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 Petitioner

Team 3
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Cases

State Cases

Constitutional Provisions

Statutes

Secondary Sources

QUESTIONS PRESENTED

I. WHETHER THE REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS OF PAROLE REQUIRED BY LACKWANNA'S REGISTRATION OF SEX OFFENDERS ACT VIOLATE PETITIONER'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS OF PAROLE REQUIRED BY LACKWANNA'S REGISTRATION OF SEX OFFENDERS ACT AND IMPOSED ON PETITIONER CONSTITUTE VIOLATION OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

SUMMARY OF ARGUMENT

This Court should hold Lackawanna's Registration of Sex Offenders Act (ROSA), as applied to Mary Guldoon, violates her constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. Specifically, the ROSA conditions violate Mrs. Guldoon's rights to freedom of speech, travel, and substantive due process. ROSA's blanket ban on "commercial social networking" is unconstitutional as applied because it is not narrowly tailored to serve a compelling government interest. The ban has cut Mrs. Guldoon off from the world: impeding her from finding appropriate employment, rendering her multiple degrees useless, and preventing her family from using the Internet at home. Furthermore, Mrs. Guldoon was not given proper due process regarding her right to travel. The ROSA condition revoking her driver's license is unconstitutional because under the rational basis test there are less restrictive ways for the government to accomplish its purpose without imposing on constitutional liberties, and the condition prohibiting her from traveling within 1,000 feet of school grounds unconstitutionally vague and unenforceable. There are more appropriate ways to ensure Mrs. Guldoon does not violate her parole. This Court should instruct the legislature to amend ROSA's language to comply with constitutional standards.

This Court should hold that ROSA, as applied to Mary Guldoon, violates the Ex Post Facto Clause of the United States Constitution. ROSA is retroactive as applied because it was enacted and put into effect during Mrs. Guldoon's prison sentence, after she had committed her crime. ROSA is a civil regulatory scheme, but under the framework established in *Smith v. Doe*, 538 U.S. 84 (2003), the requirements have a punitive effect on Mrs. Guldoon. Because she cannot use the Internet, drive a car, or enter school grounds, Mrs. Guldoon is precluded from working in her chosen profession and reintegrating into society. Furthermore, this Court should consider updated research about the recidivism rate of sex offenders to examine ROSA's rational relationship to a nonpunitive purpose.

STATEMENT OF THE FACTS

Mary Guldoon is a wife and a mother. R. at 11. But she is also a convicted sex offender. R. at 6. In the fall of 2010, Mrs. Guldoon returned to work as a computer science teacher at Old Cheektowaga High School after her maternity leave ended. R. at 12. She was recovering from post-partum depression after the birth of her daughter and suffering from a period of mania as a result of undiagnosed bipolar disorder. *Id.* During this time, she entered a consensual sexual relationship with one of her fifteen-year-old students, B.B. R. at 5. Throughout the consensual relationship, the pair exchanged text messages and emails. R. at 5-6.

After the pair was discovered at school, Mrs. Guldoon was charged under Lackawanna Penal Law with ten counts of rape in the third degree, five counts of criminal sexual acts in the third degree, and nine counts of sexual misconduct. R. at 6, 47. To avoid bringing further harm to B.B. or her family, she pleaded guilty to one count of each charge and received a sentence of ten to twenty years in prison. *Guldoon v. Lackawanna Bd. of Parole* (*Guldoon I*), 999 F.3d 1, 2 (M.D. Lack. 2019); R. at 2. While she was in prison, Mrs. Guldoon received diagnosis and

treatment for her bipolar disorder from a psychiatrist, who determined that her relationship with B.B. likely arose during a manic episode. R. at 13. Since she began treatment, Mrs. Guldoon has not had any manic episodes and completed a Master's Degree in Computer Programming online while in custody. R. at 13-14.

In 2015, the Lackawanna State Legislature passed the Registration of Sex Offenders Act (ROSA). R. at 19. Under ROSA, former sex offenders must register with local law enforcement agencies, regardless of when their crimes were committed or whether they have served their prison sentences. R. at 25-26. The law "prohibits certain dangerous convicted sex offenders from using the internet to access . . . a commercial social networking website;" prevents Level Two and Three offenders from operating motor vehicles; and mandates that offenders of minor victims "refrain from knowingly entering into or upon any school grounds." R. at 21, 45-46. As applied in ROSA, the phrase "commercial social networking website" means "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." R. at 46. The statutory regime operates on a tiered classification system of Level One (low risk of recidivism), Level Two (moderate risk of recidivism), and Level Three (high risk of recidivism) Offenders, which are classifications imposed by a court proceeding based on a registrant's predicate offenses. R. at 32. Level Two and Three Offenders must register for life. R. at 35.

Mrs. Guldoon was released from prison in 2017, to carry out the remainder of her sentence on parole. R. at 8-10. Although her presentence report provided that Mrs. Guldoon would be subject to general conditions of parole, upon release she was also required to comply with special conditions under ROSA. R. at 7-9. She was designated a Level Two Sex Offender because her victim was a minor. ROSA restricted Mrs. Guldoon from traveling within 1,000 feet

of any school grounds and accessing commercial social networking websites. She was also forced to surrender her driver's license in accordance with ROSA's driving ban. R. at 9-10.

To comply with her parole conditions and ROSA, Mrs. Guldoon has sacrificed many basic freedoms. The only suitable employment Mrs. Guldoon was able to find because of ROSA's limitations was a night job at a pierogi plant, three miles from her family's home. However, the house, where Mrs. Guldoon lived prior to her conviction, is within three miles of an elementary school and a high school. Thus, to comply with ROSA she is forced to ride a bicycle on a circuitous twenty-mile route along a busy highway to work at night. R. at 12-17.

Before she went to prison, Mrs. Guldoon's chosen profession involved teaching people how to use computers and she completed an additional degree while in prison with an aim to continue teaching after her release. R. at 11, 13. Yet due to the blanket ban on "commercial social networking websites," Mrs. Guldoon has no home Internet and cannot use websites like LinkedIn to find a job related to her degrees. R. at 16-17. Not only is she negatively affected by this Internet ban, but also her family is similarly affected: her daughter cannot use the Internet to do school projects at home and her husband, who needs to be available to his employer, must use a phone that cannot access the Internet. *Id.*

Based on these draconian restrictions, Mrs. Guldoon filed a civil action against the Lackawanna Board of Parole (Board) pursuant to 42 U.S.C. § 1983. Mrs. Guldoon claimed that ROSA violated her constitutional rights under the First and Fourteenth Amendments, including her rights to free speech, freedom of travel, and substantive due process. R. at 3-4. She also claimed that ROSA violated the United States Constitution's Ex Post Facto Clause. R. at 4. The district court granted the Board's motion for summary judgment, finding that Mrs. Guldoon "ha[d] no protected liberty interest to be free from the special conditions of her parole" imposed

by ROSA, and thus had "failed to state facts sufficient to prove her claims." *Guldoon I*, 999 F. Supp. 3d at 6. The Thirteenth Circuit Court of Appeals affirmed, over dissent from Circuit Judge Dawn Skopinski, who reasoned that the majority "ignore[d] the clear language of the Constitution, and our own precedent, to uphold a law that is facially overbroad and violative of the *Ex Post Facto* Clause." *Guldoon v. Lackawanna Board of Parole* (*Guldoon II*), 999 F.3d 1, 1 (13th Cir. 2019). This Court granted certiorari to determine whether ROSA violated Mrs. Guldoon's First and Fourteenth Amendment rights and the prohibition against ex post facto laws. *Guldoon v. Lackawanna Board of Parole*, 999 U.S. 1, 1 (2019).

ARGUMENT

I. THE SPECIAL CONDITIONS OF PAROLE REQUIRED BY LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT AND IMPOSED MRS. GULDOON ARE UNCONSTITUTIONALLY VAGUE AND CONSTITUTE VIOLATIONS OF HER RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS THROUGH THE DUE PROCESS CLAUSE.

Parolee Rights Generally

Parolees are not without constitutional rights and protections; nonetheless, they are still considered to be in legal custody. *United States ex rel Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970); *Robinson v. N.Y. State*, 2010 U.S. Dist. LEXIS 144553 at *10 (N.D.N.Y. 2010). The purpose of parole is to allow parolees to become valuable members of society while alleviating the financial burden that housing an individual in prison imposes on society. *Robinson,* 2010 U.S. Dist. LEXIS 144553 at *10. Special conditions imposed on parolees are necessary to meet the public interest and the goals of rehabilitation and deterrence. *Morrissey v. Brewer*, 408 U.S. 471, 496 (1972); *Robinson,* 2010 U.S. Dist. LEXIS 144553 at *11. Yet parole conditions must be "reasonably related to the circumstances of the offense, and the history and characteristics of the parolee so the purpose of the sentencing includes the appropriate means for

deterrence." *United States v. Reeves*, 591 F.3d 77, 80 n.1 (2d Cir. 2010) The conditions imposed on the parolee are "reasonably related" to the statute if they are designed in the light of the crime and "narrowly tailored to serve a compelling government interest." *Reeves*, 591 F.3d at 82-83; *United States v. Pablo Hernandez*, 209 F. Supp. 3d 542, 545 (E.D.N.Y. 2016). Society has a heightened interest in treating each parolee with basic fairness to help successfully reintegrate them into society. *Morrissey*, 408 U.S. at 484.

A. The Condition Placed Mrs. Guldoon Banning Access To Internet Is Unconstitutional And Not Narrowly Tailored To Allow Successful Reintegration Into Society.

Although a parolee's First Amendment rights are circumscribed, the "Government may not suppress lawful speech as the means to suppress unlawful speech." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); *United States v. Lombardo*, 546 F. App'x 49, 51 (2d Cir. 2013). A prohibition on access to all social media is equivalent to prohibiting the user from engaging in legitimate use of First Amendment rights. *Packingham*, 137 S. Ct. at 1738. "A fundamental principle of the First Amendment is that all persons have access to places where they can speak, and listen, and then after reflection, speak and listen once more." *Id.* at 1735 (declaring intermediate scrutiny as the appropriate standard to review statues that are content neutral). Speech and reflection take form in various ways, and First Amendment ideals remain essential to engage in new views, protests, and gatherings, or simply to learn or inquire. *Id*. The Internet affords people the chance to exercise their right to freedom of speech nearly anywhere and anytime. *Id*. Social media in particular has quickly become one of the most significant places for people to exchange their thoughts and speak their minds. *Id*. at 1736.

When the government sets a limitation, it must not marginalize the human spirit and mind in a way that is inconsistent with a functioning society. *Pablo Hernandez*, 209 F. Supp. 3d at 545 (vacating a condition banning parolee's possession of adult pornography because the offense did

not involve computers or the Internet).“Today, the Internet plays an essential role in the daily lives of most people—in how they communicate, access news, purchase goods, seek employment, perform their jobs, enjoy entertainment, and function in countless other ways.” *J.I. v. New Jersey State Parole Bd.*, 155 A.3d 1008, 1012 (N.J. 2017) (recognizing that, a “blanket ban” on Internet use is unconstitutionally overbroad without a nexus to the crime committed or evidence that the parolee is likely to use the Internet to continue illegal activities); *United States v. Voelker*, 489 F.3d 139, 143, 147 n.8 (3d Cir. 2007) (stating that computers and Internet access are indispensable in the modern world, and a lifetime ban on computer and Internet usage with no exception for employment or education constitutes a severe deprivation of liberty).

The Supreme Court recently held that registered sex offenders cannot be habitually barred from social media even where the ban *only* extends to websites that can be accessed by minors. *Packingham*, 137 S. Ct. at 1737. A condition imposed by North Carolina’s sex offender registry barred sex offenders from gaining access to commercial social networking sites. *Id*. Seven out of ten American adults use *at minimum* one social networking platform; these platforms have become today’s equivalent of the “town square.” *Id*. at 1735 (emphasis added). The concurrence in *Packingham* conceded that even though a social media ban is designed to serve a compelling state interest, it may not substantially burden more speech than necessary. *Id.* at 1740 (Alito, J., concurring). The Court found the North Carolina statute’s definition of “commercial social networking” platform was too broad and failed to recognize additional uses and benefits of the Internet. *Id*. at 1740-43 (concluding that restraining a parolee from using webpages that allowed back-and-forth comments between users, including websites that are “unlikely to facilitate the commission of a sex crime against a child,” was unconstitutional).

A federal district court followed the reasoning in *Packingham* to find a standard condition prohibiting parolees from accessing the Internet or owning an Internet-capable device unconstitutional. *Yunus v. Robinson,* No. 17-cv-5839, 2018 WL 3455408, at *30-31 (S.D.N.Y. June 29, 2018). The state failed to link any of the defendant's crimes to the Internet and could not prove that he posed any of the risks that motivated the legislature to create the social media ban, a condition routinely imposed upon registrants regardless of their specific crimes. *Id*. at *33. *Yunus* recognized that prohibitions on Internet and Internet-capable devices violated the defendant's First Amendment rights because the state offered only the defendant's status as a sex offender, and nothing else, to rationalize the restrictions. *Id*.

Mrs. Guldoon admittedly made a grievous mistake and has since been paying her debt to society. R. at 11, 13. ROSA's Internet and Internet-capable device ban effectively makes Mrs. Guldoon an outcast of the modern world, because most people rely on the Internet for daily tasks and information. *J.I.*, 155 A.3d at 1012. ROSA's requirements contradict its legislative purpose: it states that each parolee should be reintegrated into society, yet deprives parolees of the means to achieve that goal. Mrs. Guldoon has been deprived of her First Amendment right to take part in and listen to those at the modern-day town square, preventing her from entirely reintegrating into society. *See generally Packingham*, 137 S. Ct. at 1735.

Similar to *Yunus* the Lackawanna legislature set a "blanket ban" of the Internet on all Level Two and Three Sex Offenders, regardless of whether the registrant used the Internet or social media websites in the commission of their crimes. R. at 25, 26. ROSA prohibits the use of a "commercial social networking website" that permits persons under eighteen, for purposes of establishing a relationship, to create personal profiles, engage in real time communication with other users including adult users who are over the age of eighteen. R. at 25. The severity of this

blanket ban most intensely affected Mrs. Guldoon while she was searching for jobs she might have been qualified for. R. at. 15. The purpose of employment websites such as LinkedIn, Indeed, Monster, or Career-Builder are undeniably to "establish personal relationships with other users," and these relationships are expected to turn into job prospects and jobs. LINKEDIN, https://about.linkedin.com (last visited Mar. 9, 2019). The nature of these websites falls directly within the over-inclusive language of the statute, and impedes Mrs. Guldoon from becoming a productive member of society. R. at 25.

Additionally, ROSA adversely affects the entire Guldoon family because the broad definition of "commercial social networking website" led Mrs. Guldoon to believe that she could not access any part of the Internet. R. at 15. To avoid violating her parole, the Guldoons do not have WiFi in their home. R. at 17. Thus, Mrs. Guldoon's husband, who must always be available to his employer by telephone, text, and email, cannot use an Internet-capable cell phone or a computer, impeding his ability to perform his job and provide for his family. *See id.* Mrs. Guldoon's daughter is also negatively impacted by this ban, because she cannot access the Internet to complete homework projects or purchase online textbooks. *Id.*

The purpose of this legislation is to deter parolees from recidivism. R. at 19. For this legislation to stand, it must be narrowly tailored to the crime committed and the past characteristics of the parolee. *See Voelker*, 489 F.3d at 147 n.8. Comparable to *Yunus,* Respondent fails to show either of these elements in Mrs. Guldoon's situation. R. at. 17. Mrs. Guldoon did not use the Internet or social media websites to commit the offense, and ROSA is not narrowly tailored as it imposes punitive results that affect her employment opportunities. R. at. 17. When she committed the offense, Mrs. Guldoon was having a manic episode caused by her undiagnosed bipolar disorder; she is now medicated and unlikely to recidivate. R. at 13.

On a wider scale, the broad language of ROSA leaves one to wonder how Level Two or Three Sex Offenders could find jobs that meet their needs if they are subjected to such limited avenues of employment. *Yunus,* 2018 WL 3455408, at *33. Today, many jobs are found online, and many parolees have lives they must resume and tend to; in order for parolees to become functioning members of society, registrants should be allowed access to these types of websites to meet the legislative goals. *See J.I.*, 155 A.3d at 1012. For ROSA to serve its legislative purpose and successfully rehabilitate parolees, the legislature must include more narrowly tailored guidelines for registrants to follow so they are not cut off from society. *See Packingham*, 137 S. Ct. at 1740 (Alito, J., concurring). As the law stands now it leaves Mrs. Guldoon condemned to the outskirts of civilization with a scarlet letter branded on her chest. *See generally* Nathaniel Hawthorne, *The Scarlet Letter* (Leland S. Person, ed., W.W. Norton & Co. 2017) (1850).

B. ROSA's Restrictions Revoking Mrs. Guldoon's Driver's License And Preventing Her From Traveling Within 1,000 Feet Of School Grounds Violate Her Fundamental Right To Travel Under The Due Process Clause.

"The Due Process Clause of the Fourteenth Amendment applies when government action deprives a person of liberty." *Pelland v. Rhode Island*, 317 F. Supp. 2d 86, 86 (D.R.I. 2004). The constitutional purpose of due process is to protect an essential interest in which an individual has a claim. *Pelland*, 317 F. Supp. 2d at 92 (stating that to stake a claim in a constitutional right the parolee must have more than a mere desire, she must have a legitimate claim to the right); *Robinson,* 2010 U.S. Dist. LEXIS 144553 at *20. The assessment that determines whether an individual is afforded procedural protection hinges on the extent that she will be "condemned to suffer a grievous loss." *Id.* at *20. To determine what a grievous loss encompasses, the Court must decide whether the loss falls within the "liberty or property" language of the Fourteenth

Amendment. *Id.* Once that determination is made, the Court should analyze the nature of the government function involved and the private interest affected by the government's intrusion. *Id*. The condition imposed must be reasonably related to the parolee's criminal history and the state's interests. *Id.*

Additionally, due process requires that the conditions of parole be sufficiently clear so that a person of regular intelligence will understand and know exactly what she may or may not do. *United States v. Loy*, 237 F.3d 251, 254 (3d Cir. 2001) **(**holding that a general ban on pornography was unconstitutionally vague because it failed to provide clear guidelines for the parolee or parole officer); *United States v. Green*, 618 F.3d 120, 122 (2d Cir. 2010). Because rehabilitation and integration into society are key objectives of parole, it is imperative that the legislature alter Mrs. Guldoon's special conditions of parole to protect her life and liberty and allow her to successfully pay her debt to society.

The major difference between a parolee and a citizen are the conditions imposed on a parolee, but a "parolee retains basic constitutional protection against arbitrary and oppressive official action." *In re Taylor*, 343 P.3d 867, 879 (Cal. 2015). Therefore, rational basis scrutiny is the appropriate test for determining a constitutional violation of a parolee's right to travel. *Robinson,* 2010 U.S. Dist. LEXIS 144553 at *23; *Williams v. Dep't of Corr. & Cmty. Supervision*, 979 N.Y.S.2d 489, 504 (Sup. Ct. 2014). Under the rational basis test, the goal of the statute must be rationally related to the crime and narrowly tailored to the parolee's criminal history and likelihood of recurrence. *Robinson,* 2010 U.S. Dist. LEXIS 144553 at *23; *Williams*, 979 N.Y.S.2d at 504.

1. Revocation of Driver's License

The Second Circuit Court of Appeals has recognized that there is a protectable constitutional right to *intrastate* travel as well as interstate travel. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 100 (2d Cir. 2009) (quoting *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir.1971) (recognizing it would be pointless to accept a fundamental right to interstate travel, and ignore the correlation of a constitutional right to travel within a state)); *People v. Smith*, 152 Cal. App. 4th 1245, 1251 (2007). The Constitution protects a fundamental right to travel within the United States, which has been recognized as the "right to free movement." *Selevan*, 584 F.3d at 99. A state law implicates the right to travel when the law's primary objective is to impede or deter travel, or when the law uses any classification that permits penalties to that right. *Id*. at 100 (alleging a New York tolling scheme violated rights to travel under the Equal Protection Clause, and Privileges and Immunities Clause of the Fourteenth Amendment). The right to travel is a decision based on the totality of the parolee's circumstances, and many of the controlling factors are subjective. *Rizzo v. Terenzi*, 619 F. Supp. 1186, 1191 n.5 (E.D.N.Y. 1985) (denying a parolee the right to interstate travel because she failed to exhaust all appropriate avenues for relief before filing an action). The decision to travel is largely subjective because it is, and should be based in part, on an evaluation of what will best contribute the parolee's rehabilitation and reintegration. *Id.*

Mrs. Guldoon is confined by parole conditions that prohibit her from living a somewhat-normal life. In the efforts to follow her parole conditions, she has not only taken a job that is irrelevant to her education, but also to get to her current job she must place herself in danger each night to traverse a dangerous twenty-mile route on her bicycle. R. at 16. A parolee's life is said to look more like that of a citizen than a prisoner; however, because Mrs. Guldoon has been

branded an outcast, she is living as a prisoner outside the prison walls. R. at 16. She is faced each evening with a choice to place her life in danger or to lose the only job she could attain because of the restrictions imposed upon her. R. at 16.

The purpose of ROSA is to prevent recidivism and to help parolees reintegrate as beneficial members into society. R. at 19. Mrs. Guldoon is a wife and a mother, she has a family that depends not only on her ability to travel to work and help provide, but also to stay alive so that she may continue to be a productive member of society. The right to travel is implicated when the law deters, impedes, or penalizes an individual to exercise that right. *Selevan*, 584 F.3d at 100. The mandated suspension of Mrs. Guldoon's driver's license has done exactly that: it deters, impedes, and penalizes her from efficiently reintegrating into society by prohibiting her to drive to her job safely. R. at 16. The condition imposed on Mrs. Guldoon is more than a minor burden as classified in *Selevan* because she is being denied the fundamental right to travel. R. at 16; *Selevan*, 584 F.3d at 101. *But see Rizzo*, 619 F.Supp. at 1189 (distinguishable because there the parolee had an opportunity to travel *with permission* from her parole officer) (emphasis added).

Here, Mrs. Guldoon was not afforded the opportunity to ask permission to travel, instead her license was taken with no consideration for her circumstances. R. at 23; *see Rizzo*, 619 F. Supp. At 1189 n.5. It is undisputed that Mrs. Guldoon used her car to transport B.B. to her home; however, a complete restriction on her right to drive is inconsistent with the legislative purpose. R. at 23; *Guldoon I*, 999 F. Supp. 3d at 1. In light of the circumstances, Mrs. Guldoon should be allowed to drive to work. This can be accomplished by amending the conditional rights imposed on Mrs. Guldoon: instead of revoking her driver's license completely, Respondent may place a tracking device on Mrs. Guldoon's vehicle. *See People v. Zichwic,* 94 Cal. App. 4th 944, 951,

1114 (2001) (holding that, due to a parolee's diminished expectation of privacy, placing a GPS tracking device on the parolee's vehicle pursuant to a properly imposed warrantless search condition constitutes a reasonable search under the Fourth Amendment). This amendment would meet the legislative purpose while still limiting Mrs. Guldoon's liberty consistent with the limited rights of parolees.

2. School Grounds Prohibition

The *Yunus* court ruled on a provision prohibiting sex offender parolees from "*knowingly* entering into or upon school grounds," including primary care or publicly accessed areas within 1,000 feet of where a person under the age of eighteen may be present. *Yunus*, 2018 WL 3455408, at *26. The *Yunus* court determined this vague statutory construction would put a parolee in violation of the condition just by traveling *near* schools. *Id*. (discussing that the terms of this statute and definition would put the defendant at risk of violating the condition just by working, shopping, or even walking down a street that has a known school within 1,000 feet of his route). This broad condition triggers the risk that a parolee of regular intelligence will be unable to distinguish what conduct is allowed from conduct that constitutes a violation of parole. *Id*. Following the rules of statutory construction, when the court is faced with a constitutional issue, it does not give the court the authority to rewrite the statute as it pleases, but instead permits the court to choose between two *plausible* interpretations of the statutory text. *Id.* at 28 (emphasis provided). Due to the "unmistakably broad language" of the provision, the *Yunus* court interpreted it as nothing more than a residency restriction in order to avoid absurd expectations, even though the statute did not use the word "reside". *Id.*at 28 n.38 (justifying this determination by acknowledging the absurdity of mandating a parolee to submit his daily route

to his parole officer and asking the parole officer with a large caseload to preauthorize each step a parolee takes).

The Court should hold that the 1,000-foot limitation is unconstitutionally vague so Mrs. Guldoon may live a normal life in accordance with parole standards. The statutory language analyzed by the *Yunus* court is identical to ROSA's language. R. at 45; *Yunus*, 2018 WL 3455408, at *28. ROSA's broad language impedes Mrs. Guldoon from traveling to work using the most direct route. R. at 3, 16, 18. The term "school grounds" includes parked vehicles, parks, stores, restaurants, streets, sidewalks, and parking lots. R. at 45. This leaves Mrs. Guldoon nowhere to go without fear she may violate her parole. *See generally Yunus*, 2018 WL 3455408, at *26. Furthermore, this condition impedes her ability to take her daughter out, or to spend the afternoon with her husband, exploring new places they might like to eat or shop. *Id*. The effects of this condition prohibit her from daily activities that a normal citizen might enjoy, once again branding her with a scarlet letter for all to see. *Id*.

II. THE REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS OF PAROLE REQUIRED BY LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT AND IMPOSED MRS. GULDOON CONSTITUTE VIOLATIONS OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Lackawanna's ROSA Is Retrospective and Contains Onerous Requirements With Which Mrs. Guldoon Must Comply As a Result of Her Conviction.

The Ex Post Facto Clauses in the United States Constitution have been cemented in the American conception of law since before the Founding. *See* U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."); U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any ex post facto Law."). The Clauses prevent both the United States Congress and state legislatures from passing "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v.*

Graham, 450 U.S. 24, 28 (1981) (internal quotations omitted). In *Calder v. Bull*, 3 U.S. 386 (1798), the United States Supreme Court made this point clear by defining four circumstances in which a law is considered ex post facto, including "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.* at 390. The purposes behind the clauses are unimpeachable: to ensure that laws provide fair warning to people of the effects of breaking the laws and permit them to rely on the meaning of the laws until they are explicitly changed; and to "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver*, 450 U.S. at 28-29 (citing *Dobbert v. Florida*, 432 U.S. 282, 298 (1977); *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915); *Kring v. Missouri*, 107 U.S. 221, 229 (1883)).

In modern ex post facto analysis, the critical elements used to establish a violation are a criminal statute's retrospectivity and its detrimental effect on the accused. *See Weaver*, 450 U.S. at 29; *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Calder*, 3 U.S. at 390. Although "[e]very law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective," only laws that create new punishments or increase already-operative punishments are ex post facto. *Calder*, 3 U.S. at 391. A retrospective law has a detrimental effect on the accused if the new law is more onerous than the old one. *See Weaver*, 450 U.S. at 30. Yet a law that does not "alter substantial personal rights, but merely changes modes of procedure which do not affect matters of substance" does not fall within the ex post facto prohibition. *Miller v. Florida*, 482 U.S. 423, 430 (1987).

Here, ROSA was not passed until 2015, after Mrs. Guldoon had been convicted and served time in prison. *See* R. at 19. ROSA applies to her for an offense she committed seven years before the law was passed, meaning that the law is retrospective as applied to her. *Calder*,

3 U.S. at 390. Forcing her to comply with ROSA does not "merely change[] modes of procedure" in connection with her personal life and livelihood. R. at 11-15; *Miller*, 482 U.S. at 430. ROSA imposes onerous requirements on Mrs. Guldoon, placing it squarely within the constitutional prohibition. *See Weaver*, 450 U.S. at 30.

B. An Ex Post Facto Analysis Under *Smith v. Doe* Indicates Lackawanna's ROSA Has the Effect of Punishing Registrants.

In determining whether sex offender registries violate the Ex Post Facto Clauses, the analysis must go beyond the traditional questions of retrospectivity and detrimental effects. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). Courts must determine whether the registry requirements are regulatory or punitive in nature, based on the context of the law. *See id.*; *see also Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997). If the legislature intended a statutory scheme to punish, the ex post facto inquiry ends. *Smith* 538 U.S. at 92. "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, [the court] must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil." *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). Courts give great deference to legislative intent, so "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

In *Smith v. Doe*, the Supreme Court considered the constitutionality of first-generation sex offender registries. First, the Court examined legislative intent, observing the Alaska legislature had found that "sex offenders pose a high risk of reoffending, and identified protecting the public from sex offenders as the primary governmental interest of the law." *Id.* at 93 (internal quotations omitted). Second, the Court stated that "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it

establishes, are probative of legislative intent," but these factors are not dispositive. *Id.* at 94. As applied to Alaska's registry, this factor was not dispositive because the registry was codified in both criminal and civil codes, and "aside from the duty to register, the statute itself mandates no procedures." *Id.* at 96.

In its analysis of the registry's effects upon the respondents, the *Smith* Court adopted the factors used in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), to assess the effects of Alaska's sex offender registry. *See Smith*, 538 U.S. at 97. *Mendoza-Martinez* used seven factors to decide a double jeopardy issue, but the *Smith* Court determined only five factors were relevant to an ex post facto analysis of sex offender registries: "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id.* After analyzing Alaska's registry, the majority concluded that the registry was a "civil regulatory scheme," and thus did not violate the Ex Post Facto Clause. *Id.* at 105.

1. Traditional and Historical Punishments

Although the *Smith* Court rejected the comparison of sex offender registries to historical punishments like shaming or banishment, lower courts have used the comparison to weigh against a finding that the registries are nonpunitive in effect. *See Doe v. Snyder*, 834 F.3d 696, 701 (6th Cir. 2016). Historically, sex offenders were not forced to register. *See Smith*, 538 U.S. at 97. Yet the dissemination of personal information such as names and addresses resembles the historical punishment of shaming, *see Wallace v. State*, 905 N.E.2d 371, 380 (Ind. 2017), and the registration provisions often resemble supervised release or parole requirements. *See Doe v. State*, 189 P.3d 999, 1012 (Alaska 2008).

Mrs. Guldoon is essentially forced to live on the outskirts of society. She travels by bicycle to her night job on highways that take her twenty miles out of her way so that she can comply with the mandate to avoid knowingly entering school grounds. R. at 9, 15. Moreover, because her degree is in computer programming, she is doubly barred by ROSA's requirements from seeking work in that field: she cannot access the Internet to reach out to potential employers who need her technology skills, and she cannot teach students below the age of eighteen, a group which encompasses preschoolers to college freshmen. *Id.* She has, essentially, been branded with a scarlet letter that prevents her from working in her chosen profession. R. at 15; *see Starkley v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1025 (Okla. 2013); *see also* Nathaniel Hawthorne, *The Scarlet Letter* (Leland S. Person, ed., W.W. Norton & Co. 2017) (1850). Furthermore, Mrs. Guldoon has been classified as a "Level II Offender" because of her crime, without an individualized assessment of her recidivism risk. *See Snyder*, 834 F.3d at 698. *Contra Hendricks*, 521 U.S. at 357-58 (holding that individualized assessment of high-risk offenders was appropriate because of the restraint's magnitude). The relegation of registrants to the fringes of society resembles historical punishments that are now considered taboo, such as casting lepers from the community. *See Leviticus*, 13:45-46.

2. Affirmative Disabilities and Restraints

The affirmative disabilities and restraints imposed by ROSA are numerous. Courts have held that in-person reporting requirements impose an affirmative restraint upon registrants because they must comply with this requirement several times per year, depending upon their classification under the regulatory scheme. *See Millard v. Rankin*, 265 F. Supp. 3d 1211, 1229 (D. Colo. 2017). Moreover, the restrictions that flow from the requirement not to come within a certain radius of any school operate to effectively bar registrants from certain jobs that might

occur at or near schools, and to prevent them from living in safe housing. *See Snyder*, 834 F.3d at 702 (employing a map of school districts in Grand Rapids, Michigan, to demonstrate that registrants "are forced to tailor much of their lives around school zones").

Mrs. Guldoon experiences many of these restraints, as her ROSA classification requires her to register for life, well beyond the parameters of her five-year parole term. R. at 35. She cannot enter school zones, either to travel to work or to participate in activities with her elementary school-aged daughter without express permission from her parole officer. R. at 17, 45; *see also Snyder* 834 F.3d at 697. Additionally, the Lackawanna registry goes further by requiring Mrs. Guldoon to surrender her driver's license, thereby restricting where she can work and travel. R. at 18. The draconian restraints also reach her family, who do not have Internet access at home, since Mrs. Guldoon's Internet use is so restricted. R. at 17. Thus, this factor supports a finding that ROSA imposes affirmative disabilities and restraints upon Mrs. Guldoon.

3. Promoting the Traditional Aims of Punishment

ROSA promotes the traditional aims of punishment: "incapacitation, retribution, and specific and general deterrence." *Snyder*, 834 F.3d at 704. The *Smith* Court centered its short analysis of this factor on deterrence and retribution, concluding that the registry "might deter future crimes," but was not retributive because it was "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith*, 538 U.S. at 102. Courts give this factor little weight, but the *Snyder* court noted that the Michigan registry's professed purpose to deter recidivism was not actualized. *Snyder*, 834 F.3d at 704 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011)).

ROSA promotes the traditional aims of punishment. It incapacitates registrants by suspending driver's licenses and restricting Internet access by broadly defining "commercial social networking websites." R. at 46. It seeks retribution against people who committed sex offenses both before *and* after ROSA took effect by requiring everyone convicted of a sex offense to register, no matter how long the former offender has been out of prison or how long the offender has gone without recidivating. R. at 33. It implicitly deters Lackawanna citizens from committing sex offenses, but bases registration on a past crime, not an individual's future dangerousness. R. at 39-40. As the *Millard* court observed, it "strains credulity to suppose that [ROSA's] deterrent effect is not substantial, or that [ROSA] does not promote community condemnation of the offender, both of which are included in the traditional aims of punishment." *Millard*, 265 F. Supp. 3d at 1230 (quoting *Doe v. State*, 189 P.3d at 1094). Thus, although this factor carries little weight, the evidence weighs in favor of Mrs. Guldoon.

4. Rational Connection to a Nonpunitive Purpose

A civil regulatory regime's rational connection to a nonpunitive purpose is a "most significant factor in [the Court's] determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102. Nationwide, legislatures enact sex offender registries with the purposes of reducing recidivism and promoting "public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* at 103. The *Smith* Court held that the Alaska first-generation registry had a rational connection to its nonpunitive purpose, but over the years, second-generation registries have strayed from their originally nonpunitive purposes. *Id.*; *see Snyder*, 834 F.3d at 704-05 (noting the "significant doubt cast by recent empirical studies on the pronouncement in *Smith* that 'the risk of recidivism in sex offenders is frightening and high") (internal quotations omitted). When courts consider this factor and when legislatures pass tighter

registry restrictions, they accept the assertion that recidivism in sex offenders is "frightening and high" without considering updated empirical data. *See generally McKune v. Lile*, 536 U.S. 24, 34 (2002); *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) (accepting the assertion without consulting other sources).

With respect to Mrs. Guldoon, ROSA's restrictions do not have a rational connection to a nonpunitive purpose. Mrs. Guldoon is being treated for her bipolar disorder and has a low recidivism risk. R. at 13. Yet her classification as a "Level II Offender" based on a sex offense against a minor victim does not reflect her current reality. *Id.* ROSA's excessive regulations will not decrease her risk of recidivism; her medication will and currently does. The Old Cheektowaga community is not unsafe by the mere fact of Mrs. Guldoon's residency there. ROSA has no rational connection to a nonpunitive purpose when applied to Mrs. Guldoon.

5. Excessiveness With Respect to a Nonpunitive Purpose

Courts accord legislatures great deference, so an excessiveness analysis is based on "whether the regulatory means are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. When enacting a regulatory scheme, a legislature does not have to perfectly tailor the law to fit the objective, but a nonpunitive objective "will not serve to render a *statute* so broad and sweeping as to be nonpunitive." *Starkley*, 305 P.3d at 1029 (emphasis added). In her *Smith* dissent, Justice Ruth Bader Ginsburg noted that Alaska's offense-based classification system made "no provision whatever for the possibility of rehabilitation," and was excessive with respect to the nonpunitive purpose. *Smith*, 538 U.S. at 117.

Here, ROSA was enacted with a legitimate purpose of protecting the public. Yet the requirements it imposes upon Mrs. Guldoon and other offenders are based on past crimes, not future dangerousness, and do not contemplate the possibility of rehabilitation. *See* R. at 19-21;

Smith, 538 U.S. at 117. As applied to Mrs. Guldoon, the sweeping language of the social media website restriction does not fit the reason she is required to register, because she did not use social media to commit her crimes. *See Guldoon I*, 999 F. Supp. 3d at 1. She was a teacher, but she can no longer enter school zones or access the Internet, rendering her degrees useless and hindering her ability to search for a new job. R. at 16-17. Furthermore, because she cannot drive, her only form of transportation is her bicycle, which she is forced to ride on the interstate to get to work, creating a safety hazard for both her and drivers on the road. *Id.* These consequences are adverse to other legislative policies with respect to former offenders, including reducing recidivism, as the impediments on a former offender's ability to find and maintain a job could increase recidivism. *See Snyder*, 834 F.3d at 705-06.

C. Second-Generation Sex Offender Registries Have Been Struck Down Under Ex Post Facto Analysis As Scientific Literature Indicates the Nonpunitive Legislative Purpose Has Little or No Rational Connection to the Regulatory Regime.

In recent years, courts have questioned the traditional analysis of sex offender registries under *Smith v. Doe*. *See Snyder*, 834 F.3d 696; *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Millard*, 265 F. Supp. 3d 1211. One such case is *Doe v. Snyder*, in which the Sixth Circuit Court of Appeals held that the Michigan sex offender registry was unconstitutional when applied retroactively to sex offenders who had been convicted prior to the amendments. *See Snyder*, 834 F.3d at 706. Describing the Michigan registry's growth into "a byzantine code governing in minute detail the lives of the state's sex offenders, the Sixth Circuit used the *Smith* factors to conclude the registry was punitive in effect, and thus constituted ex post facto punishment. *Id.* at 697.

Courts more frequently use updated data about the risk of recidivism in former sex offenders to conclude that parts of state sex offender registries are unconstitutional. *See* Joshua

E. Montgomery, Comment, *Fixing a Non-Existent Problem with an Ineffective Solution:* Doe v. Snyder *and Michigan's Punitive Sex Offender Registration and Notification Laws*, 51 Akron L. Rev. 537 (2017). Sex offender registries were first created in the 1990s to correct the perceived problem of sex offender recidivism and to "further the primary governmental interest of protecting vulnerable populations and in some instances the public from potential harm." *See* R. at 19; *see also* Sex Offender Registration Act, 1995 N.Y. Laws ch. 192, § 1.

Recently, courts have concluded that empirical data does not support the *Smith* Court's statement that "the risk of recidivism posed by sex offenders is frightening and high." *Snyder*, 834 F.3d at 704 (quoting *Smith*, 538 U.S. at 103). Research from 2003 indicates a 46% recidivism rate for rapists and a 41.4% recidivism rate for offenders who committed other sex offenses, which are among the lowest recidivism rates as compared to other crimes. *See* Bureau of Justice Statistics, *Recidivism Rates of Prisoners Released In 1994* 1 (2003). Other research shows only a 5.3% recidivism rate for all sex offenders arrested for a sex crime within three years of release from prison. *See* Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* 24 (2003). *Contra* Ron Langevin, et al., *Lifetime Sex Offender Recidivism: A 25-Year Followup Study*, 46(5) Canadian J. of Crim. Just. 531-52 (2004) (finding that sex offenders recidivate at a rate of 88.3%). Although the research conflicts, the most recent research indicates that the more-punitive conditions in second-generation sex offender registries go beyond merely working to prevent recidivism, and instead either have no impact on reducing recidivism rates or increase the likelihood that former offenders will recidivate. *See* Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. Econ. 207, 208 (2011) (finding "little or no evidence to support the effectiveness of sex offender registries, either in practice or in potential").

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks the Supreme Court of the United States to reverse the judgment of the Thirteenth Circuit Court of Appeals in denying Petitioner's claims of violation of her rights under the First and Fourteenth Amendments and the Ex Post Facto Clause by the Lackawanna Board of Parole.

Team 3

Team 3, Attorneys for Petitioner