NO. 19-01

IN THE
SUPREME COURT OF THE UNITED STATES

MARY GULDOON,
Petitioner,

VS.

STATE OF LACKAWANNA BOARD OF PAROLE,
Respondent.

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

Brief for Respondent

Team Number 25

Question Presented

1. Mary Guldoon pled guilty to three sex offenses and served a prison term as a result, before being released on parole subject to several significant restrictions. While incarcerated, convicts lose many of their constitutional liberties, and parolees remain in the state's custody with only conditional liberty subject to the state's penological interests. Are the parole conditions permissible and within the discretion of the state parole board?

2. The Supreme Court has held an Act requiring convicted sex offenders to register with law enforcement and comply with other regulatory measures does not necessarily violate the Ex Post Facto clause. Lackawanna recently passed the Registration of Sex Offenders Act (ROSA) which applies to previously convicted sex offenders. Defendant, a registered sex offender, contends that the Act violates her Constitutional right not to be subject to Ex Post Facto laws. Does ROSA violate the Ex Post Facto Clause?

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The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported at *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1 (13th Cir. 2019).

Constitutional and Statutory Provisions at Issue

> Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law…

U.S. CONST. amend. XIV, § 1

> No State shall…pass any…ex post facto Law…

U.S. CONST. art. I, § 10

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Statement of the Case

Mary Guldoon, a former teacher at Old Cheektowaga High School, pled guilty to three charges: rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. (App. 5). All three charges stem from a sexual relationship she began with her student, a fifteen-year-old boy. *Id.* She frequently communicated with him through email and text messages. *Id.* No sexual or pornographic communications were recovered, though many files had been deleted prior to police investigators gaining access to the data. (App. 5-6). The victim claims he made and sent naked pictures of himself to Guldoon. (App. 6).

Guldoon received an indeterminate sentence of ten-to-twenty years, to be followed by probation. (App. 2). She began serving the sentence in 2011, and was released on parole in 2017, six years into her sentence. *Id.* While she was incarcerated, the state of Lackawanna passed the Registration of Sex Offenders Act (ROSA). (App. 2, 19-26). The law imposed new parole conditions on Guldoon, including a ban on entering school grounds; using the Internet to access pornographic material, commercial social networking websites, or to communicate with most minors; and a ban on driving. (App. 25-26). Guldoon claims the social media restriction has made finding her preferred job difficult, and her lack of a driver's license and need to avoid school grounds force her to take inconvenient routes to work. (App. 14-16).

Guldoon filed a lawsuit against the Lackawanna Board of Parole (the Board) in the United States District Court of the Middle District of Lackawanna. (App. 1-4). She claims ROSA violates the Ex Post Facto clause of the U.S. Constitution, and that her parole conditions violate her First and Fourteenth Amendment rights under the U.S. Constitution. (App. 4). The Board filed for and received summary judgment, finding Guldoon failed to provide evidence that the Board acted in an arbitrary and capricious manner, or that her special conditions were not reasonably related to Lackawanna's interests. *Guldoon v. Lackawanna Bd. of Parole*, 999 F. Supp.3d 1, 4-7 (M.D. Lack. 2019). The court also granted summary judgment on the Ex Post Facto claim, finding ROSA did not penalize Plaintiff retroactively. *Id.* at 7-10.

Guldoon appealed to the United States Court of Appeals for the Thirteenth Circuit, which affirmed the district court's opinion. *Guldoon v. Lackawanna Bd. of Parole*, 999 F.3d 1, 1 (13th Cir. 2019). The decision included a dissent from Circuit Judge Dawn Skopinski. *Id.* at 1-7.

This Court granted certiorari to address whether the registration requirements and special conditions of parole violated Guldoon's rights under the First and Fourteenth Amendments to the

U.S. Constitution, and whether the registration requirements and special conditions of parole violated the Ex Post Facto clause of the U.S. Constitution. *Guldoon v. Lackawanna Bd. Of Parole*, 999 U.S. 1 (2019).

Summary of the Argument

The Court of Appeals for the Thirteenth Circuit properly affirmed the District Court's decision. ROSA's parole conditions do not violate Guldoon's First and Fourteenth Amendment rights because the conditions are reasonably and necessarily related to the state's legitimate interests. Additionally, ROSA does not violate the Constitutional prohibition of ex post facto laws, because they are not punitive and satisfies the judicial framework traditionally used to determine if a law is ex post facto.

ROSA's parole conditions do not infringe on Guldoon's constitutional rights. As a parolee, Guldoon's constitutional rights may be restricted if the parole conditions are reasonably related to the state's interests. The state has a legitimate interest in the community safety, preventing recidivism, and reintegrating Guldoon into society. Restrictions on her use of social media reasonably relate to her prior criminal use of the Internet and protect the community. Similarly, restricting Guldoon from school grounds and from driving a car keep her from the scenes of past crimes, which held reduce recidivism. Based on the deference due to a state in the imposition of parole conditions, the parole conditions should be upheld.

ROSA is not an unconstitutional ex post facto law for at least three reasons. First, ROSA was intended to apply retroactively so that it could encompass most sex offenders – those who had previously been convicted of an offense. Second, the legislative intent was regulatory and non-punitive. Third, because the Act is retroactive, and the intent of ROSA is non-punitive, it can only be considered ex post facto when a challenger shows the Act has a punitive purpose or

effect that negates the non-punitive intent. In this case, the seven-factor test used to show this does not indicate a punitive purpose or effect. Therefore, the non-punitive intent of ROSA stands. The analysis shows that ROSA's registration requirements and special conditions of parole do not violate the Ex Post Facto Clause of the United States Constitution.

Standard of Review

The Court reviews grants of summary judgment *de novo*. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008) "Ordinarily, where a challenge to supervised release is preserved, we consider whether the district court abused its discretion in imposing special conditions." *United States v. Inman*, 666 F.3d 1001, 1004 (6th Cir. 2012).

Argument

The Lackawanna Board of Parole imposed permissible conditions on Mary Guldoon's release, which did not violate her Constitutional rights. Parole conditions must be reasonably and necessarily related to the state's legitimate interests, and that standard is met in this case. Additionally, ROSA does not violate the Ex Post Facto Clause because the law is not punitive.

I. ROSA's parole conditions are reasonably related to the state's penological goals

Guldoon was convicted of three sex offense charges, all three of which implicate the Registration of Sex Offenders Act's special parole conditions. Lackawanna Exec. Law § 259-c (14-16). Guldoon pled guilty to three sex offenses, all defined in § 130 of Lackawanna's Penal Code. (App. 5); Lackawanna Penal Law § 130.25, § 130.40, § 130.20. Any person serving a sentence for an offense defined in § 130, and released on parole, cannot knowingly enter any school grounds. Lackawanna Exec. Law § 259-c (14). "School grounds" means either being inside the real property line of a public or private school, or any area accessible to the public within 1,000 feet of the property line. Lackawanna Exec. Law § 259 (14). Additionally, because

Guldoon's victim was under eighteen years old at the time of the offense, as a parolee she may not use the Internet to access pornographic material, commercial social networking websites, communicate with individuals or groups to promote sexual relations with minors, and communicate with a person under the age of eighteen. Lackawanna Exec. Law § 259-c (15). Finally, because Guldoon pled guilty to a § 130 crime with a minor victim, she may not operate a motor vehicle until she is no longer required to register as a sex offender or twenty years from the date of release, whichever is sooner. Lackawanna Exec. Law § 259-c (16).

II. The Lackawanna Board of Parole did not violate Mary Guldoon's First and Fourteenth Amendment rights in the imposition of its parole conditions.

To succeed on a lawsuit under 42 U.S.C. § 1983 suit, Guldoon needs to show the state deprived her of constitutional rights while acting under color of state law. *See, e.g., Haley v. Kintock Grp.*, 587 F. App'x 1, 3 (3d Cir. 2014), as amended (Oct. 7, 2014). The Board admits it acted under color of state law, but argues it did not deprive Guldoon of her constitutional rights. For a due process claim to succeed, she needs to show she possessed a liberty interest and the procedures that deprived her of that interest were constitutionally insufficient. *Id.* In this case, she can do neither Guldoon is due only minimal process in the imposition of special conditions of parole, and her claimed constitutional rights are possessed in a very limited form by parolees. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Further, a parolee's First Amendment right to access social media may be restricted, *see Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017), and a parolee does not have the right to travel possessed by other citizens, *see Bagley v. Harvey*, 718 F.2d 921, 924 (9th Cir. 1983). The special conditions imposed by the Board are reasonably and necessarily related to the state's interests and are therefore within the lawful

discretion of the Board. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972). The Court should affirm the Circuit Court's decision and affirm summary judgment against Guldoon.

A. Mary Guldoon has limited Due Process rights in the imposition of special conditions of parole

The state retains rehabilitation and community safety interests in Guldoon's conduct while on parole. Parolees do not possess the full liberty owed to all citizens, but only a conditional liberty that depends on observing the conditions of one's parole.[1] *Morrissey*, 408 U.S. at 480. While a parolee is released, the government retains an interest in ensuring the rehabilitation of a convicted criminal. *Birzon*, 469 F.2d at 1243. Parole conditions need only be necessarily and reasonably related to the government's interests. *Id.* Along with rehabilitation, those interests include preventing recidivism and protecting community safety. *Samson v. California*, 547 U.S. 843, 853 (2006) ("This Court has repeatedly acknowledged that a State has an "'overwhelming interest'" in supervising parolees because "parolees ... are more likely to commit future criminal offenses.'"") (quoting *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 358 (1998)). The state of Lackawanna has found the risk of recidivism among convicted sex offenders, and protecting the public from these offenders, "of paramount concern or interest to government." (App. 19). The state's interest in reintegrating convicted felons can only be achieved if those individuals are not committing further criminal and harmful acts

1. For the purposes of evaluating Constitutional rights claims, courts have not generally recognized a distinction between parole, probation, or supervised release. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) ("Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one."); *United States v. Marmolejo*, 915 F.2d 981, 982 (5th Cir. 1990) ("The Supreme Court, although recognizing that parole and probation are different, held that they are constitutionally indistinguishable."); *United States v. Kincade*, 379 F.3d 813, 817 n. 2 (9th Cir. 2004) ("Our cases have not distinguished between parolees, probationers, and supervised releasees for Fourth Amendment purposes.").

against the community. *See Samson*, 547 U.S. at 854 (2006) ("As the recidivism rate demonstrates, most parolees are ill prepared to handle the pressures of reintegration."). Logically, any interest in reintegration necessarily relies on first ensuring a minimal risk of recidivism and protecting the community, and any barriers to that raised by the parole conditions fade over time to allow fuller integration back into society.

Special conditions of parole must be struck if the Board acted in an arbitrary and capricious manner. *Parnell v. U.S. Parole Comm'n*, 852 F.2d 1289, 1289 (9th Cir. 1988); *Muhammad v. Evans*, 2014 WL 4232496, at *8–9 (S.D.N.Y. 2014) ("In the Second Circuit, special restrictions on a parolee's rights are upheld where they "are reasonably and necessarily related to the interests that the Government retains after his conditional release.") (quoting *Birzon*, 469 F.2d at 1243). Special conditions may also be struck when they are too vague. *Farrell v. Burke*, 449 F.3d 470, 485 (2d. Cir. 2006); *United States v. Loy*, 237 F.3d 251, 262 (3d Cir. 2001) ("A statute violates due process of law if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application…The same principles apply to a condition of supervised release.") (internal quotation marks and citations omitted). Because Guldoon has such a limited right to process in the imposition of special conditions of parole, the Board need only show it did not act in an arbitrary or capricious manner, and that the conditions are sufficiently clear. The Board has met this low burden.

B. Guldoon, as a parolee, does not have full access to her First Amendment rights

The Court should not extend its recent rulings to prohibit special parole conditions that restrict Internet usage. Though not a binding holding, the Court has suggested states can adopt

some laws which restrict a sex offender's social media access without violating the First Amendment. *Packingham*, 137 S. Ct. 1730, 1737 (U.S. 2017) ("[I]t can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."). The statute at issue in *Packingham* governed sex offenders after their sentences had ended, and appellate courts have upheld parole conditions that restricted social media access. *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018) ("Because supervised release is part of Halverson's sentence (rather than a post-sentence penalty), and because our review is for plain error, we find that *Packingham* does not—certainly not "plainly"—apply to the supervised-release context.") (internal citation omitted); *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017) ("The Supreme Court's recent decision in *Packingham*…does not make the error plain because Rock's condition is imposed as part of his supervised-release sentence, and is not a post-custodial restriction of the sort imposed on *Packingham*…"). These circuits correctly held states can restrict the First Amendment rights of parolees, so long as the restrictions are reasonably related to achieving a government interest. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only…conditional liberty properly dependent on observance of special [probation] restrictions.""") (quoting *Morrissey*, 408 U.S. at 480).

A parolee's First Amendment rights are significantly restricted and, as such, laws that could not apply to citizens out of the state's custody may pass constitutional muster when applied to parolees. "The alternative to limited Internet access may be additional time in prison, which is surely more restrictive of speech than a limitation on electronics." *Doe v. Prosecutor, Marion*

Cty., Indiana, 705 F.3d 694, 703 (7th Cir. 2013) (striking down a law that prohibited sex offenders from accessing social media *after* the expiration of their sentence). While courts have expressed skepticism toward laws restricting Internet access to registered sex offenders, the law at issue in this case applies only to parolees, and the conditions imposed on their parole. (App. 45). Parolees have been convicted of crimes, and those convictions permit the state to restrict their liberty in ways that would not otherwise be constitutional. *Morrissey*, 408 U.S. at 480. While parolees receive more liberty than their still-incarcerated counterparts, they have received a conditional liberty that does not include every right otherwise due to a citizen. *Id.* This includes First Amendment rights, when the restrictions are reasonably and necessarily related to the state's penological interests. *See, e.g., Birzon*, 469 F.2d at 1243 ("It has been properly held that the Government can infringe the first amendment rights of prisoners so long as the restrictions are reasonably and necessarily related to the advancement of some justifiable purpose of imprisonment.").

Precedent shows parole conditions substantially more restrictive than ROSA's social networking prohibition are reasonably and necessarily related to the state's interests. When a parolee used the Internet to cultivate a relationship with the victim of his sexual abuse, an appellate court upheld the lower court's complete ban on Internet access. *United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999) ("In this case, Crandon used the Internet as a means to develop an illegal sexual relationship with a young girl over a period of several months. Given these compelling circumstances, it seems clear that the condition of release limiting Crandon's Internet access is related to the dual aims of deterring him from recidivism and protecting the public."). "A restriction on computer usage does not constitute an abuse of discretion if the district court has found that the defendant used his computer to do more than

merely possess child pornography, particularly if the prohibition on computer usage is not absolute." *United States v. Boston*, 494 F.3d 660, 668 (8th Cir. 2007) (upholding a parole condition prohibiting possession of a computer without permission when the parolee was convicted of producing child pornography). The restriction does not need to be so direct - courts have upheld conditions that limit material likely to cause recidivist behaviors, even when the material was not an element of the underlying offense. *United States v. Lombardo*, 546 F. App'x 49, 51-52 (2d Cir. 2013) (upholding a ban on materials depicting "sexually explicit content" when the parolee had a pornography addiction which contributed to his child pornography crimes). In this case, Guldoon used the Internet in the commission of her sex offenses, supporting the Board's decision to restrict her social media access.

C. As applied, ROSA's restrictions on Internet reasonably relate to the state's interests in community safety and reducing recidivism.

The conditions infringing on Guldoon's First Amendment rights are reasonably related to the state's penological interests and should be upheld. As a condition of her release, Guldoon cannot use the Internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups to promote sexual relations with persons under eighteen years old, or communicate directly with persons under the age of eighteen years old. Based on her initial complaint and affidavit, Guldoon has only challenged her restricted social networking usage. (App. 11-17).

Guldoon's parole condition restricting her ability to access commercial social networking sites is reasonably and necessarily related to the state's interests. Guldoon used online communications to further her illicit relationship with an underage victim. *See Crandon*, 173 F.3d at 127–28. Though the record does not indicate using commercial social media accounts,

technology and the means of communication have changed in the intervening time between Guldoon's conviction and her parole. In 2010, a Pew study found 73 percent of teens used commercial social networking websites, and 63 percent using the Internet daily. PEW RESEARCH CENTER, Social Media and Young Adults (2010), http://www.pewinternet.org/2010/02/03/social-media-and-young-adults/. Only 36 percent of teens were using the Internet multiple times per day. *Id.* By 2018, 95 percent of teens had access to Internet-connected smartphones that are constantly online. PEW RESEARCH CENTER, Teens, Social Media & Technology 2018 (2018), http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/. Social media access is nearly universal, with 97 percent of teens on one of seven major social media platforms. *Id.* While Guldoon did not use social networking sites to commit her crime, social media was not then the fertile ground for sex offenders that it is today. *See* App. 20-21. The social media restriction is consistent with the state's interests in reducing recidivism and keeping the community safe, because Guldoon has shown a willingness and ability to use Internet communications to groom sexual abuse victims. While continuing to serve her sentence, a restriction on social networking access is consistent with community safety and reducing recidivism, which will gradually fade into rehabilitation and reintegration interests that support removing this restriction.

ROSA's social networking restrictions are well-tailored. ROSA applies its social networking restriction only to parolees required to register as sex offenders, who are convicted of crimes with minor victims or who used the Internet to facilitate the commission of the crime. (App. 45-46). Additionally, it restricts a narrow class of websites: only those with a purpose of establishing personal relationships, who allow minors to make profiles, and permit minors to make profiles that provide information about themselves, engage in direct or real time

communication with other users, and communicate with adults. (App. 46). It is limited to keep Guldoon out of cyberspace forums where children are likely to be digitally present. Cf. *Doe v. Miller,* 405 F.3d 700 (8th Cir. 2005) (upholding a law requiring registered sex offenders live more than 2,000 feet from a school). Guldoon's crimes stem from an illicit relationship with a teen and barring her from accessing online forums populated by teens while she serves the remainder of her sentence on parole is reasonably and necessarily related to the state's interests. It keeps Guldoon from making unsupervised contact with minors, which furthers the state's interest in protecting the larger community and preventing recidivism. *McKune v. Lile,* 536 U.S. 24, 33 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.") (plurality opinion). The statues consider several factors with enough specificity that the imposed parole conditions are reasonably related to the state's interests and should be upheld.

D. Guldoon's travel restrictions do not violate her constitutional rights

As a parolee, Guldoon has not regained her full right to travel, and the Board's condition does not infringe on the limited right she possesses. Parolees are not without rights, but neither do they have all the rights a typical citizen has, and the right of an incarcerated citizen to travel is plainly restricted. *United States v. Polito*, 583 F.2d 48, 54 (2d Cir. 1978) ("[P]arolees are assigned to a unique status in our legal system, neither physically imprisoned nor free to move at will."). This ruling has been extended to apply to parolees who are restrained from entering other states. *Bagley*, 718 F.2d at 924 ("Since, to this date, Bagley has never regained that freedom of travel he lost upon conviction, he may not invoke the due process clause of the fifth amendment to compel the Government to grant him the desired right"). As a special condition of parole, travel restrictions are reviewed to see if the Board acted arbitrarily and capriciously, or if the

terms are unconstitutionally vague. *Birzon*, 469 F.2d at 1243 ("Although a parolee should enjoy greater freedom in many respects than a prisoner, we see no reason why the Government may not impose restrictions on the rights of the parolee that are reasonably and necessarily related to the interests that the Government retains after his conditional release."); *United States v. Moritz*, 651 F. App'x 807, 809 (10th Cir. 2016). Subject only to this deferential level of review, the Board's travel restrictions are reasonably related to the state's legitimate interests and should be upheld.

1. Restrictions on Guldoon's right to travel are reasonably related to the state's interests.

The Board can impose restrictions on Guldoon, a convicted sex offender on parole, that would otherwise violate constitutional rights. A fundamental right to travel has been previously recognized by this Court. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986). While never explicitly recognized by this Court, others have found an intrastate right to travel protected by the constitution. *Johnson v. City of Cincinnati*, 310 F.3d 484, 493-498 (2002). Nonetheless, fundamental rights of parolees can be restricted beyond what could be imposed on an ordinary citizen. *Morrissey*, 408 U.S. at 478 ("Typically, parolees…must seek permission from their parole officers before engaging in specified activities, such as…acquiring or operating a motor vehicle [and] traveling outside the community…").

Guldoon's travel restrictions are reasonably related to the state's interests. "The risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune*, 536 U.S. at 34). Keeping convicted child sex offenders away from children is a "self-evident" strategy for reducing harm. *Vasquez v. Foxx*, 895 F.3d 515, 525 (7th Cir. 2018), cert. denied, 2019 WL 113118 (U.S. Jan. 7, 2019). Both reducing recidivism and

protecting the community are legitimate interests for the state to pursue, and the parole conditions need only be reasonably related to these goals, among others, to survive judicial scrutiny. *Samson*, 547 U.S. at 844.

Similar restrictions on convicted sex offenders no longer on parole have previously been upheld, and those restrictions are subject to more exacting judicial review. *See Packingham*, 137 S. Ct. at 1737 (2017) (calling the state's sex offender restrictions that applied to individuals after release "troubling"). The Seventh Circuit, applying rational basis review, upheld an Indiana law barring a convicted serious sex offender from voting at his polling location, a public school. *Valenti v. Lawson*, 889 F.3d 427, 429-31 (7th Cir. 2018) ("Indiana's position is an iron-clad fortress in light of the rational basis test."). Additionally, the Eighth Circuit upheld an Iowa law prohibiting convicted child sex offenders from living within 2,000 feet of a school. *Miller*, 405 F.3d at 705 (8th Cir. 2005) ("We hold unanimously that the residency restriction is not unconstitutional on its face."). These examples applied not to parolees, who have a conditional liberty, *Morrissey*, 408 U.S. at 480, but to individuals who are no longer serving any sort of sentence due to the perceived risks of sex offenders. This suggests the Board's restrictions, which apply only to parolees, should be upheld, because parolees have significantly restricted rights, and the state maintains a strong interest in public safety when supervising parolees. "[Plaintiffs] insist that 'scant evidence' supports the public-safety rationale of this statute; they also argue that the harsh burdens placed on sex offenders are highly disproportionate to any benefit. But our role is not to second-guess the legislative policy judgment by parsing the latest academic studies on sex-offender recidivism. *Vasquez*, 895 F.3d at 525; App. 20 ("[T]he legislature has enacted a series of laws to monitor sex offenders and protect the public from victimization, specifically, a system to…prohibit high risk sex offenders from entering upon

school grounds…"). These examples demonstrate sex offender restrictions that infringe more greatly on liberty interests have been upheld, and this restriction on a parolee should similarly be upheld.

The Lackawanna law provides conditions that are rationally related to the state's legitimate interests, and narrowly tailors the law to avoid unnecessary restraint. It advances the state's legitimate interest in protecting children, and in this case applies to a child sex offender who used her time in school to prey on a fifteen-year-old student. (App. 12-13). Much of the difficulty experienced by Guldoon could be mitigated by moving elsewhere.[2] Therefore, this condition should be affirmed.

2. There is no right to drive, therefore the restriction on Guldoon's driving privileges is constitutional.

Regardless of how important cars have become in modern America, a fundamental right to drive has not been recognized. "The [Supreme] Court conspicuously did not afford the possession of a driver's license the weight of a fundamental right." *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (citing *Dixon v. Love*, 431 U.S. 105, 112-16 (1977) (App. 5). "Where an individual used a vehicle in the commission of their crime, a parole condition limiting their access to such vehicles without approval is not unreasonable." *Yunus v. Robinson*, 2019 WL 168544, at *22 (S.D.N.Y. Jan. 11, 2019). Neither is Guldoon entitled to an easy path to her job. A California law that revoked the driver's license of an attorney for delinquent taxes was upheld

2. Citizens, let alone parolees, do not have an unlimited right to live where they wish, and moving could ameliorate Guldoon's difficulties. *Doe v. Miller*, 405 F.3d 700, 714 (8th Cir. 2005) ("Some thirty years ago, our court said 'we cannot agree that the right to choose one's place of residence is necessarily a fundamental right,' and we see no basis to conclude that the contention has gained strength in the intervening years.") (quoting *Prostrollo v. Univ. of S.D.*, 507 F.2d 775, 781 (8th Cir.1974)).

because it did not infringe on any substantive due process right. *Franceschi v. Yee*, 887 F.3d 927, 938 (9th Cir. 2018), cert. denied, 139 S. Ct. 648 (2018) ("No doubt an inability to drive oneself around Los Angeles could make the practice of law more difficult. However, Franceschi still has access to public transit, taxis, or services such as Lyft or Uber. Accordingly, whatever burden may exist does not amount to a 'complete prohibition' on Franceschi's ability to practice law, and thus, does not rise to a violation of substantive due process.") (quoting *Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003)).

In short, Guldoon has failed to show she has rights to be free of ROSA's parole conditions, or that the conditions were imposed without sufficient process. *Haley*, 587 F. App'x at 3. Her Internet usage, car access, and restricted access to school grounds are all reasonably related to her underlying crime and advance the state's interests in rehabilitation, community safety, and reducing recidivism. Therefore, the lower court decision granting the Board summary judgment should be affirmed.

III. Despite ROSA's retroactive application, the intent was non-punitive, and the intent-effects test to challenge these presumptions fail.

The Ex Post Facto Clause prohibits retrospective "laws that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction." *Calder v. Bull*, 3 U.S. 386, 391 (1798).

Courts must initially determine if an Act was intended to be applied retroactively, if "it was intended to be applied retroactively, then [it] must be determine[d] whether its retroactive application violates the ex post facto clause." *Starkey v. Okla. Dept. of Corr.*, 305 P.3d 1004, 1013 (Okla. 2013). For this aspect, "the court normally defers to [the legislator's] stated intent." *United States v. Lawrance*, 548 F.3d 1329, 1333 (10th Cir. 2008).

If an Act applies retroactively, with a non-punitive intent, courts use a seven-factor intent-effects test to determine if the Act has a punitive effect or purpose that negates the non-punitive intent. "'Only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997).

A. Policies that apply retroactively do not inherently violate the Ex Post Facto Clause because such policies are not always punitive.

While "every ex post facto law must necessarily be retrospective; [not] every retrospective law is . . . an ex post facto law." *Calder*, 3 U.S. 386 at 391. ROSA was created with the dual purpose to inform the community of sexual offenders and to aid law enforcement. (App. 19) ("Registration will provide law enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly.").

Registering previously convicted and newly convicted sex offenders while also requiring them to comply with special conditions of parole is a more effective way to accomplish these goals than only registering future convicted offenders. That "decision . . . was guided by the legislature's desire to protect the public from potentially dangerous persons [because] without retroactive reach, the Act would 'leave[ ] the majority of sexual offenders cloaked in anonymity." *Doe v. Pataki*, 120 F.3d 1263, 1277 (2nd Cir. 1997).

Applying ROSA to previously convicted sexual offenders does not violate the Ex Post Facto Clause so long as it is also not punitive. ROSA merely requires those who have been convicted of a sexual offense to register with law enforcement and "failing to register . . . does not increase the punishment for the past conviction" of an offender. *United States v. Felts*, 674 F.3d 599, 606

(6th Cir. 2012). A failure to register would bring about a new charge separate from the offender's previous crime, therefore Guldoon's past conviction serves only as an evidentiary purpose for her need to register and is not punitive in nature. *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997.)

The parole conditions do not violate the Ex Post Facto clause, because "a statute may be retrospective even if it alters punitive conditions outside the sentence." *Weaver v. Graham*, 450 U.S. 24, 32 (1981). ROSA's restrictions to Internet access and entering schools, and confiscation of Guldoon's driver's license are all valid procedural changes. Even though these changes negatively affect Guldoon, "a procedural change is not ex post facto." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977.) These are simply necessities to further aid law enforcement and to ensure the safety of the community. Ultimately, an Act that has a backward-looking application is not immediately an ex post facto provision so long as the change is not punitive.

B. In determining whether a retroactive Act is punitive or regulatory in nature, courts should look to legislative intent.

When analyzing whether a statute is civil or criminal, courts "initially ascertain whether the legislature meant the statute to establish 'civil' proceedings, [in so doing so, courts] ordinarily defer to the legislature's stated intent. *Kansas*, 521 U.S. at 361. Legislative intent can be either expressed or implied, however, "simply labeling a law as 'procedural'. . . does not thereby immunize it from scrutiny under the Ex Post Facto Clause." *Collins v. Youngblood*, 497 U.S. 37, 46 (1990). A shallow 'procedural' labeling in ROSA is not at issue here.

ROSA's stated intent is to aid law enforcement in protecting communities and to inform the public as to potential dangers. (App. 19). "[T]he danger of recidivism posed by sex offenders . . . and the protection of the public from these offenders is of paramount concern" to the government. *Id.* The law also solves a significant law enforcement problem. "[L]aw enforcement

agencies efforts to protect their communities . . . are impaired by the lack of information about sex offenders who live" in the area. *Id.* The problem is compounded by rapid advances in technology, particularly online, and as a result the existing law has become outdated. (App. 20). Without ROSA's requirement for offenders to register, and without the imposed Internet restrictions "social networking websites and other similar services pose a clear and present danger to Lackawanners, [because] [b]ehind a computer screen, convicted sex offenders are able to hide their identity." *Id.* The creation of ROSA and its provisions fall within Lackawanna's police powers. *Smith*, 538 U.S. at 85. ("[W]here a legislative restriction is an incident of the State's power to protect the public health and safety, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.").

At no point does ROSA explicitly or implicitly imply it was designed to further punish already convicted sex offenders, such as Guldoon. Moreover, any "unfortunate consequences for [those] subject to its operation . . . [fails to] sufficie[ntly] transform the regulatory measure of community notification into punishment." *Pataki*, 120 F.3d at 1279. That is not to say that convicted sex offenders have no right to liberty, but that in the "interests of public security, the legislature finds that releasing information about sex offenders to appropriate and responsible parties will further the primary government interest of protecting vulnerable populations." (App. 21); *Morrissey*, 408 U.S.at 480. "Even if [ROSA] advances some goals traditionally associated with the criminal law, it primarily 'serve[s] important nonpunitive goals' of protecting the public from potential dangers and facilitating future law enforcement efforts." *Pataki*, 120 F.3d at 1284.

In determining whether an Act is punitive or regulatory in nature, courts normally defer to the legislature's intent. Here that intent was to "enhance[ ] the state's ability to protect the public and prevent further victimization, sexual abuse, and exploitation." (App. 20.) Any supposed

punitive damage resulting from the Act was not purposeful, and only with the clearest of evidence may a challenger establish that ROSA has a substantial punitive purpose or effect to negate its non-punitive intent. *Doe v. State*, 189 P.3d 999, 1007 (Alaska 2008).

C. Only through clear proof in applying the seven factors intent-effects test can a challenger prove that a retroactive and non-punitive Act has a purpose or effect as to negate the non-punitive intent and make a statute Ex Post Facto.

When a retroactive Act has a non-punitive legislative intent, the Act may violate the Ex Post Facto Clause when it operates with a punitive purpose or effect. This is because "a subtle ex post facto violation is no more permissible than an overt one." *Collins*, 497 U.S. at 46. The traditional analytical framework used to determine "if a sex offender registry scheme was penal rather than civil . . . has been labeled the 'intent-effects' test." *Starkey*, 305 P.3d at 1019. The test has seven major factors, which "although not exhaustive, are useful in determining whether the overall effects of a statute are so punitive as to negate any civil regulatory intent." *Id.* at 1021. The following factors are:

(1) "[w]hether the sanction involves an affirmative disability or restraint";
(2) "whether it has historically been regarded as a punishment";
(3) "whether it comes into play only on a finding of scienter";
(4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence";
(5) "whether the behavior to which it applies is already a crime";
(6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and
(7) "whether it appears excessive in relation to the alternative purpose assigned."

Doe v. State, 189 P.3d at 1008 (Alaska 2008) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963.).

1. Affirmative disability or restraint

This factor is used to "inquire how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. 84 at 99-100. The registry provision of ROSA does not impose a disability on sex offenders. The Act requires a sex offender to register under ROSA on each anniversary of their initial registration date by mailing in a verification form. (App. 33.) Additionally, on the third anniversary and for every proceeding three years after, a sex offender must personally appear at the law enforcement agency to provide a current photograph. These stipulations are reasonable and serve the purpose of informing law enforcement as to a convicted sex offender's whereabouts and helps potentially identify that offender.

The court in *Starkey* decided that Oklahoma's registration requirement was a disability. However, that Act required a person to register in person with the local law enforcement agency anytime they planned to be in an area for seven days or more, anytime an out of state offender entered Oklahoma, whenever a convicted offender planned to move, whenever that person terminated or changed their employment, and whenever that person changed their student status. *Id.* This requirement was extremely burdensome. In comparison ROSA only requires an in-person registration every three years with a mail-in verification being valid for annual registration. A three-year physical appearance requirement is minor in comparison to what was held to be unreasonable in Oklahoma. ROSA is not imposing any sort of "physical restraint, [it] . . . does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability." *Smith*, 538 U.S. at 100. A person subject to ROSA is still free to move residencies, they simply must also register.

Additionally, ROSA's requirement that an offender not come within 1,000 feet of a school or other similarly situated institutions is reasonable and does not serve as a disability to an offender. *See Valenti*, 889 F.3d at 429-31. Places with large numbers of children are vulnerable to potential offenders. This restriction is especially true in the case at hand, because Guldoon, a former teacher, was convicted of several sexual offenses against a student. Imposing a 1,000-foot radius is not burdensome for offenders.

2. Sanctions that have been historically considered punishment

The second factor "requires [courts] to determine whether the scheme established . . . ha[s] historically been regarded in [ ] history . . . as punishment." *Starkey*, 305 P.3d at 1025. Some courts have looked to determine if registration was "analogous to the colonial punishment of public shaming." *Id*. The court in *Starkey* found that such registration did conform to a type of punishment because the Act there required a driver's license to indicate that the person was a sex offender, therefore it served as form of public humiliation. However, that is not the case under ROSA. Convicted offenders are required to give up driving privileges. This is not a form of public shaming and ultimately is not a form of historical punishment, because driving is a privilege not a right. *Miller*, 176 F.3d at 1206. Guldoon can still use other forms of transportation.

3. Finding of scienter

The crimes listed in ROSA do require scienter, however this is of little weight, because "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime." *Smith*, 538 U.S. at 105. This factor leans toward punitive, however, the finding of scienter is a key element in the purpose of the Act which is to combat potential recidivism.

4. Traditional aims of punishment-retribution and deterrence

The fourth factor looks to determine if an Act promotes traditional aims of punishment. Acts like ROSA deter future crimes. Though "[t]o hold that the mere presence of a deterrent purpose renders such sanction 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." *Smith,* 538 U.S. at 103 (quoting *Hudson,* 522 U.S. at 105.) As stated earlier the intent of ROSA is primarily for informational purposes to the community and law enforcement. The fact that ROSA does have a contributing retributive effect does not mean the "statute is . . . deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id*.

Further, any arguments that ROSA is retributive should be rejected because the "differentiating reporting requirements among the levels of offenses . . . are reasonably related to the danger of recidivism and consistent with the Act's regulatory objective." *Starkey,* 305 P.3d at 1025. For example, this results in level three sex offenders having a more stringent registration requirement in comparison to lower levels. The difference is based on potential recidivism not retribution. Because ROSA does not have traditional aims of punishment it is non-punitive under this factor.

5. The behavior is already a crime

ROSA applies to those who have been convicted of a sex offense due to the concerns of recidivism. The registration requirements and other regulations are not individually tailored to individuals. Therefore, this factor can be said to be punitive because the Act is dependent upon an offender's previous conviction.

6. Rational connection to a non-punitive purpose

ROSA has a rational non-punitive purpose, which is to aid law enforcement agencies and inform the community to protect the public from potential known sex offenders' recidivism. ROSA specifically mentions the dangers posed due to the out of date laws and the advancement of technology. ROSA was designed to protect Lackawanna's citizens and is a proper non-punitive use of a State's police power.

7. Excessiveness

The final factor looks to determine if the regulations imposed are "excessive with respect to the non-punitive objective of public safety." *Starkey*, 305 P.3d at 1028. This "inquiry is not an exercise in determining whether the legislature has made the best choice possible to address the problem . . . [but] whether the regulatory means chose are reasonable in light of the non-punitive objective." The last factor also indicates that ROSA is non-punitive. Its regulations are reasonable and are not overly burdensome to convicted offenders. Under ROSA sexual offenders do have restrictions and obligations but these are in-line with the necessary precaution to combat potential recidivism.

In summation, two of the seven factors indicate ROSA has a punitive effect. However, these are easily outweighed by the remaining five factors which show ROSA has a non-punitive purpose and effect. The intent-effects test shows that there is no punitive effect or purpose that negates the non-punitive intent. Therefore, ROSA stands as not being an ex post facto law despite being retroactive.

Conclusion

For the foregoing reasons it was proper for the Court of Appeals for the Thirteenth Circuit to affirm the decision of the District Court for the Middle District of Lackawanna. The parole

conditions imposed by ROSA are reasonably related to the state's interests. Additionally, Guldoon cannot show she has a right to be free of any of ROSA's parole conditions. ROSA also does not violate the Ex Post Facto Clause because despite being retroactive, the legislature's stated intent was non-punitive. Furthermore, the intent-effects test does not show that the Act has punitive purpose or effect which negates the non-punitive intent. For all the above stated reasons, this Court should affirm the lower court's decision.