No. 19-01

IN THE
Supreme Court of the
United States

MARY GULDOON
Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

TEAM 7

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act violate Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution; and
2. Whether the registration requirements and special conditions of parole required by Lackawanna's Registration of Sex Offenders Act and imposed on Petitioner constitute violations of the Ex Post Facto Clause of the United States Constitution.

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STATEMENT OF FACTS

In December 2010, the principal of Old Cheektowaga High School discovered Mary Guldoon, a teacher, having sex in her classroom with a fifteen-year-old student, B.B. R. at 12. Ms. Guldoon, the Petitioner in this case, subsequently pleaded guilty to one count of rape in the third degree, one count of criminal sexual act in the third degree, and one count of sexual misconduct. R. at 2. The Old Cheektowaga Police Department investigation into her crimes revealed that Ms. Guldoon had begun the sexual relationship with B.B. in October 2010. R. at 5. The two engaged in sexual activities in her car, her classroom, and her home; Ms. Guldoon admitted they had likely had sex dozens of times. Id. They also communicated regularly through email and text messaging, and Ms. Guldoon drove B.B. home on multiple occasions after the two had sex in her home. R. at 5, 7. Additionally, B.B. stated that he had sent Ms. Guldoon naked photos of himself. R. at 6. B.B. now lives in a residential facility for counseling and has stated that he has trouble trusting adults or forming relationships with people his own age. Id.

Ms. Guldoon was sentenced to ten to twenty years in prison, followed by a period of probation. R. at 2. She began serving her sentence in 2011 and was released on parole in 2017. Id.

In 2016, the State of Lackawanna passed the Registration of Sex Offenders Act (ROSA). Id. The preamble to ROSA states that the statute is intended to protect the public from sex offenders and enhance law enforcement's ability to prevent and quickly resolve sex crimes. Id. at 19. ROSA imposed new conditions of parole on certain sex offenders deemed especially dangerous, which included suspension of driver's licenses, bans on travel within 1000 feet of schools, and bans on accessing social media. Id. Those new conditions only applied to those who victimized a minor, were determined to pose a high risk of danger to the public by the Board of

Examiners of Sex Offenders, or who, in the case of the social media site ban, used the Internet to facilitate in the commission of their crime. Those conditions were applied to Ms. Guldoon when she was released in 2017 because she victimized a minor, was determined to be a Level II sex offender, and used the Internet to facilitate the commission of her crime. R. at 3.

In 2019, Ms. Guldoon brought an action seeking declaratory and injunctive relief under 42 U.S.C. §1983 against the Lackawanna Board of Parole for violating her right to travel under the Fourteenth Amendment, her right to free speech under the First Amendment, and the Constitution's Ex Post Facto clause. R. at 4. The United States District Court for the Middle District of Lackawanna granted the Lackawanna Board of Parole's motion for summary judgment, ruling that the petitioner failed to state a claim for relief for all alleged violations of her rights. Guldoon v. Lackawanna Board of Parole, 999 F. Supp.3d 1 (M.D.Lack. 2019). The United States Court of Appeals for the Thirteenth Circuit affirmed the District Court's judgment. Guldoon v. Lackawanna Board of Parole, 999 F.3d 1 (13th Cir. 2019). This Court granted certiorari. Guldoon v. Lackawanna Board of Parole, 999 U.S. 1 (2019).

SUMMARY OF THE ARGUMENT

Petitioner alleges four potential violations of her constitutional rights: the Due Process Clause, the right to travel, the First Amendment, and the ex post facto clause. None of these violations occurred.

First, the special conditions of parole do not violate the Due Process Clause because the conditions are reasonably related to the Petitioners offense, the state's interest in her rehabilitation, and the protection of the public from further crimes. She used her car both as a location to have sex with her victim and as a means of taking him home after having sex. She met her victim at a school, and she communicated with him through online messaging services.

Therefore, it is reasonable for the State of Lackawanna to prevent the Petitioner from using her car, going near a school, or using social media.

Second, the conditions do not abridge the constitutional right to travel. The Supreme Court has never recognized a constitutional right to intrastate travel, and to recognize this now would be inconsistent with the history and purpose of the Privileges and Immunities Clause. Additionally, even if a right to intrastate travel exists, it would not apply to Petitioner, as it was extinguished upon her conviction and was not automatically regained by the fact of her release on parole.

Third, the conditions do not violate Ms. Guldoon's right to free speech. Parolees possess only limited constitutional rights, and the Supreme Court's 2017 ruling that social media is protected by the First Amendment did not apply to parolees and should not be extended to do so.

Fourth, the enactment of ROSA and its application to Ms. Guldoon do not violate the Ex Post Facto Clause. ROSA satisfies the two-step test used by the Supreme Court to analyze ex post facto challenges. ROSA satisfies the first step because its preamble and specific provisions within the statute demonstrate that the Lackawanna legislature's intent was to create a civil regulatory scheme, and not to punish sex offenders. ROSA also satisfies the second step because the statutory scheme is not so punitive in effect that it negates the state's intention to deem it a civil regulation.

ARGUMENT

Appellate courts review grants of summary judgment de novo. Shaw v. Conn. Gen. Life Ins. Co., 353 F.3d 1276, 1282 (11th Cir. 2003). A motion for summary judgment should be granted when there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

I. THE SPECIAL CONDITIONS OF PAROLE DO NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENTS.

Petitioner alleges that her constitutional rights to due process, travel, and free speech have been violated. None of these claims are supported.

A. The Special Conditions of Parole Do Not Violate the Due Process Clause.

Parolees have a right under the Due Process Clause to have parole conditions imposed only if those conditions are reasonably related to their offense or rehabilitation, but they do not have a general right to be free of parole conditions with which they disagree. Birzon v. King, 469 F.2d 1241, 1243 (2d Cir. 1972); Daniels v. Ralph, No. 10-CV-884, 2010 WL 2120591, at *8 (W.D.N.Y. June 11, 2012); Boddie v. Chung, No. 09-CV-04789(RFD)(LB), 2011 WL 1697965, at *1 (E.D.N.Y. May 4, 2011). The conditions to which Petitioner objects require her to surrender her driver's license, refrain from traveling within 1000 feet of a school, and avoid social media. These are related to the offense she committed and her ongoing rehabilitation from that offense, so she has no viable claim under the Due Process Clause based on the imposition of the conditions. Maldonado v. Fischer, 2012 WL 4461647, at *5 (W.D.N.Y. Sep. 24, 2012).

i. The School Grounds Restriction and the Driver's License Revocation Are Related to Petitioner's Use of Her Car to Commit Her Offenses.

The first condition of parole to which Petitioner objects requires her to surrender her driver's license. She claims this is unrelated to the offense she committed, but she also admits to using her car to drive B.B. home and to engaging in sexual conduct in the car with B.B. Without a car, she is forced either to ride her bike or to rely on her husband or friends to give her rides. This makes it far less likely she would be able to transport a minor to and from her home again without others noticing, or that she herself would be able to travel to a minor's home. It also removes one location where she could have sexual relations with a minor in the future. This

condition furthers Petitioner's rehabilitation and protects the public by making it more difficult for her to commit similar crimes in the future.

Ms. Guldoon's parole conditions also prohibit her from knowingly entering within 1000 feet of a school when minors are present. This is directly related to her crime, as she met B.B. at school and engaged in sexual activity with him in her classroom. It is entirely reasonable for the state of Lackawanna to conclude that Ms. Guldoon should refrain from traveling near a school with children present while she is on parole. See In re Williams v. Dep't of Corr. and Cmty. Supervision, 24 N.Y.S.3d 18 (N.Y. App. Div. 2016) (applying rational basis review to uphold prohibition on parolees traveling within 1000 feet of a school).

ii. The Social Media Restrictions Are Related to the Protection of Vulnerable Minors on Social Media Websites.

An additional condition of parole to which Petitioner objects bars her from accessing social media websites. Even broad conditions of parole such as this one should be upheld if they are reasonably related to prior crimes or to sentencing objectives. See Muhammad v. Evans, No. 11-CV-2113(CM), 2014 WL 4232496, at *9 (S.D.N.Y. Aug. 15, 2014) (upholding requirement of notification to parole officer when entering an intimate relationship due to prior convictions for domestic violence). Sentencing objectives include preventing recidivism and protecting the public from future offenses. Robinson v. New York, 2010 U.S. Dist. LEXIS 144553 (N.D.N.Y. Mar. 26, 2010).

The investigation into Ms. Guldoon's crimes by the Old Cheektowaga Police Department revealed that she had communicated frequently with B.B. through both email and text messaging. B.B. also stated that he had sent Petitioner naked pictures of himself. R. at 6. Ms. Guldoon's prior use of Internet messaging services to facilitate her crimes provides reason to restrict her access to those services in the future. See United States v. Perazza-Mercado, 553 F.3d

65, 72 (1st Cir. 2009) (noting that restrictions on Internet access are appropriate when the defendant used the Internet during the underlying offense). Additionally, because B.B. sent her naked pictures, she also used these Internet messaging services to receive child pornography. The use of the Internet to solicit or receive child pornography also justifies restrictions on Internet access while the Petitioner is released on parole. See United States v. Boston, 494 F.3d 660, 668 (8th Cir. 2007) (noting that restrictions on computer usage are appropriate if the parolee used their computer to "do more than merely possess child pornography"); United States v. Brigham, 569 F.3d 220, 234 (5th Cir. 2014) (finding that a ban on the use of computers and the Internet was appropriate after a conviction for receipt of child pornography).

B. The Special Conditions of Parole Do Not Violate the Constitutional Right to Travel.

The right to interstate travel, while not explicitly mentioned in the Constitution, has been recognized as a protected right since at least 1823. See Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (finding that the Constitution's Privileges and Immunities Clause protects the rights of citizens of one state to travel through or reside in other states). The Supreme Court recognized this right in 1869, finding that the Privileges and Immunities Clause gives citizens of one state "the right of free ingress into other States, and egress from them." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869). Because of this, states cannot place burdens on those traveling into or out of their boundaries. See, e.g., Crandall v. Nevada, 73 U.S. 35 (1868) (holding that a tax on individuals leaving the state by certain transportation methods is unconstitutional); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that the District of Columbia cannot impose a residency requirement on welfare recipients).

The Supreme Court further explained in Saenz v. Roe that there are three aspects of the right to travel: (1) the right of a citizen of one state to enter and exit other states; (2) the right to

be treated "as a welcome visitor rather than an unfriendly alien" when visiting another state; and (3) the right to be treated similarly to other citizens of the state when an individual chooses to live in that state. 526 U.S. 489, 500 (1999). The first aspect was not located in a particular constitutional provision (though it had been included in the Articles of Confederation); the second and third aspects were identified as part of the Privileges and Immunities Clause. Id. at 501-02.

Petitioner in this case must rely on a proposed aspect of the right to travel that has never been recognized by this Court: a right to intrastate travel. This is not an aspect of the constitutional right to travel, and even if it were, parolees would have fewer travel rights than other citizens.

i. There Is No Constitutional Right to Intrastate Travel.

The right to travel recognized by the Supreme Court does not include a right to travel within the particular state in which one lives. This was not one of the three components of the right explained in Saenz, and it has not been recognized by the Supreme Court in subsequent cases. See Johnson v. City of Cincinnati, 310 F.3d 484, 496 (6th Cir. 2002) ("The Supreme Court has not yet addressed whether the Constitution also protects a right to intrastate travel.").

Multiple lower courts have concluded, based on the Supreme Court's precedents, that there is no constitutional right to intrastate travel. See, e.g., Wright v. Jackson, 506 F.2d 900 (5th Cir. 1975); D.L. v. Unified Sch. Dist. No. 497, 596 F.3d 768, 776 (10th Cir. 2010). Even the Third Circuit, which concluded in Lutz v. York, 899 F.2d 255 (3d Cir. 1990), that a right to intrastate travel does exist, acknowledged that "this area of law as a whole is far from settled." United States v. Baroni, 909 F.3d 550, 588 (3d Cir. 2018) (finding that defendants did not have fair warning that obstructing intrastate travel violated civil rights). In Eldridge v. Bouchard, the

United States District Court for the Western District of Virginia explained that the history of the Privileges and Immunities Clause is consistent with recognizing the right to interstate, but not intrastate, travel. 645 F. Supp. 749, 754 (W.D. Va. 1986), aff'd, 823 F.2d 546 (4th Cir. 1987). The Privileges and Immunities Clause governs how states must treat citizens of *other* states, not how a state must treat its own citizens. Id.

ii. Even if a Constitutional Right to Intrastate Travel Exists, Petitioner's Right was Extinguished by the Fact of Her Conviction and Has Not Been Regained.

The special conditions of parole requiring Petitioner to give up her driver's license and to stay 1000 feet away from schools do not abridge the right to travel. Even if they did, this Court should still uphold the conditions because parolees remain in the custody of the jurisdiction in which they are released and do not possess full constitutional rights. United States v. Polito, 583 F.2d 48, 54 (2d Cir. 1978).

When an individual is convicted of a crime and imprisoned, that person's constitutional rights can be greatly restricted, including their right to travel. Bagley v. Harvey, 718 F.2d 921 (9th Cir. 1983) ("There can be no doubt that Bagley's constitutional right to interstate travel was extinguished upon his valid convictions and imprisonment."). This right is not simply returned automatically when a prisoner is released on parole. Rizzo v. Terenzi, 619 F. Supp. 1186, 1189 (E.D.N.Y. 1985). When the constitutional right to travel has been revoked due to a valid conviction and has never been reinstated, an individual may not compel the government to grant that right. Bagley, 718 F.2d at 924; see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 9 (1979) (holding that potential parolees had no constitutionally protected interest in a level of liberty they desired but did not currently possess).

The Petitioner was convicted of multiple crimes pursuant to her guilty plea in 2011, and she was imprisoned until 2017. At the time of her release, a condition of her parole required her to give up her driver's license and to refrain from traveling within 1000 feet of a school. Her right to travel was extinguished at the time of her imprisonment, and it has never been fully returned to her. The state exercised its discretion to release her on parole and restored parts of her constitutional rights, including limited travel rights, but it was under no obligation to restore all of her rights while she remained under the Parole Board's jurisdiction. As such, she cannot ask this Court to vindicate a right that she simply desires but has not possessed since before her conviction.

C. The Special Conditions of Parole Do Not Violate the First Amendment to the Constitution.

One of Petitioner's parole conditions bars her from accessing social media websites. The Supreme Court ruled in Packingham v. North Carolina that accessing social media is protected First Amendment activity. 137 S. Ct. 1730, 1735 (2017). However, the Court did not directly rule on whether individuals possess this right while on parole. It is well-recognized that parolees have limited constitutional rights, including in the First Amendment context. See, e.g., Farrell v. Burke, 449 F.3d 470, 497 (2d Cir. 2006) ("[T]he First Amendment rights of parolees are circumscribed."). As such, parole conditions which limit access to social media may be permissibly imposed.

i. Parolees Possess Only Limited First Amendment Rights.

Courts have broad discretion to impose special conditions on individuals released on parole or other forms of supervised release. See, e.g., United States v. Green, 618 F.3d 120, 124 (2d Cir. 2010) (noting that broad conditions of supervised release are valid as long as the individual has notice of what is prohibited). While parolees are not completely without

constitutional rights, United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1164 (2d Cir. 1970), conditions of parole may still be upheld where they implicate First Amendment rights such as freedom of speech or freedom of association. For example, parolees may permissibly be prevented from interacting with certain groups of people or prohibited from viewing constitutionally-protected pornography. LoFranco v. United States Parole Commission, 986 F. Supp. 796, 804 (S.D.N.Y. 1997) (upholding parole condition barring association with the Hell's Angels motorcycle gang); Birzon v. King, 469 F.2d 1241, 1243 (2d Cir. 1972) (upholding parole condition barring association with individuals who have criminal records); Farrell v. Burke, 449 F.3d 470, 497 (2d Cir. 2006) (upholding parole condition banning possession of pornographic material).

Parole Boards also have discretion to enact restrictions on parolees' access to the Internet. These serve the dual goals of rehabilitating the individual parolee and protecting vulnerable individuals from Internet crimes that are easy to commit and difficult to trace. See United States v. Brigham, 569 F.3d 220 (5th Cir. 2014) (upholding parole condition barring Internet access to prevent parolee from accessing child pornography); United States v. Boston, 494 F.3d 660 (8th Cir. 2007) (upholding supervised release condition barring Internet use after conviction for child pornography). Restricting Internet access may be particularly appropriate when sex offenders are released on parole, given the high likelihood of recidivism among this group. Brigham, 569 F.3d at 234; Smith v. Doe, 538 U.S. 84, 103 (2003) ("The risk of recidivism posed by sex offenders is 'frightening and high.'" (quoting McKune v. Lile, 536 U.S. 24, 34 (2002))).

When Petitioner was released on parole, her full First Amendment rights were not immediately restored. She is still subject to reasonable restrictions on First Amendment activity due to the government's interests in protecting the public and preventing recidivism. See Malone

v. United States, 502 F.2d 554, 556-57 (9th Cir. 1974) (upholding ban on participation in the American Irish Republic movement in order to prevent future crimes).

ii. The Supreme Court's Ruling in Packingham v. North Carolina That Social Media Access is Protected by the First Amendment Does Not Apply to Parolees.

In a landmark ruling on the applicability of the First Amendment to new forums, the Supreme Court ruled in 2017 that states cannot impose lifetime bans on sex offenders accessing social media websites. Packingham v. North Carolina, 137 S. Ct. 1730 (2017). The North Carolina law in that case applied to all sex offenders, regardless of whether they were currently imprisoned, released on probation or parole, or free of any restrictions other than those imposed by the sex offender registration statute. The Supreme Court took issue with the breadth of this law, noting that it imposes severe restrictions even on those who have already completed their sentences. Packingham, 137 S. Ct. at 1737.

After Packingham, lower courts struggled with how to apply this precedent to parolees. Some courts, relying on the lack of an explicit distinction in the Packingham opinion between parolees and other sex offenders, found Packingham controlling and overturned social media restrictions. See, e.g., Yunus v. Lewis-Robinson, 2019 U.S. Dist. LEXIS 5654, at *50 (S.D.N.Y Jan. 11, 2019); Doe v. Kentucky ex rel. Tilley, 283 F. Supp. 3d 608, 612 (E.D. Ky. 2017); Manning v. Powers, 281 F. Supp. 3d 953, 960 (C.D. Cal. 2017). Other courts, however, read the language in Packingham to suggest that its holding did *not* extend to parolees. People v. Morger, 103 N.E.3d 602, 616 (Ill. App. Ct. 2018); United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017); United States v. Halverson, 897 F.3d 645, 658 (5th Cir. 2018). The language and policy of Packingham clearly support the latter position.

The Packingham opinion included sweeping language on the importance of the First Amendment and changing technology, disapproval of the breadth of the challenged North Carolina law, and an explanation of the need for caution in expanding constitutional protection to new technologies. The Court put states on notice that social media is subject to the First Amendment, but because of the nature of the law at issue, it did not need to explain exactly how the First Amendment applies. The majority opinion focused on the breadth of the North Carolina law – it imposed lengthy bans on social media access for sex offenders, "even by persons who have completed their sentences." Packingham, 137 S. Ct. at 1737. The Court was deeply concerned about such a restriction placed on those who are "no longer subject to the supervision of the criminal justice system." Id. It did not need to decide whether the same concerns applied to parolees because that issue was not presented to it. It cannot be assumed that, simply because an overly broad restriction on all individuals who had committed sex offenses was found to be unconstitutional, the Supreme Court intended to invalidate all restrictions on social media access.

The majority opinion urged "caution" in applying the First Amendment to social media. Id. The three concurring justices also emphasized the need for caution, recognizing that the Internet is "a powerful tool" for sex offenders, particularly those who victimize children. Id. at 1739 (Alito, J., concurring).

Petitioner's case exemplifies this need for caution. Petitioner, then a teacher, manipulated and exploited her young student. As a result of Petitioner's actions, this student now must stay in a residential facility for counseling and has trouble trusting adults or forming relationships with individuals his own age. The State of Lackawanna wishes to restrict Petitioner's access to social media so that she can no longer contact, manipulate, or exploit other impressionable teenagers.

Packingham does not bar the state from enacting this restriction and should not be interpreted to do so.

II. LACKAWANNA'S REGISTRATION OF SEX OFFENDERS ACT DOES NOT VIOLATE THE EX POST FACTO CLAUSE

Article I, section 10 of the Constitution prohibits states from passing ex post facto laws. U.S. Const. art. I, §10. One type of ex post facto law is a statute that increases the punishment for a crime after its commission. See Beazell v. Ohio, 269 U.S. 167, 169 (1925). The Ex Post Facto Clause applies only to statutes that impose punishment, and not to statutes that establish civil proceedings or regulations. See Smith v. Doe, 538 U.S. 84, 92 (2003); Doe v. Pataki, 120 F.3d 1263, 1272 (2d Cir. 1997) ("'Ex post facto' is a term of art applicable only to 'punishment'"). In order to determine whether a statute imposes punishment or establishes a civil regulatory scheme, the court uses a two-step inquiry: first, the court examines the legislative intent and determines whether the statute was meant to be punitive or regulatory. See Pataki, 120 F.3d at 1273-74. Second, the court examines whether the statutory scheme is "so punitive either in purpose or effect 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)) (internal quotations omitted).

A. The Text and Structure of the Statute Demonstrate that the Legislative Intent was to Protect the Public, not Punish Sex Offenders

The first step in the ex post facto inquiry is determining whether the legislature intended to impose punishment or establish civil proceedings. See Smith, 538 U.S. at 92. If the court finds that the legislature intended to impose punishment, the analysis ends, and the statute is deemed ex post facto. Id. The court determines legislative intent through interpretation of the text and structure of the legislation: in doing so, the court considers whether the legislature "indicated either expressly or impliedly a preference" for labeling the statute civil or criminal. Id. at 92-93

(quoting Hudson v. United States, 522 U.S. 93, 99 (1997)). Courts consider the preamble, legislative history, manner of codification, enforcement procedures, and specific features of the provision to come to a conclusion about the intent of the law. See Smith, 538 U.S. at 93-96; Pataki, 120 F.3d at 1276-78.

i. ROSA's Preamble Demonstrates that the Lackawanna Legislature's Intent was Non-Punitive.

To determine legislative intent, the Supreme Court in Smith v. Doe looked first to the preamble of Alaska's SORA, which stated that public protection from sex offenders was its purpose. Based on that statement of intent, the Smith court asserted that the "imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive government objective.'" Smith, 538 U.S. at 93 (quoting Kansas v. Hendricks, 521 U.S. 346, 363 (1997)). The Second Circuit in Doe v. Pataki also looked first to the preamble when analyzing New York's Sex Offender Registration Act (SORA), a statute that is substantially similar to ROSA. Guldoon v. Lackawanna Board of Parole, 999 F.Supp.3d 1, 8 (M.D.Lack. 2019). Upon examining SORA's preamble, the Second Circuit found that the twin objectives of SORA were the non-punitive purposes of protecting communities and enhancing law enforcement authorities' ability to fight sex crimes. See Doe v. Pataki, 120 F.3d at 1276. ROSA's legislature, which copied much of SORA's preamble, expressed the same twin non-punitive purposes as SORA: protecting vulnerable populations and the public from sexual crime, and providing additional information to law enforcement to prevent and quickly resolve sexual crimes. R. at 19. Additionally, the Lackawanna legislature expressly states in the preamble that the social media provisions are meant to protect the public, and especially minors, from victimization in cyberspace. Id. at 21. Like the courts in Smith and Pataki, this Court should find the purpose of ROSA to be non-punitive based on its stated intent in the preamble.

ii. ROSA's Specific Provisions Demonstrate a Civil Regulatory Purpose, Not an Intent to Punish.

The court in Pataki also considered specific provisions within New York's SORA to find that it had a civil regulatory purpose – those provisions are mirrored in Lackawanna's ROSA. Pataki noted that restrictions on sex offenders "[are] carefully calibrated to, and [depend] solely upon, the offender's perceived risk of re-offense" and that the criteria used to determine an offender's risk level "fully bear out [the statute's] prospective, regulatory aim." Pataki, 120 F.3d at 1278. That is also true for Lackawanna's ROSA, since it copies New York's SORA with regard to the statutory provisions that govern determination of risk level. Like New York's SORA, ROSA's criteria for determining this risk level include, *inter alia*, "conditions of release that minimize risk [of] re-offense," "physical conditions that minimize risk of re-offense," and "whether psychological or psychiatric profiles indicate a risk of recidivism," as noted by the court in Pataki. Id.; R. at 37-38.

Moreover, in both New York's SORA and Lackawanna's ROSA, risk level determination is generally done by the Board of Examiners of Sex Offenders comprised of experts in the field of behavior and treatment of sex offenders, and the risk-assessment is done not at the time of original sentencing, but immediately prior to the offender's discharge. See Pataki, 120 F.3d at 1278; R. at 37-38. Like the court in Pataki, which found these aspects of the statute to confirm the "forward looking nature" of SORA's provisions, this court should find similarly, since these features indicate the statute's concern with protecting the public from re-offenses by sex offenders and not with punishing them for past crimes. Pataki, 120 F.3d at 1278.

The structure of ROSA further demonstrates its regulatory purpose because the restrictions on sex offenders do not apply indiscriminately, but are specifically tailored to those who have a high-risk level or are particularly dangerous to the public. R. at 23-26. ROSA's

special conditions of parole only apply if the victim was under the age of 18, if the offender has an elevated risk level based on the determination of the expert Board, or, in the case of social network use, if the Internet was used to facilitate the commission of the crime. Id. Since one of the stated purposes of ROSA is to protect vulnerable populations, like minors, it is consistent with that objective to restrict the ability of especially dangerous sex offenders to meet potential victims at schools or through social media sites, or more expeditiously commit further crimes by operating motor vehicles. Id. at 19.

Additionally, ROSA limits the negative effects of the restrictions. Pataki cited the careful control and limitation of public notification of sex offender registration information as an indication of its regulatory and non-punitive purpose. See Pataki, 120 F.3d at 1278. Similarly, the limitations on negative effects built into the structure of ROSA show that the legislature was not aiming to impose maximum pain on dangerous sex offenders, but aiming to achieve the objective of public safety while minimizing harms to the offenders. For instance, the restriction on entering school grounds only applies while a minor is present at the school. R. at 24. Moreover, it does not apply if the offender is a student or employee of the school or has a family member enrolled at the school, and has permission from the parole officer and superintendent of the school. Id. The ban on social media use does not extend to other uses of the Internet, and if the sex offender is the parent of a minor child, communicating with that child through social media sites is allowed with permission of the Board. Id. at 25. Lastly, an offender can operate a motor vehicle if given permission by his parole officer and commissioner of the department of motor vehicles. Id. at 26.

Although ROSA amends the state's corrections, penal, and executive law governing the Board of Parole, the manner of codification in itself does not make what is in other respects a

civil provision into a criminal one. R. at 19. The sex offender registration provisions of Alaska's SORA, examined in Smith v. Doe, were placed in the criminal procedure code, but the Supreme Court in that case ruled that its codification was not dispositive and that the "locations and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." 538 U.S. at 94. Similarly, a forfeiture provision for firearms or ammunition involved in certain crimes was declared to be a civil sanction though located in the federal criminal code. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363-64 (1984). Similarly, ROSA is a civil regulation, as demonstrated by its preamble and specific provisions, and not a criminal punishment, despite its manner of codification.

B. The Effects of ROSA on Sex Offenders Fail to Rise to the Level of Criminal Punishment

If the court determines that the legislature intended to establish a civil regulatory scheme, the second step of the ex post facto inquiry examines whether the "statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." Smith, 538 U.S. at 92 (quoting Hendricks, 521 U.S. at 361 (1997)) (internal quotations omitted). The court ordinarily defers to the legislature's stated intent, so "only the clearest proof" will justify overriding legislative intent and declaring the statute to be a criminal punishment. Id. (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

Courts use the seven-factor test from Kennedy v. Mendoza-Martinez, which was originally used in the double jeopardy context, to analyze the effects of the act for ex post facto analysis. See Smith, 538 U.S. at 97; see also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). In the ex post facto context, only five of the seven factors are generally considered relevant: whether the regulatory scheme "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of

punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." Smith, 538 U.S. at 97.

i. ROSA's restrictions have not been regarded in our history and traditions as punishment.

First, none of the restrictions imposed by ROSA on sex offenders have been regarded in our history and traditions as punishment. The Supreme Court in Smith v. Doe stated that sex offender registration and public notification statutes "are of fairly recent origin" and found that they did not resemble historical or traditional punishments. 538 U.S. at 97 (quoting Doe v. Otte, 259 F.3d 979, 989 (2001)). Colonial shaming punishments forced the defendant to be displayed before fellow citizens for face-to-face shaming, and the stigma and ridicule were integral aspects of the punishment; on the other hand, sex offender registration and notification provisions involve the dissemination of accurate information about a criminal record, most of which is public, and publicity and stigma is not an integral part of the regulation. See id. at 98-99.

School grounds restrictions, social media site prohibitions, and driver's license revocations similarly have not been regarded in our history and traditions as punishment. Although the Sixth Circuit noted that school grounds restrictions resemble the ancient punishment of banishment, it noted that unlike banishment, a school grounds restriction "doesn't make a registrant dead in law [and] entirely cut off from society." Doe v. Snyder, 834 F.3d 696, 701 (6th Cir. 2016) (quoting 1 William Blackstone, Commentaries at 132). Both driver's licenses and social media sites are modern developments, so it would be difficult to analogize restricting them to historical or traditional punishments.

ii. ROSA does not impose enough of an affirmative disability or restraint to convert it into a criminal punishment.

Second, ROSA imposes some affirmative disability or restraint on sex offenders, as any regulation does, but not enough to convert it into a criminal punishment. Any regulation imposes a disability or restraint on those affected by it, since they are prevented from doing something they would otherwise be able to do. It is only when this disability or restraint is sufficiently severe that the court will consider the restriction to be punishment. See Smith, 538 U.S. at 100. While imprisonment is considered the paradigmatic example of an affirmative disability or restraint, a lesser restraint that leaves offenders the ability to change jobs or residences, as is the case here, indicates that the restriction is not severe enough to be a punishment. Id. The restraints imposed upon certain sex offenders by ROSA still allow them to travel by public transportation or when driven by others, communicate by phone, texts, and in person, and allow them to be anywhere in the city except school grounds during certain times of the day.

Moreover, all of the special conditions of parole apply only during the limited time that the sex offender is on parole. Parolees "enjoy only a conditional liberty dependent on their adherence to special…restrictions." Daniels v. Ralph, No. 10-CV-884, 2012 WL 2120591, at *8 (W.D.N.Y. June 11, 2012). Under the general conditions of release, which have remained unchanged since the time of the Petitioner's conviction, parolees are, for example, not allowed to own a firearm or deadly weapon, not permitted to leave the State of Lackawanna, and they must permit the parole officer to search and inspect their person and residence. R. at 8. Given that parolees are subject to "restrictions not applicable to other citizens" and expected to comply with certain restrictions on their freedom, the special conditions of parole do not add a significant affirmative disability or restraint. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

iii. ROSA does not serve the traditional aims of punishment.

Third, ROSA does not serve the traditional aims of punishment. It is very unlikely that an individual will be deterred from committing a sex crime because of ROSA, which does not in any way increase the length of the sentence or of probation. Even if ROSA's restrictions have a deterrent effect, that is insufficient to transform a civil regulation into a punishment. See, e.g., United States v. Ursery, 518 U.S. 267, 292 (1996) ("though [the civil forfeiture statutes at issue] may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals"); Hudson v. United States, 522 U.S. 93, 105 (1997) ("the mere presence of this [deterrent] purpose is insufficient to render a sanction criminal"). As the Supreme Court in Smith v. Doe noted, "any number of government programs might deter crime without imposing punishment." 538 U.S. at 102. To hold otherwise would make it difficult for the government to engage in effective regulation. See id.

Additionally, ROSA is not retributive because unlike punishment, which is imposed solely based on one's criminal conduct and a determination of culpability, the restrictions of ROSA are based on an assessment of the offender's dangerousness to the public. Confirming ROSA's non-retributive nature, the determination as to whether special conditions of parole are imposed on sex offenders is made shortly before release, not during sentencing, and by a Board comprised of experts in the field of behavior and treatment of sex offenders. R. at 37-38.

Lastly, ROSA does not incapacitate sex offenders, but rather makes it more difficult for them to commit further sex crimes. While an incarcerated sex offender cannot commit sex crimes against someone in the general public, one who is subject to ROSA would still be able to do so, though it would be more difficult. ROSA is no different from other regulations that make it more difficult to commit crime, but do not incapacitate individuals.

iv. ROSA has a rational connection to a non-punitive purpose and is not excessive with regard to that purpose.

Fourth, ROSA does have a rational connection to a non-punitive purpose. This factor is considered the most significant of the Mendoza-Martinez factors. See Smith, 538 U.S. at 102. The connection to a non-punitive purpose does not have to be narrowly tailored or be a close fit in order to be a rational connection. See id. at 103. The twin purposes of the act, as stated in the preamble, are to protect the public and vulnerable populations from sex offenders, and to provide additional information to law enforcement to enhance their ability to prevent and quickly resolve sex crimes. R. at 19. The need for this extra protection is highlighted by studies that show that convicted sex offenders are "much more likely than any other type of offender to be rearrested for new rape or sexual assault." See McKune v. Lile, 536 U.S. 24, 33 (2002) (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6. (1997)).

Sex offender registration furthers these goals by giving the community notice about potentially dangerous sex offenders in their midst, making them more cautious about allowing offenders easy access to vulnerable populations. Registries also give law enforcement an organized and centralized databank, and allow them to more quickly identify sex offenders who have recidivated. Restricting sex offenders from entering school grounds when minors are present removes an easy opportunity to lure young victims and minimizes risk of sex offenses against minors. See Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005). Restricting social media site use similarly blocks sex offenders from another easy avenue through which they could communicate with and victimize minors online, all while remaining anonymous and hiding behind seemingly innocuous Internet profiles. Lastly, revoking the offender's driver's license makes it more difficult for the offender to carry out a sex crime with a minor: they will not be

able to drive the minor to another location where it is easier to commit the crime, and they will be more likely to travel with others who can observe the offender's behavior.

The rational connection between the special conditions of parole and the safety of vulnerable populations is satisfied not just in general, but specifically in the Petitioner's case. The school grounds restriction is rationally connected to the Petitioner because she met and abused her victim at a school. See R. at 5. The social media site restriction is rationally connected because she regularly communicated with the child through the high school's email system, which would be covered under ROSA. See id. Lastly, the driver's license revocation is rationally connected because on several occasions, the petitioner engaged in sexual conduct in her car as well as in her home after driving the victim there. See id. at 7.

Fifth, ROSA's restrictions are not excessive with regard to its non-punitive purpose. The Supreme Court in Smith v. Doe clarified that the excessiveness factor "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy… [but] whether the regulatory means chosen are reasonable in light of the nonpunitive objective." 538 U.S. at 105. ROSA's restrictions are not excessive because they are limited in two key ways. First, the special conditions of parole do not apply to all sex offenders, but only to those who are considered especially dangerous, either because of the manner of the crime, the minor status of the victim, or because an expert Board has determined that they pose a high risk. R. at 23-26, 37-38. Second, the restrictions themselves are limited and can be avoided based on the personal circumstances of the offender or the permission of certain officials. Id. at 23-26.

The petitioner in this case does face significant hardship as a result of the restrictions placed on her by ROSA, as described in her affidavit. R. at 14-17. However, the Supreme Court

has prohibited "as applied" ex post facto challenges to statutes because the approach would be unworkable and would "never conclusively resolve whether a particular scheme is punitive." Seling v. Young, 531 U.S. 250, 263 (2001). Moreover, the Supreme Court has added that whether a sanction constitutes a punishment is not determined from the defendant's perspective, and a statutory scheme may "bear harshly on one affected" and yet still not be a punishment. Flemming v. Nestor, 363 U.S. 603, 614 (1960); see also United States v. Halper, 490 U.S. 435, 447 n.7 (1989). The Supreme Court has held even harsh restrictions to be civil regulations, not punishments. See Kansas v. Hendricks, 521 U.S. 346, 369 (1997) (holding that involuntary civil commitment of sex offenders with a "mental abnormality" is not punishment); Galvan v. Press, 347 U.S. 522, 531 (1954) (holding that deportation is not punishment); Hawker v. New York, 170 U.S. 189, 196 (1898) (holding that prohibitions on physicians convicted of a felony from practicing medicine is not punishment). The hardship that a sex offender affected by ROSA might face is not uniquely excessive in light of the Supreme Court's precedents.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Thirteenth Circuit should be affirmed.