No. 19-01

IN THE
SUPREME COURT OF THE UNITED STATES

MARY GULDOON,
Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE,
Respondent.

Appeal from the
UNITED STATES COURT OF APPEALS
THIRTEENTH CIRCUIT

Brief of Respondent

Team 28
Attorneys for Respondent

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QUESTIONS PRESENTED

1. Whether the registration and parole requirements imposed on Petitioner by Lackawanna's Registration of Sex Offenders Act violate the First and Fourteenth Amendments to the United States Constitution where the restrictions are tailored to serve the compelling governmental interest in protecting minors from sexual predators?

2. Whether the registration and parole requirements imposed on Petitioner by Lackawanna's Registration of Sex Offenders Act violate the Ex Post Facto Clause of the United States Constitution where the requirements are nonpunitive civil remedies and do not have overwhelmingly punitive effects?

STATEMENT OF THE CASE

I. Proceedings Below

Mary Guldoon ("Petitioner"), a teacher at Old Cheektowaga High School, was caught engaging in sexual activity with her fifteen-year-old student. (R. 5). In 2011, Petitioner pleaded guilty to one count of rape in the third degree, one count of criminal sexual act, and one count of sexual misconduct and was sentenced to be incarcerated for an indeterminate period of ten to twenty years. Aff. Mary Guldoon, Feb. 1, 2019, No. 19-CV-0001(O), at 3 (R. 13). After Petitioner began serving her sentence, The State of Lackawanna enacted the Registration of Sexual Offenders Act ("ROSA"). Aff. Guldoon at 4 (R. 14). She was released from prison in 2017 to serve five years' parole. (R. 2).

Petitioner filed suit against the Respondent, State of Lackawanna Board of Parole ("Parole Board"), in the United States District Court for the Middle District of Lackawanna. Guldoon v. Lackawanna Board of Parole, 999 F. Supp. 3d 1, 2 (M.D. Lack. 2019). The district court granted the Respondent's motion for summary judgment dismissing both of Petitioner's causes of action. Id. Petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit. Guldoon v. Lackawanna Board of Parole, 999 F.3d 1, 1 (13th Cir. 2019). That court affirmed the district court's judgment. Id. On January 1, 2019, Petitioner's Appeal to the

Supreme Court of the United States was granted Writ of Certiorari. Guldoon v. State of Lackawanna Board of Parole, 999 U.S. 1, 1 (2019).

II. Statement of the Facts

In September 2010, after the birth of her daughter and the expiration of her maternity leave, Petitioner returned to teaching at Old Cheektowaga High School. Aff. Guldoon at 1 (R. 12). Upon this return, Petitioner met B.B., the fifteen-year-old student in Petitioner's Introduction to Computer Science course who eventually became victim to Petitioner's criminal sexual conduct. Aff. Guldoon at 1 (R. 12). B.B. would often seek out Petitioner for assistance with homework. Aff. Guldoon at 1 (R. 12). This relationship continued as B.B. grew fonder of Petitioner and began confiding in Petitioner regarding private details about his troubling home life. Aff. Guldoon at 1 (R. 12). The student-teacher relationship turned sexually abusive, when one day after class Petitioner performed oral sex on her fifteen-year-old student. (R. 7). The next day, the two engaged in sexual intercourse in her classroom. (R. 7). Usually, the sexual abuse would occur when the pair would meet in her classroom after school, but on at least three occasions, they engaged in sexual activity in Petitioner's home. (R. 7). Petitioner drove B.B. to his house after these occasions. (R. 7). According to B.B., the two engaged in sexual conduct at least thirty times. (R. 7). This sexual abuse ended when the principal witnessed the sexual abuse firsthand, as Petitioner and B.B. were engaged in sexual activity in her classroom. (R. 7).

In January of 2011, following her arrest and indictment, Petitioner pleaded guilty to one count of rape in the third degree, one count of criminal sexual act in the third degree, and one count of sexual misconduct. She received an indeterminate sentence of ten to twenty years in prison. (R. 5). In 2015, after Petitioner had begun serving her term of incarceration, the State of Lackawanna enacted the Registration of Sexual Offenders Act ("ROSA"), requiring her to

register as a level two sex offender. Aff. Guldoon at 4 (R. 14); Lack. P. L. No. 2016-1 § 1(A) (2016) (R. 19). After becoming effective in 2016, ROSA placed new restrictions on Petitioner. Aff. Guldoon at 4 (R. 14); LACK. EXEC. LAW § 259-c (2018) (R. 45–46). In addition to the requirement that Petitioner register as a sex offender upon her release from prison, ROSA further requires that she surrender her driver's license, avoid coming within 1000 feet of any school, and refrain from accessing any commercial social networking website. LACK. EXEC. LAW § 259-c (R. 45–46). The legislature made specific findings that sex offenders pose a high risk of recidivism and that social networking websites, in the hands of sex offenders intent on harming minors, pose a clear and present danger to Lackawanna citizens. Lack. P. L. No. 2016-1 (R. 20–21). The legislature acknowledged that there are already laws in place aimed at protecting children from sexual predators, but that these laws have been less effective and other proposed methods would be less effective. Lack. P. L. No. 2016-1 (R. 20–21).

According to Petitioner, her term of five years of parole has been made extremely difficult because of ROSA's new conditions. Aff. Guldoon at 5 (R. 15). The prohibition on social media access has complicated her search for work, as she believes she is barred from using sites such as LinkedIn, Craigslist, Indeed, Facebook, and Twitter. (R. 15). The inability to drive herself has also made Petitioner's search for employment more complicated and has resulted in her reliance on a bicycle as the primary means of travel. (R. 15). She claims that access to public transportation is lacking in Old Cheektowaga, her neighborhood. (R. 15). Despite these obstacles to employment, Petitioner was able to find employment working the night shift at a pierogi manufacturing plant. (R. 15). Because of ROSA's condition that prevents Petitioner from coming within 1000 feet of any school grounds, she must commute to her job by taking a route that is twenty miles each way, as opposed to the more direct route, which is three miles each away. (R.

15). Finally, Petitioner has interpreted ROSA's ban on accessing social media websites to extend to her family. (R. 16). Petitioner's family has no Internet access in their home, which has greatly limited her husband's employment productivity and has burdened her daughter's education. (R. 17).

SUMMARY OF THE ARGUMENT

The registration requirements and special parole conditions implemented through ROSA by the Parole Board do not violate the United States Constitution. Parolees are entitled to constitutional rights and protections, even though these rights are circumscribed. Legislatures are given significant power to draft and pass legislation aimed at protecting children. States may impose reasonable restrictions on the time, place or manner of protected speech as long as those restrictions do not reference the content of the regulated speech. Additionally, these restrictions must be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels to communicate the information. Furthermore, states are free to place minor restrictions on a citizen's right to travel.

Additionally, not every retroactively-applied law is unconstitutional. Only those laws intended by the state legislature to be punitive, or those laws that have such apparently punitive effects, are prohibited under the Ex Post Facto Clause. State legislatures have significant discretion to enact civil laws that serve to protect the public, and courts owe deference to the stated purpose of those laws. If the party challenging that law is able to provide clear proof that the law's effects are overwhelmingly punitive, the court may construe the law as such, thus overriding the legislature's intent.

Here, ROSA's ban on social networking websites is a content-neutral time, place, or manner restriction and is therefore valid. Because the ban restricts the locations where speech

may be made, rather than the types of speech, it is content-neutral. The ban is narrowly tailored and leaves open ample alternative channels for communication because Petitioner is only restricted from using commonly-understood social networking sites, such as Facebook and Twitter, and is not restricted from using other Internet websites such as Netflix or Amazon. Finally, ROSA's driver's license revocation serves as a minor restriction on travel and is therefore valid.

ROSA's registration requirements and special parole conditions do not violate the Ex Post Facto Clause because they are not punitive and do not have overwhelmingly punitive effects. The Lackawanna legislature intended to enact a civil and nonpunitive regulatory scheme, as evidenced by the statute's findings and purpose section. Furthermore, the effects of ROSA are not so overwhelmingly punitive as to override the legislative intent. While its effects may inconvenience Petitioner, her inconvenience does not equate to punishment.

ARGUMENT

The registration requirements and special parole conditions implemented through ROSA by the Parole Board do not violate the United States Constitution. Courts have found that individuals on parole, even though they have been convicted and are under some form of governmental supervision, are not without constitutional rights, safeguards, and protections. See United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1164 (2d. Cir. 1970). Despite these constitutional rights, a parolee is only entitled to "conditional liberty properly dependent on observation of special parole conditions". Morrissey v. Brewer, 408 U.S. 471, 477 (1972). Therefore, parolees are necessarily subject to "restrictions not applicable to other citizens." Id. at 481.

While it is established that parolees are not without constitutional rights, the "First Amendment rights of parolees are circumscribed." Farrell v. Burke, 449 F.3d 470, 497 (2d Cir. 2006); U.S. CONST. amend. I. Courts have routinely held that the government is not powerless to restrict 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" Sobell v. Reed, 314 F.Supp. 1294, 1303 (S.D.N.Y 1971). The same rationale for restricting First Amendment rights of prisoners also extends to parolees. See Birzon v. King, 469 F.2d 1241, 1243 (2d Cir. 1972). The notion that a parolee enjoys greater freedom than those still incarcerated is undoubtedly true; however, after the parolee is granted conditional release, the government still possesses "a substantial interest" in ensuring that society is kept safe from future crimes committed by the parolee. Id.

When a convicted sex offender is conditionally released on parole, the government may restrict the parolee's activities to further these substantial governmental interests. Id. A parolee's liberty is conditional on conforming with these restrictions, which come in the form of special conditions. Parolees have "no constitutionally protected interest in being free" from special conditions of parole. Boddie v. Chung, No. 09-CV-04789(RJD)(LB), 2011 WL 1697965 at 1 (E.D.N.Y May 4, 2011).

The United States Constitution prohibits states from passing any ex post facto law. U.S. CONST. art. I, § 10, cl. 1. This Court has long defined an ex post facto law as "one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed." Burgess v. Salmon, 97 U.S. 381, 383 (1878); see also Beazell v. Ohio, 269 U.S. 167, 169–70 (1925). Nonetheless, the Ex Post Facto Clause prohibits only retroactive criminal laws; the clause does not extend to retroactive civil laws. Calder v.

Bull, 3 U.S. 386, 399–400 (1798). While retroactive changes in laws governing parole may violate the Ex Post Facto Clause, state legislatures—and, therefore, parole boards—do enjoy considerable discretion in taking steps to protect the public from repeat offenders. See Garner v. Jones, 529 U.S. 244, 253–54 (2000).

In light of this discretion, a state law retroactively altering the terms of parole for sex offenders does not violate the Ex Post Facto Clause unless it was intended to punish the offender rather than to impose civil proceedings upon the offender. Smith v. Doe, 538 U.S. 84, 92–97 (2003). If the legislature clearly intended for the law to be penal, "that ends the inquiry" and the law is an apparent violation of the Ex Post Facto Clause. Id. at 92; see also Trop v. Dulles, 356 U.S. 86, 95–97 (1958). If, however, the legislature intended to impose a nonpunitive and civil regulatory scheme, the court must evaluate whether the scheme is "so punitive either in purpose or effect as to negate" the intent of the legislature. United States v. Ward, 448 U.S. 242, 248–49 (1980). The effects of a statute may be evaluated using a number of factors, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963), but "'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) (quoting Ward, 448 U.S. at 249). Therefore, ROSA's special conditions and parole requirements are constitutional.

I. ROSA's special condition prohibiting Petitioner from using social networking websites does not infringe on her First Amendment right to free speech, and ROSA's special condition requiring the surrender of Petitioner's driver's license does not violate her fundamental right to travel.

One of the First Amendment's foundational principles is that all persons have a right to access certain locations where they can speak, listen, and engage in discourse. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017). Historically, this right to speech and the exchange of ideas was limited to certain spatial contexts, such as public streets and parks. See Ward v.

Rock Against Racism, 491 U.S. 781, 796 (1989). Public parks and streets are still essential locations for the exchange of ideas and viewpoints, but in the modern era, the Internet has rapidly become the most popular place to communicate with others. Packingham, 137 S. Ct. at 1735. Not just the Internet, but social media itself provides a "relatively unlimited, low-cost capacity for communications of all kinds" and as such allows individuals to engage in constitutionally protected speech. Id. at 1735–36.

Despite this, the Court has acknowledged that "the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." New York v. Ferber, 485 U.S. 747, 757 (1982). As such, legislatures are empowered to draft and pass legislation aimed at protecting children, who are particularly vulnerable, from becoming victims of sexual exploitation and abuse. Free Speech Coalition, 535 U.S. at 245. Furthermore, this country has a longstanding tradition of imposing civil disabilities on people convicted of crimes, even after their criminal sentences have been completed. See District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (upholding the constitutionality of barring convicted felons from firearm possession); Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (upholding the constitutionality of preventing convicted felons from voting). As such, states should be given greater leeway in regulating the constitutionally protected rights of convicted felons, as opposed to those of ordinary citizens.

States may impose reasonable restrictions on the time, place, or manner of protected speech so long as the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." Clark v.

Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). In determining whether a governmental regulation is content neutral, the primary question is whether the "government has adopted a regulation of speech because of disagreement with the message it conveys." Id. at 295. The Court has stated, "so long as the [] regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" the requirement of narrow tailoring is met. United States v. Albertini, 472 U.S. 675, 689 (1985). The final requirement, that the regulation leave open "ample alternative channels of communication," is concerned with ensuring that there are other avenues and means available allowing the restricted individual to engage in constitutionally protected speech. See Rock Against Racism, 491 U.S. at 802; Frisby v. Schultz, 478 U.S. 474, 482–83 (1988). While the government must show that its enacted regulation is narrowly tailored, narrow tailoring does not require the government to prove that its regulation is the least restrictive or least intrusive means of achieving the governmental goal. Rock Against Racism, 491 U.S. at 798–99. The Court has definitively concluded that a time, place, or manner restriction's validity "does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests." Albertini, 472 U.S. at 689.

In the present case, the challenged ROSA condition, which bans convicted sex offender's from accessing commercial social networking websites, serves as a content-neutral time, place, or manner regulation and as such should be subject to intermediate scrutiny. When a law applies to a particular kind of speech because of the subject matter, idea, or message represented in the speech, the Court has determined that type of law to be content based. Clark, 468 U.S. at 293. By contrast, when a law or regulation's application does not turn on the "topic discussed or the idea or message expressed" it is determined to be content neutral. Reed v. Town of Gilbert, 135 S. Ct.

2218, 2227 (2015). Here, the ROSA is not concerned with the content of a sex offender's speech, but rather the location they engage in the speech. ROSA is violated, not when specific words are posted or read, but when a sex offender accesses a commercial social networking website. Because the law does not regulate the content of any speech, but instead the place where the speech may be made, ROSA satisfies the content-neutral requirement.

Laws preventing access to specific locations, such as social media websites, where speech would otherwise take place, are evaluated by the Court as time, place, or manner restrictions. See, e.g., McMullen v. Coakley, 573 U.S. 464, 470 (2014) (the challenged law prevented the public from standing within a 35-foot buffer zone around abortion facilities). ROSA serves as a complete ban, preventing all sex offenders from accessing commercial social networking sites. Despite ROSA's nature as a complete ban, it is still a time, place, or manner restriction. The Court has upheld complete bans, deeming them valid time, place, or manner restrictions. See Frisby, 478 U.S. at 484 (upholding a local ordinance that completely banned picketing before or about any residence). Considering that ROSA's complete ban applies only to convicted sex offenders and prevents the affected class of individuals from accessing only commercial social media sites, the Court must analyze ROSA as a content-neutral time, place, or manner restriction and subject it to intermediate scrutiny.

ROSA's ban on sex offender's access to social networking sites satisfies intermediate scrutiny. A content-neutral time, place, or manner regulation is valid when it is "narrowly tailored to serve a significant governmental interest" and when it leaves "open ample alternative channels for communication of the information." Rock Against Racism, 491 U.S. at 791. Furthermore, the government is not required to prove that the regulation is the "least restrictive or least intrusive means" of accomplishing the government's goal, but merely that the

"regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. at 798–99. ROSA's ban on sex offender access to social networking sites satisfies this test. The State of Lackawanna Legislature found "that the danger of recidivism posed by sex offenders . . . and the protection of the public from these offenders is of paramount concern or interest to government." Lack. P. L. No. 2016-1 § 1(A) (R. 19). The legislature made further findings that current law had failed to keep pace with the rapid advent of social networking websites, particularly when considering that "tens of thousands of known sex offenders use social networking websites popular with children." Lack. P. L. No. 2016-1 §1(B) (R. 20).

Petitioner's claim that ROSA's ban on social networking sites sweeps to broadly and in effect prevents all access to the Internet by both her and her family appears to be based on a misreading of the text of the statute. (R. at 16.) Petitioner, and not her family, is prohibited from using the Internet to: access a commercial social networking website. (R. at 16.) ROSA defines a commercial social networking site as "any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users *for the purpose of establishing personal relationships with other users*, where such persons under eighteen years of age may: create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; engage in direct or real time communication with other users, such as a chat room or instant messenger: and communicate with persons over eighteen years of age." LACK. EXEC. LAW § 259-c (15) (2018) (R. 46).

Respondent concedes that the statutory definition of commercial social networking website does include websites such as Facebook, Twitter, and Instagram and other commonly-understood social networking websites. However, contrary to petitioner's allegations, this

definition does not include non-social networking websites such as Indeed, Netflix, or Hulu. Furthermore, this ban on social networking websites does not extend to other popular Internet websites such as Amazon, Ebay, Craigslist, or The New York Times. Petitioner's misinterpretation of the ban essentially prevents sex offenders from living in a house in which the Internet may be accessed. As a matter of plain meaning, an educated user of English would not describe websites such as Indeed, Netflix, Hulu, or Amazon as social networking sites. The most reasonable interpretation is guided by the language: ". . . *for the purpose of establishing personal relationships with other users.*" LACK. EXEC. LAW § 259-c (15) (R. 46). The purpose of creating a Facebook account is to interact with other users and establish personal relationships, while Indeed's purpose is to find employment opportunities. An Amazon account facilitates the purchase, and sometimes sale, of goods. Netflix and Hulu accounts enable users to stream movies and television shows. Respondent's narrow interpretation of ROSA gains even further support from the constitutional doubt doctrine. If a challenged statute is "readily susceptible to a narrowing construction that would make it constitutional, it will be upheld." Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988).

ROSA's ban on social networking websites furthers a significant governmental interest. This Court has already determined that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Ferber, 458 U.S. at 757. ROSA's social networking ban recognizes that not only do sex offenders pose a high risk of recidivism, but in the hands of sex offenders intent on harming minors social networking sites pose a clear and present danger to the citizens of Lackawanna. As such, ROSA's aim to protect the children of Lackawanna from potentially dangerous interactions on social media with convicted sex offenders, furthers a significant, and already recognized, government interest in

public safety. Other laws aimed at protecting children from sexual predators were already on the books prior to ROSA's enactment, but these laws have been less effective. The Lackawanna legislature determined that other proposed methods of protecting children would be less effective.

Ample alternative channels of communication are left open to Petitioner. She is free to use the Internet and access any websites that don't qualify as social networking websites. Under the most reasonable interpretation, a narrower interpretation, Petitioner is not precluded from using email, Netlfix, Amazon, or a whole host of other such websites, so long as they are not social networking websites, such as Facebook, Twitter, Instagram, and Snapchat. For these reasons, ROSA's ban on accessing social networking websites is a content-neutral time, manner, or place restriction narrowly tailored to serve a compelling governmental interest, and therefore does not violate the First Amendment.

It is undisputed that the Constitution protects a fundamental right to travel within the United States. U.S. CONST. amend. XIV, § 1; Williams v. Town of Greenburgh, 535 F.3d 71, 75 (2d Cir. 2008). This fundamental right to travel has also been referred to as the "right to free movement." Id. The Court has struggled to pinpoint the precise textual source supporting the fundamental right to travel, but it has protected this right by invoking both the Privileges and Immunities Clause of the Fourteenth Amendment and the Equal Protection Clause. Saenz v. Roe, 526 U.S. 489, 502–503 (1999). Despite this confusion regarding the textual source underpinning the right to travel, the right to travel has been firmly established. See Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902 (1986). While much of the Court's treatment of this fundamental right to travel has been in the context of protecting a right to interstate travel, courts also recognize that this right extends to intrastate travel as well. Williams, 535 F.3d at 75. "It

would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971).

While this right to free movement is established, it is not without its limitations. A state law implicates the right to travel only when it "actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right. Soto-Lopez, 476 U.S. at 903. Minor restrictions on travel do not amount to the denial of a fundamental right. Town of Southold v. Town of East Hampton, 477 F.3d 38, 54 (2d Cir. 2007). Nor has the fundamental right to travel ever been interpreted as guaranteeing the right to the most convenient form of travel. City of Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982). In fact, "governmental conduct such as the revocation of a driver's license, that 'neither proceeds along suspect lines nor infringes fundamental constitutional rights' is subject to rational basis review." Franchesi v. Yee, 887 F.3d 927, 940 (9th Cir. 2018) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).

Here, Petitioner has been subjected to two restrictions on her right to free movement as a result of ROSA's enactment. First, Petitioner is required to surrender her driver's license. Second, Plaintiff may not travel within 1000 feet of a school. Petitioner argues that when taken collectively, these restrictions act as a denial of her fundamental right to travel. This argument is unavailing, because the restrictions do not deprive Petitioner of her right to free movement, but merely restrict the form of travel. The ROSA condition requiring that Petitioner surrender her driver's license does not prevent Petitioner from travelling, but instead prevents her from driving herself from place to place. Petitioner is not restricted from travelling in a car driven by another licensed driver, nor is she precluded from utilizing public transportation or a taxi service. Even

further, by Petitioner's own admission, she has been traveling to and from work utilizing a bicycle. Respondent concedes that these restrictions prevent Petitioner from using the most convenient form of travel, but as previously mentioned, no such right to convenient travel exists. Furthermore, the restriction preventing Petitioner from being within 1000 feet of a school zone similarly inhibits her right to convenient travel, but nothing more. The end result is that Petitioner must take a longer route to and from work, to avoid passing by the schools which she lives near.

In the present case, the two restrictions on Petitioner serve as minor restrictions on Petitioner's right to travel and as such do not amount to a denial of a fundamental right. Therefore, the restrictions should be subject to rational basis review. Rational basis review is satisfied when there is any "reasonably conceivable state of facts that could provide a rational basis for the classification." Beach Commc'ns, Inc., 508 U.S. at 313. Here, Petitioner engaged in sexual conduct with a fifteen-year-old student. By her own admission, Petitioner engaged in this sexual abuse in her car and would utilize her driver's license to transport the victim between school and home, both of which were locations where sexual abuse occurred. Considering the state's compelling governmental interest in protecting minors from sex offenders, the conditions requiring her to surrender her driver's license and to refrain from entering within 1000 feet of a school are eminently rational. Therefore, ROSA's conditions do not infringe on Petitioner's fundamental right to travel.

II. The registration requirements and special parole conditions implemented by the Parole Board do not violate the Ex Post Facto Clause because they are not intended to be punitive and do not have overwhelmingly punitive effects.

The retroactive registration requirements and special parole conditions imposed onto Petitioner do not violate the Ex Post Facto Clause because they are not punitive. They are civil

remedies implemented to protect the people of Lackawanna from a sex offender. States have considerable discretion in taking measures to protect their citizens from offenders determined to be dangerous. See Kansas v. Hendricks, 521 U.S. 346, 363 (1997) (holding that imposing restrictions upon sex offenders is "a legitimate nonpunitive government objective.") See also Smith, 538 U.S. at 93–94 (("[W]here a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'") (quoting Flemming v. Nestor, 363 U.S. 603, 616 (1960))). Therefore, not every retroactive law is prohibited by the Ex Post Facto Clause. Calder, 3 U.S. at 399–400. The clause prohibits only those laws that constitute retroactive punishment, not those laws that impose or alter a civil remedy. Collins v. Youngblood, 497 U.S. 37, 41 (1990) ("[T]he constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them.") (emphasis in original); see also De Veau v. Braisted, 363 U.S. 144, 160 (1960). This Court has rejected expansive applications of the Ex Post Facto Clause and has reaffirmed that a law that merely disadvantages a party is not prohibited by the clause. See Collins, 497 U.S. at 50 (overruling Kring v. Missouri, 107 U.S. 221 (1882)).

When determining whether a law is a criminal penalty or a civil remedy, the Court must first consider the legislative intent. Smith, 538 U.S. at 92. If the legislature intended to impose punishment, "that ends the inquiry" and the law is an unconstitutional violation of the Ex Post Facto Clause. Id.; see also Trop, 356 U.S. at 95–97 (holding that a law taking away citizenship from wartime deserters was barred by the Ex Post Facto Clause because the law served no purpose besides punishment). If, however, the legislature intended to enact a nonpunitive and civil regulatory scheme, the Court must then consider whether the statute's purpose or effect is

so punitive as to negate the intent of the legislature. Smith, 538 U.S. at 92; see also Ward, 448 U.S. at 248–49. The standard of proof required to override legislative intent is high; the party challenging the constitutionality of the statute must provide "the clearest proof" that the statute is punitive, whether in purpose or effect. Ward, 448 U.S. at 249; see also Shaw v. Patton, 823 F.3d 556, 562 (10th Cir. 2016).

In ascertaining the legislature's intent in enacting the statute, courts may consider a number of the statute's aspects, including its text, structure, stated purpose, requirements, enforcement procedures, and location. See id. at 92–96. None of these factors are determinative but instead must be evaluated holistically. Id. Starting with the text and structure of the statute, courts should evaluate the statute using the plain meaning of the words within the greater context of the entire statute. See, e.g., United States v. Tupone, 442 F.3d 145, 151 (3d Cir. 2006). The reviewing court must give "considerable deference" to the legislature's stated purpose in enacting the statute. Smith, 538 U.S. at 93; see also Hudson, 522 U.S. at 100; Ward, 448 U.S. at 248–49.

As for requirements and enforcement procedures, the fact that the statute subjects the offender to criminal penalties for violating the terms of his or her parole does not make the statute punitive. Smith, 538 U.S. at 96 ("Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.") See also United States v. W.B.H., 664 F.3d 848, 854 (11th Cir. 2011). If the statute's requirements are regulatory, the statute will probably be determined to be regulatory. Efagene v. Holder, 642 F.3d 918, 924–25 (10th Cir. 2011) (holding that a sex offender registration statute was regulatory and therefore nonpunitive because, even though failing to register was criminally punishable, it was not a *malum in se* crime as understood by society). Similarly, the fact that a statute is located in a criminal code

section does not make the statute punitive. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362–65 (1984); see also (determining that placement of the statute in a criminal code section was not sufficient to transform a remedy intended to be civil into a criminal punishment).

If, upon evaluation of the legislature's intent, the court determines that the statute was intended to be punitive, the inquiry is over, and the court need not proceed to the second step: whether the effects of the statute are so punitive as to override the legislature's intent. See, e.g., Doe v. Nebraska, 898 F.Supp. 2d 1086, 1125–27 (Neb. Dist. Ct. 2012) (finding that statements of the bills' introducer coupled with the text, structure, and history of the laws plainly indicated that the law was punitive). However, since most courts typically determine that the legislature enacted a nonpunitive civil remedy, most courts proceed to analyze the effects of the statute. See, e.g., Smith, 538 U.S. at 92–96. The proper way to analyze the statute's effects is in accordance with the seven nondeterminative factors outlined in Kennedy v. Mendoza-Martinez. 372 U.S. at 168–69. In the present case, only five of the seven factors are relevant:

> [1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, . . . [3] whether its operation will promote the traditional aims of punishment—retribution and deterrence, . . . [4] whether an alternative purpose to which it may rationally be connected is assignable for it, and [5] whether it appears excessive in relation to the alternative purpose assigned.

Id. The first factor, whether the sanction involves an affirmative disability or restraint, addresses the effects of the statute upon those subject to it. Smith, 538 U.S. at 100. Restraints or disabilities that are "minor and indirect" are not likely to have punitive effects. Id. On the other hand, a "sanction approaching the infamous punishment of imprisonment" qualifies as an affirmative disability or restraint. Herbert v. Billy, 160 F.3d 1131, 1137 (6th Cir. 1998) (holding that loss of driver's license was not an affirmative disability or restraint); Hudson, 522 U.S. at 104–105 (holding that disbarment from chosen profession was not an affirmative disability or restraint)

and Vasquez v. Foxx, 895 F.3d 515, 522 (7th Cir. 2018) (recognizing that while the offenders had difficulty with finding compliant housing, that difficulty did not rise to an affirmative disability or restraint because the offenders were not physically restrained).

The second and third factors respectively address whether the sanction has historically been regarded as punishment and whether the statute's operation implicates the traditional aims of punishment, particularly whether the sanction is retributive. Smith, 538 U.S. at 102 (not giving much weight to deterrent effects because "[a]ny number of governmental programs might deter crime without imposing punishment." See also Vasquez, 805 F.3d at 522. This Court in Smith clarified that the historical analysis is important because "a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." 538 U.S. at 97. Some of the historically recognized forms of punishment include shaming and banishment. Id.; Doe v. Miller, 405 F.3d 700, 720–21 (8th Cir. 2005). Courts have consistently rejected expansive definitions of both shaming and banishment. See, e.g., Smith, 538 U.S. at 98–99 (rejecting argument that a sex offender registration and the "dissemination of information" was a form of public shaming); Belleau v. Wall, 811 F.3d 929, 943 (7th Cir. 2016) (determining that a state requiring a sex offender to wear an ankle monitor for the rest of his life was not akin to shaming because the purpose of the ankle monitor was not to impose shame upon the offender); Miller, 405 F.3d at 719–20 (rejecting argument that residency restrictions were sex offenders were a form of banishment).

The fourth and fifth factors, which are closely related, address whether the statute has a rational relationship to a nonpunitive purpose and whether the statute is excessive in relation to that nonpunitive purpose. The "rational relationship" standard is low, and a statute will not be deemed "punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks

to advance." Smith, 538 U.S. at 103. The standard is not whether the state "legislature has made the best choice possible to address the problem it seeks to remedy." Id. at 102. Courts traditionally consider the purpose of enacting the statute as articulated by the legislature. See, e.g., United States v. Shannon, 511 Fed. App'x 487, 492 (6th Cir. 2013). For statutes related to sex offenders, courts additionally consider the likelihood of recidivism as identified by the legislature. Vasquez, 895 F.3d at 522. As for the excessiveness of the statute in relation to the nonpunitive purpose, in addition to the likelihood of recidivism, the Court in Smith established that sex offenders may be "regulated as a class regardless of individualized risk assessments." Windwalker v. Governor of Alabama, 579 Fed. App'x 769, 772–73 (11th Cir. 2014); Smith, 538 U.S. at 103–104; see also Belleau, 811 F.3d at 944. Upon evaluation of these factors, the court must then decide whether "the clearest proof" has been offered to override the legislature's stated intent. Smith, 538 U.S. at 92. If that question is answered in the negative, then the statute does not have such a punitive effect to warrant ignoring the intent of the legislature. Id.

In the present case, the registration requirements and special parole conditions imposed upon Petitioner by the Parole Board do not violate the Ex Post Facto Clause because they are not punitive and do not have punitive effects. Instead, they are civil remedies implemented not to punish Petitioner but instead to afford greater protections to the public at large. In ascertaining the intent of the Lackawanna legislature in enacting ROSA, which was to enact a civil and nonpunitive scheme, the Court may consider ROSA's text, structure, stated purpose, requirements, enforcement procedures, and location. See id. at 92–96. The words of the statute must be read in accordance with their plain meaning and in relation to the surrounding sections. See, e.g., Tupone, 442 F.3d at 151. Here, there is nothing in the plain meaning of ROSA or in the statutory amendments it generated to suggest punitive intentions on the part of the Lackawanna

legislature. See LACK. CORR. LAW § 168 (2018) (R. 27–44); LACK. EXEC. LAW § 259 (2018) (R. 45–46); LACK. PEN. LAW § 130 (R. 47); Lack. P. L. No. 2016-1 (R. 19–21, 23–26); see also Doe v. Nebraska, 898 F.Supp. 2d at 1125–27 (finding that statements of the bills' introducer expressing his rage towards sex offenders plainly indicated that the law was punitive).

The Lackawanna legislature included legislative findings and purpose with the public law enacting ROSA. Lack. P. L. No. 2016-1 (2016) (R. 19–21). The legislature identified that the purpose of ROSA's registration requirement was to provide law enforcement with more complete information about sexually violent predators, so that law enforcement can better protect the public. Lack. P. L. No. 2016-1 at § 1(A) (R. 19). The purpose of ROSA's limitation on Internet use was to prevent sexual predators from being able to use rapidly-advancing forms of technology to contact minors. Lack. P. L. No. 2016-1 at § 1(B) (R. 20). Similarly, the purpose section of § 168 of the Lackawanna Correction Law identifies the purpose of ROSA as "to protect the public from the dangers posed by sexual offenders." LACK. CORR. LAW § 168 (R. 27). Therefore, the purpose of ROSA as stated by the legislature is to protect the citizens of Lackawanna, not to punish sex offenders.

The requirements and enforcement procedures of ROSA are similarly nonpunitive. So long as the requirements of a statute are regulatory, that statute will probably be considered regulatory. Efagene, 642 F.3d at 924–25. Here, ROSA requires sex offenders to register with a local law enforcement agency at least ten days prior to release from confinement. LACK. CORR. LAW § 168(f)(1) (R. 33). This registration form can be mailed in. Id. at (2) (R. 33). Sex offenders with a level three designation must personally report to the law enforcement agency once a year to provide a current photograph, and offenders with a level one or two designation need only do so every three years. Id. (R. 33). Both level two and level three offenders must comply with these

requirements for life; however, level two offenders who are not also classified as sexual predators, sexually violent offenders, or predicate sex offenders may petition for relief under section (o). LACK. CORR. LAW § 168(h) (R. 35). These requirements are regulatory because a violation of them is a regulatory infraction rather than a violent offense. As for enforcement procedures, the fact that the statute subjects the offender to criminal penalties for violating the terms of his or her parole does not make the statute punitive. Smith, 538 U.S. at 96 ("Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.") Here, offenders who fail to register are guilty of a felony, and offenders who use motor vehicles are guilty of a misdemeanor for the first offense. LACK. CORR. LAW § 168(t) (R. 44). However, the fact that criminal penalties are available is not sufficient for transforming ROSA into a punitive statute.

While ROSA as enacted is found primarily in the Lackawanna Correction Law, its location does not automatically mean that it is punitive. One Assortment of 89 Firearms, 465 U.S. at 362–65. Section 168 of the Correction Law contains a number of provisions that are undoubtedly regulatory, such as a description of the division of criminal justice services, duties of notification of the offender, duties of the court, registration and verification requirements, establishment of a board of examiners, options for petitions of relief, and establishment of a special telephone number. LACK. CORR. LAW §§ 168(b)–(p) (R. 28–42). This section of the Correction Law as a whole is not punitive.

Therefore, the Lackawanna legislature, in enacting ROSA, intended to enact a civil and nonpunitive regulatory scheme. This intent is reflected in the statute's text, purpose, requirements, enforcement procedures, and location.

Moving to the second step of the analysis, whether ROSA's effects are so punitive as to override the Lackawanna legislature's intent to enact a civil scheme, the statute's effects as alleged by Petitioner do not rise to the requisite degree under the Kennedy factors. 372 U.S. at 168–69. The first factor, whether the statute imposes an affirmative disability or restraint, forbids those sanctions "approaching the infamous punishment of imprisonment," particularly physical restraint. Herbert, 160 F.3d at 1137. Several courts have held that "minor and indirect" inconveniences, such as losing driving privileges, struggling to find compliant housing, or disbarment from one's chosen profession, do not rise to the level of an affirmative disability or restraint. Smith, 538 U.S. at 100; see also Hudson, 522 U.S. at 104–105; Vasquez, 895 F.3d at 522; Herbert, 160 F.3d at 1137. In the present case, the limitations imposed upon Petitioner are minor and indirect and therefore do not rise to the level traditionally associated with this factor. She is not physically restrained; rather, she is able to move freely within her community, so long as she abides by certain guidelines. She may not enter onto any school grounds or come within 1000 feet of a school. LACK. EXEC. LAW § 259 (14) (R. 45–46). Any difficulties she experiences with adhering to these limitations is not at issue for purposes of this factor. Therefore, the first factor in the Kennedy analysis weighs towards the Parole Board.

The second and third factors respectively address whether the sanction has historically been regarded as punishment and whether its operation implicates the traditional aims of punishment, particularly retribution rather than deterrence. See Smith, 538 U.S. at 102 (since "[a]ny number of governmental programs might deter crime without imposing punishment," retributive effects should be the focus when applying this factor.) As to the second factor, any resemblance between ROSA's operation and historical forms of punishment such as shaming and banishment are misplaced. This Court in Smith expressly rejected expansive definitions of

historical forms of punishment. 538 U.S. at 98–99. The sharing of information, regardless of the effects it might have, is not a form of public shaming. Id.; Belleau, 811 F.3d at 943. Additionally, Petitioner has not in any way been banished from her community. Historically, banishment entailed being exiled, but Petitioner has been allowed to remain; in fact, she still resides in the same home where she resided prior to her arrest. Aff. Guldoon at 5 (R. 14). While she may be limited in where she may go within her community, she is still a part of the community, so she has not been banished. Finally, ROSA has no retributive components. Its focus is on continuing to protect the public from individuals who have been determined to be dangerous, not on continuing to punish those offenders. Lack. P. L. No. 2016-1 (R. 19–21).

Finally, the fourth and fifth factors address whether the statute has a rational relationship to a nonpunitive purpose and whether the statute is excessive in relation to that nonpunitive purpose. Here, ROSA does have a rational relationship to a nonpunitive purpose, and that purpose—as stated by the legislature—is to protect the public from sex offenders. Lack. P. L. No. 2016-1 (R. 19–21). The standard is not whether the state legislature "made the best choice possible to address the problem." Smith, 538 U.S. at 103. Therefore, so long as ROSA remedies a problem that the Lackawanna legislature set out to address, this factor weighs in favor of the Parole Board. Here, ROSA does indeed address the problems of recidivism and advancing technology, identified in the purpose of the public law as the reasons behind ROSA. Lack. P. L. No. 2016-1 (R. 19–21). Next, as to whether the statute is excessive in relation to its nonpunitive purpose, ROSA is not excessive. Since sex offenders may be "regulated as a class regardless of individualized risk assessments," Windwalker, 579 Fed. App'x at 772–73, it is acceptable for the Lackawanna legislature to identify key concerns plaguing the class of sex offenders and to then take measures to regulate the class based off those concerns. Furthermore, in Petitioner's case,

the special parole conditions are especially appropriate, because she met B.B. at a school, interacted with him using email, transported him in her vehicle, and has extensive knowledge of and experience with computers. Guldoon v. Lackawanna Board of Parole, 999 F.Supp. 3d at 1; Aff. Guldoon at 1–2, 4 (R. 11–12, 14). Thus, not only is ROSA reasonable as applied to the class of sex offenders, but it is reasonable as applied to Petitioner.

Therefore, the registration requirements and special parole conditions imposed upon Petitioner do not have such overwhelmingly punitive effects to override the intent of the Lackawanna legislature in enacting a nonpunitive civil scheme.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this court AFFIRM the lower court.

Team 28

Team 28, Attorneys for Respondent