5-6. Ms. Guldoon's presentence report, filed prior to her sentencing on January 31, 2011, stated that if she was placed on parole, she would have to comply with the general conditions of parole. J.A. at 7. ROSA's passage added additional "special conditions" to Ms. Guldoon's parole and release, which require Ms. Guldoon to register with the Division of Sex Offenders as a Level II Sex Offender. J.A. at 9. As a Level II Sex Offender, Ms. Guldoon is forbidden from entering upon school grounds, which means she cannot enter within 1,000 feet of school property. J.A. at 9. In addition, ROSA's special conditions severely limit Ms. Guldoon's ability to use the internet and force her to surrender her driver's license. J.A. 9-10.

First, these special conditions violate Ms. Guldoon's First Amendment right to free speech, and her Fourteenth Amendment right to travel. Ms. Guldoon does not surrender her constitutional rights simply because she is on parole. The Supreme Court has closely guarded individual's right to free speech and preventing Ms. Guldoon from accessing commercial social networking sites flies directly in the face of those protections. In addition, ROSA effectively deprives Ms. Guldoon of her right to travel, which has long been recognized by the Supreme Court. Specifically, ROSA revokes Ms. Guldoon's driver's license and forbids her from travelling within 1,000 feet of a school. These restrictions have severely and irrationally restricted Ms. Guldoon's ability to travel to and from work, dramatically impairing her ability to reintegrate into society. This Court should therefore vacate these provisions of ROSA.

ROSA also serves to retrospectively punish Ms. Guldoon, in violation of the U.S. constitution's ex post facto clause. First, ROSA is retrospective as it increases the punishment for Mr. Guldoon's crimes after she was sentenced. In addition, ROSA is punitive under this Court's

test in *Smith v. Doe*. 538 U.S. 84, 92 (2002). First, ROSA's text and statutory construction reveal that the Lackawanna legislature intended for ROSA to be punitive. *Id.* Second, even if ROSA's punitive nature is not obvious from its text and statutory scheme, ROSA is so punitive in effect that it still violates the ex post facto clause. *Id.* Therefore, this Court should grant Ms. Guldoon relief from ROSA, as it retrospectively punishes her in violation of the ex post facto clause after she has already paid the price for her crimes.

I. MARY GULDOON IS ENTITLED TO CONSTITUTIONAL PROTECTION OF HER FUNDAMENTAL RIGHTS AS A PAROLEE.

Ms. Guldoon remains within the protections of the United States Constitution, even while released on parole. As a foundation, the Supreme Court determined that a parolee's liberty, though indeterminate in its exact nature, still maintains "many of the core values of unqualified liberty." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Although the Supreme Court has not spoken directly on what types of special conditions states may place on parolees, lower courts have required that the conditions contain a rational relation to the crime committed. *See, e.g.*, *Iuteri v. Nardoza*, 732 F.2d 32, 37 (2d Cir. 1984) (reviewing the parole board's decision under abuse of discretion to determine whether the parole conditions were irrational).

Despite the deference that courts may grant parole boards in making their release decisions, the boards do not have carte blanche in creating the conditions that parolees receive. To uphold the substance of a parole board's conditions, the state must show that the conditions "are reasonably related to a parolee's past conduct, are not arbitrary and capricious, and are designed to deter recidivism and prevent further offenses." *Robinson v. N.Y. State*, no. 1:09-cv-0455 (GLS\RFT), 2010 U.S. Dist. Lexis 144553, at *14 (N.D.N.Y. Mar. 26, 2010). When a parole condition does not fall within these parameters, the court should vacate that condition and relieve the parolee of the unconstitutional burden. *See United States v. Shannon*, 743 F.3d 496, 503 (7th

Cir. 2014); *United States v. Perazza-Mercado*, 553 F.3d 65, 79 (1st Cir. 2009); *Robinson*, 2010 U.S. Dist. Lexis 144553, at *14.

II. THE UNREASONABLY AND UNNECESSARILY EXPANSIVE INTERNET RESTRICTIONS FROM THE SPECIAL CONDITIONS OF MARY GULDOON'S PAROLE VIOLATE HER FIRST AMENDMENT FREE SPEECH RIGHTS.

This Court should vacate ROSA's special parole condition that prohibits Ms. Guldoon from accessing a commercial social networking site. Outside of the parole context, the restriction would be undoubtedly violative of her First Amendment rights. Even within the parole context, the condition is not reasonable or necessary for Lackawanna Parole Board to achieve its state interests. This Court should therefore vacate the condition.

A. Viewed in isolation, the expansive internet restrictions violate the First Amendment.

The restrictions placed on Ms. Guldoon's internet usage are sweepingly overbroad and violate her First Amendment right to free speech. A special condition that prevents an individual from participating in such huge amounts of speech must at least be narrowly tailored to serve a legitimate state interest. *Packingham v. United States*, 137 S. Ct. 1730, 1736 (2017).

At the outset, any free speech analysis should begin with consideration of whether the state prohibition touches on speech. *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 410 (1974) (contemplating whether the conduct in question constituted speech). Under a traditional free speech analysis of a speech restriction, the court would then ask whether the prohibition is content-neutral or content-based as it relates to speech. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015). A content-based restriction "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* At 2227. Content-based restrictions must pass strict scrutiny to survive, *id.* at 2226, while content-neutral restrictions face intermediate scrutiny, *Packingham*, 137 S. Ct. at 1737.

This case, however, may fall outside of that traditional paradigm. In *Packingham*, this Court recognized the unique circumstances that overbroad internet restrictions have on First Amendment analysis. At issue in that case was a state statute that prohibited registered sex offenders from accessing "a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." *Id.* at 1733. The petitioner had been convicted of taking indecent liberties with a child and served his sentence. *Id.* at 1734. Declining to determine whether the statute was content-neutral or content-based, the Court assumed neutrality and struck down the law under intermediate scrutiny, focusing on the requirement that the law be "narrowly tailored to serve a significant government interest. *Id.* at 1736 (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). Most important in the analysis was the breadth of the statute, violating the principle that it not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (quoting *McCullen*, 573 U.S. at 486). Relying on a common understanding of "social networking sites," the Court found that the statute went too far and burdened far more speech than necessary, "prevent[ing] the user from engaging in the legitimate exercise of First Amendment rights." *Id.*at 1737. Without this access, individuals would be left with "the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.*

In an attempt to preserve its overly prohibitive statute, the state in *Packingham* claimed the breadth was necessary to serve the "purpose of keeping sex offenders away from vulnerable victims." *Id.* However, a purported purpose does not by itself justify the means to achieve that purpose. In holding that the statute was too broad to be necessary or legitimate, the Court relied on a fundamental First Amendment principle that the state "may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 1738 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)). Justice Alito added that the "fatal problem" was that the statute's "wide

sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child." *Id.* at 1741 (Alito, J., concurring). Because the statute in that case ostracized the individual from speech "integral to the fabric of our modern society and culture," the Court invalidated the unconstitutional infringement on speech. *Id.* at 1738 (majority opinion).

Mary Guldoon's parole condition mirrors the state statute from *Packingham* almost exactly, arguably creating an even broader ban. The special condition prohibits Ms. Guldoon from "access[ing] a commercial social networking site," failing even to attempt a carve out related to the likely presence or absence of minors on a site. J.A. at 9. Like *Packingham*, the breadth of this condition forbids access to websites such as Facebook, Twitter, and LinkedIn, all of which can be instrumental in political and employment contexts. Regardless of whether this Court treats the condition as content-based or content-neutral, the burden it creates is not narrowly tailored to serve a significant government interest. The breathtaking breadth of the condition sweeps in far too much legal speech on websites that pose virtually no risk of endangering children. For example, Ms. Guldoon no longer feels safe accessing websites such as Netflix or Hulu for fear that doing so would violate the special condition of her parole. On the whole, Ms. Guldoon disconnected internet access in her house to avoid the possibility of a violation. Given the wide range of websites that could trigger a violation, this precautionary deprivation of First Amendment rights should come as no surprise. Lackawanna went far beyond a permissible line, burdening an amount of legal speech that far exceeds the purpose of the condition. The special condition is thus unconstitutional.

B. The expansive internet restrictions are not reasonably or necessarily related to Lackawanna's purported interests.

Lackawanna does not successfully demonstrate a reasonable or necessary relationship between the special condition and Ms. Guldoon's conviction, requiring that the Court vacate the condition. Although parolees are not entitled to the same liberties as an individual free from

supervised release, a state imposing special conditions must demonstrate that they "are reasonably related to a parolee's past conduct, are not arbitrary and capricious, and are designed to deter recidivism and prevent further offenses." *Robinson v. N.Y. State*, no. 1:09-cv-0455 (GLS\RFT), 2010 U.S. Dist. Lexis 144553, at *14 (N.D.N.Y. Mar. 26, 2010).

Although in a statutory context, *Shannon v. United States* provides instructive guidance in determining whether a condition is reasonably related to the underlying conduct. 743 F.3d at 500. There, the court highlighted the breadth of the prohibition created under the special condition, covering a large amount of legal activity without a clear link to the convictions. *Id.* at 501. As a special condition grew in its coverage, the court desired to see a justification for each of the bans it created. *See id.* Because the trial court had not produced adequate findings to justify the breadth of some of the parolee's special conditions, the court held that "it is difficult for [the court] to uphold such a ban when the record does not make its connection clear to the goals of supervised release." *Id.* at 502. Those provisions lacking support were therefore vacated for lacking a nexus to the underlying behavior that would indicate an ability to prevent future misconduct. *Id.* at 503.

In the present case, Lackawanna fails to show any meaningful connection between the special condition imposed and the conviction giving rise to the sentence. The special condition states that Ms. Guldoon may not "access a commercial social networking website." J.A. at 9. This broad condition, unquestionably violative of the First Amendment in a non-supervised release situation, would need a nexus that links Ms. Guldoon's past actions to the future risk avoided. The District Court relied solely on evidence that Ms. Guldoon communicated with the student via e-mail to justify a de facto ban on all internet access. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp. 3d 1, 1 (M.D. Lack. 2019). Given the broad impact of this ban, the Court should require justification for the various ways in which it burdens the constitutional protections of Ms. Guldoon. Without evidence that she did nothing more than use e-mail to communicate over the internet, this

Court is left to wonder why the Parole Board felt it would be necessary or appropriate for preventing access to all commercial networking sites. The implications of this condition are far reaching, but the logic falls short. Relying on a much narrower ban on communications with minors would have sufficed to offer equivalent protection without burdening more speech than necessary. The facts presented in this case do not demonstrate that the special condition placed upon Ms. Guldoon reasonably related to the underlying conduct.

The Lackawanna Parole Board created a special condition on Ms. Guldoon that violates her First Amendment free speech rights. The condition was not tailored to reasonably relate to the underlying conduct. Accordingly, the special condition placed on Ms. Guldoon is unconstitutional and should be vacated.

III. THE UNREASONABLY AND UNNECESSARILY BROAD TRAVEL RESTRICTIONS FROM THE SPECIAL CONDITIONS OF MARY GULDOON'S PAROLE VIOLATE HER FOURTEENTH AMENDMENT RIGHT TO TRAVEL.

Though the Lackawanna Parole Board is granted deference in making its parole decisions, it crosses the line with Ms. Guldoon by infringing on her fundamental right to travel. Because the restrictions would constitute a violation when viewed in isolation and the conditions are not reasonably or necessarily related to Lackawanna's interests, this Court should vacate those conditions.

A. In isolation, the expansive travel restrictions of Mary Guldoon's parole special conditions violate her fundamental right to travel.

The immense burden that the special conditions place on Ms. Guldoon's freedom of movement violate her right to travel. As a staple of fundamental rights, the Constitution has fiercely protected the individual's ability to travel. *Saenz v. Roe*, 526 U.S. 489, 499 (1999). The right carries such significant weight that it is "a virtually unconditional personal right, guaranteed by the Constitution to us all." *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969)

(Stewart, J., concurring)). When the government restricts a constitutional freedom, the infringement must be "necessary to promote a *compelling* government interest." *Id.*

In the present case, Lackawanna withdrew Ms. Guldoon's ability to drive a motor vehicle or come within 1000 feet of a school. Without question, these restrictions infringe on her right to travel. She may not travel on two main roads near her house, even if she refrains from using a vehicle. Her ability to travel is greatly restricted, especially given her location in a relatively rural area and compelled reliance on others or a bicycle for transportation. In fact, Ms. Guldoon's only option places her in significant danger as all bicycle travel requires her to use a road that is not designed for non-motorized travel.

These conditions are not "necessary to promote a *compelling* government interest" that Lackawanna may assert. *Id.* The extent of the parole conditions is unnecessary, even on the interests of general law enforcement, promoting rehabilitation, or deterring recidivism, if treated as compelling. There was no showing that these restrictions were necessary to achieve those means. When permitting a parole board to set conditions that deprive individuals of their constitutional rights, they must be bound by a requirement that they substantiate the conditions with evidence to justify the restriction. Without such a limitation, constitutional protections lose their force in the context of parole. Otherwise, one could imagine an urban situation where similar travel restrictions around schools effectively prevent a person from accessing their own home if all access points were blocked by schools. Because Lackawanna does not offer any evidence detailing the necessity for this special condition in Ms. Guldoon's case, this Court should find it unconstitutional.

B. Mary Guldoon's expansive travel restrictions are not reasonably or necessarily related to Lackawanna's purported interests.

Lackawanna fails to show that the burdensome travel conditions on Ms. Guldoon are sufficiently related to the circumstances of her conviction. Similar to the First Amendment context,

a state imposing special conditions on travel must demonstrate that they "are reasonably related to a parolee's past conduct, are not arbitrary and capricious, and are designed to deter recidivism and prevent further offenses." *Robinson v. N.Y. State*, no. 1:09-cv-0455 (GLS\RFT), 2010 U.S. Dist. Lexis 144553, at *14 (N.D.N.Y. Mar. 26, 2010).

The special conditions applied to Ms. Guldoon are irrational in their effect on her supervised release. Contrary to Lackawanna's interest in rehabilitation, the conditions require her to risk her life in commuting to work, ultimately threatening her wellbeing. While supervision and the ability to create some limitations on freedoms are necessary to further Lackawanna's interests in monitoring the behavior of convicted individuals, they go too far here. The restriction confines Ms. Guldoon's scope of potential employment due to the limited range of travel she can manage on her own. She could take a three-mile ride to work. Instead, she makes an arduous twenty-mile bike ride because the three-mile bike ride passes within 1000 feet of a school. The parole board fails to demonstrate why the school buffer zone should not be the school property itself and not the 1000-foot zone around the school. Also, the board does not indicate why the prohibition must extend through the entire night when children are not present at the school. As a result, Lackawanna is unable to demonstrate how the special conditions of parole are reasonable and necessary in furthering its interests.

The special conditions revoking Ms. Guldoon's driver's license and prohibiting her from travelling within 1000 feet of a school violate her fundamental right to travel, based in the Fourteenth Amendment. Therefore, this Court should vacate those conditions of Ms. Guldoon's parole.

IV. ROSA VIOLATES THE EX POST FACTO CLAUSE BY RETROSPECTIVELY PUNISHING SEX OFFENDERS SUCH AS MS. GULDOON.

ROSA retrospectively imposes new punishment upon previously convicted sex offenders, such as Ms. Guldoon, in a variety of ways including, severely restricting their ability to use the internet, inexplicably revoking their drivers' licenses, requiring that they stay at least 1,000 feet away from school grounds, and imposing severe registration requirements upon them. *See* Lackawanna Public Law 2016-1 § 2 (amending the State's correction law, penal law, and executive law). For instance, in Ms. Guldoon's case, ROSA imposes new "special conditions" to her parole, which were not included in her pre-sentence report. J.A. at 5-10.

The ex post facto Clause of the United States Constitution mandates that "[n]o State shall . . . pass any . . . ex post facto [l]aw." U.S. Const. art. 1, § 10 cl. 1. In other words, the ex post facto clause "forbids . . . the States [from enacting] . . . any law 'which imposes a punishment for an act which was not punishable at the time it was committed or *imposes additional punishment to that then prescribed.*" *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (emphasis added) (quoting *Cummings v. Missouri*, 71 U.S. 277, 325-26 (1867)). It is well established that when enacting the ex post facto clause, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 U.S. at 29 (citing *Dobbert v. Florida*, 432 U.S. 282, 298 (1977)).

Laws that are punitive and apply retrospectively violate the ex post facto clause. *See Weaver*, 450 U.S. at 29. When determining if a law is retrospective, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 31. Furthermore, this Court in *Smith v. Doe* provided a two-part test to determine when a retrospective law is punitive, and thus violates the ex post facto clause. 538 U.S. at 92-107. Applied to this case, the first prong of the test is to determine whether the Lackawanna legislature intended

for ROSA to impose punishment. *Id.* 92-93. In doing so, it is important to "consider the statute's text and its structure to determine the legislative objective." *Id.* at 92. If the Lackawanna legislature intended to impose punishment, the inquiry is over, and the retrospective application of ROSA violates the ex post facto clause. *Id.*

However, even if the Lackawanna legislature did not intend to impose punishment, and instead intended to establish a civil, nonpunitive, regulatory scheme, ROSA still violates the ex post facto clause when Ms. Guldoon establishes, by "the clearest proof[,]" that "the statutory scheme is 'so punitive either in purpose or effect as to the negate the State's intention to deem it civil.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). In *Smith*, this Court identified five factors that are relevant, although no dispositive, in cases evaluating the constitutionality of sex offender registration programs. *Id.* at 98. Specifically, the factors that are most relevant in evaluating ROSA are:

> (1) does the law inflict what has been regarded in our history and traditions as punishment?; (2) does . . . [the law] impose an affirmative disability or restraint?; (3) does . . . [the law] promote the traditional aims of punishment?; (4) does . . . [the law] have a rational connection to a non-punitive purpose?; (5) is . . . [the law] excessive with respect to this purpose.

Does #1-5 v. Snyder, 834 F.3d 696, 701 (6th Cir. 2016) (citing *Smith*, 538 U.S. at 97).

Overall, it is "[t]he effect, not the form, of the law [that] determines whether it is ex post facto." *Weaver*, 450 U.S. at 31. Here, ROSA violates the ex post facto clause because the law's effect is to retrospectively punish individuals like Ms. Guldoon, and subject them to new punishments after they have already paid the price for their crimes.

A. ROSA Applies Retrospectively to Ms. Guldoon and Other Individuals who Have Already Paid the Price for Their Crimes.

ROSA was clearly intended to apply retrospectively, and obviously does so in this

case. A law violates the ex post facto clause when it "'imposes additional punishment to'" a crime after the individual has already been convicted. *Weaver*, 450 U.S. at 28 (quoting *Cummings*, 71 U.S. at 325-326). "The critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31-33 (holding that changing the amount of good time credits available to an inmate was retrospective because the law "substantially alter[ed] the consequences attached to a crime already completed").

In *Smith*, this Court held that an Alaskan statute requiring the registration of previously convicted sex offenders applied retrospectively. 538 U.S. at 90. Here, ROSA also applies retrospectively by adding new conditions to Ms. Guldoon's parole, including forcing her to surrender her driver's license, not go within 1,000 feet of school grounds, and barring her from accessing online social networking programs. J.A. at 9, 10, 14. ROSA therefore clearly applies retrospectively by establishing new conditions on Ms. Guldoon's release from prison after she had already been convicted and agreed to the general terms of her release. J.A. at 9-10.

i. ROSA's Text and Statutory Construction Reveal That the Lackawanna Legislature Intended to Retrospectively Punish Ms. Guldoon and Other Individuals Impacted by the Act.

ROSA's text and structure indicate that the Lackawanna legislature intended to retrospectively punish sex offenders, such as Ms. Guldoon, by implementing new restrictions on their release after they had already been convicted and paid the price for their crimes. Under the first prong of the *Smith* test, courts ask "'whether the legislature meant the statute to establish [criminal or] civil proceedings.'" *Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361). Overall, "[w]hether a statutory scheme is civil or criminal 'is . . . a question of statutory construction.'" *Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361). When making this determination courts should "consider the statute's text and its structure to determine the legislative objective." *Smith*, 538 U.S. at 92. If ROSA's text and structure indicate that the Lackawanna

legislature intended to punish Ms. Guldoon and other individuals retrospectively, then ROSA violates the ex post facto clause. *Id.* at 92-93.

The Lackawanna legislature states that ROSA "amend[s] the correction law, the penal law, and the executive law." Lackawanna Public Law 2016-1. Furthermore, while this Court stated in *Smith* that "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one" this Court also noted that the Alaskan statute in that case "aside from the duty to register . . . mandate[d] no procedures." 538 U.S. at 96. In fact, all that was required under the Alaskan statute was for convicted sex offenders to register with local law enforcement or the Department of Corrections, and the individual's information was stored by the Alaska Department of Public Safety. *Id.* at 90 - 91.

ROSA imposes far more drastic procedures. Instead of merely requiring individual sex offenders to register with an already established agency, ROSA creates "a board of examiners of sex offenders" whose sole responsibility is to "develop guidelines and procedures to assess the risk of a repeat offense by . . . sex offender[s] and the threat posed to the public safety." Lackawanna Public Law 2016-1 § 168-l; J.A. at 37. Ultimately, after the board of examiners evaluates an individual, the board then classifies him or her as either a level I, II, or III sex offenders. *Id.* Based solely on this categorization, the board then places severe restriction on a wide variety of individual offenders without specifically tailoring the restrictions to an individual's case. *Id.* For instance, because Ms. Guldoon is classified as a Level II sex offender, she is now required to register with the Division of Sex Offenders, is prohibited from entering within 1,000 feet of school grounds, has severe restrictions on her ability to use the internet, and had to surrender her driver's license. J.A. at 9-10.

Once the board of examiners of sex offenders decides what category (level I, II, or III) to place an individual into, the board then makes a recommendation to a sentencing court on how to

classify the individual. Lackawanna Public Law 2016-1 § 168-l; J.A. at 38. The sentencing court then reviews the board's recommendation, and ultimately determines if the individual should be classified as a level I, II, or III offender. *Id.* Finally, once an individual, such as Ms. Guldoon, is classified as a level II sex offender, he or she has to register annually for at least thirty years before he or she can petition the sentencing court for relief, and even then the individual must prove by clear and convicting evidence that he or she is no longer a threat to public safety and therefore registration is no longer necessary. Lackawanna Public Law 2016-1 § 168-h, 168-o. Finally, if Ms. Guldoon ever fails to comply with the registration and verification requirements, she is guilty of a class E felony for her first offense. Lackawanna Public Law 2016-1 § 168-t. In addition, Ms. Guldoon is forbidden from operating a motor vehicle, and if she violates this prohibition, she is guilty of a class A misdemeanor. Lackawanna Public Law 2016-1 § 168-t, 168-v.

It is clear that ROSA implements a far more complex and punitive system than the simple registration and notification statute at issue in *Smith*. First, ROSA creates its own board which is responsible for promulgating regulations regarding sex offenders after they have already been convicted of a crime. Lackawanna Public Law 2016-1 § 168-l; J.A. at 37. As evidenced by Ms. Guldoon's case, these regulations are extremely far reaching and virtually prohibit Ms. Guldoon from engaging in a wide array of activity such as driving a car, traveling near school grounds, and using the internet. J.A. at 9, 10. Therefore, ROSA, unlike the statute in *Smith*, does not leave offenders "free to move where they wish and to live and work as other citizens, with no supervision." 538 U.S. at 101.

Second, this Court stated in *Smith* that the statute "aside from the duty to register . . . mandate[d] no procedures." 538 U.S. at 96. ROSA, on the other hand, sets forth an elaborate set of procedures wherein the board of sex offenders classifies an individual as a level I, II, or III sex offender, and then submits this report to a sentencing judge. Lackawanna Public Law 2016-1 §

168-l; J.A. at 38. The sentencing judge then renders a decision on the classification. *Id.* Furthermore, since Ms. Guldoon has been classified as level II, she must now register annually for thirty years before she can petition the court for relief. Lackawanna Public Law 2016-1 § 168-o J.A. at 40. Even then, when Ms. Guldoon submits this petition she bears "the burden of proving by clear and convincing evidence that . . .her risk of repeat offense and threat to public safety is such that registration or verification is no longer necessary." *Id.* Such petitions can only be considered once every two years. *Id.* These procedural hurdles are much higher than those under the Alaskan statute in *Smith* and are therefore clear evidence that the Lackawanna legislature intended for ROSA to be punitive. *See Smith*, 538 U.S. at 96 (noting that all the statute required was for individuals to register).

Finally, unlike the statute in *Smith*, ROSA changed the conditions of Ms. Guldoon's release from prison so that she is not merely required to register as a convicted sex offender but is also prohibited from stepping within 1,000 miles of what ROSA defines as "school grounds." J.A. at 9. Also, Ms. Guldoon is virtually forbidden from using the internet, and must surrender her driver's license "for a period of twenty years, or as long as . . . she is required to remain registered, whichever is shorter." J.A. at 9; Lackawanna Public Law 2016-1 § 168-v; J.A. at 23. These draconian prohibitions far exceed the scope of the statute at issue in *Smith* and are therefore punitive. *See Smith*, 538 U.S. at 96 (noting that all the statute required was for individuals to register). Therefore, ROSA violates the ex post facto clause because its text and underlying statutory structure indicate that the Lackawanna legislature intended to punish Ms. Guldoon and other previously convicted individuals retrospectively, after they had already paid the price for their crimes. *Id.* at 92-93.

ii. Even if the Punitive Intent is Not Obvious from ROSA's Text Alone, the Smith Factors Clearly Illustrate that ROSA is Punitive in Effect and Therefore Violates the Ex Post Facto Clause.

Finally, even if it is not obvious that the legislature intended to retrospectively impose punishment, ROSA still violates the ex post facto clause because Ms. Guldoon established, by "the clearest proof[,]" that ROSA's "statutory scheme is 'so punitive . . . in purpose or effect as to negate the State's intention to deem it civil.'" *Id.* (quoting *Hendricks*, 521 U.S. at 361 (1997)). *Smith* identified five factors that are relevant, although not dispositive, when evaluating statutes like ROSA. *Id.* at 98. These factors include:

> (1) does the law inflict what has been regarded in our history and traditions as punishment?; (2) does . . . [the law] impose an affirmative disability or restraint?; (3) does . . . [the law] promote the traditional aims of punishment?; (4) does . . . [the law] have a rational connection to a non-punitive purpose?; [and] (5) is . . . [the law] excessive with respect to this purpose.
>
> *Snyder*, 834 F.3d at 701 (citing *Smith*, 538 U.S. at 97).

Overall, it is "[t]he effect, not the form, of the law [that] determines whether it is ex post facto." *Weaver*, 450 U.S. at 31. Here, ROSA violates the ex post facto clause because its effect retrospectively punishes individuals, and subject them to new punishments after having already paid the price for their crimes.

a. ROSA Resembles Multiple Historically Recognized Forms of Punishment.

ROSA resembles multiple historically recognized forms of punishment, including banishment, as it severely restricts Ms. Guldoon's ability to travel within her own community. "Banishment has been defined as 'punishment inflicted upon criminals by compelling them to quit a city, place, or country for a specified period of time, or for life." *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009) (quoting *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905)).

Multiple courts have compared the school grounds prohibition present in ROSA and similar statutes to banishment. *See*, *e.g.*, *Snyder*, 834 F.3d at 701-02; *Baker*, 295 S.W.3d at 44; *Starkey v. Oklahoma*, 305 P.3d 1004, 1026 (Okla. 2013). Courts have also found that statutes similar to ROSA impose other historically recognized forms for punishment. *See*, *e.g.*, *Snyder*, 834 F.3d at 701-05 (comparing sex offender registration statute to traditional shaming practices, parole/probation, and complete occupation-disbarment); *Doe v. State*, 111 A.3d 1077, 1097 (N.H. 2014) (stating that placing offender's pictures on a website resembled the colonial practice of shaming).

For example, in *Snyder*, the Sixth Circuit held that a statute which prohibited previously convicted sex offenders from travelling within 1,000 feet of a school resembled banishment because the restriction severely restricted where sex offenders could live and work. 834 F.3d at 702. In *Snyder*, the court also noted that the statute created tier classifications based on how dangerous the State believed the offender was without going through any form of individualized assessment. *Id.* Finally, the court also noted that the statute resembled parole/probation because "registrants are subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person, rather than by phone or mail . . . [and] failure to comply can be punished by imprisonment." *Id.* at 703.

In *Snyder*, the court also repeatedly emphasized that the sex offender registration statute, which imposed similar restrictions to ROSA, was far more restrictive than the statute at issue in *Smith*. *Id.* at 702-03 (citing *Smith*, 538 U.S. at 101). For instance, the Court in *Smith* noted that "[t]he Act does not restrain activities sex offenders may pursue, but leaves them free to change jobs or residencies . . . [and that there was] no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders." 538 U.S. at 101. In contrast, ROSA requires Ms. Guldoon to stay 1,000 feet away from school grounds which is defined as

"any building, structure, athletic playing field, playground, or land contained within the real property line of" a school. Lackawanna Public Law § 259-c (14); J.A. at 9. Furthermore, Ms. Guldoon also has to surrender her driver's license, further restricting her ability to travel to and from work. J.A. at 9-10. In fact, due to these draconian restrictions, Ms. Guldoon is forced to bike 20 miles each way to work along a busy highway in order to avoid passing through school grounds, sometimes through inclement weather. J.A. at 15-17. Ms. Guldoon also noted that, since public transportation is infrequent in the rural area where she lives, her husband was forced to drive her to interviews which severely limited her ability to find work, as her husband has job which requires him to work during the day. J.A. at 15.

In summary, it is clear that ROSA's restrictions are far more onerous than those imposed by the statute in *Smith*. *See* 538 U.S. at 100. As Ms. Guldoon's testimony illustrates, she is far from "free to change jobs or residencies" as ROSA places severe restrictions on her ability to obtain and travel to work. *Id.*; J.A. at 15-17. Instead, ROSA, like the statute in *Snyder*, places "numerous restrictions on where . . . [Ms. Guldoon] can live and work." 834 F.3d at 703. Therefore, this factor weighs in Ms. Guldoon's favor and suggests that ROSA is punitive in effect, regardless of what the legislature intended. *See Smith*, 538 U.S. at 98.

b. ROSA Imposes Affirmative Disabilities and Restraints on Ms. Guldoon and Others Impacted by the Act.

The restrictions ROSA places on Ms. Guldoon and others impacted by the act far exceed the "minor and indirect" burdens presented by the statute in *Smith*. 538 U.S. at 100. "Under the 'affirmative disability or restraint' factor . . . [courts] 'inquire how the effects of the . . . [statute] are felt by those subject to it.'" *Doe v. Miami-Dade Cty*., 846 F.3d 1180, 1185 (11th Cir. 2017). For example, in *Doe v. Miami-Dade Cty.*, the Eleventh Circuit held that Plaintiff's had alleged sufficient facts to state a claim that a law violated the ex post facto clause when a city ordinance established school buffer zones that severely restricted registrants' ability to obtain employment

and affordable housing. *Id.* at 1184-85. Similarly, the Sixth Circuit in *Snyder*, held that a statute violated the affirmative disability prong because it required greater restraints than those imposed by the statute in *Smith*. *Snyder*, 834 F.3d at 703-04 (distinguishing *Smith*, 538 U.S. at 101). Specifically, the court in *Snyder* noted that, while the statute did not explicitly provide for complete occupation-disbarment, the statute in effect put massive regulations on "where registrants may live, work, and loiter." 834 F.3d at 703-04.

As mentioned previously, ROSA has placed severe restrictions on where Ms. Guldoon can work and how she can travel to work. J.A. at 9-10, 15-17. Specifically, since Ms. Guldoon had to surrender her driver's license, she cannot drive to job interviews and must bike 20 miles each way on a busy highway, at night, sometimes in dangerous weather, just to go to work. J.A. at 15-17. Furthermore, ROSA essentially forbids Ms. Guldoon from searching for other forms of work because she cannot utilize social networking cites including "LinkedIn, Craigslist, Indeed, Facebook, Twitter, and other similar platforms where employment opportunities are posted." J.A. at 15. Due to these draconian restrictions, Ms. Guldoon is forced to work the night shift at a pierogi plant, despite the fact that she completed a master's degree in Computer Programming through the University of Phoenix while serving her sentence. J.A. at 13-14.

In summary, ROSA places severe restraints and disabilities upon Ms. Guldoon and other registrants. These restraints and disabilities far exceed the "minor and indirect" restraints imposed by the statute in *Smith*, as ROSA "has led to substantial occupational . . . disadvantages" for those forced to register under the act, and specifically Ms. Guldoon. 538 U.S. at 101. Therefore, this factor also weighs in Ms. Guldoon's favor and suggests that ROSA is punitive in effect, regardless of what the legislature intended. *See id.* at 101.

c. ROSA Advances Traditional Aims of Punishment Including Incapacitation, Retribution, and Specific and General Deterrence.

ROSA serves to both incapacitate and deter Ms. Guldoon and other registrants by revoking their drivers' licenses, severely restricting their access to the internet, and imposing massive restrictions on their ability to travel without incidentally entering on school grounds. J.A. at 9-10. Furthermore, the act provides no justification for revoking Ms. Guldoon's driver's license, which at least suggests that this provision of ROSA is retributive. *See* Lackawanna Public Law 2016-1 § 1 (listing the legislatures purpose in enacting ROSA, but failing to even mention, let alone explain, why the law revokes registrant's drivers' licenses).

In *Snyder*, the Sixth Circuit noted that the statute's "very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend." 834 F.3d at 704. On the other hand, this Court in *Smith*, noted that just because a statute serves to deter individuals, this does not necessarily mean that the statute serves as a criminal punishment. 538 U.S. at 101. Nevertheless, it is important to note how much more restrictive ROSA is than the statute in *Smith*. The statute in *Smith* merely required individuals to register. *Id.* at 96. Here, ROSA requires Ms. Guldoon to register, forbids her from entering within 1,000 feet of a school, and dramatically restricts her ability to use the internet. J.A. at 9. Furthermore, ROSA forces Ms. Guldoon to surrender her driver's license, and fails to provide a non-punitive reason for doing so. *See* Lackawanna Public Law 2016-1 § 1. Therefore, this factor also weighs in Ms. Guldoon's favor and suggests that ROSA is punitive in effect, regardless of what the legislature intended. *See Smith*, 538 U.S. at 100.

d. ROSA Does Not Have a Rational Relation to a Non-Punitive Purpose and is in fact Excessive in Regard to the Non-Punitive Purposes Alleged by the Legislature.

ROSA is not rationally related to the non-punitive purposes the legislature provides and is in fact excessive in regard to the non-punitive purposes the legislature alleges ROSA serves. The fourth and fifth prongs of the *Smith* test ask: "(4) does . . . [the law] have a rational connection to

a non-punitive purpose?; [and] (5) is . . . [the law] excessive with respect to this purpose." *Snyder*, 834 F.3d at 701 (citing *Smith*, 538 U.S. at 97). This Court noted in *Smith* that "[t]he Act's rational connection to a nonpunitive purpose is a 'most significant' factor." *Smith*, 538 U.S. at 102 (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)). Again, multiple courts have held that statutes similar to ROSA are excessive and not rationally related to non-punitive purposes. *See*, *e.g.*, *Snyder*, 834 F.3d at 705 (holding that "the punitive effects of these blanket restrictions thus far exceed even a generous assessment of the salutary effects"); *Doe*, 846 F.3d at 1186 (noting that the law's residency restrictions not only fail to advance public safety, but may also undermine it); *Starkey*, 305 P.3d at 1030 (noting that the law's "obligations are excessive in relation to its non-punitive public safety purpose").

In *Commonwealth v. Baker*, the Kentucky Supreme Court held that a registration statute similar to ROSA was not rationally related to the asserted interest in public safety when the law prohibited registrants for residing within 1,000 feet of an area where children congregated even when the children were not present, instead of focusing on regulating contact with children. 295 S.W.3d at 446. Furthermore, the Court held that the law was excessive because it did not allow for individualized assessment based on the specific needs of a particular offender. *Id.* at 446. On the other hand, this Court in *Smith* held that individualized assessment is not always necessary in cases regarding registration statutes. 538 U.S. at 104. However, in *Smith*, this Court also alluded to *Kansas v. Hendricks*, where the Court upheld a statute that involuntarily confined individuals based on a finding that they were particularly dangerous. *Id.* at 104 (citing *Hendricks*, 521 U.S. at 357-58, 364 (1997)). This Court noted in *Smith* that "the magnitude of the restraint [in *Hendricks*] made individual assessment appropriate." 538 U.S. at 104. The Kentucky Supreme Court keyed in on this distinction in *Baker* and held that "the magnitude of the restraint involved in residency

restrictions is sufficient for a lack of individual assessment to render the statute punitive." 295 S.W.3d at 446.

Here, ROSA implements numerous restrictions on Ms. Guldoon and other registrants. J.A. at 9-10. While ROSA attempts to justify these provisions by stating that the overall goal is public safety and assisting law enforcement, the effect of the statute on Ms. Guldoon reveals that these provisions are not rationally related to these policy goals. Lackawanna Public Law 2016-1 § 1. Specifically, the law revokes Ms. Guldoon's driver's license without providing a justification for doing so. *Id.* at § 168-v. In addition, the law forbids Ms. Guldoon from entering within 1,000 feet of school grounds and severely restricts her access to the internet. J.A. at 9-10. This has forced her to bike forty miles round trip to work every day and has severely limited her ability to find employment. J.A. 15-17. Furthermore, these restrictions are placed on Ms. Guldoon simply because she is classified as a level II sex offender, without any individualized assessment as to what would best help her reintegrate into society. J.A. at 9-10. Ms. Guldoon's case illustrates that not only are ROSA's restrictions not rationally related to a non-punitive regulatory scheme, but they are also excessive in regard to the alleged non-punitive interests of public safety and assisting law enforcement. *See Smith*, 530 U.S. at 97. Therefore, these factors also weigh in Ms. Guldoon's favor and suggests that ROSA is punitive in effect, regardless of what the legislature intended. *Id.*

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court to reverse the decision of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

TEAM 17

COUNSEL FOR PETITIONER

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