NO. 19-01

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY 2019 TERM

MARY GULDOON

PETITIONER,

V.

STATE OF LACKAWANNA BOARD OF PAROLE

RESPONDENT

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

BRIEF FOR PETITIONER

TEAM 19
Counsel for Petitioner

QUESTIONS PRESENTED

I. Under the First and Fourteenth Amendments, are registration requirements and special conditions of parole narrowly tailored when they enact sweeping bans on social media, exclude the parolee from populated areas, and impede rehabilitation by implementing license suspensions?

II. Under the Ex Post Facto Clause, is an individual protected from being retroactively subjected to statutorily mandated registration requirements and stringent special conditions of parole that were not contemplated by the sentencing court, parole board, or legislature at the time of her sentencing?

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STATEMENT OF THE FACTS

With one swift legislative change, Mrs. Mary Guldoon went from being a repentant former offender on the road to rehabilitation to a downtrodden individual with little means to get her life back on track. In 2008, Mrs. Guldoon began teaching computer science courses at Old Lackawanna High School. R. at 11. Her career was briefly put on hold in April of 2010 when she went on maternity leave for the birth of her daughter. R. at 12. While this was undoubtedly a joyous occasion for Mrs. Guldoon and her family, the pregnancy came with the unfortunate cost of causing her to suffer from "severe post-partum depression." R. at 12. Subsequent medication proved ineffective at alleviating Mrs. Guldoon's depression. R. at 11.

Although her depression persisted, Mrs. Guldoon's maternity leave expired in September of 2010, thus requiring Mrs. Guldoon to return to her teaching position, at which point she met B.B., a student in one of her computer science courses. R. at 12. B.B., then fifteen years of age, would often visit Mrs. Guldoon during non-class hours, not only for the purpose of getting academic help for his school-work, but also to confide in her. R. at 12. B.B. came from a dysfunctional family environment, and revealed to Mrs. Guldoon that his father routinely abused his mother and siblings, and that his mother was plagued by substance abuse. R. at 6, 12.

While the relationship between Mrs. Guldoon and B.B. began as healthy and professional, it took a lamentable turn when Mrs. Guldoon "allowed [her] emotions to control [her] actions." R. at 12. The two established a sexual relationship in October 2010; while most of their sexual encounters took place on campus, there were a few occasions in which the sexual relationship took place at Mrs. Guldoon's home. R. at 7. After about 30 incidents of sexual interaction, Mrs. Guldoon and B.B. were caught by Ed Rooney, the Principal of Old Cheektowaga High School, which led to Mrs. Guldoon's arrest and charges. R. at 7, 13.

On January 1, 2011, Mrs. Guldoon pled guilty to one count of Third Degree Rape, one count of a Third Degree Criminal Sexual Act, and one count of Sexual Misconduct, and was sentenced to an indeterminate period of ten to twenty years' incarceration on January 31, 2011. R. at 5, 13. At the time of her sentencing, the Lackawanna Board of Parole ("the Board") provided a Pre-sentence Report, which informed the sentencing court that should Mrs. Guldoon be released on parole, she would be subject to the general conditions of parole, and made no mention of the special conditions of parole that were later statutorily imposed. R. at 7.

While Mrs. Guldoon served her sentence at Tonawanda State Correctional Facility, she was diagnosed by her psychiatrist with Manic Depression. R. at 13. Her Manic Depression was also determined to have contributed to an experience of "mania," or a period of "expansive emotion" that resulted in deviant behaviors including, among other things, hypersexuality. R. at 13. Her psychiatrist further concluded that Mrs. Guldoon's past crimes were "the result of a manic episode, triggered by the Prozac" she was prescribed back when her depression began. R. at 13.

During Mrs. Guldoon's incarceration, Lackawanna passed the Registration of Sex Offenders Act ("ROSA"), effective January 21, 2016, which retroactively applied to Mrs. Guldoon upon her release in 2017. R. at 2-3, 19. ROSA required all individuals convicted of sex offenses to register as either Level I, Level II, or Level III sex offenders. R. at 33, 38. Although ROSA would generally require the Board to assign one of the three foregoing "risk levels" to sex offenders at the time of sentencing based on individualized assessments that looked into multiple factors, Mrs. Guldoon, already incarcerated, was assigned a Level II designation for nothing more than "the crimes to which [she] pleaded guilty." R. at 14, 37-38.

ROSA also subjected Mrs. Guldoon to a number of additional retroactive parole conditions: she was forbidden from being within 1000 feet of all "school grounds," barred from accessing

almost any website on the internet, and had her driver's license suspended for 20 years. R. at 9-10. Like the registration requirements, each of these parole conditions automatically attached to Mrs. Guldoon without any individualized assessment into her actual risk level to society. R. at 2.

ROSA resulted in numerous challenges for Mrs. Guldoon as she attempted to reintegrate into society. R. at 14-16. These included forgoing numerous job opportunities due to lack of transportation and access to websites that list employment opportunities. R. at 15. Further, she was forced to ride a bike forty (40) miles a day on hazardous roads and through inclement weather to reach the only job she could obtain at Plewinski's Pierogi Company. R. at 15-16. Not only did Mrs. Guldoon suffer under these restrictions, but her family was also required to endure going without internet or internet capable phones. R. at 16-17.

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit erred in holding that ROSA was not a violation of the First and Fourteenth Amendments. Equally important as the right to freedom of speech in public forums is the right to localized travel to and from such forums. Yet, statutes like ROSA trample on these revered rights by enacting broad bans on social media and excessive travel restrictions. Thus, the State of Lackawanna's infringement on these rights should be met with the utmost resistance.

ROSA violates Mrs. Guldoon's right to free speech because it is overbroad in light of this Court's decision in *Packingham*. The Court noted there that the internet has become the most important place for sharing and receiving ideas, and that a restriction on "commercial social media websites" has the potential of banning a vast number of websites beyond just the commonplace sites such as Facebook and Twitter. Here, as in *Packingham*, even if ROSA is understood to apply merely to such commonplace social media sites, it still prohibits an "unprecedented" amount of

First Amendment speech. Thus, ROSA, which is content neutral in its restrictions, fails to be narrowly tailored to achieve the substantial government interest of promoting Mrs. Guldoon's rehabilitation and protecting the public.

Moreover, ROSA violates Mrs. Guldoon's fundamental right to intrastate travel. The right to interstate travel has been recognized by this Court, and numerous Circuits have recognized a parallel right to intrastate travel. In order to be recognized as a fundamental right, a liberty must be "implicit in the concept of ordered liberty" and a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Both history and precedent indicate that the right to intrastate travel is such a right. Furthermore, ROSA's restrictions on this right failed to be narrowly tailored to further Mrs. Guldoon's rehabilitation or protect the public. Not only was Mrs. Guldoon's offense almost entirely unrelated to her ability to travel, the restrictions on her travel all but prevent her from reintegrating into society.

This Court should reverse the Thirteenth Circuit's decision and hold that ROSA violated the First and Fourteenth Amendments by enacting broad restrictions that are not narrowly tailored to achieve substantial government interests.

II.

The Thirteenth Circuit erred in holding that ROSA was not retroactive punishment in violation of the Ex Post Facto Clause. Retroactive increases in punishment are antithetical to the principles of fair notice and equity inherent in the rule of law. It is for this reason that the Constitution enshrines the right of individuals to be free from such burdens. Therefore, any attempt by a State to retroactively subject an individual to restrictions that were not contemplated at the time of that individual's sentencing should be met by this Court with the greatest of skepticism.

Although the Lackawanna legislature ostensibly intended ROSA to be civil, ROSA is so punitive in its effect as to negate that civil intent. ROSA cannot be said to bear a rational connection to a nonpunitive purpose, and even if it could, it would be excessive with regard to that purpose. Moreover, ROSA imposes affirmative disabilities and restraints upon Mrs. Guldoon, resembles the historical punishment of banishment, and promotes retribution and incapacitation—both of which are traditional aims of punishment. All of these considerations taken together demonstrate that ROSA's punitive effect rendered its civil intent obsolete.

In addition, the fact that ROSA's restrictions were made mandatory by the Lackawanna legislature removes any speculation regarding whether such restrictions were the result of any protected discretion on the part of the Board. Whereas discretionary measures taken by parole boards that alter the availability or conditions of parole have received great deference from this Court, retroactive statutes that mandatorily impose increased punishments have not. Thus, ROSA lacks any of the qualities necessary to survive an Ex Post Facto challenge.

This Court should reverse the Thirteenth Circuit's decision and hold that ROSA violated the Ex Post Facto Clause by retroactively imposing increased punishment upon Mrs. Guldoon.

ARGUMENT

The American penal system exists to hold those who break the law accountable, not to blindside individuals who have paid their dues with retroactive burdens that thwart their successful reintegration into society. In order to prevent such abuses, the First Amendment, the Due Process Clause, and the Ex Post Facto Clause were incorporated into the Constitution to protect all citizens, not just those without moral error. As such, conditions that impose retroactive punishments and overbroad restrictions violate each of these provisions and stymie the successful rehabilitation of those striving to regain society's trust.

This Court should reverse the holding of the Thirteenth Circuit for two reasons. First, the conditions imposed by ROSA restricting Mrs. Guldoon's right to freedom of speech were not narrowly tailored to serve a substantial government interest and violated her fundamental right to intrastate travel under the Fourteenth Amendment. Second, the Thirteenth Circuit erred in holding that ROSA's retroactive registration requirements and special conditions of parole did not violate the Ex Post Facto Clause because ROSA negated its civil purpose with the punitive nature of the restrictions, and the conditions imposed by ROSA in no way were the result of any protected discretion on the part of the Board.

I. THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT THE STATES FROM VIOLATING THE FUNDAMENTAL RIGHTS OF PAROLEES BY NOT NARROWLY TAILORING SPECIAL CONDITIONS OF PAROLE TO ACHIEVE A SUBSTANTIAL GOVERNMENT INTEREST.

The Primacy of the First Amendment in the Bill of Rights, and the freedom of speech that it enshrines, demonstrates its importance to a free society. As essential as exercising this freedom in a "street or a park," the "quintessential forum for the exercise of First Amendment rights," is the right to travel to and from such places. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Thus, constrained by the Fourteenth Amendment, states must take the utmost caution when infringing on these fundamental rights.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. However, this prohibition is not absolute, and certain speech may be regulated. *Miller v. California*, 413 U.S. 15 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. N.H.*, 315 U.S. 568 (1942). Yet, even when speech is regulated the state must prove a substantial interest in a restriction that is narrowly tailored to achieve such interest. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

Additionally, this Court has recognized rights not enumerated in the Constitution that are so fundamental as to be given equal constitutional protection. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). One such right is the right to travel or "go from one place to another." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Unfortunately, lack of clarity has led to a split among the lower courts as to whether this right includes intrastate travel. *Compare Ramos v. Town of Vernon,* 353 F.3d 171, 176 (2d Cir. 2003) (Holding the right to intrastate travel exists); *Johnson v. City of Cincinnati*, 310 F.3d 484, 505 (6th Cir. 2002) (Holding drug exclusion zone ordinance "curtailed an individual's right to localized travel."); *Hutchins v. District of Columbia*, 188 F.3d 531, 561-62 (D.C. Cir. 1999) (Holding "precedents recognize a fundamental right to walk through public streets without thereby subjecting oneself to police custody."); *and Lutz v. City of York*, 899 F.2d 255, 266 (3d Cir. 1990) (Concluding "the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'") *with Wright v. City of Jackson*, 506 F.2d 900, 902-03 (5th Cir. 1975) (rejecting a fundamental right to intrastate travel). Further, several other Circuits have expressed confusion or failed to answer the question at all. *See Doe v. Miller*, 405 F.3d 700, 713 (8th Cir. 2005); *Willis v. Town of Marshall*, 426 F.3d 251, 268 (4th Cir. 2005); and *Doe v. City of Lafayette*, 377 F.3d 757, 770-71 (7th Cir. 2004).

Here, ROSA violates Mrs. Guldoon's First and Fourteenth Amendment rights for the following two reasons. First, the special condition banning the use of social media websites is not narrowly tailored to achieve a significant governmental interest. Second, ROSA's school grounds restriction and driver's license suspension infringe on Mrs. Guldoon's fundamental right to intrastate travel.

A. ROSA violated Mrs. Guldoon's First and Fourteenth Amendment rights because the special condition banning the use of social media websites is not narrowly tailored to serve a significant governmental interest.

Because ROSA's stringent social media condition is a content neutral restriction, it is examined under intermediate scrutiny. *Packingham*, 137 S. Ct. at 1736. This requires the condition to be "narrowly tailored" to a "significant governmental interest," and to not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* This condition falls short of this level of scrutiny because it is not narrowly tailored to the statutory goals in 18 U.S.C. § 3553(a). In sum, these goals are "designed, in light of the crime committed, to promote the [defendant's] rehabilitation and to insure the protection of the public." *United States v. Tolla*, 781 F.2d 29, 34 (2d Cir. 1986). Furthermore, "[n]o condition is presumed valid; rather, a condition is reasonable only if it is not 'unnecessarily harsh or excessive.'" *Id.* Although parole conditions are necessary, they become excessive when they deprive an individual of almost any speech on the world's biggest public forum. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham*, 137 S. Ct. at 1735 (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

In *Packingham v. North Carolina*, this Court held that a social media restriction on registered sex offenders violated the right to free speech. *Id.* at 1738. The Court noted that "given the broad wording" of the statute in that case, it "might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com." *Id.* at 1736. However, even after assuming the statute only applied to common social media websites such as Facebook and Twitter, this Court still found it to "enact[] a prohibition unprecedented in the scope of First Amendment speech it burdens." *Id.* at 1737.

In this case, the special condition restricting social media use is not related to Mrs. Guldoon's rehabilitation. Here, a nearly identical statute to that in *Packingham* bars Mrs. Guldoon from any "commercial social networking website," R. at 9, which has the "unnecessarily harsh" effect of denying Mrs. Guldoon "access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1737. Thus, not only is the condition unrelated to her rehabilitation, it actually hinders it. Restrictions on social media thwart Mrs. Guldoon's rehabilitation because "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Packingham*, 137 S. Ct. at 1737. This is evident as her attempt to start over after receiving her Masters in Computer Programming was stymied by the condition which all but eliminated her computer use. R. at 14. She is also severely disadvantaged in her employment search because she cannot access sites such as "LinkedIn, Craigslist, Indeed, Facebook, Twitter, and other similar platforms where employment opportunities are posted." R. at 15. As such, this condition is unrelated to and ultimately impedes her rehabilitation.

Also, the condition is unrelated to protecting the public. Determination of special conditions must be done "in light of the crime committed"; yet, Mrs. Guldoon's crime only tangentially involved the internet, and the majority of her contact with B.B. was in person at school. R. at 6-7. Furthermore, although Mrs. Guldoon is a registered sex offender, there are numerous factors that indicate she is no threat to the public. First, she did not instigate a relationship with B.B. R. at 6-7. On the contrary, her interactions with B.B. were due to a grave error in judgment in which she let her emotions control her actions. R. at 12. Second, this error was most likely due

to a mania episode brought on by Prozac that was prescribed for her post-partum depression. R. at 13. Third, even if she had sought out the relationship, which is controverted by the facts, she did not use social media at all in doing so. R. at 6-7. Thus, she is not a danger to society and the special condition preventing social media use does not further the "protection of the public."

The right to free speech is as precious to those who have paid their debt to society as those who have never darkened a cell door. And even though individuals that have committed an offense can be restricted in the exercise of that right, such restrictions must still be narrowly tailored to achieve a "substantial government interest." *McCullen*, 573 U.S. at 486. Thus, because ROSA's special condition restricting Mrs. Guldoon's use of social media is not narrowly tailored to further her rehabilitation or to protect the public, it violates her First Amendment right to free speech.

B. ROSA violated Mrs. Guldoon's Fourteenth Amendment rights because the special conditions infringe on the defendant's fundamental right to travel.

The ability to move about freely without jeopardizing one's life is essential to the concept of liberty. In fact, this Court has held the right to interstate travel to be fundamental. *Saenz*, 526 U.S. at 500. It is a right "broadly assertable against private interference, as well as governmental action, and a virtually unconditional personal right guaranteed by the Constitution." *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring). Reason and precedent would call for this Court to also recognize the right to *intrastate* travel. Consequently, Mrs. Guldoon's fundamental liberty interests were violated for two reasons: (1) the right to intrastate travel is a fundamental right, and (2) the special conditions fail to pass intermediate scrutiny.

First, the special conditions violate Mrs. Guldoon's liberty interests because there is a fundamental right to intrastate travel. A right is considered "fundamental" and given the highest of constitutional protections when it is "implicit in the concept of ordered liberty"; a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental";

and to disregard it would violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Palko v. Connecticut*, 302 U.S. 319, 325, 328 (1937).

This Court has recognized the right to interstate travel. *Saenz*, 526 U.S. at 500. And while it has not as clearly acknowledged a parallel right to intrastate travel, it has certainly not precluded it. In *Kent v. Dulles*, Justice Douglas stated in dicta that "[f]reedom of movement across frontiers . . . and inside frontiers as well, was a part of our heritage" and that "[f]reedom of movement is basic in our scheme of values." 357 U.S. 116, 125-26 (1958). He then stated in *Aptheker v. Sec'y of State* that "[f]reedom of movement, at home and abroad, is important for job and business opportunities — for cultural, political, and social activities — for all the commingling which gregarious man enjoys" which also implies that the right to travel subsumes intrastate travel. 378 U.S. 500, 519-20 (1964) (Douglas, J., concurring). This implication was further observed by Justice Marshall in *Bykofsky v. Borough of Middletown*, where he writes "freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty.'" 429 U.S. 964, 964-65 (1976) (Marshall, J., dissenting). Therefore, rather than precluding the argument that the right to travel includes intrastate travel, this Court has actually strongly implied its existence.

Furthermore, the importance of localized travel has been acknowledged since the time of the founders. In *United States v. Wheeler*, the Court noted that under the "Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." 254 U.S. 281, 293 (1920). Likewise, according to William Blackstone, "Personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatever places one's own inclination may

direct, without imprisonment or restraint, unless by due course of law." 1 William Blackstone, Commentaries *120-41.

Finally, several Circuits have recognized such a right. *Ramos* 353 F.3d at 176; *Johnson,* 310 F.3d at 505; *Hutchins*, 188 F.3d at 561-62; *Lutz*, 899 F.2d at 266. As noted by the Second Circuit in *King v. New Rochelle Municipal Housing Authority*, "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." 442 F.2d 646, 649 (2d Cir. 1971). On the contrary, only one Circuit has expressly held that the right to intrastate travel does not exist. *Wright*, 506 F.2d at 902-03.

Thus, although never explicitly articulated, the right to intrastate travel included in the right to travel has been recognized to be "of the very essence of a scheme of ordered liberty," *Bykofsky*, 429 U.S. at 964-65 (Marshall, J., dissenting), in so much that it is "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Therefore, Mrs. Guldoon's right to intrastate or localized travel is a fundamental right guaranteed the utmost constitutional protection.

Second, the special conditions violate Mrs. Guldoon's right to intrastate travel because they fail to pass intermediate scrutiny. In cases involving a fundamental right under the due process clause of the Fourteenth Amendment, this Court usually applies strict scrutiny. *Washington. v. Glucksberg*, 521 U.S. 702, 721 (1997). Although this is the standard that would normally apply to such a "severe restriction" as the case at hand, *Johnson*, 310 F.3d at 502, the fact that Mrs. Guldoon is a parolee does justify modifying this standard to intermediate scrutiny. *See Ramos*, 353 F.3d at 181 (holding that intermediate scrutiny is acceptable to apply to constitutional rights of children because of their "vulnerability and their needs."); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)

(applying lower level of scrutiny to prison regulations that impinge upon prisoners' constitutional rights). Therefore, the restrictions at issue must be narrowly tailored "to promote the [defendant's] rehabilitation and insure the protection of the public." *Tolla*, 781 F.2d at 34.

A statute prohibiting sex offenders from *residing* within a certain proximity of schools or from entering certain public places does not implicate the right to intrastate travel because such statutes do not prevent the individual from traveling "through parts of the City to engage in religious, political, commercial and social activities." *City of Lafayette,* 377 F.3d at 769-70; *Miller*, 405 F.3d at 704. Conversely, a statute which excludes "an individual . . . from the 'public streets, sidewalks, and other public ways'. . . " without any sort of individualized assessment indicating likelihood of recidivism unconstitutionally infringes on the fundamental "right to travel locally through public spaces and roadways." *Johnson*, 310 F.3d at 487, 495.

In this case, not only do the proximity conditions and suspension of her license drastically limit Mrs. Guldoon's ability to travel, they put her very life in jeopardy by forcing her to ride a bike on a main highway. R. at 16. Also, she has been forced to forgo numerous job opportunities because of her suspended license and the rarity of public transportation. R. at 15. Adding to these "harsh and excessive" conditions is the fact that she is forced to ride her bike for twenty miles one way to a job that is only three miles away because the safer routes pass within one thousand feet of a school. R. at 15, 16. These conditions not only restrict where Mrs. Guldoon can live and recreate, but also prevent her from moving "locally through public spaces and roadways" and deny her the ability to travel "through parts of the City to engage in religious, political, commercial and social activities," which only serves to deprive Mrs. Guldoon of "socially beneficial action" that would aid her rehabilitation. Thus, these conditions are unrelated to her rehabilitation.

Also, the proximity conditions and license suspension are not related to the goal of protecting the public. Mrs. Guldoon's offense occurred almost entirely at the school and only required the use of a car on three out of thirty occasions. R. at 7. Thus, the complete suspension of her license is merely punitive of "wholly innocent conduct" that is all but unrelated to her offense. Further, the record does not indicate that she was a predator looking for victims. Rather, she was a sick woman who fell prey to her emotions and consequently made a grave mistake. R. at 2. Like the court in *Johnson*, this Court should be troubled by the unnecessarily vast area that Mrs. Guldoon will be barred from when a simple exclusion from schools would have accomplished the state's interest of protecting the public. Equally troubling should be the concern that no individual assessment was made of Mrs. Guldoon to determine her likelihood of recidivism. R. at 14. If such an assessment was made, the emotional nature of the situation and Prozac-triggered episodes of mania would have strongly indicated a low chance of recidivism. Thus, these conditions are not related to protecting the public.

In its pursuit of the interests of rehabilitation and public protection, ROSA has violated Mrs. Guldoon's fundamental right to travel by "burden[ing] substantially more" of that travel than was "necessary to further the government's legitimate interests." *McCullen*, 573 U. S. at 486. Therefore, because Lackawanna has failed to narrowly tailor its conditions, it has violated Mrs. Guldoon's Fundamental right to travel under the due process clause of the Fourteenth Amendment.

II. THE EX POST FACTO CLAUSE PROTECTS INDIVIDUALS FROM RETROACTIVE MANDATORY REGISTRATION REQUIREMENTS AND BURDENSOME SPECIAL CONDITIONS OF PAROLE THAT WERE NOT CONTEMPLATED AT THE TIME OF SENTENCING.

A fundamental aspect of our criminal justice system and constitutional order is that sentencing and punishment be based on fair notice to those subject to the law. For this reason, the Ex Post Facto Clause safeguards individuals from retroactive increases in punishment, which are

in every sense "contrary to the first principles of social compact, and to every principle of sound legislation." *The Federalist No. 44* (James Madison). In order to protect individuals from laws that are "manifestly unjust and oppressive," the judiciary must remain committed to the principle that retroactive punishment is "altogether inadmissible in our free republican government." *Calder v. Bull*, 3 U.S. 386, 389 (1798) (Chase, J.)

When the Framers included the Ex Post Facto Clause in the Constitution, they provided a bulwark against "the violent acts which might grow out of the feelings of the moment . . . those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810) (Marshall, C.J.). In expounding upon this central concern of the Ex Post Facto Clause, this Court has stated that the "[l]egislature's unmatched powers . . . [and] responsivity to political pressures pose[] a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Accordingly, a principled interpretation of the Ex Post Facto Clause will serve as a shield against "arbitrary and oppressive legislative action," rather than grant misguided deference to the whims of the state. *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915).

Here, this Court should hold that ROSA's mandatory restrictions and registration requirements violate the Ex Post Facto Clause for two reasons. First, ROSA imposes restrictions and requirements that are so punitive in their effect as to negate the statute's ostensible civil intent. Second, ROSA's registration requirements and special conditions of parole were mandatory, and not the result of any protected discretion on the part of the Lackawanna Board of Parole.

A. ROSA's Restrictions and Requirements Are So Punitive in Their Effect as to Negate the Statute's Ostensible Civil Intent.

The Ex Post Facto Clause prohibits "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 U.S. at 390.

Consistent with longstanding precedent, a law only violates the Ex Post Facto clause when it imposes punishment, as opposed to civil regulations. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

In *Smith v. Doe*, this Court recognized a two-part test for determining whether statutes are punitive or civil. First, courts must discern whether the legislature that enacted the statute intended it to be civil or criminal. *Id*. If the legislature intended the statute to be civil, courts must then look to whether "'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). In analyzing the extent of a statute's punitive effects, this Court adopted the factors test established in *Kennedy v. Mendoza-Martinez* and applied it in the Ex Post Facto context, asking whether the challenged statute "[1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Smith*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

Because ROSA's stated intent is nearly identical to the statute deemed to have a civil intent in *Smith*, ROSA's ability to survive constitutional scrutiny depends on the magnitude of its punitive effects. *Smith*, 538 U.S. at 92. An examination of ROSA under the *Mendoza-Martinez* factors test demonstrates that it indeed imposed punishment, and therefore cannot be considered a civil regulatory scheme.

First, ROSA does not have a rational connection to a nonpunitive or civil purpose. Although the factor of whether a statute has a rational connection to a nonpunitive purpose is not listed first in the *Mendoza-Martinez* test, because this Court has identified that factor as the "most significant," *United States v. Ursery*, 518 U.S. 267, 290 (1996), a demonstration of how ROSA

falls short in this aspect is warranted at the outset. While ROSA need not be "a close or perfect fit with . . . nonpunitive aims" to be rationally connected to such aims, *Smith*, 538 U.S. at 103, no rational connection is established when it is wholly ineffective or even counterproductive at fulfilling nonpunitive aims. *Doe v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016).

Recent and comprehensive research has cast "significant doubt" on the assumption upon which statutes like ROSA are based: that sex offenders, as the *Smith* Court put it, pose a "frightening and high" risk of recidivism. *Snyder*, 834 F.3d at 704-05. To the contrary, statistics from the Bureau of Justice show that individuals previously convicted of sexual assault or rape are among the *least* likely to recidivate, second only to those convicted of homicide. Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* 1, 8 (2014); *see also* Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003) (concluding that sex offenders recidivate at a lower rate than other criminals). Even if the assumption that sex offenders have high rates of recidivism were correct, additional research has shown that statutory schemes like ROSA have no effect at reducing recidivism among sex offenders. *Snyder*, 834 F.3d at 705. As one such study put it, there is "little evidence to support the effectiveness of sex offender registries, either in practice or in potential." Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & Econ. 207, 208 (2011).

The most troubling aspect of sex offender registries is that they not only are shown to be ineffective at reducing recidivism rates, there is also research showing that such laws actually *exacerbate* recidivism rates among sex offenders. *Snyder*, 834 F.3d at 704 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011)). Such counterproductive effects are likely attributable to the fact that statutes like ROSA increase "risk factors for recidivism by making it hard for registrants to get

and keep a job. . .and reintegrate into their communities." *Id.* at 705. As such, because statutory schemes like ROSA have been shown to contribute to the very problem they seek to remedy, ROSA cannot be considered to have a rational connection to a nonpunitive purpose.

Second, even if ROSA had a rational connection to a civil and regulatory purpose, it would be excessive in regard to that purpose. An imposition of physical restraints and lifetime registration requirements, without any assessment of an individual's *current* danger to public safety, is excessive. *Commonwealth v. Baker*, 295 S.W.3d 437, 446 (Ky. 2009). Where no individualized assessment is present, the public is left with the unwarranted perception that all registrants are equally dangerous to public safety. *State v. Letalien*, 985 A.2d 4, 23-24 (Me. 2009).

Here, Mrs. Guldoon was forced to register as a Level II Sex Offender for no other reason than the presence of the past "crimes to which [she] pleaded guilty," without any consideration of her present dangerousness to society. R. at 14. ROSA's lack of individualized assessment in Mrs. Guldoon's case is especially problematic, considering that her psychiatric diagnosis identified Prozac-triggered manic episodes as the root cause of her past transgressions, and that lithium treatments since her diagnosis have eliminated her manic episodes altogether. R. at 13.

In contrast to the statute analyzed in *Smith*, ROSA is also excessive in terms of its duration. Unlike the registration requirements in *Smith*, which lasted for only fifteen years, Mrs. Guldoon is forced to register for *life* in light of her Level II designation, without any possibility of appealing her designation until she has been registered for a "minimum period of thirty years," R. at 41, providing additional evidence of its excessive impositions and expectations.

ROSA's fluidity raises even more concerns of its excessiveness. *Baker*, 295 S.W.3d at 446. Statutes that prevent an individual from residing near school zones subject that individual to a threat of "constant eviction," because he or she cannot be assured that a school will not open within

1,000 feet of his or her home while they are subject to the statute's restrictions. *State v. Pollard*, 908 N.E.2d 1145, 1150 (Ind. 2009); *see also Baker*, 295 S.W.3d at 446 ("While a sex offender may be permitted one day to live in a particular home, he may the next day find himself prohibited by the opening of a school, daycare facility or playground."). The fluidity of ROSA therefore weighs in favor of deeming ROSA punitive.

Third, ROSA subjects Mrs. Guldoon to affirmative disabilities and restraints. A statute imposes affirmative disabilities and restraints when it "restrain[s] activities sex offenders may pursue" and infringes on their ability "to change jobs or residences." *See Smith*, 538 U.S. at 100. Furthermore, a statute places "direct restraints on personal conduct" when it threatens "serious punishment" upon individuals for failure to comply with its requirements. *Snyder*, 834 F.3d at 704.

In this case, ROSA restricts Mrs. Guldoon's movement in a number of ways. Mrs. Guldoon is not only prohibited from living within 1,000 feet of school grounds, she also cannot at any point *be* within 1000 feet of school grounds. R. at 9. Moreover, any violation of ROSA's requirements would hold Mrs. Guldoon culpable for a variety of felonies. R. at 44. Each of these aspects taken together provide more justification for deeming ROSA sufficiently punitive in its effects, and makes ROSA plainly distinguishable from the statutory scheme in *Smith*, where previous offenders were free to move and reside where they pleased. *Smith*, 538 U.S. at 100.

Fourth, ROSA resembles historical forms of punishment. Given that sex offender registries are "relatively recent in history," this factor of the *Mendoza-Martinez* test looks not to whether such statutory schemes "mirror an exact form of historical punishment," but rather whether the act is "*analogous* to a historical punishment." *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015). In this regard, ROSA is analogous to the historical punishment of banishment.

Although the *Smith* Court held that the sex offender registry in that case was not sufficiently similar to banishment, ROSA imposes far more stringent restrictions than that statute, thereby increasing ROSA's resemblance to that punishment. Banishment included expelling persons from their community and making it difficult for them to reintegrate into other communities. *Smith*, 538 U.S. at 98. Likewise, ROSA's geographical restrictions force Mrs. Guldoon to tailor her life around Lackawanna's school grounds, even to the point of putting her life at risk just to maintain a source of income. R. at 16. As discussed previously, Mrs. Guldoon is also at risk of potential expulsion from her own home and is prevented from being in substantial portions of her own community as a result of the school grounds restriction. R. at 9, 15-17. As such, these burdensome restrictions should "strike this Court as decidedly similar to banishment." *Baker*, 295 S.W.3d at 437.

Fifth, ROSA promotes traditional aims of punishment. Deterrence, retribution, and incapacitation typify some of the major traditional aims of punishment. *See Smith*, 538 U.S. at 102; *Snyder*, 834 F.3d at 704; *Letalien*, 985 A.2d at 21. Because the *Smith* court found deterrent aims to be consistent with regulatory purposes, primary focus will be given to the aims of retribution and incapacitation. ROSA promoted each of these aims, thereby providing additional evidence of its punitive effect.

Statutes serve retributive aims when they "affix culpability for prior criminal conduct." *Hendricks*, 521 U.S. at 362. Here, ROSA imposed the restrictions and registration requirements on Mrs. Guldoon because of her past crimes, R. at 2, 14, and not because of "any individualized assessment of current risk or level of dangerousness." *Doe*, 111 A.3d at 1098. In this way, ROSA held Mrs. Guldoon culpable for her past actions, evincing the statute's retributive aim.

Finally, statutes that impose registration requirements and various restrictions upon individuals promote incapacitation "insofar as [they] keep sex offenders away from opportunities

to reoffend." *Snyder*, 834 F.3d at 704. ROSA seeks to incapacitate Mrs. Guldoon by preventing her from being within 1000 feet of school grounds, from being able to access the vast majority of the internet, and from being able to lawfully drive a motor vehicle for 20 years, all for the purpose of diminishing her opportunity to reoffend. R. at 9-10, 19. Thus, ROSA demonstrably subjects Mrs. Guldoon to the punitive aim of incapacitation.

Under the scrutiny of the *Mendoza-Martinez* factors test, ROSA's effects are sufficiently punitive to negate the statute's civil intent. As such, this Court should hold that ROSA retroactively inflicted punishment upon Mrs. Guldoon in violation of the Ex Post Facto Clause.

B. ROSA's Retroactive Restrictions and Requirements Were Not the Result of any Protected Discretion on the Part of the Lackawanna Board of Parole.

Increased punishments that arise from retroactively applied statutes raise different concerns from increases that arise from the discretion of parole boards *separate* from the challenged statute. *Garner v. Jones*, 529 U.S. 244, 254 (2000). In order for an Ex Post Facto violation to occur, any increases in punishment must be attributable to a retroactively applied statute, and not to the discretion of a parole board or other similar governing body. *Id*. at 250.

A comparison between the statutory schemes in *Weaver v. Graham* and *Garner v. Jones* illustrates the difference between the two aforementioned scenarios. In *Weaver*, inmates were once able to earn "gain time" that automatically reduced the duration of their sentences if they abided by statutorily defined rules of "good conduct" while in prison. *Weaver v. Graham*, 450 U.S. 24, 25 (1981). Subsequently, the Florida legislature retroactively reduced the gain time that inmates could earn and applied the changes to the Petitioner in that case, effectively guaranteeing a longer sentence than he could have otherwise earned prior to the statutory changes. *Id*. at 27. Because the Petitioner in that case experienced a "substantial disadvantage" due to the "lack of fair notice" at

the time of his sentencing that the legislature would retroactively reduce the gain time he could earn, this Court held that the statute violated the Ex Post Facto Clause. *Id*. at 30, 33, 36.

By contrast, *Garner* involved a change in the mandatory frequency of parole review. Prior to the relevant statutory changes, Georgia's Parole Board was required to review inmates who were serving life sentences after seven years of incarceration, and then for a "reconsideration" review every three years thereafter if inmates were denied parole at the initial review. *Garner*, 529 U.S. at 247. Subsequently, Georgia changed the statute to require the Parole Board to grant inmates reconsideration every eight years after the initial review, but still gave the Parole Board discretion to grant reconsideration at any earlier point. *Id*. In concluding that the statutory change was constitutionally permissible, this Court reasoned that because the retroactive law vested "broad discretion" with the Georgia Parole Board and the Board scrupulously exercised that discretion in managing the parole review of inmates, that the statute therefore did not create a "significant risk of increased punishment" necessary to find an Ex Post Facto violation. *Id*. at 256, 257.

Here, ROSA did not grant the Board any discretion regarding the conditions of parole it imposed. Prior to ROSA, the Board exercised its discretion by relaying to the sentencing court that Mrs. Guldoon would only be subject to the general conditions of parole upon her release, and made no mention of the restrictions and registration requirements that ROSA later retroactively enforced. R. at 7. After ROSA's enactment, the Board was stripped of its discretion and was forced to subject Mrs. Guldoon to the increased restrictions, some of which were not even available to the Board at the time of Mrs. Guldoon's sentencing, R. at 19, refuting the lower court's claim that ROSA simply "formalized" restrictions that the Board could have otherwise imposed prior to ROSA's enactment. *See Guldoon v. Lackawanna Board of Parole*, 999 F. Supp. 3d 1, 9 (M.D. Lack. 2019).

Mrs. Guldoon was disadvantaged by the "lack of fair notice" that this Court has deemed to be integral to any Ex Post Facto challenge. *Weaver*, 450 U.S. at 30. Because this lack of fair notice regarding the increase in punishment imposed upon Mrs. Guldoon is attributable to the mandatory registration requirements and special conditions of parole imposed by ROSA, and not to any protected discretion on the part of the Board, this Court should hold that ROSA lacks any of the qualities necessary to survive scrutiny under the Ex Post Facto Clause.

CONCLUSION

Justice may demand payment, but once that debt is paid, retroactive punishment that prohibits one from reintegrating into society violates the most fundamental principles of our Constitution. ROSA violated Mrs. Guldoon's rights under the First and Fourteenth Amendments and the Ex Post Facto Clause, and the Thirteenth Circuit erred by holding otherwise. Accordingly, this Court should reverse the Thirteenth Circuit's decision and remand to the district court with instructions to enter judgment in favor of Mrs. Guldoon.

Dated March 13, 2019.

Respectfully Submitted,

/s/_____
COUNSEL FOR PETITIONER