No. 19-01

In the Supreme Court of the United States

MARY GULDOON, PETITIONER

v.

LACKAWANNA BOARD OF PAROLE, RESPONDENT

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

BRIEF FOR THE PETITIONER

TEAM NUMBER: 6

QUESTIONS PRESENTED

I. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act violates Petitioner's rights under the First and Fourteenth Amendment to 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.

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BRIEF FOR THE PETITIONER

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CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State . . . shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. Amend. XIV.

Clause Three of Article One, Section Nine of the United States Constitution provides that "[n]o . . . ex post facto Law shall be passed[.]" U.S. Const. art. I, § 9, cl. 3.

Clause One of Article One, Section Ten of the United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law[.]" U.S. Const. art. I, § 10, cl. 1.

STATEMENT

Following Mary Guldoon's plea of guilty to three counts of statutory rape pursuant to Lackawanna Penal L. §§ 130.35, 130.40, and 130.20, Ms. Guldoon was given an indeterminate sentence of ten to twenty years—to be followed by probation. (R. at 2.) Ms. Guldoon began serving her sentence in 2011 and was released on parole in 2017. (R. at 2.) While incarcerated, the Lackawanna Senate and Assembly passed, and the Governor signed, the Registration of Sex Offenders Act ("ROSA")—ultimately imposing new special conditions on Ms. Guldoon's parole. (R. at 2.) She challenged the constitutionality of these conditions in district court. (R. at 1-4.) The

district court granted summary judgment to the Lackawanna Board of Parole; Ms. Guldoon then appealed, and the court of appeals affirmed the district court's holding.

In 2008, Ms. Guldoon started teaching at Old Lackawanna High School as a computer science teacher. (R. at 11.) In April 2010, Ms. Guldoon left her teaching position on maternity leave; after giving birth, Ms. Guldoon was diagnosed with severe post-partum depression. (R. at 12.) Ms. Guldoon sought treatment and was prescribed Prozac to help combat the mental illness. (R. at 12.) The medication did not help, but Ms. Guldoon insisted on returning to teaching and in September 2010, she did just that. (R. at 12.) Upon resuming to teaching, Ms. Guldoon began building a traditional student-teacher relationship with B.B., a student in her Introduction to Computer Science class. (R. at 12.) B.B. frequently sought out Ms. Guldoon for extra help with B.B.'s studies, and eventually, their discussions expanded to include topics such as B.B.'s abusive father and B.B.'s mother's struggles with addiction. (R. at 12.) In October 2010—approximately a month after returning to teaching—Ms. Guldoon engaged in a sexual relationship with B.B. (R. at 12.) Ms. Guldoon and B.B. would communicate via text messaging, emails, and notes on B.B.'s homework. (R. at 6.) The relationship occurred mostly in Ms. Guldoon's classroom, but on at least three occasions, Ms. Guldoon drove B.B. to her house. (R. at 7.) The relationship lasted from October 2010 until May 2011 when the two were discovered in Ms. Guldoon's classroom by Ed Rooney, the Principal of Old Cheektowaga High School. (R. at 7 & 12.) After Mr. Rooney contacted legal authorities, Ms. Guldoon was charged, and eventually plead guilty, to three statutory rape charges. (R. at 2.)

In 2011, Ms. Guldoon began serving her sentence at Tonawanda State Correctional Facility, and during her tenure at Tonawanda, Ms. Guldoon was diagnosed with bipolar disorder. (R. at 13.) The psychiatrist determined that Ms. Guldoon's bipolar disorder was unmasked by the

Prozac medication. (R. at 13.) Ms. Guldoon underwent successful treatment for the disorder and starting thriving at Tonawanda—illustrated by the earning of a Master's Degree in Computer Programming through the University of Phoenix online program. (R. at 13-14.)

Also, the Lackawanna Government passed, and ultimately implemented, ROSA during the time of Ms. Guldoon's incarceration. (R. at 2.) ROSA requires every person convicted of a "sex crime" to register with the State as a "sex offender." (R. at 2.) ROSA further classifies "sex offenders" within a specified level—either I, II, or III—corresponding to the crimes committed; Ms. Guldoon was required to register as a Level II offender. (R. at 2 & 14.) Resulting from Ms. Guldoon's classification, ROSA mandatorily imposed new special conditions on her parole—specifically:

> (a) I will register with the Division of Sex Offenders as a Level II Sex Offender . . . (b) I will not enter into or upon any school grounds . . . or any other facility or institution primarily used for the care and treatment of persons under the age of eighteen . . . (c) I will not use the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, or communicate with a person under the age of eighteen . . . (d) I will surrender my license to operate a motor vehicle[.]

(R. at 9.) ROSA's special conditions were superimposed with the general conditions of Ms. Guldoon's parole. The general, i.e., the original, conditions of her parole included: (1) meeting with her parole officer within twenty-four hours of release; (2) reporting to her parole officer as directed; (3) not leaving the State of Lackawanna without permission; (4) granting the parole officer permission to search her person and residence; (5) answering any questions that her parole officer asked; (6) agreeing to not fraternize with a known sexual offense on their criminal record; (7) giving up the right to own a firearm; and (8) not possessing drug paraphernalia. (R. at 8-9.)

With Ms. Guldoon's agreement to sign an amended parole scheme (R. at 8-10), she was released from Tonawanda in 2017 and returned home to live with her husband and one daughter. (R. at 2.) Ms. Guldoon's family home is located within just a few miles of both Old Cheektowaga Elementary School and Old Cheektowaga High School. (R. at 14.) Because of this location, the special conditions imposed by ROSA—specifically, revoking Ms. Guldoon's driver's license and banning her from traveling 1000 feet within a school—make it almost impossible for her to travel. (R. at 18.) The special conditions imposed by ROSA have not only forced Ms. Guldoon to choose a new profession, but also, they have created an immense struggle to find any employment, as Old Cheektowaga does not have reliable public transportation. (R. at 15.) Consequently, Ms. Guldoon resorts to working a night-shift with Pleinski's Pierogi Company. Ms. Guldoon's average commute time is approximately two hours, but in the absence of the parole conditions, the travel time would only be 20 minutes. (R. at 15.) Considering that the weather in Old Cheektowaga makes commuting abnormally dangerous and the circuitous routes she must take because of the 1000 feet rule (R. at 18), Ms. Guldoon puts her life at risk every time she travels to work. (R. at 16.)

Aside from the revocation of her driver's license and the school ground restriction, Ms. Guldoon's rehabilitation back into society has also been burdened by the condition prohibiting access to "commercial social networking websites," defined as:

> [A]ny business, organization or other entity operating a website that permits persons under eighteen . . . to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen . . . may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as chat room or instant messenger; and (iii) communicate with persons over eighteen[.]

Lackawanna Exec. L. § 259-(c)(15) (amended 2016). In other words, the special condition prohibits Ms. Guldoon from accessing websites such as LinkedIn, Craigslist, Indeed, Facebook,

Twitter, and other similar websites because of the ambiguous and over-inclusive wording. The ban has also rendered Ms. Guldoon's computer science degree useless, as she is also prevented from teaching in an online setting. (R. at 15 & 17.)

In addition to putting Ms. Guldoon in a substantially difficult situation, the special conditions of her parole also impose the same detrimental effects on her family—as the conditions apply to them as well. (R. at 16.) Ms. Guldoon's family does not have internet access, nor do they have cell phones with internet capabilities. (R. at 17.) These conditions hinder Ms. Guldoon's husband and his work significantly as he needs to be available to his employer by text and email (R. at 17.) Also, Ms. Guldoon's daughter needs internet access for school but is unable to meet this requirement because of the condition. (R. at 17.) ROSA's promulgation has deprived Ms. Guldoon and her family the ability to function in present-day society.

SUMMARY OF ARGUMENT

The Supreme Court's precedent makes it clear that, although a parolee is not entitled to absolute liberty, a parolee's restrictions are to be designed to assure a "period of genuine rehabilitation" for the parolee, as well as ensuring that the "community is not harmed by the probationer's being at large." *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987). However, the Lackawanna Government—through their implementation of ROSA—diverges from this rationality and employs restrictions that are arbitrarily-mandated. First, by banning Ms. Guldoon from using the internet, ROSA explicitly imposes a special condition of parole that burdens more speech than is necessary. That is to say, because the connection between Lackawanna's legitimate interests, i.e., protecting minors and the general population from sexual abuse solicited over the internet, and Ms. Guldoon's prior convictions are nonexistent, the condition is not narrowly and necessarily tailored to achieve that end. Thus, ROSA prevents Ms. Guldoon from engaging in the "legitimate exercise of First Amendment rights" simply because the legislation mandates it—

thereby violating her First Amendment rights to free speech. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

Moreover, the special conditions imposed by ROSA also violates Ms. Guldoon's due process rights pursuant to the Fourteenth Amendment. The internet ban violates the Due Process Clause under the void for vagueness doctrine because, as the condition is so vague and standardless, it fails to give an ordinary person fair notice of the conduct it punishes and invites arbitrary enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Also, the special condition mandatorily-revoking Ms. Guldoon's driver's license violates the Due Process Clause. Any connection between the use of an automobile and the facilitation of Ms. Guldoon's prior crimes is solely tangential; therefore, because the right to travel is fundamental and any infringement upon that right must be narrowly tailored to serve a compelling state interest, ROSA violates Ms. Guldoon's due process rights because no State interest is truly being "served."

ROSA is also unconstitutional pursuant to the Ex Post Facto Clause for three reasons. First, ROSA retrospectively imposes a greater punishment than provided by the original parole conditions. In other words, the special conditions increase the measure of punishment attached to Ms. Guldoon's convictions. *See Peugh v. United States*, 569 U.S. 530, 539 (2013). Secondly, ROSA alters Ms. Guldoon's substantive rights, rather than her procedural rights, to her disadvantage because ROSA alters the substantive formula used to calculate the applicable sentencing range; this specific type of change to Ms. Guldoon's parole conditions is "one of the principal interests that [the Ex] Post Facto Clause was designed to serve[.]" *Carmell v. Texas*, 529 U.S. 513, 531 (2000). Third, ROSA axiomatically functions as a punitive penalty—rather than a civil penalty—because Ms. Guldoon is not a danger to society, and thus, the disadvantageous conditions are not justified by Lackawanna's legitimate interests. For these reasons, this Court

should hold that the special conditions of Ms. Guldoon's parole not only violate her First and Fourteenth Amendment rights, but also violates the Ex Post Facto Clause.

ARGUMENT

I. The registration requirements and special conditions of parole required by Lackawanna's ROSA violate Ms. Guldoon's rights under the First and Fourteenth Amendments to the United States Constitution.

As a parolee, Ms. Guldoon is "not without constitutional rights[,]" and thus, she is "entitled to some form of due process in the imposition of special conditions of parole[.]" *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970); *Pollard v. U.S. Parole Comm'n*, No. 15-cv-9131 (KBF), 2016 WL 3167229, at *3-4 (S.D.N.Y. June 6, 2016). Although Lackawanna retains a substantial interest in ensuring that its citizens are protected from further criminal acts by Ms. Guldoon, Lackawanna may only impose restrictions and special conditions on her rights insofar that the restrictions and conditions are "reasonably and necessarily related to the interests that the Government retains after . . . conditional release." *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972). Because ROSA imposes two special conditions upon Ms. Guldoon's parole—(1) the internet ban and (2) the revocation of her driver's license—which are not reasonably and necessarily related to Lackawanna's legitimate interests, ROSA impermissibly infringes, and ultimately violates, Ms. Guldoon's constitutional rights under the First and Fourteenth Amendments to the United States Constitution.

A. Because Ms. Guldoon never used the internet to commit, or even slightly facilitate, her past crimes, ROSA's internet ban is unconstitutional pursuant to the First Amendment as the special condition is not narrowly tailored to serve Lackawanna's legitimate interests.

A fundamental principle of the First Amendment is that "all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham*, 137 S. Ct. at 1735. In other words, the First Amendment protects an individual's

right to speak in a spatial context, such as a "street or a park[,]" because these spaces represent "essential venues for public gatherings[.]" *Id*. Spatially, there is no more important of a venue than cyberspace and "social media in particular[.]" *Id*. Social media offers individuals the "unlimited, low-cost capacity for communication of all kinds" and the ability to "engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Id*. at 1735-36 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). Consequently, for Lackawanna to "foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id*. at 1737; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (holding that the government "may not suppress lawful speech as the means to suppress unlawful speech").

Even conceding that ROSA's internet ban is "content neutral," i.e., ROSA does not regulate speech on the grounds of *what* one is saying but simply on *where* one is saying it, the question becomes whether ROSA, under the judicial deference of intermediated scrutiny, is "justified without reference to the content of the regulated speech[.]" *McCullen v. Coakley*, 573 U.S. 464, 501 (2014) (quoting *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986)). Intermediate scrutiny demands a law to be "narrowly tailored to serve a significant governmental interest"; put another way, ROSA must not "burden substantially more speech than is necessary" to further Lackawanna's legitimate interests. *Packingham,* 137 S. Ct. at 1736. With respect to this case, this Court should find that the internet ban violates Ms. Guldoon's First Amendment rights because ROSA does not, and is not specifically tailored to, further Lackawanna's legitimate interests.

Numerous courts have held that a special condition restricting or banning a parolee's ability to use the internet must be the result of specific tailoring and not the result of an arbitrary mandate. *See United States v. Peterson*, 248 F.3d 79, 82-84 (2d Cir. 2001) (holding sentencing component

that prohibited access to the internet because of defendant's prior conviction for incest and accessing adult pornography on a home computer was an unreasonable condition); *United States v. White,* 244 F.3d 1199, 1205-07 (10th Cir. 2001) (invalidating and requiring modification of restriction imposed on a defendant who used the internet to receive child pornography); *United States v. Ramos,* 763 F.3d 45, 62 (1st Cir. 2014) (noting where defendant's offense did not involve the use of internet or computer, and he did not have a history of impermissible internet or computer use, courts have vacated broad internet bans regardless of probation's leeway in being able to grant exceptions); *United States v. Smathers*, 351 Fed. App'x 801, 802 (4th Cir. 2009) (invalidating supervisory condition restricting defendant's internet access because defendant's crime did not involve computer or internet and because there was no evidence that defendant had a history of using computer or internet to obtain or disseminate child pornography); *United States v. Paul,* 274 F.3d 155, 169 (5th Cir. 2001) (upholding restriction imposed on a defendant who produced child pornography and used the internet to distribute it).

In light of the Supreme Court's holding in *Packingham* and the numerous holdings of past cases, ROSA's internet restriction violates Ms. Guldoon's First Amendment rights because the internet was not essential or integral to the facilitation of her past crimes and because Ms. Guldoon has no history of using the internet to commit other offenses. *See United States v. Lacoste,* 821 F.3d 1187, 1191 (9th Cir. 2016) (noting courts have upheld conditions prohibiting internet use only in limited circumstances: (1) when use of internet was "essential" or "integral" to offense of conviction, or (2) when defendant has a history of using internet to commit other offenses). Ms. Guldoon concedes that Lackawanna's governmental interest in protecting minors and the general population from sexual abuse solicited over the internet is legitimate. However, nothing in the record reflects that Ms. Guldoon used the internet or any commercial social networking websites

to commit, or even slightly facilitate, her past crimes. Thus, ROSA is simply "suppress[ing] lawful speech as the means to suppress unlawful speech" because ROSA assumes that all Level II sex offenders, just as Ms. Guldoon is classified, should be banned simply because they are classified as such. *Ashcroft*, 535 U.S. at 255.

Moreover, rather than taking into account the specifics of Ms. Guldoon's prior conviction and narrowly-tailoring a probational scheme, Lackawanna infringes upon Ms. Guldoon's First Amendment rights simply to "combat misuse of the internet by sex offenders[,]" i.e., there is no specificity. (R. at 21.) ROSA fails to site to any statistical data or objective findings that substantiate their claims that an internet ban furthers Lackawanna's legitimate interests. Although Ms. Guldoon has "substantial restraints" on her freedom as a result of parole, this does not mean that she is not entitled to any constitutional rights whatsoever. As articulated by the Supreme Court, ROSA may not prevent Ms. Guldoon from engaging in the "legitimate exercise of First Amendment rights" simply because the legislation says it can. *Packingham*, 137 S. Ct. at 1737; *see United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (holding that condition of supervised release imposing a ban on defendant's internet access violated the First Amendment because, although defendant had history of sexual misconduct, the record was devoid of evidence that he used his computer for anything beyond possessing child pornography).

Packingham is clear that an internet ban or restriction cannot burden more speech than is necessary, and the Court did not make an exception for parolees. Because Ms. Guldoon's past convictions were not facilitated through her use of the internet, there is no axiomatic relationship between the special condition of parole and the minimizing of sexual abuse solicited over the internet. For this reason, and combined with the lack of relationship between the ban and Ms. Guldoon's rehabilitation back into society, ROSA fails the intermediate scrutiny standard; ergo,

this Court should find that this special parole condition violates Ms. Guldoon's First Amendment rights.

B. ROSA's special conditions are unconstitutional pursuant to the Fourteenth Amendment because the conditions violate Ms. Guldoon's due process rights.

In essence, the Due Process Clause of the Fourteenth Amendment guarantees fairness. The special conditions imposed by ROSA violate this constitutionally-guaranteed fairness. First, ROSA's internet ban violates Ms. Guldoon's due process rights as the ban is so vague and standardless, it fails to give an ordinary person fair notice of the conduct it punishes and invites arbitrary enforcement. *See Kolender*, 461 U.S. at 357-58. Secondly, ROSA violates the substantive portion of Ms. Guldoon's due process rights because the revocation of her driver's license is not narrowly tailored to serve Lackawanna's legitimate interests. *See Reno v. Flores*, 507 U.S. 292, 302 & 305 (1993).

1. ROSA's internet restriction violates Ms. Guldoon's due process rights because the condition is so standardless that it forces persons of common intelligence to guess at its meaning and to differ as to its application.

An implicit premise within the Due Process Clause is that "the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). Thus, the void for vagueness doctrine ensures that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes"; in other words, "[a]ll are entitled to be informed as to what the State commands or forbids." *Bouie v. Columbia*, 378 U.S. 347, 351 (1964) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). The vagueness doctrine also applies to circumstances where precise and technical language is used throughout the statute. *Id*. at 352 (stating that "[t]here can be no doubt that a deprivation of the right of fair warning can result . . . from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language").

As a result, the Due Process Clause prevents the construction of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application[.]" *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The standard for determining whether a law violates the void for vagueness doctrine is as follows: if the statute "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case[,]" the statute violates the doctrine. *Giaccio,* 382 U.S. at 402-03. Ms. Guldoon's special condition of parole bans her from using the internet to access "commercial social networking websites"; because this condition is so vague and standardless, ROSA violates Ms. Guldoon's due process rights under the void for vagueness doctrine.

Although ROSA defines the term "commercial social networking websites," the provision is void for vagueness because it is so unclear as to be susceptible to no reasonable interpretation. Most websites call for some form of networking or, at the very minimum, to connect to a networking site. Moreover, the term "commercial" suggests that there are "non-commercial" social networking sites; a person of reasonable intelligence cannot be expected to know such subtle differences. As a result, Ms. Guldoon would necessarily have to guess at its meaning—thereby leading reasonable individuals to differ as to its application. Respondent will most likely raise the fact that ROSA affirmatively defines the term with three minor subsections. However, the resulting definition still leaves Ms. Guldoon with uncertainty as to the conduct it prohibits. In other words, the special condition inadvertently delegates Ms. Guldoon the responsibility to determine "what is prohibited and what is not in each particular case." *Giaccio*, 382 U.S. at 402-03; *see James v. United States*, 550 U.S. 192, 230 (2007) (noting that "[t]he phrase 'shades of red[]' . . . does not

generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so") (Scalia, J., dissenting). It places the burden on Ms. Guldoon, at the expense of violating her parole, to interpret and figure out what is meant by "engage in direct or real time chat" and "create web pages and profiles [that] provide information about themselves where such web pages are available to the public or other users." Lackawanna Exec. L. § 259-(c)(15).

This is not to say that the words used by ROSA are vague in themselves; rather, the words—when applied to a vast and fluid environment such as the internet—are not capable of providing a person of reasonable intelligence adequate notice of what is, and what is not criminal conduct. In other words, ROSA's vagueness presents a "potential for arbitrarily suppressing First Amendment liberties[.]" *Kolender*, 461 U.S. at 358 (quoting *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90-91 (1965)); *see Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Aptheker v. Sec'y of State*, 378 U.S. 500, 505-06 (1964). Even when applied to the context of Ms. Guldoon's knowledge, the phrase "commercial social networking sites" still does not provide sufficient definiteness so that Ms. Guldoon can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. In other words, Ms. Guldoon's prior convictions were not facilitated by the use of a commercial social networking website, and thus, the contextual argument is immaterial—i.e., Ms. Guldoon's personal knowledge provides her with no more adequate notice. Consequently, ROSA fails the vagueness test because it "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits[.]" *Giaccio*, 382 U.S. at 402-03. The Court should rule in favor of precedent and find that ROSA's internet condition is void for vagueness—thereby violating Ms. Guldoon's Fourteenth Amendment rights.

2. Because ROSA mandatorily revokes Ms. Guldoon's ability to operate a motor vehicle and necessarily infringes upon her fundamental right to travel, the special condition violates her due process rights

The substantive portion of the Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). In other words, the substantive component "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 302. Consequently, a substantive due process analysis "must begin with a careful description of the asserted right"; if the asserted right is "fundamental," the Court must apply strict scrutiny. *Id*. Conversely, if the asserted right is not fundamental, the government is demanded no more "than a 'reasonable fit' between [the] governmental purpose . . . and the means chosen to advance that purpose." *Id*. at 305. An asserted right is fundamental when that right is "'so rooted in the traditions and conscience of our people as to be ranked as fundamental[,]'" and the "mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it[.]" *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Because the right to travel is a fundamental right, ROSA violates Ms. Guldoon's due process rights because the revocation of her driver's license is not narrowly tailored to serve a compelling state interest.

The right to travel—also referred to as the right to freedom of movement—is not a novel issue; rather, the right to travel has been identified by the Supreme Court, on numerous occasions, as a right that is fundamental to the American scheme of values. *See Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (holding that the right interstate movement is "fundamental" and its "constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest"); *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (holding that "[i]n all . . . States[,]

from the beginning down to the adoption of the Articles of Confederation[,] citizens . . . possessed the fundamental right, inherent in citizens of all free governments, [to] peacefully . . . dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right"); *Kent*, 357 U.S. at 126 (stating that fundamental rights, such as free speech, free assembly, and free association, are often tied in with the right to travel, and the "[f]reedom of movement is basic in our scheme of values"); *see also Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 901-02 (1986); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254 (1974). Unquestionably, the right to travel is fundamental; thus, any infringement upon that right by Lackawanna must be narrowly tailored pursuant to a compelling state interest.

As prescribed in Lackawanna Corr. L. § 168-v, "no person who has been designated a level two or three sex offender . . . shall operate a motor vehicle . . . for a period of twenty years, or long as that person is required to remain registered, whichever is shorter." This probational condition is mandatory and calls for the Parole Board, regardless of the facts and relevant information regarding Ms. Guldoon's convicted crime, to revoke her driver's license. See Lackawanna Exec. L. § 259-(c)(16). Because the right to travel is fundamental, any infringement upon that right must be "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302. Lackawanna's compelling state interest in promulgating ROSA is to reduce the community's risk and exposure to sex offenders. However, as applied to Ms. Guldoon's circumstances, the revocation of her driver's license does not further and "serve" this state interest. Ms. Guldoon never used a motor vehicle as a primary method to facilitate her past convictions—any use of a motor vehicle was tangential. There is no discretion left to the Parole Board as ROSA mandates a blanket-sweep of all Level II and Level III sex offenders of their driver's license. That is to say,

the Parole Board does not take into account that preventing Ms. Guldoon from coming within 1000 feet of any school essentially makes Ms. Guldoon a prisoner in her own home. Ms. Guldoon's house is within one mile of two schools, and because she is located in a rural area with limited roads, Ms. Guldoon is forced to put her life at risk merely to get to her job. (R. at 3 & 16.)

The Parole Board's decision in no way facilitates Ms. Guldoon's rehabilitation back into society; the special condition is axiomatically the result of an arbitrary and capricious implementation. Also, the revocation of Ms. Guldoon's driver's license does not further Lackawanna's legitimate interests in protecting minors, reducing recidivism, and preventing harm to the public. For these reasons, ROSA violates Ms. Guldoon's due process rights pursuant to the Fourteenth Amendment as it deprives her of a fundamental right without constitutional justification.

II. The registration requirements and special conditions of parole required by ROSA and imposed on Ms. Guldoon constitute violations of the Ex Post Facto Clause of the United States Constitution.

The Constitution of the United States forbids the enactment of ex post facto laws—stating that "[n]o bill of attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9. The Constitution also prohibits states from passing ex post facto laws in section ten by stating: "[n]o State shall . . . pass any . . . ex post facto Law[.]" U.S. Const. art. I, § 10. Specifically, the Ex Post Facto Clause forbids Congress and the States to enact a law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867). Through this prohibition, the Framers of the Constitution sought to assure that legislative acts gave fair warnings of their effect—permitting individuals to rely on the meaning of those acts. *Dobbert v. Florida*, 432 U.S. 282 (1977). In other words, it is only when the legislative acts are explicitly changed should the meanings change.

To violate the Ex Post Facto Clause, the statute must be retrospective, although the converse is not necessarily true; that is to say, a retrospective statute imposing a less onerous punishment would not be invalidated under the Clause. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In *Calder,* Justice Chase defined ex post facto laws as the following:

> [W]ithin the words and the intent of the prohibition. 1st. Every law that makes an action . . . 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[,] . . . or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390. ROSA violates the Ex Post Facto Clause of the United States Constitution because: (1) the legislation retrospectively imposes a greater punishment than provided by the original parole conditions; (2) ROSA alters Ms. Guldoon's substantive rights to her disadvantage; and (3) ROSA imposes a punitive penalty, rather than a civil penalty.

A. ROSA changes the conditions of parole and inflicts a greater punishment than Ms. Guldoon's original parole conditions.

A law is ex post facto, not when a new act increases the maximum punishment but rather, when a new act "presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh*, 569 U.S. at 539 (quoting *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995)). If the post-conduct amendments fail to increase the defendant's punishment beyond what it would have been prior to the amendments, the "imposition of punishment [is not] more severe than the punishment assigned by law when the act . . . occurred." *United States v. Colon*, 707 F.3d 1255, 1258-59 (11th Cir. 2013) (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)).

ROSA imposes special conditions upon Ms. Guldoon's parole that are new and "further" punishments. Ms. Guldoon pleaded guilty in 2011, and ROSA was not implemented until 2016—retroactively applying to Ms. Guldoon's conduct some 5 years prior. ROSA imposes "further" punishment as it forces Ms. Guldoon to suffer the public humiliation of being classified as a sex offender; this condition was not present in the original condition. Furthermore, Ms. Guldoon has lost her freedom of movement because she is reliant upon her husband to drive her everywhere, and if he is not available, she is forced to find another means of transportation. ROSA also deprives Ms. Guldoon of her ability to gain employment within her specialized fields. By banning Ms. Guldoon from using the internet, she is prohibited from accessing commercial social networking sites—thereby eliminating a major avenue to access job postings. The condition also makes her computer science degree useless. For the reasons stated, the implementation of ROSA was applied retrospectively and clearly imposes, when compared to the original conditions, new and more severe punishments that axiomatically hinders Ms. Guldoon. Therefore, ROSA violates the third definition of an ex post facto law prescribed by Justice Chase's definition in *Calder*.

B. Because the change of parole conditions is a limitation on Ms. Guldoon's substantive rights rather than a change in procedural posture, ROSA violates the Ex Post Facto Clause.

For a change in law to be considered ex post facto, the change must present a substantive change; that is to say, a change in law that is merely procedural, i.e., a change to the way in which a defendant "travels" through the criminal justice system, is not sufficient to violate the Ex Post Facto Clause. *Thompson v. Utah*, 170 U.S. 343 (1898); *see Beazell v. Ohio*, 269 U.S. 167 (1925); *see also Collins v. Youngblood*, 497 U.S. 37 (1990) (noting that the term "procedural" refers to a change in law affecting the way criminal cases are to be adjudicated). The Supreme Court, while re-articulating Justice Chase's four categories, explicitly addressed the differences between a

substantive and procedural change in *Duncan v. Missouri*—stating that "the prescribing of different modes of procedure and . . . leaving untouched all the substantial protections which the existing law surrounds the person accused of a crime" are not considered to be substantive changes pursuant to the Ex Post Facto Clause. *Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894). Because ROSA illustrates a substantive change in the law, the Act satisfies Justice Chase's requirement.

The Supreme Court's analysis in *Carmell* provides the framework for determining whether a change in law, with respect to convicted sex offenders, is procedural. *Carmell*, 529 U.S. 513. The defendant amended a statute that authorized conviction of certain sexual offenses on a victim's testimony alone, rather than requiring corroborating evidence as previously required. *Id*. The Court held that the amendment acted as a procedural change because the amendment did not increase the punishment or present a change in the elements that the defendant had to prove. Thus, because the defendant's amendment only altered the legal rules of evidence, the change did not violate the Ex Post Facto Clause. *Id*.

In contrast to the holding in *Carmell*, the Supreme Court in *Peugh* held that a change in the law represented a substantive change, rather than a procedural change. *Peugh*, 569 U.S. at 538-39. In *Peugh*, the defendant was convicted of bank fraud in Illinois and was charged under the 2009 Federal Sentencing Guidelines, rather than the version of the Sentencing Guidelines current at the time the crime was committed. *Id*. The Court held that the use of the 2009 Federal Sentencing Guidelines violated the Ex Post Facto Clause because, although the sentencing authority exercises some measure of discretion, the change "enhance[d] the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." *Id*. (internal citations omitted). In doing so, the change in law "created a 'significant risk' of a higher sentence for Peugh

. . . and offended 'one of the principal interests that the Ex Post Facto Clause was designed to serve, fundamental justice[.]'" *Id.* (quoting *Carmell*, 529 U.S. at 531).

In this case, the record reflects that ROSA substantively changes the conditions of Ms. Guldoon's parole. That is to say, ROSA does not affect any procedural aspect of court proceedings and parole hearings in Lackawanna, such as the rules of evidence in *Carmell*. Instead, the sole purpose of ROSA is to add substantive conditions to Ms. Guldoon's parole. More specifically, these conditions impermissibly infringe on Ms. Guldoon's substantive rights by *adding* additional punishments to her terms of parole, such as the internet and motor vehicle prohibitions. Thus, ROSA enhances the measurement of Ms. Guldoon's punishment by altering the substantive formula used to calculate her applicable sentencing range. See *Peugh*, 569 U.S. at 538-39. Because the change in Ms. Guldoon's parole conditions are substantive rather than procedural, this Court should hold that ROSA violates the Ex Post Facto Clause.

C. ROSA functions as a punitive penalty—rather than a civil penalty—as applied to Ms. Guldoon because she is not a danger to society, and thus, the disadvantageous conditions are not justified by Lackawanna's legitimate interests.

An ex post facto law represents an imposition of new punishment for past acts. Thus, "[t]he question . . . where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction . . . comes about as . . . relevant incident to a regulation of a present situation[.]" *De Veau v. Braisted*, 363 U.S. 144, 160 (1960); *see Kansas v. Hendricks*, 521 U.S. 346 (1999) (holding that civil commitment programs detaining violent sexual predators are not punitive because it protects society); *United States v. Comstock*, 560 U.S. 126 (2010). In other words, the law "must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29 (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). The factors to be considered for determining whether an act is penal or civil in character are:

> (1) Whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned[.]

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-70 (1963). Because the Act satisfies a majority of these factors, ROSA is a punitive, rather than a civil, penalty.

In this case, ROSA imposes affirmative conditions on Ms. Guldoon's parole that both materialize as a disability and a restraint. Specifically, ROSA restrains Ms. Guldoon by revoking her driver's license—and consequently her ability to operate a motor vehicle—prohibiting her from using the internet to access commercial social networking websites, and denying her the right to go within 1000 feet of a school. (R. at 9.) ROSA also disables Ms. Guldoon because she is forced to suffer the public shame and the stigma of being labeled a Level II sex offender in Lackawanna. (R. at 9.)

Also, the operation of ROSA furthers the "traditional aims of punishment—retribution and deterrence." *Mendoza-Martinez*, 372 U.S. at 168-70. First, registration as a sex offender is both axiomatically retributive and deterrent. The registration requirement is retributive because it brings about some amount of shame and stigma— making the offender "pay" for their crime. The registration requirement is also a deterrent because the purpose is to make society aware of Ms. Guldoon's convictions and to put fear in Ms. Guldoon's stream of consciousness. Secondly, the ROSA's internet ban is a deterrent because prevents Ms. Guldoon from committing the same crime again via the internet; also, the ban is retributive because Ms. Guldoon is prohibited from looking at pornographic material or to engage in free speech activities, such using social media or reading

blogs. Moreover, ROSA did not apply until 2016, and thus, the special conditions could not, and were not, associated with Ms. Guldoon's convictions in Lackawanna prior to the Act's enactment. *See Mendoza-Martinez*, 372 U.S. at 168-70

Even conceding that registering as a sex offender is not excessive and is, for the most part, deemed reasonable, banning Ms. Guldoon from using the internet is excessive and a violation of First Amendment freedom. The Supreme Court has upheld that a blanket ban on internet usage, even for a sex offender, violates a person's constitutional rights. *See Packingham*, 137 S. Ct. 1730. Furthermore, the revocation of Ms. Guldoon's driver's license is also excessive; there is no rational connection between Lackawanna's interests and the revocation. Although respondent will most likely use the reasoning that a driver's license ban limits the movement of Ms. Guldoon and therefore restricts her access to possible victims—this logic is flawed because Ms. Guldoon, or any past convicted sex offender, could use a taxi, catch a Lyft or Uber, or simply walk to their victim. In other words, there is no logical connection, policy-wise, for the revocation of Ms. Guldoon's driver's license; thus, it is purely punitive.

Although historically courts have been split on whether special conditions on one's parole represents punishment, *See Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986); *see also Prater v. U.S. Parole Comm'n*, 802 F.2d 948 (7th Cir. 1986); *Warren v. U.S. Parole Comm'n*, 659 F.2d 183 (D.C. Cir. 1981), the modern trend among courts is that parole conditions adopted after an inmate has committed the crime are to be charged as punishment under an ex post facto analysis. *See Blair-Bey v. Quick*, 159 F.3d 591 (D.C. Cir. 1998). In consideration of all these factors, ROSA is a punitive penalty rather than a civil measure; therefore, this Court should hold that ROSA violates the Ex Post Facto Clause.

CONCLUSION

For the reasons stated, this Court should hold: (1) ROSA's registration requirements and special conditions are to be severed from Ms. Guldoon's parole because they are unconstitutional and (2) ROSA violates the Ex Post Facto Clause.