**No. 19-01**

# In the Supreme Court of the United States

JANUARY TERM, 2019

MARY GULDOON, Petitioner

v.

STATE OF LACKAWANNA BOARD OF PAROLE, Respondent

*On Writ of Certiorari to the Supreme Court of the United States*

BRIEF FOR THE PETITIONER
TEAM: 34

## QUESTIONS PRESENTED

I. Whether ROSA violates Mrs. Guldoon's rights under the First and Fourteenth Amendments by restricting her free speech in prohibiting her access to social media websites and by erroneously depriving her of her liberty interests without an additional hearing.

II. Whether ROSA violates the Ex Post Facto clause by making Mrs. Guldoon's punishment more burdensome after her crime was committed.

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## STATEMENT OF FACTS

In May 2010, while Mary Guldoon ("Mrs. Guldoon") was on maternity leave from her job as a high school teacher at Old Cheektowaga High School, she was diagnosed with severe post-partum depression and was prescribed Prozac, which did little to improve her illness. J.A. at 12. Her relationship with B.B. began when he returned to the high school in September 2010. *Mary Guldoon v. Lackawanna Board of Parole*, 999 F. Supp.3d 1, 1 (M.D.Lack. 2019). The Lackawanna Board of Parole ("Board") submitted a Pre-Sentence Report ("PSR") in connection with Mrs. Guldoon's sentencing hearing, which stipulates that Mrs. Guldoon and B.B. communicated through the high school's email system and text messaging. J.A. at 5-7. The report also states they engaged in sexual conduct in Mrs. Guldoon's classroom, in her car, and in her home. J.A. at 5-6. Mrs. Guldoon drove B.B. home after the few encounters in her home. J.A. at 7. B.B. admitted to a parole officer that during their relationship, he asked Mrs. Guldoon to send him naked pictures, but she always refused. J.A. at 6. B.B. claimed to send her naked pictures, but none were recovered during the OCPD investigation. J.A. at 6.

In 2011, Mrs. Guldoon pleaded guilty to three charges: rape in the third degree, criminal sexual act in the third degree, and sexual misconduct (respectively, Penal Law §§ 130.25, 130.40, 130.25). J.A. at 5. In accordance with the Board's PSR, Mrs. Guldoon received an indeterminate sentence of ten- to twenty-years' incarceration to be followed by probation. J.A. at 2, 5. While incarcerated, Mrs. Guldoon's psychiatrist diagnosed her with Bi-Polar Disorder, and determined her crimes were a result of a manic episode triggered by the Prozac she was taking for postpartum depression. J.A. at 13. Since Mrs. Guldoon's diagnosis, she has been treated with lithium, and has had no further manic episodes. J.A. at 13. Also, while incarcerated, Mrs. Guldoon received a Master's Degree in Computer Programing on-line through the University of Phoenix. J.A. at 13-4.

In 2017, she was released to serve five years of parole. *Guldoon*, 999 F. Supp.3d at 2, J.A. at 5. When she was released, the Board imposed general conditions, as well as mandatory special conditions, required by the Registration of Sex Offenders Act ("ROSA"), a law that the Lackawanna passed in 2015 during her incarceration. *Id.* at 2. These special conditions were not listed in her PSR and were not mandatory prior to ROSA's passage. J.A. at 2, 7.

Under ROSA, the special conditions imposed on Mrs. Guldoon are: (1) to register as a Level II Sex Offender; (2) prohibited from being within 1,000 feet of school grounds; (3) prohibited using the internet for pornography, accessing a commercial social networking website, communicating with people for the purpose of promoting sexual relations with persons under the age of eighteen, or communicating with individuals under the age of eighteen; and (4) her driver's license was revoked. *Guldoon*, 999 F. Supp.3d at 2, J.A. at 3, 9-10.

After her release, Mrs. Guldoon moved back to Nine Mile Road with her family, which is located approximately one mile from both the elementary and high schools. J.A. at 14. She spent a few months looking for work due to the obstacles of her special conditions, such as not being able to drive to interviews, little public transportation in her rural town, and her restricted Internet access. J.A. at 15. The only job she could find entails working night shifts at the Plewinski's Pierogi Company Plant, which is three miles away from her home on direct route, but twenty miles away on an indirect route. J.A. at 15-6. Mrs. Guldoon is forced to take the indirect route because she cannot pass by schools, which is more dangerous for her because she has to ride her bicycle on the highway. J.A. at 16.

## SUMMARY OF THE ARGUMENT

First, this Court should reverse the Court of Appeals for the Thirteenth Circuit ("Thirteenth Circuit") and find that ROSA violates Mrs. Guldoon's First and Fourteenth Amendment rights. Lackawanna Executive Law § 259c – (15) violates Mrs. Guldoon's right to

free speech. It is a speaker-based restriction because it restricts the speech of a particular class while allowing other classes to speak freely. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564 (2011). Speaker-based restrictions are subject to strict scrutiny. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 339 (2010). Even if the statute is content neutral, it would be subject to intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Under both tests, § 259c – (15) is unconstitutional because it is not narrowly tailored to serve the governmental interest. The law restricts substantially more speech than the targeted evil it aims to prevent. *See Id.* Further, § 259c – (15) is impermissibly vague. A reasonable person and law enforcement would be unclear as to what is proscribed. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). ROSA also violates Mrs. Guldoon's Fourteenth Amendment due process rights by depriving her of her protected liberty interest in her reputation, employment opportunity, free speech, and right to migrate. Mrs. Guldoon suffered an erroneous deprivation in the aforementioned liberty interests because she was labelled a Level II Sex Offender without a hearing. Finally, Mrs. Guldoon is entitled to a hearing even with the strong governmental interest in protecting minors.

Second, this Court should reverse the Thirteenth Circuit and find that the ROSA violates the Ex Post Facto clause. ROSA is being applied retroactively, making Mrs. Guldoon's punishment more burdensome years after she pled guilty and received her sentence. By requiring Mrs. Guldoon to register, and by prohibiting her from traveling within 1,000 feet of any school, ROSA is designating her as someone to be shunned from the community – a practice which has been recognized in our history and tradition as punishment. Further, the requirements and restrictions Mrs. Guldoon must now abide by expose her to long-term humiliation and ostracism within the community in which she has lived her entire life. Through deterrence, retribution, and

incapacitation, ROSA has utilized traditional aims of punishment retroactively against Mrs. Guldoon.

## ARGUMENT

### I. ROSA VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE THE PROHIBITION ON ACCESSING SOCIAL MEDIA RESTRICTS MRS. GULDOON'S FREEDOM OF SPEECH AND VIOLATES HER PROCEDURAL DUE PROCESS RIGHTS BY ERRONEOUSLY DEPRIVING HER OF HER LIBERTY INTERESTS WITHOUT AN ADDITIONAL HEARING

ROSA violates Mrs. Guldoon's First and Fourteenth Amendment rights because her prohibition on accessing social media abolishes her freedom of speech and she was not afforded due process under the stigma plus and balancing tests. Parolees do not have an absolute liberty, as every other citizen is entitled to, but there is conditional liberty imposed in special conditions. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). A parolee's conditions are invalidated when they produce a greater deprivation of the parolee's liberty than is reasonably necessary. *United States v. Sales*, 476 F.3d 732, 736 (9th Cir. 2007).

#### A. Lackawanna Executive Law § 259c – (15) Under ROSA Violates the First Amendment Because it is Not Narrowly Tailored to Serve a Governmental Interest and is Impermissibly Vague

It is undisputed that free speech is a fundamental right. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), *citing to Roth v. United States*, 354 U.S. 476, 484 (1957) (the First Amendment serves "to assure [the] unfettered interchange of ideas for the bringing about of political and social change…"). When the liberty interest at issue is fundamental, the deprivation of that liberty is reasonably necessary only if the deprivation is narrowly tailored to serve a compelling government interest. *United States v. Reeves*, 591 F.3d 77, 82-3 (2d Cir. 2010).

1. Lackawanna Executive Law § 259c – (15) is a Speaker-Based Regulation Because it Disfavors Mrs. Guldoon as a Member of a Specific Class from Speaking in a Way Which Others are Freely Permitted to Speak

A regulation is speaker-based when the statute disfavors specific people by prohibiting them from communicating a message which others are free to communicate. *Sorrell*, 564 U.S. at 564 (holding that a statute which prohibited pharmaceutical manufacturers from using information for marketing, while other entities could use the same information to convey messages, was unconstitutional because it disfavored pharmaceutical manufacturers over others).

Here, ROSA prohibits Mrs. Guldoon as a member of sex offenders, a specific class, from expressing her views on social media while allowing other specific classes to use social media to express their views freely. States implementing restrictions that distinguish solely among the speakers by allowing speech by some but not by others, is prohibited. *Citizens United*, 558 U.S. at 340 ("By taking the right to speak from some and giving it to others, the government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice"). The Board may argue that § 259c – (15) is content neutral because the class of people affected by it are permitted to access other websites through the statute's caveat "a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein." J.A. at 25. However, the right to speak in only some places is not the equivalent of free speech. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011), *citing to Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (finding that with the advancement of technology, "'the basic principles of freedom of speech…do not vary when a new and different medium for communication appears"). Limiting Mrs. Guldoon's use of the Internet to certain websites disfavors her because others are allowed to freely communicate their own messages on all websites, while she is not. Therefore, § 259c –

(15) is a speaker-based regulation because it prohibits Mrs. Guldoon under one class from speaking in a way that other classes are free to do.

2. Lackawanna Executive Law § 259c – (15) Fails Both Strict and Intermediate Scrutiny Because it is not Narrowly Tailored to Serve the Governmental Interest of Protecting Minors

ROSA violates both strict and intermediate scrutiny because it is not narrowly tailored. When a law is speaker-based, it is subject to strict scrutiny. *Citizens United*, 558 U.S. at 339. Alternatively, if a law is content-neutral, it is subject to intermediate scrutiny. *Turner Broad Sys. v. FCC*, 512 U.S. 622, 642 (1994). Both of these tests require that the law be narrowly tailored to serve a compelling or substantial government interest. [1] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), *see also Ward*, 491 U.S. at 791. A law is narrowly tailored when it pursues its purpose without "significantly restricting a substantial quantity of speech that does not create the…evils" at which it is directed. *Ward*, 491 U.S. at 791.

In *Packingham v. North Carolina*, the State passed a law making it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." 137 S. Ct. 1730, 1733 (2017). In this case, the petitioner was convicted of violating this statute when he used Facebook to express his joy about a dismissed parking ticket. *Id.* at 1734. This Court found that the statute was not narrowly tailored because it excluded more than just the evil it intended to prevent. *Id.* at 1737 ("By prohibiting sex offenders from using those websites, North Carolina…bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge").

[1] There is no dispute that the State has a compelling and significant interest to protect minors. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) ("safeguarding the physical and psychological well-being of a minor" is compelling). At issue here is whether the condition is narrowly tailored to serve that interest.

Here, § 259c – (15) is nearly identical to North Carolina's statute in *Packingham* by denying Mrs. Guldoon from using the Internet to "access a commercial social networking website." The Board may argue that ROSA's definition of social media is narrow because it adds a caveat that "a website that permits users to engage in such other activities as are not enumerated herein" is not a commercial social networking website and requires those under eighteen to use the website for the "purpose of establishing personal relationships." J.A. at 25. This is still not narrowly tailored because the statute significantly restricts substantially more speech than the evil the government intended to prevent. This evil is the "unlawful sexual advances from adults." J.A. at 20. However, ROSA implements an absolute social media ban on Mrs. Guldoon based on the *possibility* that she will use social media for this evil. *See Frisby v. Shultz*, 487 U.S. 474, 485-86 (1988) (a law is not narrowly tailored if the evil it aims to prevent is only a "possible byproduct of the activity" is proscribes). Mrs. Guldoon is barred from accessing what is today's public square. To many, social media is the primary source of the reading the news, finding employment, and speaking and listening to others. Therefore, the § 259c – (15) is not narrowly tailored to protect minors.

3. Lackawanna Executive Law § 259c – (15) is Unconstitutionally Vague Because It Fails to Provide a Person of Ordinary Intelligence a Reasonable Opportunity to Understand What the Statute Prohibits and it Encourages Arbitrary Enforcement

Regardless of whether the challenge is facial or as-applied, a statute is unconstitutionally vague when it either (1) fails to provide a person of ordinary intelligence a reasonable opportunity to understand what the statute prohibits; or (2) authorizes or encourages enforcement that is arbitrary and discriminatory. *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006), *citing to Hill*, 530 U.S. at 732.

In *Hill*, the statute at issue made it "unlawful within the regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the

purpose of passing a leaflet or handbill…or engaging in oral protest, education, or counseling with such other person…within one hundred feet from any…health care facility.'" 530 U.S. at 707, *citing to* Colo. Rev. Stat. § 18-9-122(3) (1999). This Court found that the statute was not vague because (1) it was likely that people of ordinary intelligence could understand the prohibited conduct and (2) there was adequate guidance to law enforcement because the statute specified the zones within one hundred feet of defined health care facilities. *Id.* at 732-33.

Here, unlike *Hill*, § 259c – (15) is vague on the first prong because it prohibits Mrs. Guldoon from using the internet to "access a commercial social networking website" without a scienter requirement, which fails to provide a person of ordinary intelligence a reasonable opportunity to understand what the statute prohibits. J.A. at 24-5. The Board may argue that the statute is not vague because it is a clear definition of a commercial social networking website: a business operating a website that permits persons under eighteen to be registered users "for the purpose of establishing personal relationships with other users…" J.A. at 25. However, this definition is subjective because Mrs. Guldoon will be in violation if *those under eighteen* are the ones who register for the purpose of establishing personal relationships, regardless of whether she registered for the purpose of establishing personal relationships. In *Farell,* the Second Circuit found that "the term 'pornography' is notoriously elusive… heavily influenced by the individual, social and cultural experience of the person making the determination." 449 F.3d at 486-87. Similarly here, Mrs. Guldoon risks violating this restriction based on the social and cultural experience of people under eighteen, not her experience. Additionally, Mrs. Guldoon risks violating this restriction based on law enforcement determining the social and cultural experience of people under eighteen years old. This encourages arbitrary and discriminatory enforcement because law enforcement only takes into account how minors intend to use the website and not how Mrs. Guldoon intends to use the website. Therefore, § 259c – (15) is impermissibly vague.

### B. ROSA Violates Mrs. Guldoon's Due Process Rights Under the Fourteenth Amendment Because She was Deprived of her Liberty Interests in her Reputation, Employment, Free Speech, and Right to Move Freely and She was Erroneously Deprived of these Liberties Without an Additional Hearing

This Court should find that Mrs. Guldoon's due process rights have been violated because ROSA fails the stigma plus test under *Paul v. Davis* and the balancing test under *Mathews v. Eldridge*. Analysis under Due Process is twofold: first, a court must ask whether there exists a liberty or property interest that has been deprived, and second, whether the procedures which deprived that interest were constitutionally adequate. *Ky. Dep't of Corr. V. Thompson*, 490 U.S. 454, 460 (1989). The stigma plus test is applied when an individual has been stigmatized by reputational harm plus has been deprived a separate liberty interest. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Once a deprivation of liberty is established, the process due weighs three factors under the *Mathews v. Eldridge* balancing test: (1) the private interest affected by the statute; (2) the risk of an erroneous deprivation of the private interest with and without "additional or substitute procedural safeguards;" and (3) the government interest, including the fiscal and administrative burdens, that the additional or substitute procedures would entail. 424 U.S. 319, 335 (1976).

This Court should find that Mrs. Guldoon has been deprived of her Due Process rights under the Fourteenth Amendment. First, ROSA deprives her of her liberty interest in her reputation, employment opportunities, free speech, and right to move freely under the "stigma plus" test. Second, ROSA entails a high risk of erroneous deprivation because it labels Mrs. Guldoon as a Level II Sex Offender, concluding that she is currently dangerous without holding any additional hearing. Finally, as applied to Mrs. Guldoon, an additional hearing with respect to her classification as a sex offender who is a current danger to minors would not constitute an undue burden on the government.

1. ROSA Fails the Stigma Plus Test[2] Because It Deprives Mrs. Guldoon of Her Protected Liberty Interest in Her Reputation, Her Opportunity for Meaningful Employment, Her Right to Free Speech, and Her Right to Migrate

"A liberty interest may be implicated 'where a person's good name, reputation, honor, or integrity is at stake'" because of the government action at issue. *Humphries v. County of L.A.*, 554 F.3d 1170, 1185 (9th Cir. 2009), *citing to Wisconsin*, 400 U.S. at 437. To determine whether a liberty interest involves reputational harm, courts use the "stigma plus" test. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Even when there is reputational harm from the government action, the government action must also alter a previously recognized right or status. *Id.* at 701, *see also Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994) (holding that the plaintiff's inclusion on the Central Register of Child Abuse and Maltreatment satisfied the stigma plus test because itdamaged to the plaintiff's reputation and also affected the plaintiff's employment opportunities).

Here, ROSA places a tangible burden on Mrs. Guldoon beyond mere damage to her reputation. First, ROSA stigmatizes Mrs. Guldoon by designating her as a Level II Sex Offender, the "moderate" level under Correction Law § 168-l (6)(b). As a Level II designation under ROSA, law enforcement may disseminate relevant information, including the description of her special conditions, to "any entity with vulnerable populations related to the nature of the offense committed by such sex offender" and "such information shall, upon request, be made available to the public." J.A. at 38. This damages her reputation because not only is the released information generally public, such as her address, but details of her crime and her special conditions are accessible to the public, which would not occur if she did not have to register under ROSA. Second, her opportunity for meaningful employment is deprived because she does not have

[2] Since this test requires the identification of the liberty interest(s) at issue, it addresses the first prong of the *Mathews* test because it determines the private interest affected by the statute. 424 U.S. at 335.

access to social media nor does she have a driver's license. These restrictions caused Mrs. Guldoon to spend several months trying to find work and she had to forego acceptable employment opportunities because she could not get to job interviews via family members or public transportation. J.A. at 15.

Thirdly, Mrs. Guldoon is deprived of her right to free speech, as discussed under Section I-A above. *See Bd. Of Regents v. Roth*, 408 U.S. 564 (1972) (finding the right to free speech is a liberty interest protected under the Fourteenth Amendment). Lastly, Mrs. Guldoon is deprived of her right to migrate. *See Att'y General of New York v. Soto-Lopez*, 476 U.S. 898, 902-3 (1986) ("Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases"), *see also* Max Kravitz, *Ohio's Administrative License Suspension: A Double Jeopardy and Due Process Analysis*, AKRON L. REV., Winter 1996, at 138-40 (1996) (describing how both rights and privileges can be protected under due process and that a driver's license is a protected interest no matter what it is labeled). Once a license is issued, its continued possession "may become essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971). Therefore, ROSA fails the stigma plus test because the law is stigmatizing to Mrs. Guldoon's reputation plus it alters her previously recognized rights of free speech, employment opportunities, and the right to migrate.

2. Mrs. Guldoon Was Erroneously Deprived of Her Liberty Interests in the Absence of Any Procedural Safeguards Because She did not Have a Hearing Prior to the Imposition of Level II Designation

The second prong of the *Mathews* test requires courts to weigh the risk of an erroneous deprivation of the private interest with and without "additional or substitute procedural safeguards." 424 U.S. at 335. If a determination of dangerousness is material under a sex offender registration statute, there must be procedural safeguards for those who wish to challenge their designation. *See State v. Germane*, 971 A.2d 555 (R.I. 2000) (holding that a "tiered"

registration system that classifies convicted sex offenders by "risk level" triggers the right to a meaningful hearing to contest the classification); *see also Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006) (holding that a sex offender classification system that afforded individuals the right to challenge their classification comported with procedural due process).

Here, ROSA has a three-tiered system of classifying sex offenders, where Level I is low risk, Level II is moderate, and Level III is high. Correction Law § 168-l (6). Mrs. Guldoon did not have an opportunity to be heard on her Level II status prior to the Board's imposition of the designation. The Board may argue that ROSA's Correction Law § 168-n has a hearing process in place to determine an individual's sex offender level. J.A. at 39-40. However, the record is silent on whether this process was ever held for Mrs. Guldoon. Mrs. Guldoon's affidavit merely indicates that ROSA required her to register as a Level II sex offender for the first time. J.A. at 14. As such, when the Board made its recommendation to the sentencing court aboutMrs. Guldoon's level designation under Correction Law § 168-n (2), there is no indication from the record that she was notified of a hearing under Correction Law § 168-n (3). J.A. at 39-40. While incarcerated, a psychiatrist determined that Mrs. Guldoon's Prozac from her post-partum depression caused Manic episodes, which resulted in her illicit relationship with B.B.. J.A. at 12-3. Further, once she was treated with lithium, there were no further manic episodes. J.A. at 13. If Mrs. Guldoon had the opportunity to inform the Board and the sentencing court of her mental health status, more likely than not, she would have been given a lower Level designation. Therefore, Mrs. Guldoon was erroneously deprived of her liberty interests absent of any procedural safeguards.

3. The Government's Interest in Protecting Minors does not Outweigh the Erroneous Deprivation of Mrs. Guldoon's Liberty Interests Because She Has to Register as a Sex Offender for Thirty Years Minimum without Having a Hearing Prior to Her Designation

The last prong of the *Mathews* test requires courts to balance the government's interest, "including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail." 424 U.S. at 335. Even where the government has a strong interest, it must provide for "some kind of hearing" where the risk of an erroneous deprivation of a liberty interest is high. *Humphries*, 554 F.3d at 1202 (holding that the government must fashion some procedure through which an individual may challenge his or her placement on the Child Abuse Central Index).

Here, as noted above, Mrs. Guldoon was not afforded a "risk assessment" process. She was merely notified that she must register as a Level II Sex Offender under ROSA when she signed her parole conditions. J.A. at 8-10. The Board may argue that the cost of instituting procedures for every released sex offender on parole or probation, together with the government's strong interest in protecting children, outweigh the other *Mathews* factors. However, the fiscal and administrative burdens on the government is minute compared to the substantial deprivation that a level designation imposes on Mrs. Guldoon. Level I offenders do not have their information released to the public, whereas Level II and III offenders do. J.A. at 38. Additionally, Level I offenders only have to register for twenty years, Level II offenders register for life with a chance to be granted relief after thirty years of registration, and Level III offenders register for life. Correction Law § 168-h, J.A. at 35. The level designation also affects what special conditions are imposed. For example, Lackawanna Executive Law § 259c – (16) revoking a sex offender's driver's license may not apply to Level I offenders. J.A. at 25-6. Without a hearing prior to Mrs. Guldoon's Level II designation, she now has to register as a sex offender for life under Correction Law § 168-h (2), with a chance to be granted relief after thirty

years of registration under Correction Law § 168-o (1). Therefore, registering as a sex offender for thirty years minimum without having a hearing prior to her designation is an erroneous deprivation that outweighs the government's interest in protecting minors and the fiscal and administrative burdens of providing hearings prior to a sex offender's level designation.

## II. ROSA VIOLATES THE EX POST FACTO CLAUSE BECAUSE THE REGISTRATION REQUIREMENTS AND SPECIAL CONDITIONS MAKE MRS. GULDOON'S PUNISHMENT MORE BURDENSOME AFTER HER CRIME WAS COMMITTED

Article 1, Section 10 of the United States Constitution states that "no state shall…pass any…ex post facto law…" U.S. Const. art. I, §10, cl. 1. A law does not violate the Ex Post Facto Clause unless it (1) punishes, as a crime, an act previously committed which was innocent when done, (2) makes the punishment for a crime more burdensome after the crime was committed, or (3) deprives someone charged with a crime of a defense according to law at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 51 (1990), see *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925).

First, one must determine whether the legislature intended to establish a criminal or civil proceeding, as the Ex Post Facto Clause only applies to criminal statutes. *Smith v. Doe*, 538 U.S. 84, 92, 105 (2003). This Court established a test to determine whether a statute is in conflict with the Ex Post Facto Clause, requiring proof that the law: (1) is retrospective; and (2) disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

A retroactive law is "a legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the law came into effect." Black's Law Dictionary, 10th Ed., p. 1511. If the statute at issue is not criminal, a "disadvantage" to the offender may still be established if the statute's effects were "so punitive…as to negate [the State's] intention to deem it 'civil.'" *Smith*, 538 U.S. at 92, *quoting Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The Court ordinarily defers to legislative intent. *Id.* Such intent can be overcome by the "clearest

proof" that the statute is a criminal penalty. *Id.* The "clearest proof" that a civil regulatory law has a punitive effect is established by the following five factors:

> "the regulatory scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to this purpose." *Id.* at 97.[3]

Here, ROSA violates the Ex Post Facto clause because it imposes additional punishment on Mrs. Guldoon after she was charged with her crime and had already served six years in prison. *See* Petitioner's Complaint, pp. 10-11. ROSA is retrospective because it took effect in 2016, yet requires the registration of those designated as sex offenders on or after March 11, 2002. Lackawanna Correction Law §168-h. Someone who committed their crime *thirteen years* before the law took effect would be subject to the registration requirement. This would then trigger the special conditions, including license revocation and restrictions from using the internet or entering school grounds. When Mrs. Guldoon pled guilty in 2011, ROSA was but a gleam in the legislature's eye. Mrs. Guldoon had no way of knowing what would be imposed upon her in six years' time; she only knew of the general parole conditions upon which she based her decision to enter a guilty plea and forgo a trial. Viewed by the founding generations as a "great substantive protection against arbitrary or vindictive legislatures," the Ex Post Facto clause has rarely been tested before this Court. Wayne A. Logan, The Ex Post Facto Clause and the Jurisprudence of Punishment, 35 Am. Crim. L. Rev. 1261, 1267, 1277-78 (1998).

> "The subjecting of men to punishment for things which, when they are done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." The Federalist No. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright 3d ed., 1972).

[3] This Court in *Smith* did not consider Alaska's law "criminal" because the law served to alert sex offenders to the civil consequences of their criminal conduct, and did not mandate any procedures other than the duty to register. *Id.* at 96.

ROSA makes the punishment for Mrs. Guldoon more burdensome by, in effect, banishing her from her community, severely restricting her freedom of travel, and arbitrarily subjecting her to excessive punitive measures without regard to her risk of recidivism.

### A. The ROSA Requirements Disadvantage Mrs. Guldoon Because They Impose a Regulatory Scheme Recognized in our History and Tradition as Punishment

A civil statute may be deemed punitive if the regulatory scheme has been regarded in our history and traditions as a punishment. *Smith*, 538 U.S. at 97. In addition to requiring Mrs. Guldoon to register as a Level II sex offender for at least thirty years before she is eligible for review, ROSA also states "…such sentenced offender shall refrain from knowingly entering into or upon any school grounds…" Lackawanna Executive Law §259-c – (14). "School grounds" are defined as any building structure or land contained within the property of a school, as well as "any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school…" Lackawanna Executive Law § 259 – (14). In addition, ROSA states that "no person who has been designated a level two or level three sex offender under this article shall operate a motor vehicle…for a period of twenty years, or as long as that person is required to remain registered, whichever is shorter." Lackawanna Correction Law §168-v.

Justice Ginsberg stated that "placement of the registrant's face on a webpage under the label 'Registered Sex Offender' calls to mind shaming punishments once used to mark an offender as someone to be shunned." *Smith*, 538 U.S. at 116 (Ginsberg, J. dissenting). In the colonial days, the most serious offenders were banished, which not only prevented them from returning to their communities, but also so tarnished their reputations that they were prevented from being admitted into new communities. *Id.* at 99, *People v. Leroy*, 828 N.E.2d 769, 786 (Ill. App. Ct. 2005) (Kuehn, J., dissenting) (noting that banishment is the traditional punishment;

having one's reputation tarnished is merely a consequence of banishment, and not itself a traditional punishment). Here, Mrs. Guldoon is required to personally appear within twenty days of the third anniversary of her initial registration and every three years thereafter for the purposes of providing a current photograph. She must also register her address and internet accounts within ten days of any change. Lackawanna Corrections Law §168-f(2)(b-3), (4). By having to register as a sex offender with her picture available to the public, she is marked as someone who should be shunned by society. Before being charged, Mrs. Guldoon was a teacher at her alma mater, Old Cheektowaga High School. M. Guldoon Affidavit, p. 1. She grew up in Lackawanna, and is connected with the tight-knit community there. M. Guldoon Affidavit, p. 1. However, she is now publicly labeled as a sex offender and can no longer approach within 1,000 feet of any school. This prevents her from not only continuing her career as a teacher, but also from participating in any school-related activity with her daughter, who is now nine years old. M. Guldoon Affidavit, p. 2.

Although ROSA does not impose a residency restriction, it does impose a restriction on entering or remaining on school grounds. This effectively bars sex offenders from living within 1,000 feet of a school, in addition to traveling on any road past a school. In *State v. Seering*, the Supreme Court of Iowa ruled that the respondent had not been banished because he remained free to engage in most community activities, and that "true banishment…works a destruction on one's social, cultural, and political existence." 701 N.W.2d 665, 667 (Iowa 2005). However, the dissent argued that the onerous obligations on sex offenders results in community ostracism, which can effectively amount to banishment. *Id.* at 671-72.

The issue should be whether restrictions "resemble" banishment instead of whether a sex offender was in fact banished from a given area. *Leroy*, 828 N.E. 2d at 780-85. In *Doe v. Miller*, the Southern District of Iowa warned that "the differences between a law that would leave a man

in prison or cause him to go homeless rather than have him reside in the community, and an order forever banishing him, are very slight." 298 F. Supp. 2d 844, 869 (S.D. Iowa 2004). The restriction prohibiting Mrs. Guldoon from traveling within 1,000 feet of a school severely limits her means of transportation. This disadvantage is compounded by the revocation of her driver's license, which reduces her to a "prisoner in [her] own home." Complaint, p. 3, pp. 23. If sex offenders are prohibited from living in much or all of that state, or prevented from traveling within their town or city, the courts are prohibiting a class of people from living within a given area within a state. The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment, which has been applied to the States under the Fourteenth Amendment. *Kent v. Dulles*, 375 U.S. 116, 125 (1958). If this Court in *Dulles* views international travel as a fundamental liberty interest, referencing the freedom of movement so deeply ingrained in our nation's history, the same should undoubtedly apply to travel within one's state of residence.

In *People v. Leroy*, the Illinois Court of Appeals held that because there was no evidence of the practical effect of the Illinois residency restriction on sex offenders, the statute did not amount to banishment. 828 N.E. 2d at 781. However, in this case, there is evidence of the practical effect of ROSA on Mrs. Guldoon. Her movement is restricted due to living in close proximity of two schools, her photograph is posted on a Registered Sex Offender site, and she was forced to take a job unrelated to her training and expertise at odd hours, further isolating her from the community.

### B. The ROSA Requirements Impose an Affirmative Disability on Mrs. Guldoon Because They Promote Traditional Aims of Punishment

A civil statute may be deemed punitive if the regulatory scheme promotes the traditional aims of punishment or imposes an affirmative disability or restraint on the offender affected by it. *Smith*, 538 U.S. at 97.

ROSA promotes retribution, deterrence and incapacitation, which are all considered traditional aims of punishment. Deterrence can be achieved by limiting a sex offender's opportunity to commit another offense, which in this case, would involve preventing Mrs. Guldoon from working with 15 year olds. ROSA achieves this aim of deterrence through the school grounds restriction. Further, the school grounds restriction excludes Mrs. Guldoon from her profession as a teacher. In *Ex Parte Garland*, this Court held that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct" is a punishment. 71 U.S. 333, 377 (1867). In *United States v. Lovett*, this Court viewed the permanent prohibition of working for the government as a punishment "of the most severe type." 328 U.S. 303, 316 (1946). This Court in *Smith* recognized that sex offender registration requirements might deter future crimes. 538 U.S. at 102. While *Leroy* stated that "the mere presence of a deterrent purpose" does not render a statute criminal—and *Smith* agreed that "to hold that the mere presence of a deterrent purpose renders such sanctions 'criminal'…would severely undermine the government's ability to engage in effective regulation,"—deterrence is not the only means of punishment ROSA promotes. *Smith*, 538 U.S. at 102, *quoting Hudson v. United States*, 522 U.S. 93, 105 (1997) (Breyer, J., concurring).

ROSA also promotes retribution, which is "punishment imposed as repayment or revenge for the offense committed…" Black's Law Dictionary, 6th Ed., p. 914. The Eighth Circuit stated, "any restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect." *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005), *see also Smith*, 538 U.S. at 109 ("…when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." (Souter, J., concurring)). Although there is not an explicit

residency restriction in ROSA, the school grounds restriction functions as a residency restriction because it would prevent a registered sex offender from living within 1,000 feet of any school.

The Court in *Leroy* stated that the Illinois residency restriction imposed a blanket restriction on all sex offenders, and directly promoted retribution. *Leroy*, 828 N.E. 2d at 781. However, the *Leroy* court failed to consider another traditional aim of punishment: incapacitation. *Ewing v. California*, 538 U.S. 11, 35 (2003) (Stevens, J., dissenting) (recognizing that the justifications for punishment include deterrence, incapacitation, retribution, and rehabilitation). One goal of imprisonment is to incapacitate prisoners and prevent re-offense by confining inmates in a controlled area. Similarly, residency restrictions, such as the school grounds restriction, incapacitate sex offenders by restricting where they live and where they may travel in order to deprive them of the opportunity to recidivate.

The ROSA registration requirement imposes an affirmative disability on Mrs. Guldoon because it exposes her to humiliation and community-wide ostracism. *Smith*, 538 U.S. at 97 (Ginsberg, J., dissenting). Additionally, the school grounds restriction severely limits where sex offenders may live and work, given potential difficulties in arranging transportation compliant with ROSA. See *Miller*, 298 F. Supp. 2d at 869. This Court in *Smith* also recognized that residency restrictions create housing disadvantages.[4] *Smith*, 583 U.S. at 100.

Because residency restrictions are more restrictive than registration requirements, like those upheld in *Smith*, yet are less restrictive than mandatory civil commitment of the mentally ill in *Hendricks*, they do not impose an affirmative disability. *Id.*, *Hendricks*, 521 U.S. at 350. However, the court in *Hendricks* upheld a statute for civil commitment that required a showing of mental abnormality that made it difficult for a sexually violent predator to control their future

[4] Residency restrictions infringe upon sex offenders' freedoms to "move where they wish" and "live…as other citizens," making restrictions more disabling than other categorical lifelong restrictions, including registration requirements, work prohibitions, and voter disenfranchisement. *Smith*, 583 U.S. 84 at 109 (Souter, J., concurring).

dangerousness. *Hendricks*, 521 U.S. at 350. ROSA is distinguishable from the *Hendricks* statute because the *Hendricks* statute narrowed the class of persons eligible for confinement to those who are "unable to control their dangerousness." *Id.* at 358. Additionally, *Hendricks* allowed for offenders to have their mental status evaluated every year, whereas here, ROSA has no such evaluation provision in place until Mrs. Guldoon has been registered for a minimum of thirty years. *Id.* at 350.

### C. The ROSA Requirements are Excessive Because They Apply to Sex Offenders of All Levels Regardless of Their Risk of Recidivism

A civil statute may also be deemed punitive if it has a rational connection to a nonpunitive purpose or is excessive with respect to this purpose. *Smith*, 538 U.S. at 97. The determination of "excessiveness" under Ex Post Facto jurisprudence is not a question of whether a legislature made the best possible choice to address the problem it sought to remedy, but whether the regulatory means chosen by a legislature are reasonable in light of the nonpunitive objective of the statute. *Id.* at 105. A number of factors go into assessing the dangerousness of sex offenders or the likelihood of their re-offense: prior criminal history; the number of sexual offenses; the victim's age and sex; the relationship to the victim; and whether mental illness was involved. *Miller*, 298 F. Supp. 2d at 861. Additionally, ROSA is excessive because the scope of the act exceeds the purpose of promoting public safety by applying the restrictions to all level II and III convicted sex offenders, regardless of their future dangerousness. See *Smith*, 538 U.S. at 116-17 (2003) (Ginsberg, J., dissenting). The duration of the reporting requirement is determined by whether the offense is qualified as aggravated, not whether the offender actually poses any risk of re-offending.[5] *Id.*

[5] "The Eight Circuit's rationale reduces simply to a decision that a legislature's inability to determine which sex offenders are dangerous and what restricted distance is safe justifies categorical restrictions for life." Mark Loudon-Brown, "*They Set Him On A Path Where He's Bound To Get Ill": Why Sex Offender Residency Restrictions Should Be Abandoned*, 62 N.Y.U. Ann. Surv. Am. L. 795, 826 (2007).

The ROSA requirements do not have a rational connection to protecting children and the public from sex offenders because there is no data establishing a correlation between the proximity of a sex offender's residence to a school and the risk of recidivism. *Id.* at 864. In *Miller*, Dr. McEchron, the State's expert witness, testified that he "had not seen a variable that consists of the distance that one resides from a school or day care, nor was he aware of any studies that have presented evidence of recidivism rates that specifically look at the distance sex offenders live from a school or child care facility." *Id.* at 861. Additionally, Dr. Rosell, the plaintiff's expert witness, testified that he "was not aware of any literature suggesting that the distance or proximity to a school or daycare center is a factor in whether or not someone was going to offend." *Id.*

Most sex offenders know their victims and do not pose a threat to strangers. In [Dr. Rosell]'s experience, "'stranger relationships' have always been the least common type of relationships." *Id.* A Swedish study, which categorized sex offenders by the modus operandi of the individual, indicated there can be stability in the offenders' choice of victim in terms of gender and age group. *Id.* Here, B.B. was a fifteen year old student of Mrs. Guldoon, not a stranger. This would indicate that if Mrs. Guldoon posed any future danger, it would likely only be towards fifteen-year-old male students. Therefore, her restriction preventing her from driving past an elementary school is irrational. Further, her current recidivism risk is lowered by the fact that she is on proper medication for her bi-polar disorder. J.A. at 13. This has prevented further manic episodes, like the one that prompted her illicit relationshp with B.B. J.A. at 13. Although ROSA does offer Level II offenders the ability to be removed after thirty years, that is a long time for a person to be registered without an opportunity for evaluation of their present dangerousness. Therefore, the offender is subjected to long-term monitoring and inescapable humiliation.

Some jurisdictions across the country are under the impression that restricting all sex offenders alike does not constitute punishment and is necessary due to the "the higher-than average risk of re-offense posed by convicted sex offenders and the imprecision involved in predicting what measures will best prevent recidivism." *Miller*, 298 F. Supp. 2d at 861. By reducing the contact between sex offenders and children, the legislature reduces sex offenders' opportunity to recidivate. *Miller*, 405 U.S. at 722-23. However, if a 500-foot restriction is sufficient to promote this nonpunitive end, why is ROSA's 1,000-foot restriction to promote the same end not excessive?

This Court expressed its concern that "a legislature may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Prods*., 551 U.S. 244, 266 (1994). This is precisely what happened to Mrs. Guldoon. The retroactive implication of ROSA drastically effects the rest of her life, to the extent that, if she had known of the ROSA requirements and restrictions, she may have decided not to plead guilty and take her case to trial. After making a decision that has substantially changed the rest of her life, she is subject to a host of restrictions that infringe upon her liberty and further penalizes her.

## CONCLUSION

This Court should reverse the decision of the Thirteenth Circuit and find that ROSA violates Mrs. Guldoon's First Amendment right to free speech and her Fourteenth Amendment right to due process. Moreover, this Court should reverse the decision of the Thirteenth Circuit and find that ROSA violates Mrs. Guldoon's Ex Post Facto rights when the law was passed after her conviction.

Respectfully Submitted,

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