IN THE
SUPREME COURT
OF THE UNITED STATES

Mary Guldoon
Petitioner,

v.

State of Lackawanna Board of Parole
Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 31

Table of Contents

Table of Authorities

UNITED STATES SUPREME COURT CASES

FEDERAL COURT OF APPEALS CASES

STATE SUPREME COURT CASES

STATE APPELLATE COURT CASES

STATUTES

AMERICAN JURISPRUDENCE

TREATISES

THE UNITED STATES FEDERAL CONSTITUTION

Questions Presented

I. 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 of the United States Constitution.

II. 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.

Introduction

The Petitioner asks the Supreme Court of the United States to reverse and remand the Thirteenth Circuit's decision to affirm the District Court's determination with instructions. A declaratory judgment, declaring ROSA's provisions unconstitutional, and preliminary injunction, stopping enforcement of the unconstitutional provisions, is necessary here to prevent Petitioner from irreparable harm from First Amendment, Fourteenth Amendment, and *ex post facto* Federal Constitutional violations. Petitioner asks the court to review the issues presented here *de novo*.

Statement of Facts

Mary Guldoon was born and raised in Old Cheektowaga, Lackawanna, and currently resides there with her family. Guldoon Aff. ¶ 3. Mary accomplished her dream of becoming a teacher in 2008 when she was hired at her *alma mater*. *Id.* at ¶ 4. In April 2010, after giving birth to her daughter, Mary's medical issues began; she began suffering from severe postpartum depression. *Id.* at ¶¶ 5-6. While Mary was prescribed Prozac, the medication failed to combat her depression successfully. *Id.* at ¶¶ 7-8.

Mary was forced to return to work in September 2010, and that is when she met B.B, a student in her class. *Id.* at ¶¶ 8-9. B.B. came from a troubled home and confided in Mary about his struggles, specifically about his abusive parents. *Id.* at ¶¶ 11-12. Mary's emotions began controlling her actions and she and B.B. entered into a physical relationship. *Id.* at ¶¶ 13-14. Mary was arrested and charged for rape, criminal sexual acts, and sexual misconduct. *Id.* at ¶ 15. To protect her family and B.B. from the pain of trial, Mary pled guilty to one count of each charge. *Id.* at ¶16.

While serving her sentence at Tonawanda Correctional Facility in Tonawanda, Mary was diagnosed with bipolar disorder, also known as manic depression. *Id.* at ¶¶ 17-18. This medical disorder caused her recurrent episodes of depression and at least one episode of mania. *Id.* at ¶ 19. Mania is an interval of time when one experiences emotion that can cause inappropriate behavior. One example of that behavior includes hypersexuality. *Id.* at ¶ 20.

Mary met with a psychiatrist during her incarceration who concluded the Prozac had revealed her bipolar disorder. *Id.* at ¶ 21. The doctor further determined the crimes Mary pled guilty to were a direct result of a manic episode that had been triggered by the Prozac. *Id.* at ¶ 22. Since this diagnosis, Mary has been treated with lithium and has not suffered from any additional manic episodes, and has used her time at Tonawanda Correctional to recover. *Id.* at ¶¶ 23-24.

After Mary was already incarcerated, Lackawanna enacted the Registration of Sexual Offenders Act ("ROSA") with the goal of promoting safety in the community. *Id.* at ¶ 25; Registration of Sex Offenders Act ("ROSA"), Pub. L. No. 2016-1 (2016). ROSA implemented new, mandatory conditions to Mary's parole, including having her register as a Level II Sex Offender, surrendering her driver's license, barring her from coming within 1,000 feet of any school, and barring her from accessing any commercial social networking websites. Guldoon

Aff. ¶¶26-27. Prior to ROSA, these conditions would not have been mandatory parole conditions for Mary. *Id.* at ¶ 28.

Once Mary returned home, she struggled to find employment because she is barred from teaching in schools even though her experience is in teaching, and she cannot access commercial social networking websites where employment opportunities are posted (i.e. LinkedIn, Craigslist, and Indeed). *Id.* at ¶¶ 33-34. Mary is not only not able to teach in a school, but cannot even teach in an online setting as those interactions are barred by ROSA. Her professional abilities are now impossible to utilize. *Id.* at ¶ 51. The commercial social networking limitation also negatively impacts Mary's family as it hinders her family from online access. *Id.* at ¶¶ 47-50.

Another mandatory condition of Mary's parole includes surrendering her driver's license, thus making her unable to drive. This also made finding employment difficult because she lives in a rural part of Old Cheektowaga where public transportation is rare, and her husband is unable to drive her during the day. *Id.* at ¶ 35.

The only employment option for Mary was a night shift position with Plewinski's Pierogi Company Plant, which is three miles away from her residence. *Id.* at ¶ 36. This has been burdensome for Mary because ROSA's restrictions prevent her from taking the most direct route as it passes within 1,000 feet of an elementary school (which is prohibited under the mandatory provisions). The second fastest route passes with 1,000 feet of another school and so she is precluded from that option as well. *Id.* at ¶¶ 38-40. The only option left for Mary is traveling twenty miles each way, by bicycle, on a two lane road with a speed limit of sixty-five miles per hour. This is extremely risky as she has already been forced off the road multiple times because of speeding or inattentive drivers. *Id*. at ¶¶ 41-43.

Before ROSA was enacted, some of the the general conditions of her parole would have included writing reports, having her Parole Officer visit without warning at her residence and place of employment, not interacting with individuals she knew to have criminal records, not possessing any firearms, and not possessing or using any drug paraphernalia or controlled substance. R. 8. Also, before ROSA, Mary may have had to surrender her driver's license, but this was not mandatory. *Mary Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1, 9 (M.D. Lack 2019). ROSA's new mandatory conditions have nothing to do with the crimes Mary pled guilty to. Guldoon Aff. ¶ 53. Thus, Mary argues ROSA's mandatory conditions are constitutional violations of the First Amendment, Fourteenth Amendment, and *ex post facto* clause of the Federal Constitution. Compl. ¶¶ 24-27. Accordingly, the unconstitutional provisions should be struck as permitted by the Separability clause as denoted in §168-w of Lackawanna Correction Law. R. 27.

Summary of Argument

ROSA's special conditions of parole violate the Petitioner's First Amendment right to free speech and the Petitioner's Fourteenth Amendment fundamental right to travel. Special conditions of parole implicate fundamental liberty interests based on (1) the nature and circumstances of the offense, and the history and characteristics of the defendant; and (2) the need for the sentence imposed. 18 USCS §3553; *see also United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006). Since the ban on commercial social networking websites is not narrowly tailored to the government's interest, it violates the Petitioner's right of free speech. Similarly, the Fourteenth Amendment right to travel is violated because the condition of supervised release involves a greater deprivation of liberty than is reasonably necessary. *United States v. Smith*, 445 F.3d 713 (3d Cir 2006).

ROSA violates the *ex post facto* clause of the Federal Constitution. There are three elements for an *ex post facto* violation: (1) it must be retroactive in application; (2) it must disadvantage the offender who is affected by the law, and (3) it must deprive the individual of a substantive right and cannot merely be a procedural change. *Weaver v. Graham*, 450 U.S. 24, 25 (1981); *Dobbert v. Florida,* 432 U.S. 282, 284 (1977).

The first element requires the court to utilize the intent-effects test to determine whether a statute makes a punishment for a crime more severe for purposes of the *ex post facto* clause. The intent-effects test includes consideration of seven factors, with no single factor being determinative. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The relevant factors for this inquiry, weigh in favor of the Petitioner. *Id.*

The second and third elements for an *ex post facto* violation also weigh in favor of the Petitioner. The second factor is satisfied because ROSA disadvantages the Petitioner by preventing her from rehabilitating back into society because the new mandatory parole conditions disadvantage Petitioner through increased punishment. *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995). The third factor is satisfied because the changes imposed by ROSA are substantive because the changes alter the quantum of punishment, not merely the method of determining the punishment imposed. *Dobbert*, 432 U.S. at 433-435.

Argument

I. The registration requirements and special conditions of parole required by ROSA violate Petitioner's constitutional rights under the First and Fourteenth Amendments.

ROSA's special conditions implicate the First Amendment and Fourteenth Amendment. The First Amendment prohibits Congress from "abridging the freedom of speech." U.S. Const. amend. I. The First Amendment may be limited only in the event of compelling state interest.

Fed. Election Com. v. Mass Citizens for Life, Inc., 479 U.S. 238 (1986). *Packingham v. North Carolina* demonstrates that parolees enjoy fundamental Constitutional rights such as the First Amendment's right to free speech. *Packingham v. North Carolina, 137* S. Ct. U.S. 1730, 1735 (2017). However, the parolee has a "conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v Brewer*, 408 U.S. 471, 482 (1972); *see also United States v. Polito*, 583 F.2d 48, 54 (2d Cir. 1978). When analyzing First Amendment claims of a parolee, the court is instructed to consider the offense as well as the sentencing goal. Although parole boards have wide latitude to determine conditions, the conditions may not be "arbitrary and capricious" and may not be "impermissibly vague." *Boddie v. Chung*, No. 09 CV 04789, 2011 U.S. Dist. LEXIS 48256 at *1, *5 (E.D.N.Y. 2011); *Farrell v. Burke*, 449 F 3d. 470, 485 (2d Cir. 2006).

Similarly, the Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14 § 1. The Privileges and Immunities Clause of the Fourteenth Amendment establishes a fundamental right to travel. *Selevan v. New York Thruway Authority*, 711 F.3d 253 (2d Cir. 2012). Although the parole board may have a legitimate interest in restricting the parolee's right to travel, the restriction must be reasonable and may "involve no greater deprivation of liberty than is reasonable necessary to achieve the deterrence, public protection, and/or correctional treatment for which it is imposed." *United States v. Smith*, 445 F.3d 713, 717 (3d Cir. 2006); *see also* 59 Am Jur. 2d Pardon and Parole § 94.

During the parolee's release, "the government retains a substantial interest in ensuring that it's rehabilitative goal is not frustrated and that the public is protected from further criminal acts by the parolee." *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972). Parole conditions have

dual purposes of: (1) protecting the community from a parolee reoffending, and (2) affording a parolee the opportunity for rehabilitation. If there is a concern regarding a fundamental liberty, courts must determine if that restriction is narrowly tailored to serve a compelling interest. 59 Am Jur. 2d Pardon and Parole § 94. Parole boards are also prohibited from instituting conditions that are arbitrary or unreasonable. 59 Am Jur. 2d Pardon and Parole § 94 (quoting *Preston v. Piggman*, 496 F.2d 270, 275 (6th Cir. 1974)).

A. The bar on accessing any "commercial social networking website" in ROSA's special conditions of parole violates Petitioner's First Amendment rights.

Access to the internet is a protected First Amendment right, even to parolees. *Packingham v. North Carolina,* 137 S. Ct. 1737 (2017). To determine whether a parolee's fundamental liberty concerns are implicated, 18 U.S.C.S. §3553 Imposition of a Sentence states courts should consider: "(1) the nature and circumstances of the offense and the history and characteristics of the defendant and (2) the need for the sentence imposed." 18 U.S.C.S. §3553; *see also United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006). Conditions of parole may be struck as unconstitutional if they are imposed in an "arbitrary and capricious manner." *Boddie v. Chung*, No. 09 CV 04789, 2011 U.S. Dist. LEXIS 48256 at *1, *5 (E.D.N.Y. May 2, 2011).

The first factor is case specific and allows the court to probe into the history of the defendant as to the likelihood of rehabilitation or risk of reoffending. The second factor requires a public policy analysis. The second factor considers the purpose of sentencing which includes: (1) the seriousness of the offense, (2) the deterrence effect, (3) the protection of the public, (4) and the need to provide the defendant with training or medical care. *United States v. Peterson*, 248 F.3d 79, 82 (2d Cir. 2000). The courts allow parole conditions to impose restrictions as long as those restrictions do not involve a greater deprivation of liberty than is reasonably necessary.

The ban on commercial social networking websites as a condition of parole is a content neutral regulation. A content neutral regulation is one in which the regulations are unrelated to the content of speech. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). As compared to content based regulations, content neutral regulations are subjected to an intermediate level of scrutiny because they pose less of a danger of a constitutional violation. *Id.* at 642. In order for a content neutral regulation to be upheld, the regulation must further a substantial governmental interest. *Id.* The regulation does not need to be the least restrictive means. More specifically, "the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 622.

In a unanimous decision in 2017, the Supreme Court of the United States struck down a statute declaring it a felony for registered sex offenders to "access commercial social networking websites where a sex offender knew the site allowed minor children to become members or to create or maintain a personal webpage." *Packingham v. North Carolina,* 137 S. Ct. 1730, 1731 (2017). The case involved a 21-year-old man who had sexual relations with a 13-year-old girl. *Id*. at 1731. The young man pled guilty, and was required to register as a sex offender while on parole. *Id.* Once released from prison, petitioner was convicted of violating N.C. Gen. Stat. §14-202.5 when he posted on his Facebook profile. *Id.*

The Court in *Packingham* invalidated N.C. Gen. Stat. §14-202.5 as unconstitutional and specifically declared the statute a violation of the First Amendment. *Id.* at 1731. The statute, preventing the plaintiff from accessing the internet, was content neutral, thus was subjected to intermediate scrutiny. *Id.* at 1732. Intermediate scrutiny requires the statute to be "narrowly tailored to serve a significant governmental interest." *Id.* Also, the statute must not "burden substantially more speech than is necessary to further the government's legitimate interest." *Id.*

The Court considered public policy as well as the nature of the offense in their analysis. In paroling individuals, the state's goal is rehabilitation. An outright ban on commercial social networking websites effectively bars access of "principle sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realm of human thought and knowledge." *Id.* at 1732. In preventing a parolee from accessing the internet, the state is banning them from society's most effective and popular communication. In order to successfully rehabilitate, an individual must follow certain steps to reintegrate themselves into society including finding employment, continuing friendships, and staying connected to politics and current events. The State effectively incapacitated a parolee's opportunity to rehabilitate by imposing a ban on the internet. *Id.*

In addition to the Supreme Court of the United States, the Second Circuit Court of Appeals has repeatedly struck down down conditions of parole when the special condition were not related to the nature and circumstances of the offense. The Second Circuit has relied on a case specific analysis to determine the reasonableness of the condition. *United States v. Johnson* illustrated that a deprivation of liberty in the parole conditions was dependent on the nature of the offense and the specific individual. 446 F.3d 272, 277 (2d Cir. 2006). As mentioned in *Pollard v. United States Parole Comm'n*, "in making parole decisions, the Commission is required by statute to consider all available relevant information concerning the prisoner." *Pollard v. United States Parole Comm'n*, No. 16-2918-pr, 2017 U.S. App. LEXIS 9004, at *1, *11 (2d Cir. 2017). Petitioner was a convicted sex offender who had lured young children through the Internet. 446 F.3d at 275 (2d Cir. 2006). The Petitioner was arrested and subsequently convicted after having sex with two minors and on his way to the third minor. *Id.* He was an Aerospace Engineer, and thus a sophisticated computer user, who had the ability to

bypass anything less than a total restriction on his computer. *Id.* at 274. The petitioner was also in denial of his problem, and as a result the courts determined he demonstrated a high risk for reoffending. *Id.* at 282. In upholding his condition of an absolute ban on the internet, the Second Circuit claimed the specific facts of the case warranted a total ban. *Id.* at 283. Any ban that was less restrictive than a total ban put the community at risk. *Id.*

The Supreme Court of the United States and the Second Circuit have consistently ruled special parole conditions must be narrowly tailored to serve a substantial government interest. In *United States v. Sofsky*, the defendant pled guilty to receiving child pornography and, when released, was subjected to a parole condition of a ban on the internet. *United States v. Sofsky*, 287 F. 3d 122 (2d Cir. 2002). When considering the nature of the offense, the Second Circuit ruled that a ban on the internet was unreasonable, and the condition resulted in a greater deprivation of liberty than was reasonably necessary. *Id.* at 127. Although there were concerns that the defendant could use his computer or internet to repeat his offense, the absolute ban was an infringement of his fundamental right of free speech. *Id.* at 126. Similarly, in *United States v. Peterson*, a convicted sex offender's conditions of parole were deemed too broad and restrictive. *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2000). The individual had written bad checks and had a prior conviction on incestuous abuse of his disabled daughter. *Id.* at 79. The court reasoned that "there was no indication that Peterson's past incest offense had any connection to computers or the internet." *Id.* at 79. In addition, the court realized the defendant's employment depended on his use of computers and the ban would deprive him of his ability to secure gainful employment. *Id.*

ROSA's ban on a registered sex offender is not reasonably related to the nature and circumstances of Petitioner's offense. As distinguished from *United States v. Johnson*, Petitioner

should not be restricted from commercial social networking sites because the case facts are diametrically opposite from the sex offender in *Johnson*. Petitioner here is not highly skilled with a computer nor is a computer engineer. She also was not convicted of luring children over the internet. Lastly, Petitioner is not delusional as to her offense as the sex offender in *Johnson* was. Petitioner is currently taking responsibility for her offense. Petitioner sought help for her disorder, was correctly diagnosed in Tonawanda State Correctional Facility, and had received treatment for her diagnosis for years. She has taken an active role in her own rehabilitation.

The offense was also an isolated incident. Unlike *Johnson*, where the sex offender had sex with two minors and was arrested on his way to meet the third child, Petitioner was only involved with one minor. There is no evidence on the record that she was seeking out other children. Also, unlike *Johnson*, there is no testimony or indication by her supervisors that she is attempting to evade responsibility to have sex with a minor again. In fact, Petitioner concedes that she had a problem when she engaged in the conduct and that her inaccurate diagnosis, fueled by Prozac, triggered her mania. She has had no further episodes since the treatment started.

The nature of the special condition needs to be narrowly tailored to the governmental purpose. Petitioner did communicate with the child through text messages and the email system. However, the Second Circuit has never concluded that because communication was facilitated through technology, that the ban is justified. Petitioner did not use her computer or the internet to solicit or lure a young child. Her ability to use the internet is a widely recognized First Amendment right. Petitioner's First Amendment right to free speech may be curtailed if the nature of the condition is narrowly tailored; however, this is not the case here. The circumstances in this case are much different than in *Johnson* where he expressly used computers to lure children. As seen in *Sofsky* and *Johnson*, the courts are still able to invalidate a ban on the

internet even when sex offenders use the internet to commit crimes because the ban is too broad and overly restrictive.

The ban on commercial social media sites is not reasonable because commercial social media sites were not relevant to Petitioner's crime. Quoted in *Sofsky*, the court emphasized that although they recognize that Sofsky could potentially find child pornography absent the internet ban, the judges were more persuaded by the idea in *Peterson* that "although a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of a telephone." *United States v. Sofsky*, 287 F. 3d 122 (2d Cir. 2002) (quoting *Peterson,* 248 F.3d at 83). The petitioner in this case is distinguished from *Sofsky* and *Johnson* as she did not use her computer directly as a means to commit the crime. Petitioner's crime was committed in the classroom and her home. Courts have struck down internet bans as unconstitutional and violations of the First Amendment in circumstances in which crimes were committed through a computer. Therefore, since a computer was not involved to solicit the child, the internet ban in this circumstance is unreasonable.

ROSA's ban on commercial social networking websites also inhibits the Petitioner's ability to rehabilitate. The ban includes several social networking websites that are vital to employment in her area such as LinkedIn, Craigslist, Indeed, Facebook, and Twitter. As seen in *Packingham*, banning sites where parolees will receive legitimate benefits from can jeopardize their opportunity for rehabilitation. Petitioner is prevented from her ability to work in her profession. She is unable to teach online. Therefore, she is reduced to jobs available to someone with less education and training. Similar to *Peterson*, the Petitioner's ability to secure gainful employment depends on her ability to use a computer. The Petitioner has already missed

opportunities for worthwhile employment during this ban, and is only able to secure employment at a packing plant.

A permanent injunction is proper to strike down ROSA's prohibition on commercial social networking websites as a condition of parole. Based on the nature and circumstances of Petitioner's offense and the need for the sentence imposed, the ban on commercial social networking is unreasonable and violates Petitioner's First Amendment rights.

B. ROSA's travel ban and revocation of driver's license violates Petitioner's Fourteenth Amendment rights.

The Second Circuit has established the right to travel under the Privileges and Immunities Clause of the Fourteenth Amendment in *Selevan v. New York Thruway Authority*. 711 F.3d 253 (2d Cir. 2012). As mentioned in the First Amendment claim, a condition of parole must be reasonably related to the state's interests and also may not be imposed in an "arbitrary and capricious manner." *Boddie v. Chung*, No. 09 CV 04789, 2011 U.S. Dist. LEXIS 48256 at *1, *5 (E.D.N.Y. May 2, 2011). When analyzing the special conditions of parole, the conditions must "'involve no greater deprivation of liberty than is reasonably necessary' to promote criminal deterrence, protection of the public, and effective correctional treatment." *United States v. Smith,* 445 F.3d 713 (3d Cir 2006); 18 U.S.C.S. § 3583(d)(2). The ban on Petitioner's right to travel was imposed in an arbitrary and capricious manner and involves a greater deprivation of liberty than is reasonable necessary.

A condition is unconstitutionally void for vagueness if it "fails to provide sufficient notice and because it authorizes or encourages arbitrary enforcement." *Yunus v. Lewis-Robinson*, No. 17-cv-5839, 2019 U.S. Dist. LEXIS 5654, at *1, *6 (S.D.N.Y. Jan. 11, 2019). As a condition of parole, a sex offender was subjected to limitations on travel including a ban on traveling within 1,000 feet of a school. *Id.* The court analyzed the limitation on the vagueness doctrine as

well as from a public policy standpoint. The limitation rendered the Plaintiff unable to travel anywhere in New York without potentially violating the rule because of the multitude of schools. Also, the limitation was void because it "places almost limitless discretion in the hands of Plaintiff's parole officers to arrest him for traveling almost anywhere in the city that he lives" thus "raising precisely the concerns that void for vagueness doctrine seeks to prevent." *Id*.; *see Kolender v. Lawson*, 461 U.S. at 357-58 (1983). The New York legislature had not established guidelines to enforce the 1,000 foot distance from a school. Petitioner's ban is void as it mirrors the exact situation in *Yunus*.

As mentioned in *United States v. McLaurin*, the deprivation of liberty is only justified if the "deprivation is narrowly tailored to serve a compelling government interest." *United States v. Laurin*, 731 F.3d 258, 262 (2d Cir. 2013). In this case, the court outlined several steps to consider when a fundamental liberty interest is challenged by a parole condition. The court first considers if the sentencing goal is related to the condition. If this is satisfied, the condition must then be reasonable. Whether or not a condition is reasonable depends on if it "represents a greater deprivation of liberty that is necessary to achieve that goal." Lastly, in addition to the reasonableness analysis, the courts are careful to consider if the "deprivation is narrowly tailored to serve a compelling government interest." *Id.*

For the first step, *Muhammed v. Evans* reaffirms the idea that "a parole board may impose restrictions on the rights of a parolee so long as those restrictions are reasonably related to Government interests." *Muhammed v. Evans,* No. 11 CV 2113, 2014 U.S. Dist. LEXIS 119704, at *9 (S.D.N.Y. Aug. 15, 2014). However, the Petitioner's condition in this case is not related to the offense. Petitioner is a Level II Sex Offender and pled guilty to non-forcible sex

with a child. The condition invalidating her driver's license is not related. Petitioner did not use a car as a means to solicit the minor.

Additionally, the condition is definitely not reasonable in light of the government's interests in rehabilitation and public policy. The ban on traveling within 1,000 feet of a school in combination with a lack of a driver's license in her circumstances is an overwhelmingly high burden. Due to her other parole conditions, the only job Petitioner was able to secure is at Plewinski's Pierogi Company Plant which is located three miles from her home. Petitioner is unable to travel both direct routes to the plant because of her 1,000 foot ban. Therefore, she is forced to travel the shortest legally permissible route, which is twenty miles.

The twenty mile route to work may have been reasonable if she was able to drive. Since there is no public transportation for the Petitioner to utilize to, Petitioner must bike twenty miles each way to the Plewinski's Pierogi Company Plant. This route is located on State Highway 10 which has a speed limit of sixty-five miles per hour. Traveling twenty miles twice a day on bike on this highway in unreasonably dangerous, especially since Petitioner has to do so in any weather. In light of the facts of this case, the combination of the 1,000 foot ban and the revocation of a driver's license is not reasonable in light of the government's interest in rehabilitation and public policy.

The deprivation of the fundamental right to travel is not narrowly tailored to serve a compelling interest. The driving ban is absolute. Petitioner may not have a driver's license for a maximum period of ten years while on parole. Revoking her driver's license places the burden on her husband to drive her and her child anywhere they need to go for the next ten years. This burden is not narrowly tailored. Petitioner now has immense difficulty in providing for her

family. Petitioner may not drive her child to the hospital, school, appointments, or any other location necessary in today's world.

The condition is also not reasonable because it burdens Petitioner disproportionately to the government's legitimate interests. The restriction on travel, as well as the invalidation of Petitioner's drivers license, makes Petitioner a prisoner in her own home and renders her unable to participate in society. The absolute ban on driving is also dangerous to Petitioner and threatens her livelihood. This court should strike the driving ban from ROSA as unconstitutional and as a violation of her fundamental right to travel.

II. ROSA's special conditions violate the Federal Constitution's *ex post facto* clause.

In Article I, § 10 of the United States Federal Constitution, Clause 1 states: "No State shall…pass any…*ex post facto* law." U.S. Const. art. I, § 10, Cl 1. This clause forbids the passage of laws that apply to events that occurred before the law was enacted. U.S. Supreme Court Lawyers' Ed. 2d Ann., 131 L. Ed. 2d 1043 (2012). The United States Supreme Court has established four types of *ex post facto* laws that are intended to be covered by this prohibition:

> 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.

Calder v. Bull, 3 U.S. 386, 390 (1798); *see also Peugh v. United States,* 569 U.S. 530, 539 (2013). ROSA implicates the third type of law, where the change in law inflicts a greater punishment. Whether a state law violates the *ex post facto* clause, is a federal question where the court is not bound by state decisions. U.S. Supreme Court Lawyers' Ed. 2d Ann., 131 L. Ed. 2d 1043 (2012).

An *ex post facto* violation has three elements: it must (1) apply to events that occurred before the enactment of the law; (2) disadvantage the offender who is affected by the new or changed law; and (3) deprive the individual of a substantive right and cannot merely be a procedural change. *Weaver*, 450 U.S. at 25; *Dobbert*, 432 U.S. at 284.

A. ROSA retroactively attempts to increase the punishment for Petitioner's conduct.

The Supreme Court has implemented an intent-effects test to determine "whether a statute renders the punishment for a crime more burdensome for purposes of the *Ex Post Facto* Clause." *People v. Parilla*, 970 N.Y.S.2d 497, 501-02 (2013); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The seven factors include consideration of whether the sanction: (1) involves a restraint or affirmative disability; (2) has historically been considered a punishment; (3) imposes only when there is finding of scienter; (4) promotes deterrence and retribution; (5) applies to conduct that was already considered a crime; (6) has an alternate purpose that is rationally related; and (7) is excessive in relation to the stated alternate purpose. The intent-effects test balances seven factors to make this determination, with no single factor being determinative. *Id*.; *see also Smith v. Doe*, 538 U.S. 84, 97 (2003).[1] The critical question in this inquiry of retroactive application "is whether the law changes the legal consequences of acts completed before its effective date." *United States v. Ristovski*, 312 F.3d 206, 210 (6th Cir. 2002), *Miller v. Florida*, 482 U.S. 423, 430 (1987).

1. ROSA imposes a physical restraint on the Petitioner.

If an act imposes physical restraint, resembling the punishment of imprisonment, it can be interpreted as a restraint that implicates the first factor of the intent-effects test. *Smith v. Doe*,

[1] The Court has held these factors "are never by themselves dispositive" however "should be capable of tipping the balance." *Hudson v. United States*, 522 U.S. 93, 111 (1997).

538 U.S. 84, 100 (2003). The Alaska Sex Offenders Registration Act in *Smith v. Doe*, was not deemed to restrict certain activities sex offenders could engage in, leaving them free to change where they lived or where they worked. *Id*. The Act required sex offenders to register with local law enforcement. While the Act was being retroactively applied, the Court held it was non-punitive and thus did not violate the *ex post facto* clause. *Id.* at 89. A sanction that imposes a minor or indirect restraint or affirmative disability is unlikely to be punitive and thus is unlikely to implicate the *ex post facto* clause. *Id.* at 100. For example, denial of a government benefit, such as social security, would not be considered a restraint, as it does not rise to resemble the punishment of imprisonment. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

Restraint or affirmative disability imposed by a residency restriction, specifically living "within 1,000 feet of school property, a youth program center, or a public park" is not minor or indirect. *State v. Pollard,* 908 N.E.2d 1145, 1147-1150 (Ind. 2009). To abide by the residency restrictions of the statute, the Petitioner in *State v. Pollard* would have had to incur costs of obtaining alternate housing, as his home was established prior to the offense. The Court noted the statute prevented a sex offender from living in his own home, even if the home was purchased before the statute took effect or a school or youth center moved within 1,000 feet of the sex offender's home. This acted as a substantial housing disadvantage to the individual. *Id.* at 1150.

ROSA imposes a physical restraint on Petitioner. While Petitioner has been released from Tonawanda Correctional Facility, she is confined to her home where she is severely limited in her activities. Petitioner cannot access commercial social networking websites to find viable long term employment and is unable to drive under ROSA. In *Smith v. Doe*, sex offenders were able to change where they lived and worked. Dissimilarly, Petitioner is limited in her activities and is

unable to do so. Unlike the Alaska Sex Offender Registration Act, ROSA is punitive as the restrictive aspects of the statute are not minor or indirect as the statute does not merely take away a benefit Petitioner receives. Instead, Petitioner's living and employment abilities are frustrated. She is unable to travel efficiently without being too close to a school or similar facility, and is unable to search for viable employment because she is limited to a bicycle for transportation.

Specifically, ROSA's requirement of Petitioner being 1,000 feet from any school grounds, "or any other facility, or institution primarily used for the care or treatment of persons under the age of eighteen" is physically restraining. In *State v. Pollard*, the court held a similar 1,000 foot restriction was not minor or indirect. Similar to the individual in *Pollard*, Petitioner here would need to incur costs to relocate or find convenient alternate housing. Petitioner's home is located nearby schools and facilities that she in prohibited from going near. Thus, Petitioner is required to travel dangerously at night, by bicycle, to the only place she could find employment, Plewinski's Pierogi Company Plant. This create a substantial housing disadvantage for Petitioner and her family. Thus, ROSA's requirements impose a significant restraint on the Petitioner, frustrating her ability to find viable long term employment.

2. ROSA does not promote deterrence.

When a restriction is equally imposed upon all offenders, and there has been a failure to individually consider each's danger level, the restriction more closely resembles retribution for an individual's past offenses rather than a regulation aimed at deterrence against future acts. *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1027 (Okla. 2013); *see also Matter of Berlin v. Evans*, 923 N.Y.S.2d 828, 836 (2011). Under the *ex post facto* clause, the Federal Constitution does not permit new punitive measures to apply to a crime that has already been completed and acts to the detriment of the wrongdoer. *Dobbert*, 432 U.S. at 299. The primary function of

punishment is rehabilitation, not vindictive justice. *Wallace v. State*, 905 N.E.2d 371, 381 (Ind. 2009).

ROSA is a punitive statute that does not promote deterrence or rehabilitation, the primary objectives of punishment, when applied to Petitioner. Petitioner did not receive individual consideration of her alleged danger level when considering her adjustment back into the community. Instead, she was labeled a Level II Sex Offender and required to abide by ROSA's special conditions. These conditions are new punitive measures that did not exist at the time the acts occurred. These conditions prevent Petitioner from rehabilitating back into society. For example, the Petitioner is unable to find viable long term employment as she is unable to utilize various social networking websites that boast employment opportunities. Petitioner's ability to travel is limited as she is not able to drive and public transportation is unavailable in the rural part of town in which she lives. Petitioner is forced to ride her bike, far distances, on a dangerous road because that is the only way she is able to get to and from the only place she could find employment. Also, the limitations imposed by ROSA are not related to Petitioner's conduct. The conditions were imposed even though internet access and pornography are not rationally related to the crimes she pled guilty to. Thus, ROSA does not promote deterrence because it acts as a blanket application that instead retroactively applies new punitive measures for past conduct instead of deterrence for future conduct.

3. ROSA is not rationally related to an alternate purpose and is excessive in relation to the stated alternate purpose.

While ensuring public safety is a fundamental goal, the *ex post facto* clause was designed to prevent "arbitrary and potentially vindictive legislation." *Smith*, 538 U.S. at 108-109. The Supreme Court of New York has held a lack of individual assessment contributes to a statute being punitive. *Matter of Berlin v. Evans*, 923 N.Y.S.2d 828, 835 (2011). If an act applies

broadly, and impacts a large number of people who do not pose any threat to the community, that contributes to the suspicion that more than regulation of safety is occurring. Thus a sanction can be read as excessive in relation to the stated alternate purpose it means to combat. *Id.* In *Smith v. Doe*, the court stated that the severity of burdens imposed on the individual can be used as support for this claim. The Court stated the requirements under the act, some of which included widespread dissemination of the offenders' information, resembled "shaming punishments that were used earlier in our history to disable offenders from living normally in the community." 538 U.S. at 109. Thus, while the government is able to impose restrictions on parolees who have been released, these restrictions must be "reasonably and necessarily related to governmental interests." *Rizzo v. Terenzi,* 619 F. Supp. 1186, 1190 (E.D.N.Y. 1985).

In *Matter of Berlin v. Evans*, the Supreme Court of New York held the prohibition of living within 1,000 feet of the property line of a school, of a low level sex offender, banished the individual from the only place he had ever known as home. *Matter of Berlin*, 923 N.Y.S.2d at 923. The Petitioner in that case was 77-years-old, low risk, and was facing consequences from his first offense. The statute was struck down for its failure to consider the individual who was being impacted by the statute's conditions. *Id.* at 929.

ROSA imposes severe burdens on Petitioner. These burdens are significant, not rationally related to an alternate purpose, and are excessive. The Lackawanna Board of Parole contends ROSA's special conditions promote community safety. This alternative purpose is not rationally related to ROSA's special conditions because the conditions imposed upon Petitioner go above and beyond a rational relationship. Petitioner is being subjected to "shaming punishments" that were used historically "to disable offenders from living normally in the community." The Petitioner is restricted in searching and travelling for employment, resulting in her being a

prisoner in her own home. While parolees are limited in their activities when released, the restrictions imposed must be reasonably and necessarily related to government interest, which is not the case here. Petitioner is a sex offender, who has not reoffended, and has admitted her wrongdoings. She suffers from depression, bipolar disorder, and manic episodes. Petitioner is on the road to recovery and getting the help she needs to prevent her from reoffending. ROSA fails to consider her low risk individual status, similar to the low risk 77-year-old individual. ROSA fails to ensure public safety as the measures imposed instead serve directly as excessive restrictions upon Petitioner.

While the lower court states Petitioner may have had to surrender her driver's license under the previous parole conditions, ROSA makes this mandatory. ROSA not only prevents Petitioner from traveling near schools, but limits her against any "similar facility." This broad application serves as a severe hindrance for the Petitioner for not only travel but employment. ROSA's special conditions codify restrictive, punitive measures that do not promote the goal of community safety. Instead, these conditions severely burden the Petitioner as they are excessive in nature and prevent her from readjusting back into society. ROSA is not rationally related to an alternative purpose and is excessive in the burdens it applies to Petitioner.

B. ROSA disadvantages the Petitioner because the statute prevents her from rehabilitating back into society.

For an *ex post facto* analysis, to determine if a law disadvantages an individual, the inquiry looks only to the provision being challenged. *Weaver*, 450 U.S. at 33. The effect of the law determines whether it is *ex post facto*. *Id.* at 25. The United States Supreme Court has held that when an inmate lost his opportunity to shorten his prison time through good conduct, he was substantially disadvantaged. The inmate was disadvantaged by newly imposed restrictions because these restrictions impacted his eligibility for release. Since the new restrictions made the

punishment more onerous than it was before for the crimes committed, the *ex post facto* clause was implicated and the statute violated its prohibition. *Id.* at 33-36; *see also Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937). The *ex post facto* inquiry on whether an offender is disadvantaged falls "on whether any such changes alter the definition of criminal conduct or increases the penalty by which a crime is punishable." *Cal. Dep't of Corr.*, 514 U.S. at 506 n.3.

When determining the disadvantages a petitioner will face, the controlling question is whether the retroactive application of the law creates a sufficient risk of increasing the amount of punishment attached to the crime. *Garner v. Jones*, 529 U.S. 244, 250 (2000). In *Cal. Dep't of Corr. v. Morales,* the United States Supreme Court found a changed law was unlikely to impact a prisoner's term of confinement and held the *ex post facto cause* was not violated. The changed law could possibly delay the time between suitability hearings (hearings that assess the circumstances of individual inmates). The court held, however, the ultimate release date of an inmate would be unaffected by the altered time between suitability hearings, thus the inmate's concerns were purely speculative. 514 U.S. at 512.

ROSA reduces Petitioner's opportunity to rehabilitate back into society. The statute's new restrictions, imposed after Petitioner's conduct, substantially disadvantage Petitioner's ability to reintegrate into the community. Petitioner's inability to drive and access employment platforms make the punishment for her status as a sex offender more onerous than it was before, thus implicating the *ex post facto* clause. Prior to ROSA's enactment, some of Petitioner's general conditions of release would have included writing reports, having her Parole Officer visit without warning at her residence and place of employment, not interacting with individuals who have criminal records, not possessing any firearms, and not possessing or using any drug paraphernalia or controlled substance. ROSA's new mandatory provisions are so extreme, on the

other hand, that Petitioner is prevented from moving passed this unfortunate conduct because the new restrictions prevent her from gaining viable long term employment through limitations on travel and employment search.

Petitioner faces much more than a sufficient risk of increased punishment, rather she actually does face increased punishment. ROSA was enacted in 2015 while the Petitioner was incarcerated. Prior to her incarceration, Petitioner's parole conditions would not have included the mandatory conditions of surrendering her driver's license, coming within 1,000 feet of any school, and barring access to any social networking website. Here the punishment has been increased and is directly impacting the Petitioner, disadvantaging her by preventing her from rehabilitating back into society. The critical inquiry on whether an individual is disadvantaged depends on whether the penalty by which a crime is punishable is increased and that is exactly what has occurred here.

C. ROSA includes substantive changes in the law that are not merely procedural.

The *ex post facto* clause of the Federal Constitution was enacted to secure "substantial personal rights" against arbitrary legislation and not to limit the legislature's control of "procedure which do not affect matters of substance." *Beazell v. Ohio*, 269 U.S. 167, 168 (1925); *Dobbert*, 432 U.S. at 293. Often procedural changes refer to the adjudication processes, while substance based changes include "arbitrarily infringing upon substantial personal rights." *Collins v. Youngblood*, 497 U.S. 37, 45 (1990). The Supreme Court has held procedural changes existed where the quantum of punishment was not altered and when the alteration simply involved the changing of roles of the judge and jury. *Dobbert*, 432 U.S. at 284-292.

When a court begins an *ex post facto* analysis, the focus is on whether a law assigns more disadvantageous criminal consequences than were previously in place when the conduct

occurred to determine if the law engages in a substantive change. *Weaver*, 450 U.S. at 29 n.13. The Supreme Court has determined that a substantial right is not altered if a law "does not increase the punishment" of conduct. *Id.* at 21 n.12; *see also United States v. Ristovski*, 312 F.3d 206, 211 (6th Cir. 2002). In *Miller v. Florida,* the court determined a change in sentencing guidelines, occuring after the offense was committed, "directly and adversely" affected the Petitioner's sentence. *Miller,* 482 U.S. at 430. This differed from *Dobbert v. Florida*, where the change in the Florida statute did not change the quantum of punishment but rather changed the methods of determining when the punishment would be imposed. *Dobbert*, 432 U.S. at 433-435.

ROSA impacts the substance of the law, not merely just the procedure. The conditions imposed by the statute change the intensity of punishment. Before its enactment, the general parole conditions did not require certain mandatory constraints. However, since its enactment, ROSA has unfairly changed the law through substantive changes, by altering the quantum of punishment, which acts unfairly to the detriment of Petitioner.

ROSA has imposed more disadvantageous criminal consequences than were previously required when the conduct occurred. Petitioner's case resembles *Miller v. Florida* because the Petitioner's parole conditions are directly and adversely affected by the changes imposed by ROSA. Unlike *Dobbert*, the punishment has changed, not merely just the procedure to determine when the punishment is imposed. The added limitations of ROSA are mandatory parole conditions Petitioner is expected to abide by, changes added after the conduct occurred, and impose an unfair burden on Petitioner.

Conclusion

According to the Separability clause in §168-w, the court has the ability to strike down unconstitutional portions of ROSA while maintainng legal enforcement of the rest of the statute.

Petitioner asks the court to reverse the decision from the United States Court of Appeals for the Thirteenth Circuit and remand with instructions for issuing a declaratory judgment and granting Petitioner's motion for a preliminary injunction.