No. 19-01

In the Supreme Court of the United States

MARY GULDOON,

Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR THE PETITIONER

TEAM 24
Counsel for Petitioner

March 13, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AUTHORITIES

STATUES AND RULES

OTHER

QUESTIONS PRESENTED

I. Are the protections of the First and the Fourteenth Amendment of the United States Constitution violated by Lackawanna's Registration of Sex Offenders Act, which requires suspending a person's driver's license and banning their use of commercial social networking websites?

II. Are the special parole conditions and registration requirements required by Lackawanna's Registration of Sex Offenders Act violations of the *Ex Post Facto* Clause of the United States Constitution?

STATEMENT OF THE FACTS

This case is about the State of Lackawanna's Registration of Sex Offenders Act (ROSA), which was enacted in 2015. The act has two primary components: registration requirements and special parole conditions. Both components are imposed on designated sex offenders. The registration requirements include a reoccurring duty to register with the state. Lackawanna Correction Law § 168 -f (2018), a fee, *id.* § 168-b (8)/ The information gathered through the registration process includes, among other things, a photograph of the offender, a description of their offense, and where the offender lives and works. *Id.* § 168-b (1). This information is shared with the public and multiple Lackawanna government agencies both on the internet and via phone as well. *Id.* at § 168-p, -q. Further, ROSA's special parole conditions mandate three conditions of parole for sex offenders, which prior to ROSA were not mandatory. The offender is

severely restricted from using the internet, may not have a driver's license, nor is the offender allowed within 1,000 feet of a school. Lackawanna Executive Law § 259-c (14-16) (2018).

Four years prior to ROSA's passing, Ms. Mary Guldoon plead guilty to rape in the third degree, criminal sexual act in the third degree, and sexual misconduct stemming from her relationship with B.B., a minor. Complaint at 2, *Guldoon v. Lackawanna Board of Parole*, 999 F.Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-0001(O)). B.B. was a student in Ms. Guldoon's high school computer science class. (Guldoon Aff. ¶ 4.) At the time of the offenses, she was suffering from post-partum depression. *Id.* ¶ 6. Ms. Guldoon plead guilty to spare her family the difficulty of enduring trial and to take responsibility and ownership for her actions. *Id.* ¶ 16. She was sentenced for an indeterminate length of ten to twenty years, to be followed by parole. *Id.* The Parole Board made no recommendation as to any special conditions of parole. Complaint at 2. Ms. Guldoon has shown remorse for actions. Since her release from prison, she has been rehabilitating by working a night shift at a pierogi plant, and by living with and repairing her relationships with her husband and child. *Id.* ¶ 29, 36.

But ROSA has made Ms. Guldoon's life incredibly difficult. Her husband had to drive her to every job interview she scheduled in her attempt to rehabilitate. (Guldoon Aff. ¶ 35.) Further, to comply with ROSA's parole conditions, she has to bike twenty miles one way to work, every day, along a dangerous highway. *Id.* ¶ 36–44. Further, as a result of the parole restrictions her family cannot have internet in their home. *Id.* ¶ 45–47.

The United States District Court Middle District of Lackawanna granted Respondent Lackawanna Parole Board's motion for summary judgement. *Guldoon v. Lackawanna Board of Parole*, 999 F.Supp. 3d 1, 7-10 (M.D. Lack. 2019). On appeal, the Thirteenth Circuit summarily affirmed without opinion, over the dissent of Judge Skopinski. *Guldoon v. Lackawanna Board of*

Parole, 999 F.3d 1, 1 (13th Cir. 2019). Ms. Guldoon petitioned for Writ of Certiorari, and this Court granted. *Guldoon v. Lackawanna Board of Parole*, 999 U.S. 1.

STANDARD OF REVIEW

This court reviews questions of law arising out of a case's dismissal on a 12(b)(6) motion de novo. *American Civil Liberties Union of Nevada v. Cortez Masto*, 670 F.3d 1046, 1052 (9th Cir. 2012).

SUMMARY OF THE ARGUMENT

The below judgements should be overruled. First, the special parole condition banning the use of social commercial networking websites violates the defendant's First Amendment rights. As a content-neutral statute, the court must decide whether the special condition is narrowly tailored to serve a significant government interest, and if it leaves open ample alternative channels of communication. ROSA's website ban is neither narrowly tailored nor does it leave open ample alternatives.

Second, the special parole condition requiring the defendant to surrender her driver's license violates her Fourteenth Amendment right. Because there is no fundamental right to a driver's license, the statute is evaluated under the rational basis test. Under that test, courts uphold the statute so long as it bears a rational relation to some legitimate end. ROSA's license requirement is not rationally related to any government goal.

Furthermore, ROSA's registration requirements and its special parole conditions violate the *Ex Post Facto* Clause when they are applied retrospectively. This is because both the registration requirements and the special conditions substantially disadvantage offenders by increasing their punishment. Parole conditions are traditionally punitive measures, and making some of those conditions mandatory that were not mandatory before increases the defendant's punishment under the *Ex Post Facto Clause*. Furthermore, ROSA's registration requirements

increase offender's punishment in that they have punitive effects. Because ROSA's registration requirements and special parole conditions increase the punishment for crimes after the fact, the law violates the *Ex Post Facto* Clause of the Constitution. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). For all of the foregoing reasons the Judgment of the Thirteenth Circuit should be reversed.

ARGUMENT

A § 1983 claim has two parts. First, the challenged conduct must be committed by a person "under color of any statute, ordinance, regulation, custom, or usage, of any State."[1] 42 U.S.C. § 1983 (2019). Second, that the conduct subjects "any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.*

The Court should overrule the Thirteenth Circuit on three grounds. First, ROSA violates Ms. Guldoon's First Amendment rights because a ban on commercial social networking cites is not narrowly tailored, nor does it leave open ample alternative channels of communication, (II) ROSA violates Ms. Guldoon's Fourteenth Amendment rights because surrendering her license is not rationally related to the government's stated interests, and (III) ROSA's registration requirements and mandatory parole conditions violate the Constitution's *Ex Post Facto* Clause.

I. ROSA's ban on commercial social networking sites violates Ms. Guldoon's First Amendment rights because it is not narrowly tailored, nor does it leave open ample alternative channels of communication.

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. U.S. CONST. amend. I, XIV. A parolee still has constitutional rights. *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir.

[1]Here, the first half of the § 1983 claim is not in dispute. *Guldoon v. Lackawanna Board of Parole*, 999 F.Supp. 3d 1, 4 (M.D. Lack. 2019).

1970). When the government acts in its role as a sovereign, the first step in the First Amendment analysis is to determine whether the regulation in question is content based or content neutral. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Assuming arguendo that ROSA is content neutral, the applicable test is whether the statute is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

A. ROSA is not narrowly tailored to government interests and thus fails the content-neutral First Amendment test.

Conceding that Lackawanna has a significant government interest in preventing recidivism, protecting the public and minors, and aiding in Ms. Guldoon's education and vocation, the law fails the content-neutral test because it is not narrowly tailored.

In, *Packingham v. North Carolina*, the Supreme Court found that a ban on accessing commercial social networking websites was both overly broad and not narrowly tailored. 137 S. Ct. 1730, 1737 (2017). The statute at issue forbade sex offenders from accessing commercial social networking websites. *Id.* at 1733-34. The Court concluded that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* And finally that "no case or holding of this Court has approved of a statute as broad in its reach." *Id.*

As part of Ms. Guldoon's parole, she is banned from accessing commercial social networking websites. ROSA, Pub. L. No. 2016-1, § 2, 15 (2016). In Ms. Guldoon's case, "she communicated with the child through the high school's email system, and through text messages on her cellular telephone. No pornographic or sexual communications could be recovered." Pre-sentence Report, *Lackawanna v. Mary Guldoon*, (Crim. No.: 2010-1). That is the extent and only allegation of technology use in relation to her crimes.

ROSA's law specifies users under the age of eighteen. *Id.* The statute at issue in *Packingham* contained a similar age provision in the very first sub-section of the statute: "It is unlawful for a sex offender… to access 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." N.C. Gen. Stat. § 14-202.5(a) (emphasis added). Furthermore, while ROSA is applied as a parole condition, the *Packingham* statute applies to all registered sex offenders. *Packingham*, 137 S. Ct. 1730, at 1734. Functionally, however, this makes no difference as the parole condition lasts for as long as the person is required to remain registered. Because the two statutes are virtually identical, ROSA should be rejected under the same analysis as *Packingham*.

While the inquiry could end here, the ban is also overbroad in light of the government interests it serves. First, the ban is not narrowly tailored with respect to recidivism. In *United States v. Brigham*, for example, the Fifth Circuit Court of Appeals held that a complete ban of computer and internet access was narrowly tailored to the government's interests. 569 F.3d 220, 233 (5th Cir. 2009). There, one of the special conditions of the defendant's parole was a complete ban on possessing and utilizing a computer or internet connection device during the term of his supervised release. *Id.* at 224. The defendant received and posted a number of images deemed to be child pornography on the internet, and used his computer to view and store those images. *Id.* at 233-34. Because the defendant's underlying charges were deeply related to the internet and computer usage, the court found the broad ban acceptable. *Id.*

Unlike the defendant in *Brigham*, Ms. Guldoon's offense was largely unrelated to internet access. She is not charged with viewing, receiving, nor any other crime related to child pornography. While the condition at issue in *Brigham* is a complete internet ban, a ban on

virtually all commercial social networking sites functions similarly. Ms. Guldoon did not use these sites in any such way as the defendant in *Brigham*. Accordingly, such an expansive ban for very little underlying usage should be rejected.

Further Ms. Guldoon has a low chance of recidivism. She suffered from post-partum depression, for which she was prescribed Prozac. (Guldoon Aff. ¶ 6-7.) Her psychologist was of the opinion that her behavior with B.B. was the result of a manic episode triggered by the Prozac. (Guldoon Aff. ¶ 22.) Mania is a period of expansive emotion that can be marked by inappropriate behavior, which may include hypersexuality. (Guldoon Aff. ¶ 20.) She is now being treated with lithium and has not had any other manic episodes. (Guldoon Aff. ¶ 23.) Getting her mental health in check is an important step in preventing recidivism, already creating positive impacts, as she has not experienced any further episodes. Additionally, Ms. Guldoon has no prior criminal history. Pre-sentence Report, *Lackawanna v. Mary Guldoon*, (Crim. No.: 2010-1). This is a good sign that Ms. Guldoon's actions were a one-off triggered by the Prozac.[2]

Second, the ban is not narrowly tailored with respect to either protection of the public or minors. In *United States v. Paul*, the Fifth Circuit upheld a blanket prohibition on computer and internet use. 274 F.3d 155, 168 (5th Cir. 2001). There, the defendant used the internet to find other people who had similar interests in young children, and even provided those people with directions on how to gain access to that sector of the population. *Id.* at 169. Because his involvement was not constrained to just self-use, the court was satisfied that a wide reaching restriction was narrowly tailored to protect the public. *Id.*

Conversely, in *Doe v. Nebraska*, a Nebraska District Court held that a broad internet prohibition does not advance the goal of protecting minors when it was not sufficiently narrowly

[2]*See* 18 USCS § 3553, directing the courts to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" in the imposition of a sentence

tailored. 898 F. Supp. 2d 1086, 1111 (D. Neb. 2012). There, because the statute applied to offenders regardless of whether their crime had any connection to the internet the court found that "the statute is not narrowly tailored to target those offenders who pose a factually based risk to children through the use or threatened use of the banned sites or services." *Id.*

Here, facts that justified the broad bans in *Paul* are absent. Unlike the crimes committed in *Paul*, Ms. Guldoon's crimes did not engage the general population, they were constrained to self-use. And, like the statute in *Doe*, ROSA similarly does not consider the role, or lack thereof, that commercial social networking websites played in the underlying crimes. Lastly, as a condition of her parole, Ms. Guldoon is unable to travel within 1000 feet of any school. (Guldoon Aff. ¶ 33.) Because of that restriction, she is unable to teach in any capacity and will thus not have the same day-to-day interactions with minors regardless. (Guldoon Aff. ¶ 33.)

Finally, the ban is not narrowly tailored with respect to Ms. Guldoon's education or vocation. Relevant here, the First Circuit in *United States v. Perazza-Mercado*, held that a total ban on at-home internet usage was inconsistent with the goals of supervised release. 553 F.3d 65, 72 (1st Cir. 2009). There, the defendant was also a teacher who engaged in sexual contact with one of his students. *Id.* at 67. One of the special conditions imposed for parole was a complete prohibition from accessing the internet in his home. *Id.* at 69. The government argued that the internet ban related to the goal of protecting the public from further crimes and aiding in the defendant's rehabilitation. *Id.* at 70. Ultimately, the court found that the special condition was inconsistent with both the vocational and educational goals of supervised release—making the condition actually counterproductive to the government's claimed goals. *Id.* at 72.

Here, a complete ban on commercial social networking sites is not narrowly tailored to aid in her education or vocation. The commercial social networking website ban has made it

impossible for her to seek or to apply to most employment opportunities, which require either online applications or email contact information, both of which she is barred from using due to ROSA. Complaint at 21.

B. The ban on commercial social networking websites does not leave open ample alternative channels of communication and thus fails the First Amendment content-neutral test.

The North Carolina Supreme Court's errant decision in *Packingham v. North Carolina* (subsequently overruled by the Supreme Court) illustrates this point. There, the North Carolina court argued that the exemptions in the statute provide ample alternatives. *State v. Packingham*, 368 N.C. 380, 390 (2015). According to the court, the web offers numerous alternatives that provide the same or similar services that defendant could access without violating the statute. *Id.* For example, the court explained, a person could access Paula Deen Network, WRAL.com, Glassdoor.com, and Shutterfly because each website requires users to be over the age of eighteen. *Id.* at 390-91. When the Supreme Court overruled this decision, it noted, counter to the North Carolina court's assertion, that: "given the broad wording of the North Carolina statute at issue, 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… the law applies (as the State concedes it does) to social networking sites 'as commonly understood'—that is, websites like Facebook, LinkedIn, and Twitter." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-37 (2017).

Even if there were ample alternatives in this case, there are not adequate ones. Sites are not equal. What is posted on one site might not be posted on another – an employer might exclusively post jobs on LinkedIn as opposed to Glassdoor. Furthermore, both schools and jobs alike select an email platform, often with no alternatives available – if a person is unable to use

that website there are no alternatives available.[3]

As ROSA correctly points out, the law "must be tailored to specifically target the types of offenses committed on the internet while not making it impossible for such offenders to successfully reintegrate back into society." ROSA, §1(B) (2016). Because the ban on accessing commercial social websites is both overbroad and does not relate to the goals outlined by the Parole Board, Ms. Guldoon's First Amendment right was violated. As such, this court should overturn the lower court's ruling and vacate the special condition.

II. ROSA violates Ms. Guldoon's Fourteenth Amendment rights because surrendering her license is not rationally related to the government interests.

The Fourteenth Amendment protects citizens from state laws that abridge their privileges or immunities, deprive them of due process, and promises equal protection of the laws. U.S. CONST. amend. XIV. Courts have long recognized that the Constitution protects a right to travel within the United States, including for purely intrastate travel. *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 257 (2d Cir. 2013). The right to drive, however, is not a fundamental right, meaning the rational basis test applies.[4] *Quiller v. Bowman*, 262 Ga. 769, 771 (1993). Under the rational basis test, "we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The Fourteenth Amendment applies because the statute is not rationally related to the

[3]Take "Gmail" for example, where the minimum age requirement is 13. *Age Requirements on Google Accounts*, https://support.google.com/accounts/answer/1350409/ (last visited March 2019). Gmail asks the user to create a profile, and has chat and "hangout" capabilities – where users can instant message each other. *GSuite*, https://gsuite.google.com/products/chat/ (last visited March 2019). Under ROSA, Ms. Guldoon is unable to access this basic email tool, which is essential in today's job market. Further, LinkedIn, Craigslist, Indeed, Facebook, Twitter, and other similar platforms that post employment opportunities are banned under ROSA. (Guldoon Aff. ¶ 34.)

[4]Although the bulk of precedent points in the other direction, the right to drive should be considered a liberty in the twenty first century due to the necessity of driving in modern day society. "Once licenses are issued… their continued possession may become essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971). As applied, the combination of surrendering her license and not being able to travel within 1000 feet of a school has rendered Ms. Guldoon a prisoner in her own home and forced her to bike a 40 mile round trip path to maintain her employment. (Guldoon Aff. ¶ 41.).

government's interests. In *Romer v. Evans*, the Supreme Court used the rational basis test to overrule a Colorado Amendment. 517 U.S. 620, 632 (1996). The amendment stated that sexual orientation could not be used to claim any protected status. *Id.* at 624. The government argued two main interests in the statute: other citizen's freedom of association and conserving resources to fight discrimination against other groups. *Id.* at 635. To these, the Supreme Court said, "the breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.*

The same is true of the sheer breadth of the special condition at issue here. Ms. Guldoon was classified as a level II offender. *General and Special Conditions of Parole*. Because of that classification, at a minimum, Ms. Guldoon's license suspension will last twenty years. ROSA No. 2016-1, §168-o (2016). Not even driving under the influence offenses, which endangers people's lives, are so restrictive of a person's driver's license. *See National Highway Traffic Safety Administration*, A State-by-State Analysis of Laws Dealing with Driving Under the Influence of Drugs (2009) (mandatory revocation ranges from 90 days to one year for first offenses). The special condition has such wide breadth that it cannot be rationally related.

While the inquiry could end here, the ban is also overbroad in light of government interests it purportedly serves. First, the ban is not rationally related with respect to recidivism. In *Amunrud v. Board of Appeals*, the Supreme Court of Washington held that a statute allowing for license suspension was rationally related to the goal of enforcing child support payments. 143 P.3d 571, 572 (Wash. 2006). The legislative purpose for the suspension statute explicitly stated the goal was to enforce child support payments. *Id.* at 578. Further, the legislature stated and believed that suspension was a "powerful incentive." *Id.*

As a level II offender, Ms. Guldoon's "risk of repeat offense is moderate" according to

ROSA. ROSA, §168-d(2) (2016). As a preliminary matter, rates of recidivism are overly exaggerated and the government provides no evidence for how they came to the determination that Ms. Guldoon is "level II." In a 2003 U.S. Department of Justice study, statisticians tracked 9,691 sex offenders for three years after their release. Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, 1 (2003). The report documented their recidivism, as measured by rates of re-arrest, reconviction, and reimprisonment during the three years following their release. *Id.* The rate for all 9,691 sex offenders was 2.2%. *Id.* Furthermore, the more prior arrests they had, the greater their likelihood of re-arrest for another crime after leaving prison. *Id.* Here, the legislative purpose is silent to this issue. No evidence is presented as to why the suspension of a driver's license would discourage recidivism.

Second, the ban is not rationally related with respect to either protection of the public or minors. In *People v. Lindner*, the Illinois Supreme Court found that revocation of a driver's license merely because the offender committed an underlying sexual offense was not rationally related to any government goal. 127 Ill. 2d 174, 185 (1989). The legislative history of the statute revealed the main reason for the revocation was the safe operation of motor vehicles. *Id.* at 180. To the court, "keeping off the roads drivers who have committed offenses not involving vehicles is not a reasonable means of ensuring that the roads are free of drivers who operate vehicles unsafely or illegally." *Id.* at 183. Furthermore, even assuming arguendo that the government believed the loss of driving privileges would deter persons from committing the sex offenses, the court found that "simply not rational." *Id.* at 185. Finally, the court found the argument that keeping sex offenders near their home so they can be more easily recognized was an argument without merit. *Id.*

And, in *United States v. Shannon*, the Seventh Circuit overturned a lifetime ban on the

possession of all sexually explicit material. 743 F.3d 496, 498 (7th Cir. 2014). There, the defendant plead guilty to one count of possessing child pornography. *Id.* As a condition of his lifetime supervised release, the defendant was not allowed to possess any material containing "sexually explicit conduct." *Id.* The court deemed this to be a lifetime ban on otherwise legal material, referencing the fact that the ban included legal pornography. *Id.* at 501–02. This might have been acceptable if this material somehow reinforced the defendant's previous behavior. *Id.* at 502. Ultimately, however, because a sufficient connection was not articulated, the court vacated the special condition and remanded the case. *Id.* at 502–03.

ROSA's purpose section describes these parole conditions as a way to "monitor" sex offenders and "civilly confine dangerous sex offenders who would likely re-offend if released" to protect the public. ROSA §1 (B) (2016). If safety is the Parole Board's main concern, Ms. Guldoon is not charged with any kind of traffic or driving offense: no reckless driving, no alcohol related driving offense, and car accident of any kind. Even assuming that protecting the public does not mean actual safety, but rather safety by monitoring, *Linder* rejects this argument.

The broad ban on all sexually explicit conduct is analogous to the broad restriction on Ms. Guldoon's ability to drive. The *Shannon* court noted that a ban on all sexually explicit conduct is not a condition limited to child pornography, the underlying crime. *Shannon,* 743 F.3d at 500. The same analysis applies here: taking away Ms. Guldoon's ability to drive is an untailored solution, not rationally related to the underlying crime. Driving does not reinforce Ms. Guldoon's prior behavior, nor does it represent a sufficient connection to her crime. Ms. Guldoon surrendering her license does not make the public any safer.

Finally, the ban is not rationally related with respect to Ms. Guldoon's education or vocation. The surrendering of her license is inconsistent with reintegration goals; it not only

made it difficult to find a job, it further makes keeping a job almost impossible. ROSA's revocation of her driving privileges further hampers her ability to find or maintain employment, as she can only travel by foot or on a bicycle, which eliminates most if not all employment opportunities. Complaint at 22, *Guldoon v. Lackawanna Board of Parole*, 999 F.Supp. 3d 1 (M.D. Lack. 2019) (No. 19-CV-0001(O)).

In *Standley v. Town of Woodfin*, the North Carolina Court of Appeals held that restricting a sex offenders' ability to enter public parks was rationally related to safety goals. 186 N.C. App. 134, 138 (2007). There, the defendant argued that the statute at issue denied him his constitutional freedom to intrastate travel. *Id.* at 136. The court noted that "the ordinance does not infringe upon plaintiff's fundamental right to intrastate travel because it does not impair his daily functions." *Id.*

Moreover, in *Trisvan v. Annucci*, the New York Eastern District Court held that a parole condition disallowing the defendant to have a license was related to government interests because of the defendant's willingness to flee authorities. 284 F. Supp. 3d 288, 299 (E.D.N.Y. 2018). After the commission of the crime, the defendant fled the state for five months before eventually turning himself in. *Id.* at 299. Given the underlying facts, the court found no violation of the defendant's right to travel under the Fourteenth Amendment. *Id.* at 294, 298.

Unlike the ordinance in *Woofin*, Ms. Guldoon is not restricted from entering a park – her license and thus ability to drive is completely gone. As a result, ROSA does impact Ms. Guldoon's daily functions. Furthermore, unlike the defendant in *Trisvan*, Ms. Guldoon did not attempt to flee authorities, nor is there any allegation of an underlying vehicular crime. The government failed to present any evidence arguing that revoking Ms. Guldoon's license is rationally related to preventing sexual contact with an underage person. Conversely, the

surrendering of her license negatively impacted Ms. Guldoon's ability to find and maintain employment.

Because the license surrendering special condition is not rationally related to the goals outlined by the Parole Board, ROSA violates Ms. Guldoon's Fourteenth Amendment rights. As such, this court should overturn the lower court's ruling and vacate the special condition.

III. ROSA's registration requirements and mandatory conditions of parole violate the *Ex Post Facto* Clause because it retrospectively increases Ms. Guldoon's punishment.

The Constitution prohibits states from passing *ex post facto* laws. U.S. CONST. art. I, § 10, cl. 1. The *Ex Post Facto* Clause prohibits, among other things, laws that aggravate a crime or makes the punishment for a crime greater than it was when committed. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). This prohibition has two elements. First, the law must be retrospective. *Miller v. Florida*, 482 U.S. 423, 430 (1987). This means that the law applies to events occurring before the law's enactment. *Id.* Second, the law must substantially and substantively disadvantage the offender. *Id.* Under this second element, only punitive conditions are disadvantageous; procedural, civil, or regulatory conditions are not. *Id.*; *Smith v. Doe*, 538 U.S. 84, 92 (2003).

While ROSA's retrospectivity was accepted by all of the lower courts, the fight in this case is over the second *Ex Post Facto* element. The District Court and the Respondent errantly classify ROSA's special conditions of parole and ROSA's registration requirements as non-punitive measures, but both are punitive such that Ms. Guldoon is substantively disadvantaged.

A. ROSA's special conditions of parole violate the Ex Post Facto *Clause because they increase Ms. Guldoon's punishment.*

It is unconstitutional to apply ROSA's special conditions of parole to parolees like Ms. Guldoon because retroactive application of a law that makes a greater punishment mandatory

violates the *Ex Post Facto* Clause. First, this Section explains why restrictive parole conditions are punitive. Then, this Section shows why it is irrelevant that some of the parole conditions might have been imposed prior to ROSA.

1. Parole conditions are punitive because they serve traditional criminal justice goals and because parole is a part of the criminal justice system.

Both the intent and effect of ROSA's parole conditions are punitive. To determine whether a statute is criminal and punitive or civil and regulatory courts look to the statutes intent and effect. *Smith*, 538 U.S. at 92; *accord Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997).

In *Hendricks*, the court concluded that the intent and effect of a Kansas statute, which established procedures for the involuntary confinement of defendants likely to engage in predatory acts of sexual violence, was civil and regulatory. *Id.* at 350, 369. First, the court found that Kansas's intent was not punitive because the confinement proceedings were placed in the probate code, not the criminal code. *Id.* at 361. Further evidence of Kansas's non-punitive intent was the fact that the statute did not implicate either of the primary objectives of criminal justice, retribution or deterrence. *Id.* at 361–62. Specifically, deterrence was not a goal of the statute because the class of people that Kansas sought to cover were irreformable and undeterrable. *Id.* at 362. The Court also noted that neither a criminal conviction nor a scienter finding was a prerequisite for confinement proceedings, further supporting its finding of non-punitive intent. *Id.* Justice Kennedy noted in his concurrence, however, that if civil confinement was to become a mechanism for general deterrence, then the statute would be punitive and violate *Ex Post Facto*. *Id.* at 373 (Kennedy, J., concurring).

In contrast to Kansas's scheme of involuntary civil confinement, parole conditions serve traditionally punitive goals. First, it is widely understood that parole and its conditions serve deterrent and rehabilitative functions. *Amaya v. U.S. Board of Parole*, 486 F.2d 940, 942–43 (5th

Cir. 1973); *see also Helm v. Solem*, 684 F.2d 582, 587 (8th Cir. 1982). Further, parole also stands for the idea that the defendant's "conviction-related debt" is not fully paid. Carla J. Virlee, *Offenders in the Community: Reshaping Sentencing and Supervision*, 99 MINN. L. REV. 1615, 1616 (2015). In other words, parole is still exacting retribution on the defendant.

In this case, the conditions that were retrospectively mandated for Ms. Guldoon's parole were also furthering the traditional punitive goals of retribution and deterrence. ROSA mandated that Ms. Guldoon surrender her driver's license, stay 1000 feet away from schools, and have severely restricted access to the internet. Lackawanna Executive Law 259-c(14)–(15) (2018). First, all of these parole conditions are restrictions on parolees' liberty, *see supra* Sections I.A., I.B., such that they are furthering the retributive goal of making defendants serve their debts to society. Second, all of the parole restrictions are reasonably related to the deterrence. In ROSA's purpose section, the legislature clearly identifies "the danger of recidivism posed by sex offenders who commit predatory acts against children" as the primary impetus for these conditions. Registration of Sex Offenders Act § 1(B) (2018). Stated another way, the legislative intent was general deterrence of sex offenders. Thus, all of ROSA's mandatory parole conditions make punitive sense; that is why they cannot constitutionally be applied retroactively.

Each and every factor that supported the Supreme Court's conclusion of non-punitive intent and effects in *Hendricks* is absent in this case. Unlike the Kansas law in *Hendricks*, the law here is in the Parole Board's code, which deals with punitive and criminal matters. Further, unlike *Hendricks* where the law was specifically targeting undeterrable offenders, Ms. Guldoon was classified under Lackawanna law as an offender who did not have a high likelihood of recidivism. *See* Lackawanna Correction's Law § 168-I (6)(b) (2018). Thus, Lackawanna determined that Ms. Guldoon, and other level II parolees, are in fact deterrable. This is key

because, unlike in *Hendricks*, the deterrent goal of criminal justice can still be furthered. Lastly, unlike the *Hendricks* law, ROSA contains a scienter requirement. *See id.* § 168-I (5)(b) (requiring the Board of Examiners to consider the defendant's *intent* to commit additional offenses). The presence of a scienter requirement indicates that the regime is punitive. *Hendricks*, 521 U.S. at 362.

Since the intent of the parole conditions is punitive, the inquiry need go no further. *Smith*, 538 U.S. at 92 ("If the intention of the legislature was to impose punishment, that ends the inquiry."). All of ROSA's mandatory parole conditions further traditionally punitive goals, such that the conditions' retroactive application would substantively disadvantage Ms. Guldoon.

2. ROSA increases Ms. Guldoon's punishment by making three parole conditions mandatory, which were not mandatory before.

Furthermore, it is irrelevant, for *Ex Post Facto* purposes, that Ms. Guldoon might have had some of these parole conditions imposed on her under pre-ROSA law. Laws that make mandatory what was only a possibility under the prior legal regime cannot be applied retroactively because that application would substantially disadvantage the defendant. *Lindsey v. Washington*, 301 U.S. 397, 400–01 (1937); *Dobbert v. Florida*, 432 U.S. 282 (1977).

Laws that eliminate the possibility of a lighter punishment violate *Ex Post Facto* when they are retroactively applied. *Id.* In the *Lindsey* case, the statutory penalty for grand larceny was indeterminant but capped at fifteen years imprisonment when the defendant committed that crime. *Id.* at 397–98. After the defendant's conduct, but prior to his sentencing, the State of Washington passed a new sentencing law that required judges to sentence the statutory cap in grand larceny cases. *Id.* at 398. Washington's law transformed what was before only a fifteen-year possibility into a fifteen-year mandate. *Id.* 400. The court concluded that the measure of punishment prescribed by Washington's subsequent grand larceny statute was more severe than

the prior one, so the Court held that the defendant was improperly sentenced under an *ex post facto* statute. *Id.* at 401–02; *accord Miller v. Florida*, 482 U.S. 423, 432 (1987).

The possible-turned-mandatory prohibition established in *Lindsey*, *Dobbert*, and *Miller* demonstrates that it was legal error for the District Court in this case to assert that ROSA's "formalizing" of the "conditions under which the Parole Board could grant parole" did not increase Ms. Guldoon's punishment. *See Guldoon*, 999 F. Supp at 9. The Parole Board made no recommendation as to any special conditions of parole in its Pre-Sentence Report. Pre-Sentence Report, *Lackawanna v. Guldoon* (Crim. No.: 2010-1). And although the Parole Board *could* have imposed restrictions on Ms. Guldoon, the Board was under no mandate to do so under the prior legal regime. ROSA's special parole conditions retrospectively increased Ms. Guldoon's punishment, to her substantial and substantive disadvantage.

B. ROSA's registration requirements violate the Ex Post Facto Clause because they incur a punitive effect.

Every state in the union has passed a sex-offender registration law, *Wallace v. State*, 905 N.E.2d 371, 374 (Ind. 2009), but not every state satisfied the Constitution's *Ex Post Facto* requirements on the first try. *See e.g.*, *id.* at 373; *American Civil Liberties Union of Nevada v. Cortez Masto*, 719 F. Supp. 2d 1258 (D. Nev., 2008) *rev'd in part and rev'd on other grounds*, 670 F.3d 1046 (9th Cir. 2012).

To determine whether a state's sex-offender registration law violates the *Ex Post Facto* Clause, courts look to the law's intent and effect. *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Wallace*, 905 N.E.2d at 378 ("intent-effects test"). Here, ROSA's legislative intent is ambiguous, but its effect is not. This Section begins by analyzing the ambiguous legislative intent, and concludes by demonstrating how ROSA's registration requirements is punitive.

1. ROSA's legislative intent is ambiguous.

The first step is to determine whether the Lackawanna Legislature meant ROSA to establish regulatory or criminal conditions by analyzing the texts text and structure. *Smith*, 538 U.S. at 92. While the legislative intent as to the *parole conditions* was a criminal one, Petitioner concedes that the same is not always true of registration requirements. *Smith*, 538 U.S. at 92–96.

In *Smith*, the Court acknowledged two factors that, although ultimately insufficient, indicated that Alaska's sex-offender registration act had a punitive legislative intent: first, some of the act's provisions were codified in Alaska's criminal code; second, the regulations, promulgated under the act's authority, contained strict notice requirements which resembled and mirrored criminal procedures. *Id.* at 94–96. Ultimately, the Court examined the following textual and structural factors to determine that the act did not have punitive intent: the expressed purpose of the act was to protect the public from sex offenders; the stated purpose was primarily focused on the health and safety of Alaska's citizens, and only incidentally punitive; some (but not all) of the act's provisions were codified not in the criminal code but in the health and safety code; finally, the act itself contained no mandate of criminal procedures or safeguards. *Id.* at 93–96.

ROSA, however, is distinguishable from the law at issue in *Smith*. First, all of ROSA's provisions are codified in state codes dealing with criminal matters. *See* Lackawanna Corrections Law § 168; Lackawanna Executive Law § 259 (instructing the Parole Board as to ROSA). Second, like Alaska's implementation of its act, ROSA too has strict procedural safeguards resembling criminal procedure, except that ROSA's procedures are statutory, in the act itself, not regulatory like in *Smith*. This indicates that Lackawanna is attempting to implement a criminal and punitive scheme. *Smith*, 538 U.S. at 97. Finally, ROSA itself expresses a purpose that is not merely incidental to criminal law, as was the case in *Smith*, but rather is a traditional purpose of criminal law—general deterrence of sex offenders. ROSA § 1 (A).

However, indicating strongly the other way is ROSA's other stated purpose: protecting communities from sex offenders. *Id.* This is similar to the health-and-safety purpose contained in Alaska's statute in *Smith*. Thus, the weight of the factors showing ROSA's punitive intent, balanced against ROSA's stated health-and-safety intent, shows that the punitiveness scale does not tip in either direction. With strong factors on both sides, the Petitioner concedes that the legislative intent behind ROSA is ambiguous.

2. ROSA's effect on Ms. Guldoon and similarly situated persons is punitive under either a clearest proof standard or a more neutral one.

Here, unlike in *Smith v. Doe*, the law at issue is ambiguous as to intent. Thus, *Smith*'s standard, requiring defendants show with "the clearest proof" that a law has punitive effects, is inapposite because here the legislative intent created no presumption of non-punitiveness. Rather, when a law's intent is unclear, the Supreme Court has applied a more even-handed inquiry at the effects step. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (2003); *see also Smith*, 538 U.S. at 114–15 (Ginsburg, J., dissenting).

The seven-factor test developed in *Mendoza-Martinez* is used to determine whether a statute has punitive effects. The factors include whether the act (1) has a rational connection to nonpunitive purpose; (2) is excessive with respect to that purpose; (3) imposes an affirmative disability or restraint; (4) whether the regulation comes into play only on a finding of scienter; (5) applies to conduct that is already a crime; (6) promotes the traditional aims of punishment; and finally, (7) implements a scheme that has been historically regarded as punishment. *Smith*, 538 U.S. at 97, 105. No factor alone is dispositive, but rather, each constitutes a useful guidepost. *Hudson v. United States*, 522 U.S. 93, 99 (1997). Here, while conceding that ROSA has a rational connection to a nonpunitive purpose, ROSA is excessive and overbroad with respect to that purpose, and the remaining factors point toward a finding of punitive effect.

i. ROSA's registration requirements are excessive and disproportionate to its health and safety purpose.

ROSA's driving restrictions are excessive with respect to its purpose. First, the twenty-year driving prohibition applies to level II offenders who do not have a high risk of recidivism, like Ms. Guldoon. *See* Lackawanna Corrections Law § 168-v; *Id.* § 168-I (6) (distinguishing level II offenders from the "high risk" offenders). Second, there is no way to directly appeal the driving restriction; if an offender is level II, they simply may not drive under Lackawanna law. *Id.* § 168-v. A lack of appealability and procedural safeguards is disfavored and shows a registration statute's excessiveness. *Wallace*, 905 N.E.2d at 383 ("[W]e think it significant for this excessiveness inquiry that the Act provides no mechanisms by which a registered sex offender can petition the court for relief from the obligation….").

Next, despite ROSA's primary purpose of assuring community safety, the act requires that offenders' information is shared with the department of health and the department of insurance "to enable such department[s] to identify persons ineligible to receive reimbursement or coverage for drugs." Lackawanna Corrections Law § 168-b (8). This information sharing has no rational relation to public safety. Further, the section of ROSA containing this provision states that the purpose of this sharing is that it furthers "sharing information." This is circular reasoning, which could underly pretext for discriminating against offenders in their ability to get medical treatment. Regardless, the information sharing with these departments is not neutral sharing of already available data, but rather, it "send[s] a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning." *Smith*, 538 U.S. at 109 (Souter, J., concurring). Thus, this requirement shows that the act could be a pretext for punishment, and at a minimum, is not reasonably related to its public safety purpose. These factors indicate ROSA's punitive effect.

ii. ROSA imposes punitive disability through its fee requirement, driving restrictions, and registration duties.

First, the ROSA registration requirements exacts a monetary toll on defendants by requiring them to pay a ten dollar fee each time they update their information. Lackawanna Corrections Law § 168-b (8) (2018). This is a significant expense for people like Ms. Guldoon who experience difficulty securing work because of ROSA's public shaming provisions. The costs would add up to multiple hundreds of dollars over a lifetime.

Next, Ms. Guldoon is restrained by the driving restriction. That restriction continues beyond its implementation as a parole restriction for a period of twenty years. This restriction is linked to Ms. Guldoon's registration as a level II sex-offender. *See e.g.*, ROSA § 168-v. This restraint strongly favors finding that ROSA has a punitive effect. Unlike the Petitioner in *Smith* who showed no evidence of occupational disadvantage, Ms. Guldoon has been significantly disadvantaged by the driving restrictions. She has to bike twenty miles one way to her job along a dangerous highway, and her husband has to drive her whenever she has a job interview.

Lastly, other courts have recognized that the affirmative reoccurring duty of registering and the stigma imposed by registering is an affirmative disability imposed by sex-offender registration statutes. *Wallace v. State*, 950 N.E.2d 371, 379 (Ind. 2009). Although those disabilities alone were insufficient to show disability or restraint in *Smith*, the stigma and registration duties alongside the monetary and vocational disabilities in this case show that Ms. Guldoon suffers punitive disability and restraint as a result of ROSA.

iii. ROSA applies to conduct which was already criminal, and its scheme of designating classes of sex offenders operates based off of a finding of scienter.

Here, not only does ROSA only apply to behaviors that were already criminalized, but the statutory scheme also relies on determining an offender's scienter. The law that establishes

the sex-offender levels relies on a scienter finding: In determining the sex offender's level, the Board of Examiners is to consider the defendant's *intent* to commit additional offenses. *Id.* § 168-I (5)(b). This scienter requirement is an expressly criminal component, and is different from a defendant's ability or likelihood of committing additional crimes, which would be more tied to non-punitive health-and-safety goals. Thus, the presence of a scienter requirement indicates that the regime is criminal and punitive in nature. *Hendricks*, 521 U.S. at 362. The scienter and the criminal conduct factors, although brushed aside in *Smith*, are more evident in ROSA and support a finding of the law's punitive effect.

iv. ROSA promotes the goals of general deterrence and increasing police effectiveness, which are traditionally understood to be criminal and punitive.

ROSA's goals are more explicitly related to criminal justice than Alaska's law in *Smith*. In *Smith*, the Court reasoned that the primary goal of the Alaska law was to "protect the public" and that the goal was only incidental to the criminal justice goal of general deterrence. *Smith*, 538 U.S. at 93, 102. Here though, the stated legislative purpose is more explicitly tied to the criminal goal of deterrence. The act speaks of its purpose not in terms of merely keeping the public safe but also in terms of enabling police to more quickly apprehend criminals. ROSA § 1(A) (2018). In other words, the act seeks to make police a general deterrence, and to enable the criminal justice system to work more efficiently. Those goals are explicitly, not incidentally, related to traditional goals of criminal justice. Given that ROSA's purpose is distinguishable from the Alaska law's purpose, this factor indicates ROSA's punitive effect.

v. Sex-offender registration statutes, like ROSA, implement schemes that have been historically regarded as punishment; the Supreme Court should overrule its finding in Smith v. Doe *to the contrary.*

ROSA has two components that resemble schemes that have been historically regarded as

punishment: the registration and reporting provisions are comparable to conditions of supervised parole, and the information dissemination resembles the colonial punishment of shaming. On the former: courts commonly recognize that the registration and monitoring provisions in sex-offender registration statutes mirror supervised parole statutes. *Smith*, 538 U.S. at 101 (recognizing that this analogy has force); *Wallace*, 905 N.E.2d at 380. Although the analogy between registration and parole was ultimately insufficient in *Smith*, ROSA mandates more information sharing than the statute in *Smith*. For example, ROSA requires authorities to share information with the Department of Health, and Insurance, to make it more difficult for offenders to receive medical treatment. Lackawanna Corrections Law § 168-b (2)(b) (2018).

In regard to the shaming, the Court in *Smith* rejected this rationale as not being historically recognized punishment. But many state courts have ruled the other way. *See Wallace*, 905 N.E.2d at 380; *Doe v. Smith*, 189 P.3d 999, 1012 (Alaska 2008); *accord Smith*, 538 U.S. at 115–16 (Ginsburg, J., dissenting). In particular, sex-offender statutes do more than simply make public information available in a neutral way. These statutes proclaim a message of shameful information that otherwise would not be heard, and widely disseminate it. *See Smith*, 538 U.S. at 187 (Souter, J., concurring). Regardless of the intent, it is clear after decades of experience with these laws that information sharing has a shaming effect. *See id.* To the degree the court has ruled to the contrary, it should reverse, to mold its doctrine to modern realities.

Even if the Court does not change course with regard to its historical-forms-of-punishment analysis, analysis of the remaining *Mendoza-Martinez* factors demonstrates that ROSA has a punitive effect. The law's registration requirements are disproportionate and excessive with respect to its health and safety purpose, the law imposes multiple disabilities and restraints on offenders, the law applies to conduct that was already criminal and operates based

on a finding of scienter, and the law furthers traditional goals of criminal justice.

CONCLUSION

This Court should overrule the decision below. ROSA violates Ms. Guldoon's rights under the First and Fourteenth Amendments to the United States Constitution. Additionally, because ROSA's registration requirements and special conditions of parole have a punitive effect, those requirements as applied violate the *Ex Post Facto* Clause of the Constitution.