No. 29-01

IN THE
Supreme Court of The United States

MARY GULDOON,

Petitioner,

v.

LACKAWANNA BOARD OF PAROLE,

Respondent.

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

BRIEF OF THE PETITIONER

Team 29
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution; and

2. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act and imposed on Petitioner constitute violations of the Ex Post Facto Clause of the United States Constitution.

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STATEMENT OF THE CASE

STATEMENT OF FACTS

Mrs. Mary Guldoon ("Petitioner Guldoon"), an Old Cheektowaga, Lackawanna native, is a wife, a mother, and a former science teacher at Old Lackawanna High School. (R. at 11.) She started working in 2008, and she taught Introductory and Advanced Computer Science to various students. (Id.) In April 2010, she gave birth to her daughter and went on maternity leave. (Id. at 12.) During Petitioner Guldoon's time off with her newborn child, doctors diagnosed her with post-partum depression. (Id.) The doctors perscribed Prozac to treat the symptoms; however, the Prozac proved to be ineffective. (Id.) Petitioner Guldoon returned to work in September 2010, despite having the same symptoms, because her maternity leave expired. (Id.) When the Petitioner returned, she met B.B. in one of her computer science classes. (Id.) She tutored him in other subjects as well before and after school. (Id.) In some of these sessions, B.B. would share details about his personal life, such as his parents. (Id.)

Soon after, the two began a relationship. (Id.) It began in October 2010 and lasted until her arrest on December 7, 2010. (Id. at 12-13.) The Petitioner and B.B. committed sexual acts together over what "could be dozens of times," although neither of them could remember how often they committed these acts. (Id. at 5.) Majority of the encounters happened in the school; however, the two interacted in the Petitioner's car and home a couple times. (Id.) The Petitioner and B.B. communicated through email and through text messages, but there were no sexually explicit or pornographic messages recovered from the conversations. (Id. at 6.)

After being discovered by the principal, Ed Rooney, in her classroom with B.B., the Petitioner was arrested. (Id. at 13.) Subsequently, she pled guilty in January of 2011 for one count of Rape in the third degree, one count of Criminal Sexual Act in the third degree, and one count of Sexual Misconduct. (Id.) The State sentenced her to ten to twenty years in prison,

followed by probation. (Id.) The Lackawanna Board of Parole ("the Board") did not recommend that Petitioner Guldoon have special conditions on her parole and, thus, none were added to her general parole conditions. (Id. at 7.) She began serving her sentence at Tonawanda State Correctional Facility ("Tonawanda") in 2011. (Id.) While there, a psychiatrist formally diagnosed Petitioner Guldoon with Bi-Polar Disorder. (Id.) The psychiatrist realized that the Prozac allowed the disorder to fully manifest itself; the psychiatrist also determined that the disorder brought on a manic episode during the time that the Petitioner committed her crimes. (Id.) Mania can cause a variety of symptoms such as hypersexuality. (Id.) Petitioner Guldoon now takes lithium instead of Prozac, and she has not had a manic episode since. (Id.)

Also, while Petitioner was serving her sentence, the Lackawanna legislatures passed the Registration of Sex Offenders Act (ROSA), and it was signed by the Governor on July 21, 2015. (Id. at 19.) ROSA went into effect on January 21, 2016. (Id.) ROSA made a variety of changes; these changes included new registration requirements and new conditions on parole for certain offenses, such as "sex crimes." (Id. at 12). ROSA required every person convicted of any sex crimes to register as a sex offender. (Id. at 13). Depending on the crime committed, the registered sex offender is classified as level 1, 2, or 3. (Id. at 14) When a sex offender hits a certain level, ROSA requires additional conditions to their parole. (Id.) On top of registering as a sex offender, these conditions include a ban on accessing the internet, a revocation of driving privileges, and a ban on travel near schools and other similar facilities. (Id.) These restrictions were not mandatory prior to ROSA's enactment. (Id. at 15).

Tonawanda released Petitioner Guldoon in 2017. (Id. at 16) She returned home to live with her now ten-year-old daughter and husband in Old Cheektowaga, and she began her parole sentence. (Id.) After her release, ROSA required her to register as a sex offender. Also, ROSA

imposed special conditions on her parole that she was not aware of. Those include: 1) surrendering her driver's license, 2) a ban on travel within 1000 feet of any school or a similar facility, and 3) a ban from accessing any "commercial social networking website." (Id. at 17) ROSA defines a "commercial social networking website" as follows:

> [A]ny 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: (i) 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; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age."

ROSA § 2. Petitioner Guldoon did not know because these conditions were not a part of her original parole conditions in her pre-sentence report that she signed, nor were these conditions for any parolee convicted of a sex crime prior to ROSA. (Id. at 28)

Ever since the Board added the special conditions to her parole, Petitioner Guldoon has struggled to find employment. (Id. at 35) She cannot apply to jobs online because ROSA's commercial social network ban includes sites such as LinkedIn. (Id. at 34) Thus, the Petitioner was forced to get a night job at the Plewinski Pierogi Company plant ("the pierogi plant"). (Id.) This position does not allow her to utilized all the skills she obtained from getting her Bachelors and Masters in computer science. (Id. at 17.) While the plant is only three miles from her home, the two quickest routes come within school grounds. (Id. at 18.) Because she cannot travel within 1000 feet of a school, she must travel twenty miles each way to work. (Id.) Further, Petitioner Guldoon cannot drive to work because ROSA forced her to forfeit her driver's license. (Id. at 17.) Therefore, the Petitioner must walk or bike twenty miles along State Highway 10, regardless of the weather conditions. (Id.) These conditions make it difficult for her to get to the plant because travelling along the highway at night is dangerous, especially when it snows. (Id.)

PROCEDURAL HISTORY

Because ROSA deprives Petitioner Guldoon of her liberty after she had been previously sentenced, she filed a complaint against the Lackawanna Board of Parole for violating her First Amendment and Fourteenth Amendment rights, as well as for violating the Ex Post Facto Clause. (Id. at 24-27.) The District Court granted the Board's motion to dismiss for failure to state a claim. Guldoon v. Lackawanna Bd. of Parole, 999 F Supp.3d 1, 10 (M.D.Lack. 2019). Petitioner then appealed to the 13th Circuit, where all the circuit judges affirmed, aside from the dissent by Circuit Judge Dawn Skopinski. Guldoon v. Lackawanna Bd. of Parole, 999 F.3d 1, 1 (13th Cir. 2019). The Supreme Court has now granted writ-of-certiorari to hear the Petitioner's claim that ROSA violates the First and Fourteenth Amendments, as well as ROSA violates the Ex Post Facto Clause. Id. Because there are legal questions, this Court reviews motions to dismiss claims as de novo and is "limited to the contents of the complaint." Baker v. McNeil Island Corr. Ctr., 859 F.2d 124, 127 (9th Cir. 1988).

SUMMARY OF THE ARGUMENT

This Court should conclude that ROSA's special conditions are unconstitutional because it violates Petitioner Guldoon's First Amendment and Fourteenth Amendment rights. Parolees have more constitutional freedoms than they did when they were in prison. Lackawanna legislatures are allowed to enact legislation to abridge some freedoms. However, the legislation must be narrowly tailored and reasonably related to the parolee's conviction.

ROSA's first condition bans Petitioner Guldoon from utilizing commercial social networking sites. This ban is not narrowly tailored because she cannot access these sites for employment, thus frustrating the rehabilitation goals that the Board set for her. The ban is also not reasonably related to Petitioner Guldoon's conviction because commercial social networking sites were not the primary means of effectuating her crimes and, therefore, the ban does not guarantee deterrence for future crimes.

The second condition ROSA imposes on the Petitioner is a revocation of her driver's license. This condition is also unconstitutional because it restricts her right to travel under the Fourteenth Amendment in an impermissible way. While Lackawanna legislatures have a compelling interest in protecting the State's children, this restriction is not the proper way to accomplish that goal because Petitioner Guldoon will always have incidental contact with children. Moreover, this restriction only further frustrates her rehabilitation goals because it makes it difficult for her to get to her new job at the pierogi plant.

ROSA's last condition forces Petitioner Guldoon to maintain a 1000 feet distance from any school or similar facility. This condition is also unconstitutional because it is vague as applied to the Petitioner's case. Her home is surrounded by schools and, therefore, she is arbitrarily forced to stay at home. Moreover, the two fastest routes to work pass by the schools.

Therefore, she must take a twenty-mile route to work, either with a bicycle or on foot, along the highway, at night to get to the pierogi plant.

Further, ROSA's conditions as applied to Petitioner Guldoon violate the Ex Post Facto Clause of the United States Constitution. According to the Ex Post Facto Clause, legislatures cannot enact and apply laws retroactively to individuals. When a law is retroactive, it cannot be applied if there is a substantive change. In this case, the Board only recommended general conditions to parole. With ROSA, she now has to register as a sex offender and comply with the special conditions. These guidelines add extra punishment to her conditions and, therefore, cannot be upheld.

ROSA also has a detrimental impact on Petitioner Guldoon. She has a hard time obtaining employment because she cannot access commercial social networking sites. She and her family also do not have internet, nor do they possess phones that are compatible with the internet. This condition not only affects Petitioner Guldoon, but also her husband and daughter. Without a driver's license, she must rely on her husband to bring her to work or to her job interviews. When her husband is unavailable, she must walk or bike to work. Because ROSA does not allow the Petitioner to come within 1000 feet of a school, she must take a twenty-mile route along the highway, regardless of the weather conditions, to get to and from work.

ARGUMENT

I. ROSA's Special Parole Conditions are Unconstitutional, As Applied to Petitioner Guldoon, Because They Violate Her First and Fourteenth Amendment Rights.

Parolees are entitled to their constitutional rights, even though they are under legal custody. Morrissey v. Brewer, 408 U.S. 471, 482 (1972); United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1164 (2d Cir. 1970). Parolees still have valuable liberty interests and the Fourteenth Amendment affords them due process rights for any violations of their liberty interests. Morrissey, 408 U.S. at 482. According to 18 U.S.C. 3583(d), any separate, court-ordered conditions must be reasonably related to their offenses, and cannot deprive a parolee's liberty more than reasonably necessary to achieve its goals. See Morrissey, 408 U.S. at 482. Depending on the condition and the liberty interest, courts will either use intermediate scrutiny or strict scrutiny. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017); Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 100 (2d Cir. 2009).

A. The Commercial Social Network Ban Forbids Petitioner Guldoon From Seeking Employment Online and, Thus, Violates Her First Amendment Rights.

Parolees maintain a liberty interest in their speech, words, and thoughts. Packingham, 137 S. Ct. at 1735. Thus, courts look at laws that impede free speech with intermediate scrutiny. Packingham, 137 S. Ct. at 1736. Under this level of scrutiny, the law must be narrowly tailored to a significant government interest, and the law must be reasonably related to the violation. Packingham, 137 S. Ct. at 1736; United States v. Johnson, 446 F.3d 272, 281 (2d Cir. 2006). These guidelines ensure that states do not substantially burden parolees more than absolutely necessary. Packingham, 137 S. Ct. at 1736; United States v. Perazza-Mercado, 553 F.3d 65, 69 (1st Cir. 2009); Johnson, 446 F.3d at 281. In this instance, the First Amendment requires that every person have cyberspace access because the internet is now ubiquitous in society, and it is essential to exchanging views and ideas. Packingham, 137 S. Ct. at 1736.

Petitioner Guldoon's condition restricting access to commercial social networking sites is not narrowly tailored to her conviction and, thus, creates an unnecessary burden. See id. Her case is similar to the case in Packingham. See id. at 1735. There, the defendant, a registered sex offender, was not allowed to access any commercial social networking site where minors could become members and create personal profiles. Id. at 1731. The court concluded that the condition was not narrowly tailored to achieve any legitimate goals because it barred the defendant from exercising "commonplace" websites and, thus, limited his right to access information from the realm of ideas entirely. Id. at 1736. Much like the defendant in that case, Petitioner Guldoon also cannot access any social networking cites because of ROSA's restrictions. (R. at 16.) The restrictions are not narrowly tailored because she cannot access sites such as LinkedIn and Indeed for job searches, as minors could create profiles on these pages. (Id.) These websites are "commonplace" because their purpose is to provide employment rather than personal relationships. Packingham, 137 S. Ct. at 1736. Not being able to access these sites frustrated the Petitioner's job search and, thus, made is substantially burdensome for her to obtain employment. (R. at 16)

The Board argues that ROSA's special condition is narrowly tailored to Petitioner Guldoon's violation because of her educational background. The facts closely resemble the facts in Johnson, where the court upheld a total internet ban against a defendant because the defendant had a computer engineering degree and knew how to use the internet without being discovered by law enforcement. 446 F.3d at 282. The Petitioner, who has multiple computer programming degrees, was the computer programming teacher at the Lackawanna High School for 3 years. (R. at 11.) These facts indicate that she knows how to navigate and manipulate computer programs and software to suit her needs. See Johnson, 446 F.3d at 282. Because minors could have profiles

on LinkedIn and Indeed, the condition needs to include those websites in order to prevent the Petitioner from committing future violations. See id.

While Petitioner Guldoon is well versed in computer sciences, the Board's argument is still incorrect because it does not consider the Petitioner's character traits within the analysis. See id. In Johnson, the defendant repeatedly and willfully violated his internet restrictions on a regular basis. Id. Unlike that defendant, Petitioner Guldoon fully complies with ROSA, and she goes above and beyond what the conditions require. (R. at 16.) Instead of simply not possessing social media accounts, she does not keep internet connection in her household. (Id.) This sacrifice is to her husband's and her daughter's detriment, who depend on the internet for work and school purposes. (Id.) ROSA's internet restriction does nothing more than unnecessarily burden the Petitioner and her family. See Johnson 446 F.3d at 281.

Further, Petitioner Guldoon contends that ROSA's commercial social network ban is not reasonably related to her conviction because social networking cites and her crimes are not directly connected. See Perazza-Mercado, 553 F.3d 65, 76 (1st Cir. 2009) (holding that a parole condition banning a child sex offender from accessing all forms of pornography is unconstitutional because the record did not indicate a clear connection between pornography and the offense). Petitioner Guldoon did not meet B.B. through any commercial social networking cites, nor did she continue her relationship with B.B. through these sites. (R. at 12) All of her violations occurred within the high school building. (Id. at 5-6). Social media outlets did nothing to facilitate these crimes and, therefore, should not be considered with the special conditions to her parole. See Perazza-Mercado, 553 F.3d at 73; see also United States v. Taylor, 796 F.3d 788, 793 (7th Cir. 2015) (holding that a parole condition banning sex offenders from accessing adult

pornography is unconstitutional because adult pornography did not motivate the parolee to send sexually explicit materials to a minor).

The Board asserts that the commercial social networking site prohibition is reasonably related to Petitioner Guldoon's offenses because the internet helped effectuate the crimes. See Perazza-Mercado, 553 F.3d at 73. According to the Board, the connection between the condition and the crime does not have to be substantial; there just needs to be some sort of connection between the crime and the government interest. See Perazza-Mercado, 553 F.3d at 76. In this instance, Lackawanna's legislatures have an interest in the welfare and protection of the minor children. See id. B.B testified that he and the Petitioner would communicate through text messages and through email. (R. at 6.) I was also alleged that nude photos were sent. (Id.) Emails, and sometimes text messages, require internet access. See Packingham, 137 S. Ct. at 1736; Perazza-Mercado, 553 F.3d at 72. Therefore, there is a logical connection between the crime and the condition, and ROSA should be enforced. See Perazza-Mercado, 553 F.3d at 76.

This notion also fails the Board because internet access was only an incidental consequence to Petitioner Guldoon's crimes, and it was not the primary means for committing the violations. See Taylor, 796 F.3d at 793. Petitioner Guldoon and B.B. already established a personal relationship as teacher and student prior to using emails and text messages. (R. at 12.) She also tutored B.B. with his studies before and after school. Id. at. These facts illustrate that the violations occurred through prolonged, in-person contact rather than continued, electronic or social media communication. See Taylor, 796 F.3d at 793. Thus, the commercial social media condition and Petitioner Guldoon's violation are not reasonably related and unduly restricts her First Amendment rights. See Packingham, 137 S. Ct. at 1735.

Furthermore, there is no guarantee that this special condition will deter Petitioner Guldoon from committing future crimes. See Packingham, 137 S. Ct. at 1736; Perazza-Mercado, 553 F.3d at 72. She is a one-time offender with no prior criminal history. (R. at. 5) Her violation was an isolated incident connected with her bipolar disorder diagnosis. (Id. at. 13.) All this legislation does is frustrate her chances at rehabilitation, without adding any tangible benefit to the public. See Packingham, 137 S. Ct. at 1737; Perazza-Mercado, 553 F.3d at 72. For example, she can no longer access professional social media sites to find employment. (R. at 16.) However, there are probably very few minors located on these sites to protect. See Packingham, 137 S. Ct. at 1736; Perazza-Mercado, 553 F.3d at 72. Therefore, this Court should not uphold ROSA's commercial social network ban because the ban "renders modern life…exceptionally difficult." Perazza-Mercado, 553 F.3d at 72 (quoting United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003)).

B. Revoking Petitioner Guldoon's Driver's License Violates her Fundamental Right to Travel Because Motor Vehicles are Necessary in Today's Society.

The fundamental right to travel comes from the Fourteenth Amendment's Privileges and Immunities Clause and Equal Protection Clause. Selevan, 584 F.3d at 99. According those Clauses, individuals have a right to move freely within a state. Id. at 100. Because the fundament right to travel is protected by the Constitution, this Court is required to apply strict scrutiny to any regulation that infringes upon it. Id. Under this analysis, the State must prove that the law is narrowly tailored and that there is a compelling state interest. Id. While courts do not consider minor restrictions, this Court cannot uphold a law that infringes on the fundament right to travel when the compelling state interest is to impede travel itself, or if it uses a classification to penalize that right. Id.

The Board argues that it has a compelling interest to protect Lackwanna's children with ROSA's driver's license ban because the Board wants to keep the children safe from harm that could ensue from sex offenders. New York v. Ferber, 458 U.S. 747, 756-57 (1982); Trisvan v. Annucci, 284 F. Supp. 3d 288, 296 (E.D.N.Y. 2018). According to Trisvan, a case where the court upheld a restriction revoking the parolee's driver's license, parole conditions may abridge fundamental rights when there are reasonable interests and goals present. 284 F. Supp. 3d at 296. Here, B.B. a high school student, was harmed by the Petitioner, a former high school teacher. (R at 6.) B.B. testified that he originally thought he was in a real relationship, but that he learned that he was being used instead. (Id. at 5.) B.B. also testified that he cannot "trust adults" anymore. (Id. at 6.) The Board does not want anymore instances such as this to happen with the rest of Lackawanna's youth. See Trisvan, 284 F. Supp. 3d at 296. Thus, the Board has an interest in preserving its minors' innocence and preventing further misconduct caused by sex offenders. See Trisvan, 284 F. Supp. 3d at 296; see also Ferber, 458 U.S. at 757 (holding that a statute criminalizing "the use of a child in a sexual performance" as constitutional because it protects children's mental health).

However, labeling Petitioner Guldoon as a sex offender in order to revoke her license and restrict her travel is an impermissible way to protect the compelling state interest. See Selevan, 584 F.3d at 100. The legislation only revokes sex offender's licenses and the classification does not justify restrictions on travel entirely. See Ferber, 458 U.S. at 756. Revoking Petitioner Guldoon's license will not protect children because children are everywhere, and she will always have incidental contact with children. Id. In fact, she has an underaged daughter at home. (R. at 11) Thus, revoking Petitioner Guldoon's driver's license is not a feasible way of protecting children in the community.

Moreover, the driver's license restriction merely impedes the Board's rehabilitation goal for Petitioner Guldoon. See Selevan, 584 F.3d at 100Motor vehicles, especially in rural areas such as Lackawanna, are not "de minimis" in value, and are vital for survival. Ferber, 458 U.S. at 762 (emphasis removed). Unlike the defendant in Trisvan, who lived in Brooklyn and had easy access to public transportation, Petitioner Guldoon lives in Old Cheektowaga, where public transportation is scarce. Trisvan, 284 F. Supp. 3d at 293. The Petitioner must ride a bicycle instead, during the middle of the night, and through all weather conditions just to go to work. (R. at. 15.) This ban is more than a "minor restriction": rather, it puts her life at risk in an unnecessary way, while doing nothing to help with her rehabilitation. See Selevan, 584 F.3d at 101.

C. Lackanawanna Arbitrarily Applied ROSA's School Requirement to Petitioner Guldoon When It, Among Other Things, Failed to Consider Her Home Location.

Under the Fourteenth Amendment, laws cannot be vague. Farrell v. Burke, 449 F.3d 470, 485 (2d Cir. 2006). A term within a statute is vague when average adults can differ as to the term's meaning or application. United States v. Loy, 237 F.3d 251, 262 (3d Cir. 2001). If a state enforces a vague statute, the courts must decide whether or not the statute, when applied, threatens arbitrary and capricious enforcement. Farrell, 449 F.3d at 485. A law that is applied arbitrarily does not consider important facts and is unreasonable when it comes to the plaintiff's case. Id.

In this case, the condition keeping Petitioner Guldoon 1000 feet from schools is vague as applied to her situation because of where she lives. Id. at 486. Her home is flanked by both the elementary school and the high school, where minors are present. (R. at. 18) This leaves her in a virtually landlocked parcel and, thus, keeps her as "a prisoner in her own home." Guldoon, 999 F.3d at 5. Because Petitioner is surrounded by schools, she cannot take a direct route to her new

job at the pierogi plant. The restriction forces her to take a twenty-mile trip to the pierogi plant, along the highway at night, through various weather conditions because the two direct three-mile trip comes within 1000 feet of each school. (R. at 18.) Further, because the Board arbitrarily applies this condition to each level three sex offender, there is no room for a parole officer to make exceptions or use discretion. (Id. at 26.) Unlike other sex offender laws, ROSA does not allow for Petitioner Guldoon to get permission to use a direct route for the limited purpose of going to and returning from work. (Id.)

The Board argues that ROSA is still reasonable as applied to the Petitioner, even though she lives close to school grounds. Minor inconveniences will not be considered when determining if a condition is vague, and both parties agree that she has a way to get to work. See Farrell, 449 F.3d at 490 (holding that a condition banning the parolee's pornographic books was not vague because it was clear that the condition's pornography definition included literature). Her offense took place within school grounds and affected a high school student. (R. at 5.) Therefore, it is not unreasonable to keep her away from schools in order to safeguard Lackawanna's minor children. See Loy, 237 F.3d at 268 (holding that a condition prohibiting a parolee from having contact with minors constitutional because the parolee actively exploited children in public).

While the offense did take place on school grounds, the law is still being arbitrarily applied because it unduly burdens Petitioner Guldoon's liberty interest of not being in pain. See Morrissey, 408 U.S. at 482. She should not have to choose between going to work and getting injured due to travel conditions. See id. Moreover, Petitioner Guldoon's offense was based on a longstanding relationship with B.B. Merely passing a school building will not cause her to commit the same crime because building a relationship takes time and trust. (R. at 12.) Given

that she is no longer a high school teacher, there is no reason as to why the Board cannot accommodate her request. (Id. at 13.) The Board deemed it was safe to integrate Petitioner Guldoon back into society, and home confinement will not solve her rehabilitation goal. See Guldoon, 999 F.3d at 5.

Therefore, this Court should hold that ROSA's conditions are unconstitutional because they impermissibly violate Petitioner Guldoon's First Amendment and Fourteenth Amendment rights.

II. Lackawanna Legislature Passing ROSA Five-Years After Petitioner Guldoon Was Convicted of Her Crime is a Violation of the Ex Post Facto Clause of the Constitution.

A law is considered to violate the Ex Post Facto clause whenever it is retroactively applied to an individual and causes detriment to that individual. Calder v. Bull, 3 U.S. 386, 391 (1798). The purpose of the Ex Post Facto Clause is to allow citizens to tailor their conduct according to the law, while also not allowing for vindictive legislation. Weaver v. Graham, 450 U.S. 24, 28-29 (1981). Thus, the Ex Post Facto Clause only applies to penal statutes since that is the only way the Government can threaten an individual's liberty. Collins v. Youngblood, 497 U.S. 37, 41 (1990). An Ex Post Facto law can only survive if it applies to procedural changes but will not survive if it has substantive consequences. Dobbert v. Florida, 432 U.S. 282, at 293 (1977).

A. ROSA is a Law that Was Passed Retroactively in Consideration to Petitioner's Conviction, and the Furthering of the Punishment Has Had a Detrimental Impact on Petitioner Guldoon's Life that Was Not Entailed When the Crime Was Committed.

The United States Constitution explicitly prohibits any state from passing any bills of attainder or Ex Post Facto laws. USCS Const. Art. I, § 10, Cl 1. The Court in Beazell v. Ohio explained that an Ex Post Facto law is defined as "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the

punishment for a crime, after its commission … is prohibited as *ex post facto*." 269 U.S. 167, 169-70 (1925)(emphasis added). When examining an Ex Post Facto claim, it is important that there is retroactivity because every Ex Post Facto claim must have been done retroactively. Calder, 3 U.S. 386, at 391. However, not all retroactive laws are necessarily considered to be violations of the Ex Post Facto Clause. Id. Ex Post Facto laws are, according to Supreme Court precedent, laws that "create, or aggravate, the crime; or [i]ncrease the punishment, or change the rules of evidence, for the purpose of conviction." Id. Therefore, in order to establish that a law violates the Ex Post Facto Clause of the Constitution a party must show that the law was made retroactively, is a penal law, and that the law has had a detrimental impact on those affected by the law. Weaver, 450 U.S. at 29.

Petitioner Guldoon was convicted for her crime in 2011, four years prior to the enaction of ROSA in 2015. While the law only affects those on parole, the Court in Weaver held that "even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." Id. at 30-31. Therefore, as is reaffirmed in Lynce v. Mathis, even an alteration of parole can trigger the Ex Post Facto Clause because this can result in an increase in punishment for the person that was not in place prior to their conviction. 519 U.S. 433, at 445-46 (1997). Since ROSA affects the parole conditions for Petitioner Guldoon after she had already been convicted and begun serving her sentence, it is a retroactive law. See Id.

Some courts have held that a law can be penal, but if legislatures enacted the law for a separate legitimate government interest other than to punish, it can be considered nonpenal. Trop v. Dulles, 356 U.S. 86, 96-97 (1958). The test used to decide if a law is penal is to look at the intent of the legislature and see if the law was passed to fit a form of punishment, or if it was

designed to be regulatory. United States v. Ward, 448 U.S. 242, 248-50 (1980). Here, ROSA and the conditions to the parole that it adds is penal because it increases punishment upon the parolees. See id. Even if this was considered regulatory, those regulatory goals can become penal if the same regulations become "so punitive either in purpose or effect." See Id. at 249. Since the punitive effect on the petitioner is so extensive, the goals of the legislature are not as probative since in practice ROSA has become penal. Montana v. Kurth Ranch, 511 U.S. 767, 777 (1994).

Calder is a Supreme Court decision that considered four different categories that Ex Post Facto laws can emerge from. 3 U.S. 386, 390-91. Those four categories are:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. The third category is what stands out from this decision and is analogous to Petitioner Guldoon. ROSA has increased the punishment for this crime by limiting the freedoms of a parolee exponentially as compared to the original parole conditions. Adding additional limitations on freedoms and liberty of an individual must be considered a punishment. Calder, 3 U.S. at 390. The list that the Court in Calder offers was reaffirmed in Collins where the Court distinguished procedural changes from substantive changes and used the Calder list of categories as its guideline for what laws should be considered to violate the Ex Post Facto Clause. 497 U.S. at 49.

While ROSA is applied retroactively, the courts have held that procedural changes, as opposed to substantive changes to the law, will not be considered a violation of the Ex Post Facto Clause. Dobbert, 432 U.S. at 293. The difference in a substantive and procedural change is an

important difference that needs to be made, yet one that in practice is much more difficult to find. Erie R.R. Co. v. Tompkins, 304 U.S. 64 , 89-91 (1938). An example of the struggle for the courts is Lee v. Sullivan, where one district court found that granting compensatory damages in the Civil Rights Act was remedial, therefore procedural in nature. 787 F.Supp. 921, 930-33 (N.D. Cal. 1992). Another court, however, found that the compensatory damages were substantive and should only apply to those after the law was passed. Id. at 933. This makes this approach incredibly subjective, forcing the judge to make a case by case decision to balance out factors that are not clearly indicative in deciding if the law is procedural or substantive.

The Board contends that ROSA acts as a procedural change to existing law instead of substantive. In Wallace v. Christensen the court held that changes in parole guidelines were not considered a change in law for the purpose of the Ex Post Facto Clause. 802 F.2d 1539, 1554 (9th Cir. 1986). The reasoning behind the court's decision, however, was that the guidelines were not a law because they simply broadened discretion for the parole board. Id. The court never mentioned broadening the conditions of a parole, something that is vastly different than giving the parole board more discretion. ROSA does not give the parole board more discretion. It does the opposite by making the parole guidelines an umbrella rule that applies to a large class of people regardless of the differences in their offenses. Wallace gives an example of what a procedural change looks like when applying that to an Ex Post Facto analysis of parole. Id. ROSA and its' application to Petitioner Guldoon must be considered substantive when compared to Wallace since it enhances the punishment entailed in the original pre-sentence parole conditions. Id.

In theory, separating procedural and substantive changes in law makes it easier to decide if the law is affecting the Petitioner negatively. "[T]he constitutional provision was intended to

secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." Beazell, 269 U.S., at 171. In Hopt v. Utah the Court said that a law was not Ex Post Facto because the punishment prescribed, the proof necessary, and the indictment had all been unaffected by the passing of the new statute. 110 U.S. 574, 589-90 (1884). The Court has made clear that an increased punishment for a crime is defined as substantive, and the holding in Lynce established that parole is a form of punishment and can be a violation of the Ex Post Facto Clause if it is retroactively altered. 519 U.S. at 445-46. ROSA, however, does not add to the definition of the crime, does not alter the crime, and does not directly add punishment to the sentence since parole conditions were given after sentencing. This is the conundrum that comes with using labels in such a definitive manner, because there is gray area involved that can encompass both procedural and substantive elements of a law. Miller v. Florida, 482 U.S. 423, 430 (1987).

The labels themselves, procedural and substantive, were not established nor defined with retroactivity in mind. Brian Neff, *-Retroactivity and the Civil Rights Act of 1991*: *An Opportunity for Reform*, 1993 Utah L. Rev. 475, 500 (1993). As Thompson v. Utah shows, labels are not necessarily helpful when dealing with this specific type of analysis. 170 U.S. 343, 353-54 (1898). Therefore, to allow a judge to merely attach a label and reach a final conclusion from these loosely defined labels is not justice. In Gibson v. Mississippi the Court was faced with an issue where the law facially seemed like a procedural enactment, but instead actually changed a substantive part of the law. 162 U.S. 565, 589-91 (1986). The Court warned that “the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against ex post facto enactments.” Id. at

590. Since the Ex Post Facto Clause is designed to limit legislation that "makes more burdensome the punishment for a crime, after its commission," it is obvious ROSA fits as an Ex Post Facto law, regardless of arbitrary labels. See Beazell, 269 U.S. at 169-70.

Even if the change ROSA provides is deemed procedural, the Court has in the past held that procedural changes that disadvantage a person on such an extreme scale cannot be ignored. Kring v. State of Missouri., 107 U.S. 221, 235-36 (1882). While the extreme disadvantage of a defendant is no longer the proper test, this early interpretation shows the intent of the Ex Post Facto Clause. Collins, a Supreme Court case decided over 100 years after Kring, overruled Kring in that disadvantaging a defendant is no longer considered to be a factor in deciding if the law is Ex Post Facto. 497 U.S. at 54-58. However, in overruling Kring the concurrence in Collins clarified that "[a] procedural protection is likely to be substantial, when viewed from the time of the commission of the offense, only if it affects the modes of procedure by which a valid conviction or sentence may be imposed." Id. at 58 (Justice Stevens, concurring). As earlier stated, Lynce holds that anything affecting the punishment of the convicted, even if on the back-end of the sentencing, can fall under the Ex Post Facto Clause. 519 U.S. at 446. In Lynce, Justice Stevens held that:

> [R]etroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the *Ex Post Facto* Clause because such credits are "one determinant of petitioner's prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed.

Id. at 445; (citing Weaver, 450 U.S. at 32). Therefore, since ROSA adds additional punishment that were not enacted prior to Petitioner Guldoon's conviction and original sentencing the law is indeed retroactive and penal, thus satisfying the first of two elements required to trigger the Ex Post Facto Clause. See Calder, 3 U.S. at 391.

B. Once a Law is Found to be Retroactive the Final Analysis for the Court is to Find that the Retroactive Application of the Law Passed Has a Detrimental Impact on the Individual to Whom it is Being Applied.

Before ROSA was enacted, Petitioner Guldoon would have been required to register as a sex offender, among other conditions of her parole. (R. at 12.) What was not included in her parole when she was convicted, however, was having to surrender her driver's license; not being able to travel within 1000 feet of a school; and being barred from any website that allows networking. Registration of Sex Offenders Act, § 168. Thus, Petitioner Guldoon is not only limited on physical places she can go near but is also limited to what she can access within her own home as well as being forced to find different transportation than what is by far the most convenient, simply driving herself. Therefore, since ROSA is retroactively being applied to Petitioner Guldoon and it has a detrimental impact upon her, it is a violation of the Ex Post Facto Clause. See Weaver, 450 U.S. at 24; see also Dobbert, 432 U.S. at 282.

Section 168-v of ROSA states that "No person who has been designated a level two or level three sex offender … shall operate a motor vehicle … for a period of twenty years, or as long as that person is required to remain registered, whichever is shorter." Because of this section in ROSA, Petitioner Guldoon can no longer freely travel as she pleases. Petitioner Guldoon is now restricted to walking or biking everywhere that she goes, as she lives in a rural area that lacks public transportation. (R. at 35.) This limitation has obvious negative implications for her. For example, finding a job has become exponentially more difficult because she lacks transportation. (Id.) Even going to interviews can prove to be an impossible task, as Petitioner Guldoon is at the mercy of her husband being able to get off work to take her to an interview. (Id.) This, therefore, leaves her at a disadvantage to find any employment. (Id.) Because of this restriction, she has taken a night shift at the pierogi plant. (Id. at 36.)

Difficulty in finding employment is only the tip of the iceberg in terms of restrictions placed upon Petitioner Guldoon. Because she cannot travel within 1000 feet of a school, she cannot take the fastest route to work which is only 3 miles away. (Id. at 38-39) She cannot even take the second fastest route to work. (Id. at 40.) Instead, Petitioner Guldoon is required to travel 20 miles each way, twice a day, regardless of any exigent circumstance such as the weather. (Id. at 41-42.) The reason for this extensive amount of travel is that her home is located in between two schools. The fastest, most ideal route runs within 1000 feet of Old Cheektowaga Elementary School. (Id. at 39.) The second route runs within 1000 feet of Old Cheektowaga High School. (Id. at 40.) Since these two routes run so close to two separate schools, Petitioner Guldoon must walk along State Highway 10, with a speed limit of 65 miles per hour. (Id. at 43.) She is forced to take this route day or night, creating quite an extraordinary and frankly unnecessary risk whether she is biking or walking. (Id.)

On top of these restrictions barring her from having the freedom to travel in a safe and efficient manner, Petitioner Guldoon is also barred from accessing the internet. Registration of Sex Offenders Act § 1 (B). Specifically, she is barred from "accessing any commercial networking sites." (Id.) This restriction might seem like a rule that is tailored specifically to prevent those under ROSA from accessing sites that would put them in contact with a minor, but in practice this rule is overbroad "personal relationship" within the statute is not even defined by the legislatures. (Id.) Websites such as Netflix, Hulu, and even LinkedIn are considered banned under ROSA. (R. at 47.) Therefore, Petitioner Guldoon cannot access these sites for any reason, not even to apply for a job. (Id.) In our modern job climate, not having access to the internet can be extremely limiting not only in getting a job, but also knowing what jobs are available.

Since virtually every website involves some sort of networking, the entire Guldoon family has to do without the internet and also without phones that can access the internet. (Id. at 46.) That has imposed hurdles for both Petitioner Guldoon's husband and daughter. Her husband has a job that always requires him to be available to his employer, and not having a phone capable of accessing internet means that he cannot have access to his email. (Id. at 49.) Her daughter also has been burdened by this restriction, as she cannot access online text books or any other assignments that are only available online. (Id. at 50.) While ROSA was intended only to punish the person that committed the crime, the broad restrictions limit everyone surrounded by the parolee.

Since ROSA was applied retroactively to Petitioner Guldoon and has a detrimental impact upon her, this law falls under what the framers were trying to prevent by having the Ex Post Facto Clause. If legislatures add punishments to those who have already been sentenced, then that should immediately be scrutinized more intently in order to avoid vindictive legislation. Beazell, 269 U.S. at 171. As the Court lays out in Miller and numerous other Ex Post Facto decisions, "the law must be retroactive … and it must disadvantage the offender affected by it." 482 U.S. at 430 (quoting Weaver, 450 U.S. at 29). Thus, the new conditions of parole imposed by ROSA should not apply to Petitioner Guldoon because it would directly violate the Ex Post Facto Clause of the United States Constitution. USCS Const. Art. I, § 10, Cl 1.

CONCLUSION

For the foregoing reasons, Petitioner Guldoon prays that this Court will vacate the District Court's and Court of Appeals' decision. ROSA violates Petitioner Guldoon's Constitutional rights by infringing on her First Amendment right to free speech through limiting her access to the internet, her 14th amendment right to due process by keeping her 1000 feet from schools, and her fundamental right to travel by revoking her license. Further, because ROSA was enacted after petitioners sentencing, it violates the Ex Post Facto Clause of the Constitution due to it being enforced retroactively and having a detrimental impact on the Petitioner.

Respectfully submitted.

Team 29
Counsel for Petitioner

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